REPORTS

OF

CASES IN LAW AND EQUITY

DETERMINED BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

By JOSIAH D. PULSIFER,
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.

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CASES

IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

SALOME MARDEN *vs.* CHARLES P. JORDAN, JR.

Androscoggin, 1873.—August 3, 1874.

Trespass. Landlord and Tenant.

Trespass *quare clausum fregit* may be maintained by a tenant at will against his landlord for a forcible entry upon him before the tenancy is terminated.

The objection that trespass *quare clausum fregit* will not lie by a mortgageor against a mortgagee is not sustainable where the mortgageor is in possession under such an agreement as creates the relation of landlord and tenant between them.

On a motion for a new trial on the ground of newly discovered evidence, *held*, that the motion is not sustainable where most of the evidence claimed to have been newly discovered was known to the party before the trial, and the balance of it by due diligence might have been discovered before the trial as well as immediately after.

ON MOTIONS.

TRESPASS for breaking and entering the plaintiff's barn in Auburn, December 7, 1872, and taking and carrying away twenty tons of hay and two tons of corn fodder, valued in all at $380.

At the trial, at *nisi prius*, it appeared that the plaintiff was, at the time of the trespass complained of, and had been for about

two years, mortgageor in possession, and the defendant, mortgagee of the premises. The defense there was, that the goods taken were the property of the defendant, sold to him by the plaintiff and the price endorsed by agreement on her notes to him, and that the entry was by her permission. The verdict was for the plaintiff, $100 which the defendant moved to set aside as against evidence and against law.

J. W. May, for the defendant.

The fee of the estate being in the defendant as mortgagee, he had the right to enter unless there was an agreement to the contrary. *Blaney* v. *Bearce*, 2 Maine, 132. *Noyes* v. *Sturdivant*, 18 Maine, 104. *Howe* v. *Lewis*, 14 Pick., 329.

C. C. Frost, for the plaintiff.

WALTON, J. This is an action of trespass *quare clausum fregit;* and the jury having returned a verdict for the plaintiff, the defendant moves to have it set aside, because, as he claims, it is against law, and against evidence; and on the ground of newly discovered evidence.

I. It is claimed that the verdict is against law, because the plaintiff is mortgageor, and the defendant mortgagee, of the close into which the defendant is charged with having broken and entered. It is insisted that an action of trespass *quare clausum fregit* will not lie by a mortgageor against his mortgagee. This objection does not appear to have been taken at the trial; and we think it could not have been maintained if it had. The evidence very clearly indicates that the mortgageor was in possession of the mortgaged premises by virtue of a contract with the mortgagee, and that the relation of landlord and tenant existed between them; and we take it to be well settled that a tenant,—even a tenant at will,—may maintain trespass *quare clausum fregit* against his landlord, for a forcible entry upon him before the tenancy is terminated. *Brock* v. *Berry*, 31 Maine, 293. *Dickinson* v. *Goodspeed*, 8 Cush., 119.

II. We think the verdict cannot be said to be against the weight of evidence. On the contrary we think it fairly preponderates in

favor of the verdict. A new trial cannot therefore be granted on that ground.

III. Nor do we think a new trial ought to be granted on account of the alleged newly discovered evidence. The evidence alleged to have been newly discovered does not seem to us to be of a very reliable character; and most of it appears to have been known to the defendant before he went to trial, and is not, therefore, evidence newly discovered, if his witnesses are to be believed; and no reason is perceived why by the use of due diligence that portion of it which was not known to him might not have been as easily discovered before the trial as immediately after.

Motions overruled.
Judgment on the verdict.

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

ANDREW FOLAN *vs.* JEDEDIAH G. LARY.

Androscoggin, 1874.—August 7, 1875.

Evidence. Deposition.

When a plaintiff becomes nonsuit, or discontinues his suit and commences another for the same cause, . . all depositions taken for the first may be used in the second suit, if they were duly filed in the court where the first suit was pending and remained on file till the second suit was commenced; otherwise not. R. S., c. 107, § 19. *Held*, that this rule is applicable as well where the first suit was commenced in another state and the depositions were taken to be there used, as where it was commenced in this state.

Where a party, taking a deposition, has, by his own negligence in not putting it on file, lost the right to use it while the deponent is still alive, the right to use it will not be revived by the death of the deponent.

ON EXCEPTIONS.

ASSUMPSIT.

The defendant contracted in the winter of 1865–6, with Robishaux and Dussault to cut and haul at Gorham, New Hampshire, a quantity of wood at a price agreed per cord. Robishaux and

Dussault obtained their supplies for their men and camps, of the plaintiff, who brought this action to recover for the same of the defendant. The plaintiff sued the defendant on the same account in the supreme judicial court in Coos county, New Hampshire, in 1867, and became nonsuit at the November term, 1869. Pending the action in New Hampshire, the defendant caused to be taken to be used in that action, (the cause and the parties being the same as in this,) the deposition of Barker Burbank, at Shelburne, New Hampshire; and the plaintiff by his attorney, was present at the taking and cross examined the deponent, who died in November, 1867, and the deposition was not returned to court, but remained in the hands of the defendant's attorney at New Hampshire, not having been used in the trial of the action. At the trial here, the defendant offered to prove the testimony of Barker Burbank at the time of giving his deposition either by the magistrate before whom the deposition was taken or by the reading of the deposition which was material to the defense; but the presiding justice refused to admit the deposition or the testimony of the magistrate; and the defendant, the verdict being for the plaintiff, excepted. There were also other exceptions which are stated in the opinion.

O. Ray and *M. T. Ludden*, for the defendant.

The plaintiff becoming nonsuit in the New Hampshire court, deprived the defendant of the opportunity of using the deposition in that case. The deponent having died and the plaintiff removed from New Hampshire into Maine and brought this action, the defendant unless he can use Burbank's deposition has lost the benefit of important and material testimony wholly through the plaintiff's maneuvering.

If the witness had testified in court upon a former trial of this action or the action in New Hampshire, we could after his decease prove his testimony here. *Lime Rock Bank* v. *Hewett*, 52 Maine, 531. *Emery* v. *Fowler*, 39 Maine, 326, and authorities *passim*.

An unused deposition comes within the same rule. In Greenleaf on Ev., vol. 1, § 163, he says, "this testimony may have been given either orally in court or in written depositions taken out of

court." Its admissibility turns on the right to cross examine, Id. and § 164.

W. P. Frye, J. B. Cotton and *W. H. White*, for the plaintiff.

We are unable to find any authority whatever for admitting proof of the testimony of a deceased witness, where that testimony has not been used in any former trial; and no such authority exists. *George* v. *Fisk*, 32 N. H., 32.

WALTON, J. I. Depositions taken to be used in a suit pending must be filed with the clerk at the term for which they are taken, and allowed to remain on file, or they cannot be used at a subsequent term by the party taking them. Rule 25, of this court.

When a plaintiff becomes nonsuit, or discontinues his suit and commences another for the same cause, all depositions taken for the first may be used in the second suit, if they were duly filed in the court where the first suit was pending and remained on file till the second suit was commenced; otherwise not. R. S., c. 107, § 19.

This rule is applicable as well where the first suit was commenced in another state, and the depositions were taken to be there used, as where it was commenced in this state, and for the same reason; namely, that the adverse party has a right to inspect the depositions, and use them himself, if he desires to do so; and if the party taking the depositions deprives him of this right, by neglecting or refusing to put them on file, it is but just that he should thereby forfeit the right to use them himself. Another reason for the rule, founded on public policy, is that the depositions should be kept where they can be had and used as evidence for the state, in case the deponents have sworn falsely, and are prosecuted for perjury. The rule is therefore a wise one, and the enforcement of it should not be relaxed. And if the party taking a deposition has, by his own negligence in not putting it on file, lost the right to use it while the deponent is still alive, the right to use it will not be revived by the death of the deponent. That is one of the contingencies which the party taking the deposition should have thought of when he refused or neglected to put it on file. For these reasons we cannot doubt that the deposition of Barker Burbank was rightly excluded.

II. The court is also of opinion that the submission and award between the defendant and one Robishaux was properly excluded. They were *inter alios.* The plaintiff was not a party to the submission, and ought not to be affected by it.

III. The objections to the admission of Andrew Pilan's deposition are not insisted upon, and we shall not therefore notice them further than to say that in our judgment it was clearly admissible.

Exceptions overruled.
Judgment on the verdict.

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

CHARLOTTE C. WITHEE *vs.* HAM BROOKS, administrator of P. M. Withee.

Androscoggin, 1875.—September 29, 1875.

Practice. Fraud. Trespass on the case.

When a case is before the law court on exceptions the only questions open for consideration are those presented in the bill of exceptions.

Where a woman is led into a void marriage with a married man, under his false pretense that he is a single man, he being at the time, a married man and having a lawful wife alive, *held,* that an action for deceit therefor is an action of trespass on the case within the meaning of R. S., c. 87, § 9, which declares among other things that actions of trespass on the case survive; and *held* further, that in case of his death, the right of action survives against his personal representative.

An action on the case is maintainable by a woman against a man for his deceit by which she is led into a void marriage with him; and such action survives against his administrator under R. S., c. 87, § 9.

ON EXCEPTIONS.

TRESPASS ON THE CASE, declaring (*inter alia*) that the plaintiff, January 3, 1868, at Winthrop, a single woman, became acquainted with Parker M. Withee, a doctor, practicing medicine, then in life and health; that he contriving and designing maliciously to injure the plaintiff and to deprive her of her time and personal labor and means of support, and also, in the event of her marriage with him, to deprive her of any share of his property, and of the rights by

law of a widow in the event of his decease, falsely and deceitfully pretended himself to be sole and unmarried and, making many protestations of his affections for her, requested the plaintiff to marry him; that the plaintiff consenting, the plaintiff and said Parker M. Withee were by the fraud, and deceit of said Withee joined in marriage; that she cohabited with him until July 5, 1872, when he died, possessed of personal estate of the value of $1000, and of real estate of the value of $2500; that the said Withee on the said third day of June and ever since up to the time of his death was a married man and had a lawful wife living other than herself of which she was ignorant during his life time, by means whereof he had injured her, destroyed her peace of mind, deprived her of her rights as a widow, &c., laying damages at $2000.

The defendant demurred to the declaration on the ground that the cause of action did not survive. The presiding justice *pro forma* overruled the demurrer and the defendant excepted.

W. P. Frye, J. B. Cotton and *W. H. White,* for the defendants.

In support of the cause of demurrer assigned, the counsel claimed 1, that such action is against public policy; 2, it does not survive at common law; 3, it does not survive by force of any statutory provision. They also claimed that the declaration was fatally defective in form, because it did not allege that the plaintiff relied upon the alleged fraudulent representations.

To the first point they cited, Kent's Com., 2, p. 31; Schouler's Domestic Relations, pp. 22, 23; Story's Conflict of Laws, § 108, n.; Frasier's Domestic Relations, 87.

To the second point, they cited *Grimm* v. *Carr*, 31 Penn. St. R., 533; *Nersum* v. *Jackson*, 29 Geo., 61; *Watson* v. *Loop*, 12 Texas, 11; *Browne* v. *Sturtevant*, 9 Geo., 69; *Read* v. *Hatch*, 19 Pick., 47; 14 Howard, 22.

They contended thirdly, that although this was trespass on the case, yet the provision of R. S., c. 87, § 8, that actions of trespass on the case survive, was not intended for a case like this. The statute of 1841, c. 129, § 15, added to the words trespass on the case, "for damage done to real or personal property." These

words were stricken out in the statute of 1857, in the revision, c. 87, § 8. The Massachusetts decisions under a statute like ours of 1841, has received interpretations in *Stebbins* v. *Palmer*, 1 Pick., 71; *Cutting* v. *Tower*, 14 Gray, 183; *Read* v. *Hatch*, 19 Pick., 47.

The principle contended for by the counsel was, that under the statutes of 1871 and 1857, interpreted by reference to the statute of 1841, though damages to the property would survive, damages to the person would not, without an allegation of special damages, and that the application of the principle was the same whether the action was in contract or tort.

The Mass. statute, 1842, providing that under trespass on the case, actions for damages to the person survive, was interpreted in *Smith* v. *Sherman*, 4 Cush., 408, to apply only to damages of a physical character. The action *Hooper*, admr., v. *Gorham*, 45 Maine, 209, was for a physical injury, while this was for an injury to the feelings. The action *Hovey*, admr., v. *Page.*, 55 Maine, 142, decides that "an action for breach of promise of marriage, when no special damage is alleged in the writ, does not survive, and that the allegation must be of damage to the property and not to the person merely."

M. T. Ludden, for the plaintiff.

I. The question raised by the bill of exceptions is the only question open for consideration. *White* v. *Jordan*, 27 Maine, 378.

II. There is no distinction between an action of the case founded on tort and trespass on the case. The difference in the form of the words is accidental rather than real. *Hooper* v. *Gorham*, 45 Maine, 209.

III. A woman may maintain an action at law for the deceit by which she is led into a void marriage. *Fellows* v. *Emperor*, 13 Barb., 92. *Hutchinson* v. *Ham*, 1 Smith, 242. Lady Cox's case, 3 P. Wms., 389.

IV. Actual damages may be recovered in this action of trespass on the case, against the administrator. R. S., c. 87, § 9.

DANFORTH, J. In this case there was a general demurrer to the declaration, which was overruled. The exceptions state that "the

ground of demurrer is that the cause of action does not survive." To that ground alone, then, are we confined whatever may be the formal or technical defects in the declaration.

The first objection is that the action is against public policy and could not therefore be maintained even in the life time of the wrong doer. But on what ground it is claimed to be against public policy does not distinctly appear. It is not for the purpose of annulling a marriage contract on the ground of fraud, as seems to be supposed, judging from the argument and authorities cited. On the other hand, the great cause of complaint is that, while by fraudulent misrepresentation the form of a marriage was consummated, its substance was wanting. The contract itself was illegal and void from the beginning. Thus while the offender proposed to obtain for himself all the advantages of a legal marriage, he assumed none of its responsibilities. If, therefore, the sacredness of the marriage tie is involved, it would seem to require the punishment, rather than the protection of such a violation of its sanctity; and that such is the policy of the law is made sufficiently evident from the statute providing for the punishment of polygamy.

The declaration alleges in substance, though perhaps not in form, that through certain false and fraudulent representations the plaintiff was induced to enter into an illegal and void marriage with the defendant's intestate, whereby she lost several years of time and labor, with her share of the property left at his decease, besides having suffered an injury to her character and great distress of mind.

That such an action under the proper amendments, if any are needed, if the allegations are proved, may be maintained, can hardly admit of a question. The alleged misrepresentations contain all the elements necessary to make them actionable. They are not matters of opinion, estimate, intention, or promise; but are representations of existing facts, clear and explicit, such as were material to enable the plaintiff to act in the matter intelligently, of vital importance as the determining ground of her action and such as might well induce her belief. At the same time, they were facts necessarily within the knowledge of the defendant's testator, and well calculated to produce as a proximate result the

damage claimed so far as the loss of labor is concerned. Whether the other injuries would follow, or if so, would be grounds for the assessment of damages need not now be determined.

It may be true that the plaintiff could not sustain an action for her labor founded upon a promise express or implied, for the reason that it was obtained from her under such circumstances as would exclude any promise. But this, if so, would only be an additional ground for sustaining this action to recover for an actual loss, caused by fraud, and for which she has no other remedy.

Nor can we say that the marriage contract was the proximate result of the fraud, for no such contract was consummated, except in form, and we must presume that defendant's intestate knew that under the circumstances it could not be. The attempting it must have been a mere pretense to accomplish the desired end, and was an aggravation rather than a diminution of the alleged fraud, or perhaps the fraud itself accomplished by fraudulent means.

The action being maintainable, it clearly survives, not at common law, but by the provisions of the statute, R. S., c. 87, § 8. It is there provided that actions of "trespass and trespass on the case shall survive." To this there is no qualification whatever. That this action is "trespass on the case" is conceded. It therefore comes within the express terms of the statute.

It is however claimed that in the case of *Hovey*, admr., v. *Page*, 55 Maine, 142, such a construction of the statute was adopted as would exclude this one from its provisions. But a more careful examination of that case will show this view of it to be an error. No construction of the statute was there attempted. The only allusion to it was, that the case did not come within its provisions. That action was for a breach of promise of marriage, and was therefore founded upon a contract. It is one of the very few, perhaps the only one, in form *ex contractu*, which does not survive at common law, and even that was taken out of the general rule and survived, when the declaration contained an allegation of special damage to property. Certain proof was offered, which, it was claimed, was tantamount to such an allegation, and the only question involved and discussed was, whether the testimony offered with an amendment of the declaration to correspond, would bring

the case within the exception so that it might survive, not by the force of the statute, but at common law.

The statute, being in derogation of the common law, is undoubtedly to be strictly construed. Still we are not, in its construction, to exclude or do violence to any of its terms, nor add any qualification not fairly found there, for the purpose of taking any particular action from its provisions. In the revision of 1841, to the words "trespass on the case" was added the clause "for damage done to real or personal property." In the subsequent revisions that clause has been omitted. This must be presumed to have been done for some purpose. As it now stands, all actions of "trespass on the case" without modification or qualification are made to survive. The term "trespass on the case," considering the connection in which it stands, and the purpose of the legislature as indicated by past legislation upon this subject, may be fairly construed to mean all actions of tort which are properly designated by the term, whether of injury to the property or person. This view is not inconsistent with the cases cited from Massachusetts, as they are based upon a statute materially differing from ours.

Exceptions overruled.

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

FARNSWORTH COMPANY *vs.* JORDAN RAND.

Androscoggin, 1875.—February 24, 1876.

Tax. Officer. Corporation. Replevin.

The official oath of a municipal officer may be proved by parol when there is no record of it.

Misnomer of a corporation will not necessarily defeat a tax against it.

A distress for a tax retaken and held on replevin does not operate as payment or discharge of the tax.

The statute requires the collector to keep a distress for taxes four days, and then sell. Where the distress was taken on the fifth of March, and advertised to be sold on the eleventh; *held*, that the collector, not being authorized to keep the property so long, became a trespasser *ab initio*.

Exceptions to erroneous rulings will not be sustained where the excepting party on account of fatal errors of his own cannot prevail in the suit.

A collector of taxes may justify a distraint of goods and chattels belonging to the Farnsworth Company, for a tax assessed by the town authorities upon the Farnsworth Manufacturing Company, by showing that the corporation does business under the name of the Farnsworth Manufacturing Company, and is as well known by that name as by its true name, and that they were liable to taxation in the town, and that the property upon which the tax was assessed belonged to them, and the assessors intended the assessment to apply to them, but made a mistake in the corporate name, provided his own proceedings are in all respects regular. But he will have no cause to complain of the exclusion of such evidence in a case where there is a distinct and fatal error in his own proceedings. If he keeps goods distrained for a tax more than four days without selling them, according to the requirements of R. S., c. 6, §§ 94, 104, the owner may replevy them. If the owner prevail in a replevin suit under such circumstances, the tax cannot be regarded either as void or as satisfied, and the collector may make a new distraint for the same, conforming to the law in his proceedings.

On exceptions.

Replevin for seven bales of California wool, valued at $1227.

The defendant, legally chosen collector of taxes of Lisbon in 874, received a warrant from the assessors for the collection of a tax assessed against "The Farnsworth Manufacturing Company." The warrant following the statute provides: "If any person refuses or neglects to pay the sum he is assessed, you are to distrain his goods to the value thereof, and the distress so taken to keep for the space of four days; and if he does not pay within four days, then you are to sell," etc. The wool was taken by the defendant as collector, March 5, 1874, and advertised to be sold March 11. It was admitted that there was no record of the required official oath of the collector, and that the wool was the property of the "Farnsworth Company." The defendant testified that he seasonably took the official oath, and offered to prove that the plaintiff company is known as well by the name of "The Farnsworth Manufacturing Company," as by the name of "The Farnsworth Company." The presiding justice to whom the case was submitted with right of exceptions, ruled the evidence inadmissible and ordered judgment for plaintiffs with nominal damages. The defendant excepted.

W. P. Frye, *J. B. Cotton*, and *W. H. White*, for the defendant.

The counsel conceded that the distress was kept too long, and for that reason the plaintiffs must recover here, but asked the opinion of the court on other questions raised, to settle legal rights and prevent further litigation.

A. P. Moore, for the plaintiffs.

BARROWS, J. Replevin for seven bales of wool belonging to the plaintiffs, the taking of which the defendant claims to justify as a distraint for taxes assessed by the town of Lisbon upon the plaintiff corporation by the name of "The Farnsworth Manufacturing Company," for the year 1873, and as a seizure duly made by him as collector, acting by virtue of a regular warrant from the assessors of the town. There was no record evidence that the defendant took the oath necessary to qualify him as collector, though the records show that he took the oath of office as constable, March 25, 1873.

This latter oath was not sufficient to qualify him to act in the collection, for he was proceeding therein as a collector duly chosen, and not as a constable to whom the collection had been committed under R. S., c. 6, § 97. *Payson* v. *Hall*, 30 Maine, 319. But he testifies positively and distinctly that when he was notified that the bills were ready, he took the required oath before the town clerk to qualify himself as collector.

In the absence of record evidence the parol proof was competent. *Hale* v. *Cushing*, 2 Maine, 218. *Kellar* v. *Savage*, 17 Maine, 444. *Hathaway* v. *Addison*, 48 Maine, 440. His testimony was not qualified, hesitating, and uncertain, like that offered in *Chapman* v. *Limerick*, 56 Maine, 390. While the testimony of the person administering as well as that of the person taking the oath is desirable if it can be had, it cannot be said that a clear and direct statement made by either, when it appears to proceed from a distinct recollection of the fact, is insufficient to establish it.

The defendant offered his warrant and the list of taxes committed to him, and offered to prove that the plaintiff corporation is known as well by the name of "The Farnsworth Manufacturing Company" as by the name of "The Farnsworth Company;" that merchants and business men of Lisbon where the company's prop-

erty is located, do business with the plaintiffs as "The Farnsworth Manufacturing Company," presenting accounts against them under that name, which are paid without objection; that the plaintiffs' agent, upon presentation of the tax bill, offered a check in payment of it, pointed out the wool distrained, and during all the proceedings, no notice was given of the change of name, or that the name was wrong; that in the books of assessment and valuation upon which this tax was made, the lands and property of the plaintiffs are described; that plaintiffs had never given in any list of their taxable property, and that the assessors of 1873 were ignorant of the change in the name of the corporation, and had never been notified of it by the plaintiffs.

This evidence the presiding judge, to whom the case was submitted with right to except, rejected, and ordered judgment for the plaintiffs with nominal damages; doubtless upon a ground to be hereafter noticed.

Counsel have discussed the general question of the admissibility of the evidence offered and rejected, and for the purpose of avoiding further litigation in the premises we proceed to consider the points made, though as we shall hereafter see, they cannot be decisive of the result in the present suit. This being the case it is not material here whether defendant's offer includes all that should be shown in order to constitute a justification. We assume that it was designed to cover all that would be necessary, provided it is held competent to show that while the valuation books of the assessors, and the warrant and tax list under which the collector acted, showed no tax against these plaintiffs by their true and correct name, the plaintiffs' property was in fact the property which the assessors intended to tax, and was liable to taxation, and that it was by an error or mistake of the assessors that the misnomer of the owner occurred.

The direct question is, can the collector justify the taking of goods and chattels belonging to a corporation the name of which is incorrectly stated both in the assessment and tax list, through the mistake of the assessors, to pay a tax for which such corporation would have been legally responsible had its true name appeared upon the assessors' books, and the tax list committed to the

collector. We think he may; and that proof of such mistake and parol evidence to identify the corporation intended to be taxed and their property, is competent in suits like this whenever the collector's proceedings are found in other respects justifiable and regular. The mistake in the name is fairly within the mischief designed to be remedied by § 114, c. 6, R. S., of 1871, which provides that no error, mistake or omission by the assessors, collector, or treasurer, shall render an assessment void, and remits the party to his action against the town for "any damages he has sustained, by reason of the mistakes, errors, or omissions of such officers." It is true this provision is not so specific as that contained in the Revised Statutes of Massachusetts, c. 8, § 5, which was the subject of construction in *Tyler* v. *Hardwick*, 6 Metc., 470; but it is even more comprehensive; and the reasons assigned by Shaw, C. J., for applying the remedy furnished by the Massachusetts statute to the case then before the court, apply with equal force and precision to the case before us.

It is precisely in this part of the work of the assessors, that errors, mistakes and omissions are most liable to occur; and mistakes of this description would commonly be avoided or seasonably corrected, if the tax payer obeyed the requirements of the statute, and returned a list of his taxable property when the assessors issue their notice.

If the party is liable to taxation, and is in fact the party whom the assessors intended to tax, it would be manifestly unjust that he should escape taxation for so trivial a cause as an error, mistake, or omission in his designation, when his identity with the party designed to be taxed, can be established; and the statute was framed to prevent such a result. Nor is it so absolutely essential that corporations should be described by their true names, as to place them in this respect on a different footing from natural persons. The old objection that a corporation, being a mere creation of the law, can and must be known by its true name only, and if the name be varied it cannot be known at all, was deemed nugatory in *Minot* v. *Curtis et als.*, 7 Mass., 441; and subsequent decisions have tended more and more to assimilate all corporations created for business or profit, in legal proceedings, to natural per-

sons so far as their rights, duties and liabilities are concerned. Even in the absence of such a statute for the relief of errors, mistakes and omissions, the reasoning of more than one highly respectable court goes far to show that neither corporations nor individuals can be allowed to avail themselves of pretexts of this sort to escape taxation, when their identity and liability to be taxed can be clearly established. *Souhegan Nail, Cotton and Woolen Factory* v. *McConihe*, 7 N. H., 309. *O'Neil et als.* v. *The Virginia & Maryland Bridge Co.*, 18 Md., 1. *Van Voorhis* v. *Budd*, 39 Barb., (N. Y.) 479.

If proof of the plaintiffs' identity and liability to taxation, and of the intent to tax them on the part of the assessors, and of the assessors' mistake in the name and designation of the plaintiffs upon the valuation and tax lists had been all that was necessary to perfect the defendant's justification, the presiding judge would not have excluded the testimony offered by the defendant nor ordered judgment for the plaintiffs. But the case showed that the defendant, after distraining the plaintiffs' goods for the tax kept them beyond the four days at the expiration of which, according to his warrant, (the form of which is prescribed in R. S., c. 6, § 94,) and according to the requirements of c. 6, § 104, they should have been sold, and therefore had his tax list and the assessment been entirely correct and free from the mistake which he proposed to prove and obviate, he must still have been regarded as a trespasser *ab initio* and liable to have the property taken out of his hands as it was by this suit. *Brackett* v. *Vining*, 49 Maine, 356.

Judgment must for this cause go for the plaintiffs even if the tax had been assessed against them by their true name.

The plaintiffs' counsel contends that the defendant, having once taken sufficient property of the plaintiffs to satisfy the tax, cannot hereafter make another distraint for the same tax. This cannot be so in a case where the property distrained has been returned to the owner on account of the defect in the proceedings with costs and damages for taking it, and without being in any manner appropriated to the discharge of the tax. The case is not like that of *Packard* v. *New Limerick*, 34 Maine, 266, the doctrine of which is that where land has been sold by a collector of taxes for

an amount sufficient to cover the taxes and expenses, and the purchaser has paid that amount, there is no further claim upon the lands or the owner of them for those taxes whether the purchaser gets a good title or not—that the validity of the sale is a matter between the collector and purchaser only and the purchaser must rely on the collector's covenants and is compensated for his risk by being allowed at the rate of twenty per cent. for the use of his money, if the land is redeemed, or his chance of becoming the owner of the land usually for a small part of its value, if it is not. The distinctions between such a case and the present are obvious. This tax has never been paid or satisfied, and if the defendant shall hereafter make a distraint of the plaintiffs' property in conformity with the requirements of law and his warrant, it will be competent for him to complete his justification of such sale by proof of the assessors' mistake in the plaintiffs' name and other matters necessary to his justification, though the evidence was rejected here as unavailing. To make such proof admissible it is not necessary that the mistake of the assessors should be first corrected under R. S., c. 3, § 8, or c. 6, § 37. Such correction if it could be made would make the proof needless. But it would have been admissible and necessary in order to justify the distraint of property belonging to the Farnsworth Company for a tax assessed against the Farnsworth Manufacturing Company, if the mistake in the name had been the only one in the course of the proceedings. As we have seen, there was an entirely distinct and fatal error in the proceedings of the collector himself, which made the exclusion of the testimony he offered in this suit immaterial.

Exceptions overruled.

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

NATHAN H. LANDER, administrator, *vs.* JAMES ARNO.

Androscoggin, 1875.—March 1, 1876.

The general rule that a judgment of a court having jurisdiction of the subject matter and the parties and the process and rendered directly upon the point in question is conclusive between the same parties, is not complied with, when the same person though a party in both suits is such in different capacities; in the one individually, in the other as administrator.

Where the issue actually tried is not shown by the record it may be shown by parol.

A. gave his promissory note to B. and conveyed to him a parcel of land as security for the payment of the same, taking B.'s agreement to re-convey the land when the note should be paid; B. conveyed the land to C.; afterwards in a real action, A. recovered the land of C. upon the ground, either that the deed from A. to B. was never delivered to B., or that it was obtained from A., by duress; the administrator of B. now sues A. upon the note. *Held*, that the judgment in the former action is not *per se*, a bar to the present suit. *Held*, also, that the former judgment can be made available, as a defense to this suit, by showing such an inseparableness of connection in the parts of the transaction, that the note could not have been delivered if the deed was not, and that the note must have been obtained by duress if the deed was; provided it appears that the plaintiff's intestate actually defended the former action or that he stood in a relation to it giving him the legal right to do so. *Held*, further that oral evidence may be received to prove any facts which go to establish such a defense, so far as such facts do not appear of record, either in support of a plea in bar or under the general issue.

Where a note and a mortgage to secure it are executed at the same time, a judgment against the validity of the mortgage will not be *per se* a bar to a suit upon the note.

ON REPORT.

ASSUMPSIT on a promissory note. The defendant, in the lifetime of Robert H. Randall, being indebted to him, to secure the debt, conveyed to him a parcel of land in Wales, giving him at the same time a note for the amount of the debt. Randall, at the same time and as a part of the same transaction, gave Arno a bond to reconvey the premises on payment of the note. Subsequently Arno charged Randall with a forcible carnal connection with his wife, which resulted in her death. To settle this, Randall gave up the note and conveyed the land to Arno. Immediately afterwards, Arno replaced the papers giving Randall a deed of the premises conveyed as above to him, also at the same time a new note; and Randall gave Arno a bond like the first, the intention,

as claimed by the grantees of Randall, being to replace the parties in their former position. Arno claimed that this last transaction was the result of duress, and brought a writ of entry against Randall's grantees to recover the premises by him conveyed. In the progress of the trial on the writ of entry, Arno the plaintiff in that case offered evidence tending to show duress in obtaining the last mentioned deed and also to show that there was no delivery of it. In that action the plea of the defendants, grantees of Randall, was the general issue. There was a general verdict in favor of the plaintiff, Arno; judgment was subsequently taken and a writ of possession issued. This suit is brought on the note last given. The defendant claimed to plead this judgment in bar of the present suit and to show by parol evidence the identity of the issues. If in the opinion of the full court the said judgment is a bar *per se* to this suit, then plaintiff to be nonsuit; otherwise, action to stand for trial: and the full court is to determine whether or not parol evidence will be admissible to prove what issue was actually tried in the former suit.

W. P. Frye, *J. B. Cotton*, and *W. H. White*, for the plaintiff.

The two questions in the case are practically reduced to one: Can the judgment be an estoppel.

The essential conditions under which the doctrine of *res judicata* becomes applicable are, the identity of the thing demanded, the identity of the cause of demand, and of the parties in the character in which they are litigants. Herman on Estoppel, § 29.

The counsel contended that there was no identity in either of these respects; though Randall one of the defendants in that suit was a plaintiff in this, the capacity was different; in that, he was sued as an individual, in this he sued as administrator. It does not appear that Randall or his estate could have interfered in that suit against Lander for the land. Neither Lander or Emily B. Randall had possession or control of the note in this suit. In that case, the thing demanded was land; in this case it was payment of a note.

M. T. Ludden, for the defendant.

The judgment shows that Arno was, at the time Randall got

the deed, and has ever since been, the owner of the land; that Arno was not then a debtor to Randall; that the parties are the same only reversed, and one less in number in this suit. Lander was then as he is now, the administrator and son-in-law of Randall.

The deed, bond and note are intertwined and each a part of one and the same transaction, so that the removal of the deed by the judgment of court breaks the chain, and the entire transaction falls.

PETERS, J. The first point, upon the facts agreed, is, whether the former judgment is *per se* a bar to the present suit. It is very clear that it cannot have that effect. *Non constat*, that the issue decided there and the issue to be decided here are the same. It does not appear that this cause of action was extinguished by the judgment in the other suit. Randall held the note and received the deed of the land as a security therefor, giving a bond to reconvey when the note should be paid. The claim of his grantees (to the land) was defeated in the former litigation, upon either one or the other of two defenses there set up; either because the deed was in fact never actually delivered to Randall or because it was obtained by him by duress. The present claim is, to recover upon the note. For aught that appears, Randall might have been entitled to hold the note, and not entitled to hold the land. He may have got the one without duress, but not the other. The note may have been delivered, while it was otherwise with the deed. The two are independent and separable contracts to a certain extent. It is apparent enough, therefore, that the defense set up cannot be sustained by the record alone.

Then the question is propounded to the court "whether or not parol evidence is admissible to prove what issue was actually tried in the former suit." We have no doubt of it, if the proof can be made relevant to the pending issue. The law is well settled in this state upon that point. Oral testimony may, for that purpose, be received in support of a plea in bar or under the general issue. Where the record of a case fails to show the ground upon which judgment therein was rendered, a resort may be had to the next

best evidence. *Walker* v. *Chase*, 53 Maine, 258. *Hood* v. *Hood*, 110 Mass., 463. But if the grounds of a judgment appear by the record, they must be proved by the record alone. Same cases; and *Sturtevant* v. *Randall*, 53 Maine, 149.

If there was no other difficulty in the way, and the defendant could show such an inseparableness of connection in the parts of the transaction, that, if the deed was not delivered, the note could not have been; or that, if the deed was obtained by duress, the note must also have been obtained in the same way, then the defense in this case would be made out. Under such circumstances part of the transaction being void, all of it is void. The deed being void, the note is also. The jury in the former case finding one fact, *ex necessitate* found both facts. All the facts constituted but a single transaction. And it is well established law, at the present day, that when a fact is once adjudicated by a tribunal of competent authority, the parties to the litigation are concluded thereby in any subsequent suit. In addition to the cases before cited, the following are pertinent authorities hereto: *Lynch* v. *Swanton*, 53 Maine, 100; *Bunker* v. *Tufts*, 57 Maine, 417; *Slade* v. *Slade*, 58 Maine, 157; *Atkinson* v. *White*, 60 Maine, 396; *Hill* v. *Morse*, 61 Maine, 541; Bigelow on Estoppel, 45.

But the defendant has another difficulty to encounter. The parties to the two litigations, must be the same, or must stand in an attitude and relation to each other, having the same effect as if they were identically the same. Does that relation of the parties exist here? The other action was not with Randall but with his grantees. Besure, one of the grantees is a plaintiff in this suit, in his representative capacity as administrator. But no importance can be attached to that fact, any more than there would be if the administrator were any other man. Nor does it appear that Randall conveyed with any covenants of warranty, or that he defended that suit, or that he had any interest therein or knowledge thereof. Upon these facts, (they may appear otherwise when the case is tried,) the defense by estoppel, or *res adjudicata*, which the defendant seeks to establish, would fail. The general rule is, that a person cannot be bound by a judgment, when he is not a party thereto, unless he had a right to appear and take part in the trial,

and control or help control the proceeding and appeal from the verdict or decree obtained therein. But if it can be established, that Randall's grantees really held the title to the land as a trust for his benefit, so that he was really the party in interest in that suit, or that on account of any covenants he actually defended the suit, or had the legal right to do so, in such case, if the identity of the issues is proved, he and his representatives would be concluded by the judgment thus obtained. 1 Green. Ev., 523. Bigelow on Estoppel, 65. *Case* v. *Reeve*, 14 Johns., 79. *Thurston* v. *Spratt*, 52 Maine, 202. *Emery* v. *Fowler*, 39 Maine, 326.

Action to stand for trial.

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

STATE *vs.* FREEMAN F. GOODENOW and LYDIA HUSSEY, *alias* LYDIA F. GOODENOW.

Androscoggin, 1875.—March 8, 1876.

Crimes. Intent. Adultery.

When an act is in itself unlawful, the law implies a criminal intent.

A man and woman jointly indicted for adultery, the female defendant having a lawful husband alive, cannot set up in defense of the indictment, that such husband had been married again, and that, on that account, they supposed they could lawfully intermarry; and that they were so advised by the magistrate who married them, they relying upon the opinion of the magistrate in good faith.

ON EXCEPTIONS.

INDICTMENT, alleging adultery on November 21, 1873.

The female defendant was legally married to George W. Hussey, April 30, 1861, at Turner, where they subsequently cohabited as husband and wife. They afterwards separated; and October 15, 1865, the defendants were united in marriage by one Isaac I. York, a justice of the peace, and they ever after cohabited as husband and wife. There was evidence that December 14, 1873, George W. Hussey, was alive at Byron, Michigan, (the evidence

being that his mother received a letter of that date purporting to come thence from him by due course of mail,) and that no divorce had ever been decreed between George W. Hussey and Lydia Hussey by the courts of this state.

The defendants offered to prove that prior to June, 1865, George W. Hussey had deserted and abandoned the said Lydia, and that in June, 1865, he married another woman from Toronto, Canada, and introduced her to several persons in Portland, in this state, as his wife and exhibited to them a certificate of the last named marriage; that he soon after left this state and had not returned; that October 16, 1865, the defendants exhibited to said York affidavits from various parties that George W. Hussey had married another woman; that they were thereupon advised by said York that they could legally intermarry; and that they did so intermarry in good faith; all of which the presiding judge excluded, and the defendants, the verdict being guilty, excepted.

L. H. Hutchinson and *A. R. Savage*, for the defendants.

I. To sustain an indictment for adultery, three particulars must be proved: the *corpus delicti;* that one of the parties had been previously married to some other person, and that such person was alive at the time of the acts of adultery complained of. 3 Greenl. Ev., §§ 204, 207; 2 Whart. Crim. Law., §§ 2651-2; 43 Maine, 258.

These must each be proved. As regards the third, the mere presumption of the continuation of life is not sufficient. 3 Greenl. Ev., § 207.

In the present case, the only evidence tending to show that the former husband of Mrs. Hussey was alive at the time alleged in the indictment, was a letter purporting to have come from him to his mother. The handwriting of the letter was not even identified; and this evidence is, we contend, clearly insufficient to send a man and woman to state prison upon.

II. The defendants appear to have acted, in entire good faith. They sought and acted upon the advice of the officiating magistrate, who was presumably qualified to give them proper advice.

There are numberless instances where parties are relieved from the consequences of their acts, done in accordance with the ad-

vice of those whom they may reasonably suppose to be qualified to give the same, including magistrates and such; much more, they should not be condemned.

The evidence offered by the defendants, and excluded by the presiding justice, shows that there was no knowledge or intent of committing any wrong, much less a crime.

Knowledge and intent where material must be shown by the prosecutor. 1 Whart. Crim. Law, § 631. *Wright* v. *State*, 6 Yerger, 345.

The evidence offered and excluded, shows that the defendants acted in good faith, and that the best meaning person by a mistake may be thrust into prison for a term of years.

G. C. Wing, county attorney for the state, cited, as directly in point, *Commonwealth* v. *Mash*, 7 Metc., 472; *Same* v. *Thompson*, 6 Allen, 591, and same parties, 11 Allen, 23.

PETERS, J. The respondents are jointly indicted for adultery, they having cohabited as husband and wife while the female respondent was lawfully married to another man who is still alive. The only question found in the exceptions, is, whether the evidence offered and rejected should have been received. This was, that the lawful husband had married again, and that the justice of the peace who united the respondents in matrimony advised them that, on that account, they had the right to intermarry, and that they believed the statement to be true, and acted upon it in good faith. It is urged for the respondents, that those facts would show that they acted without any guilty intent. It is undoubtedly true, that the crime of adultery cannot be committed without a criminal intent. But the intent may be inferred from the criminality of the act itself. Lord Mansfield states the rule thus: "Where an act, in itself indifferent, becomes criminal if done with a particular intent, there the intent must be proved and found; but where the act is in itself unlawful, the proof of justification or excuse lies on the defendant; and in failure thereof, the law implies a criminal intent."

Here the accused have intentionally committed an act which is in itself unlawful. In excuse for it, they plead their ignorance of

the law. This cannot excuse them. Ignorance of the law excuses no one. Besure, this maxim, like all others, has its exceptions. None of the exceptions, however, can apply here. The law, which the respondents are conclusively presumed to have known, as applicable to their case, is well settled and free of all obscurity or doubt. It would perhaps be more exact to say, they are bound as if they knew the law. Late cases furnish some interesting discussions upon this subject. *Cutter* v. *State*, 36 New Jer., 125. *United States* v. *Anthony*, 11 Blatchf., 200. *United States* v. *Taintor*, Id., 374. 2 Green's Crim. Law R., 218, 244, 275, 589. *Black* v. *Ward*, 27 Mich., 191. S. C., 15 Amer. Law Reports, 162, and note 171. The rule, though productive of hardship in particular cases, is a sound and salutary maxim of the law. Then, the respondents say that they were misled by the advice of the magistrate, of whom they took counsel concerning their marital relations. But the gross ignorance of the magistrate cannot excuse them. They were guilty of negligence and fault, to take his advice. They were bound to know or ascertain the law and the facts for themselves at their peril. A sufficient criminal intent is conclusively presumed against them, in their failure to do so. The facts offered in proof may mitigate, but cannot excuse, the offense charged against them. There is no doubt, that a person might commit an unlawful act, through mistake or accident, and with innocent intention, where there was no negligence or fault or want of care of any kind on his part, and be legally excused for it. But this case was far from one of that kind. Here it was a criminal heedlessness on the part of both of the respondents to do what was done by them. The Massachusetts cases cited by the counsel for the state, go much further than the facts of this case require us to go in the same direction, to inculpate the respondents. Besides those cases, see also *Commonwealth* v. *Elwell*, 2 Metc., 190; *Commonwealth* v. *Farren*, 9 Allen, 489; *Commonwealth* v. *Goodman*, 97 Mass., 117; *Commonwealth* v. *Emmons*, 98 Mass., 6. We see no relief for the respondents except, if the facts warrant it, through executive interposition.

Exceptions overruled.

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

NELLIE O'CONNELL, by next friend, *vs.* THE CITY OF LEWISTON.

Androscoggin, 1875.—March 15, 1876.

Way defective. Lord's Day.

Every passing along a highway under c. 18, R. S., which constitutes traveling as there used and entitles the traveler to a remedy therein provided for an injury received, does not, if done on the Lord's day, necessarily constitute a traveling within c. 124.

A young lady, who on the Lord's day, walks one-fourth of a mile to her aunt's house, calls there and invites her cousin to walk, and then proceeds to walk with her three-fourths of a mile, simply for exercise in the open air, is not thereby traveling in violation of R. S., c. 124, § 20.

ON EXCEPTIONS AND MOTION.

CASE for an injury to the plaintiff's right hand and arm received on Bridge street, Lewiston. The defect was a loose plank in the sidewalk, one end of which would tip up when the opposite end was pressed down. The plaintiff testified that on Sunday, March 22, 1874, in the afternoon before sunset, she went from her home to her aunt's house about one-fourth of a mile to get her cousin Nellie Nelligan, about the same age as herself (14), to go to walk with her; that she remained at her aunt's about fifteen minutes while her cousin was putting on her things to go with her, that they then went out to walk and walked down Bridge street and onward to the bridge across the river between Lewiston and Auburn and then went back home; that while they were going down Bridge street her cousin being in advance of her stepped upon the end of the loose plank farther from her and raised the end next to her so that she hit her toe against it and fell and received the injury named. Distance walked after she fell to the bridge is about three fourths of a mile.

The defendants requested the presiding judge to instruct the jury that traveling on Sunday except from necessity or charity is prohibited by law; that the presumption of law is that traveling on the Lord's day is unlawful; that in order for a person to recover damages for an injury sustained while traveling on the Lord's day it is incumbent upon such person to satisfy the jury that the traveling was from necessity or charity; that walking out

upon the street or sidewalk in company with an invited friend for the purpose of recreation, a walk or pleasure, is not an act of necessity or charity and is not authorized by law; and, that if the plaintiff was thus walking and received the injury complained of from the alleged defective sidewalk, she cannot recover from the city bound by law to keep the sidewalk in repair.

These instructions were refused; but the judge instructed the jury that traveling for the purpose of making a call or visit for pleasure would be unlawful; that a distinction was raised not very obvious but sustained by law; that while traveling for the purpose of making a visit to a friend merely for the purpose of spending the evening in company, was not lawful, traveling on Sunday for the purpose of exercise, gentle exercise in the open air, intending to make no call at any house, but, after taking the walk, returning home, would not be unlawful; that the distinction was, in one case the traveling was for visiting, and in the other, for no such purpose, but simply a walk in the open air without any object of pleasure.

There was no other evidence relating to the traveling or its purposes, or the cause of the injury. The plea was the general issue. The verdict was for the plaintiff for $1800.

The defendants excepted.

M. T. Ludden, city solicitor, for the defendants.

The statute provides, c. 124, § 20, that whoever on the Lord's day, travels, or does any work, labor, or business, shall be punished by a fine; and by § 22, the Lord's day includes the time between twelve o'clock Saturday night and twelve o'clock Sunday night. There is no doubt about the intention of the legislature. There are the plain, simple words of the statute, "travels, or does any work, labor or business." This word "travels," is not obscure, nor is it susceptible of a two-fold interpretation.

It is only when a statute is ambiguous in its terms, that courts may rightfully exercise the power of controlling its language, so as to give effect to what they may suppose to have been the intention of the law-makers. *Wood* v. *Adams*, 35 N. H., 36.

A person traveling on the Lord's day, unless for charity or necessity, cannot maintain an action, for injuries by a defect of the

way. *Cratty* v. *Bangor*, 57 Maine, 423. *Hinckly* v. *Penobscot*, 42 Maine, 89.

No distinction is made between those who travel, in town, and those who travel from town to town. The former are as much violators of the law as the latter. *Tillock* v. *Webb*, 56 Maine, 100.

The statute makes no distinction between those who travel on foot and those who travel in carriages. "It is the traveling which is prohibited." *Cratty* v. *Bangor*, *ubi supra*.

The fact of traveling on the Lord's day as defined by our statutes, *prima facie*, makes a violation of the statute by which such traveling is prohibited. The burden was on the plaintiff to show the act within the exceptions provided by the statute.

Against this view the plaintiff relies upon the case of *Hamilton* v. *Boston*, 14 Allen, 475. That case is no more an authority in this case than it was in *Cratty* v. *Bangor*. In that case the plaintiff had been sick during the day, Sunday, of the accident, and being invited by a friend to walk, went for benefit to himself and for exercise.

In the case at bar the plaintiff was not sick, nor is there any testimony going to show what she went out to walk for, whether for health or pleasure. If the purpose in *Hamilton* v. *Boston*, was lawful, this case discloses no such purpose.

If this plaintiff traveled on Sunday, she was performing an act prohibited by the statute. If she did not travel, the defendants are not liable.

L. H. Hutchinson and *A. R. Savage*, for the plaintiff.

I. A person walking a short distance in a public highway, simply for exercise and to take the air, on the Lord's day, with no purpose of going to or stopping at any place but his own house, or of passing from one city or town to another, is not liable to punishment therefor under the statutes for the observance of the Lord's day; and may maintain an action to recover damages for an injury sustained by him while so walking, in consequence of a defect in the highway. *Hamilton* v. *Boston*, 14 Allen, 475, and the authorites there cited.

This Massachusetts decision has been adopted by our own court. *Cratty* v. *Bangor*, 57 Maine, 423.

II. The verdict was in accordance with the evidence and the law under the instructions of the presiding judge.

The court will not interfere and grant a new trial unless upon strong conviction that the jury have fallen into some error in regard to the nature and force of the evidence. *Smith* v. *Richards*, 16 Maine, 200.

VIRGIN, J. The decision of this case involves the interpretation of R. S., c. 18, §§ 40 and 65, defining the liability of towns for injuries received through their defective ways, viewed in connection with that of c. 124, § 20, prohibiting traveling on the Lord's day.

The first section mentioned requires towns to open and keep their ways "safe and convenient for travelers;" and there is no provision requiring ways to be kept thus for any persons other than "travelers." This being the extent of the provision is the full measure of liability. *Peck* v. *Ellsworth*, 36 Maine, 393.

Section 65 providing a remedy for "any person" injured "through any defect or want of repair" in any public way, relates to those only for whom ways are established, to wit, "travelers." *Stinson* v. *Gardiner*, 42 Maine, 248. *Leslie* v. *Lewiston*, 62 Maine, 468.

In general terms, ways are established and constructed at the public expense for the accommodation of all persons who in performing the duties, or prosecuting the general pursuits of life whether of business or pleasure, have occasion to pass and repass along and upon them on foot, with horses and carriages, or with teams for the transportation of property. And persons thus using a public way are "travelers" within this statute, and are entitled to the remedies therein provided. When, however, they cease to use it for the substantial purposes for which it is established and appropriate it to uses foreign thereto, they can no longer claim to be "travelers" or be entitled to the remedies provided in behalf of "travelers." This principle is illustrated by numerous familiar decisions which need not be cited here.

Can a person recover for an injury received through a defect in a way while traveling in violation of the Lord's day statute? This question has been repeatedly decided in the negative in this and

several other states, while other courts of acknowledged learning and ability have arrived at the opposite conclusion.

Was the plaintiff, at the time of receiving the injury complained of, traveling in violation of c. 124, § 20, which provides: "whoever, on the Lord's day, . . travels, or does any work, labor or business on that day, except works of necessity or charity, . . shall be punished by fine," &c. ?

It is evident that the answer depends to a great extent on the meaning which the legislature intended to give to the word "travels" in this statute. For if the idea of traveling is precisely the same in the two statutes—if the term "traveler" as used in both are synonymous, then the plaintiff was violating the penal statute when she was injured, and cannot recover therefor, unless she was within the excepting clause.

Although a particular word or phrase is generally used in one and the same sense as often as it occurs in the same chapter, the provisions of which pertain to the same general subject matter, it does not follow that it is to receive the same interpretation in a penal as in a remedial statute. That every passing along and upon a highway under c. 18 which constitutes traveling as there used and entitles the traveler to a remedy therefor provided for an injury received, does not, if done on Sunday, necessarily constitute a traveling within the provisions of c. 124, becomes evident, from various considerations.

In construing the statute of ways, the decisions have never recognized any distinction between walking from place to place in town, and walking or riding from town to town. But such a distinction is apparent in c. 124 as will be seen by comparing sections 20 and 21. Thus § 21 forbids any innholder or victualer, on the Lord's day, to suffer "any persons, except travelers, strangers or lodgers, to abide in his house," &c. If, however, every person who walks in the street from place to place in the town "travels," within § 20, he would also thereby become a "traveler" within § 21 and the phrase "except travelers" would become a nullity as all would be "travelers" who happened into the inn. That such was not the original intention of the legislature is rendered still more apparent by regarding the language of the statute of 1821, c. 9, § 3,

(from which § 21 of c. 124 was derived,) which forbade innholders and others there enumerated to "entertain any of the inhabitants of the respective towns where they dwelt, or others not being travelers," &c. This language would seem to make it certain that the citizens of a town, when visiting an inn and certain other places of entertainment kept therein, were not considered "travelers."

Moreover, the numerous provincial statutes on this subject enacted in Massachusetts, from time to time from its earliest times down to 1791, not only contained provisions prohibiting traveling strictly so called, but they also, by distinct and variously expressed clauses, forbade under specific penalties, "unnecessary walking in the streets, highways, fields," &c. But this last and all similar provisions were omitted from the Mass. Stat. of 1791 and all succeeding statutes in that commonwealth. And "it is reasonable to infer that the provisions against mere unnecessary walking in the streets were intentionally omitted by the legislature, and for the reason that they were an unwise and arbitrary interference with the comfort and conduct of individuals." *Hamilton* v. *Boston*, 14 Allen, p. 481. Before the separation, the laws of Massachusetts were our laws. After becoming a state, our earliest statute providing for the "due observation of the Lord's day" (Stat. 1821, c. 9,) was substantially a transcript of that of 1791, c. 58, except as to its penalties; and section one provided, "No traveler, drover, wagoner, teamster, or any of their servants, shall travel on the Lord's day, except from necessity or charity." The only substantial difference between that and the present statute, is a substitution of "whoever" for the different classes specified in the other. The effect of the change simply enlarges the number of persons to whom the statute may apply, but it in nowise changes the act by which they may incur the penalty, the word travel remaining.

Our conclnsion is that a young lady, who, on the Lord's day, walks one-fourth of a mile to her aunt's house and calls there and invites her cousin to walk with her, and they then proceed to walk three-fourths of a mile simply for exercise in the open air, is not thereby traveling in violation of R. S., c. 124, § 20.

This decision has the authority of the court in Massachusetts

after a complete review and thorough analysis of the statutes. *Hamilton* v. *Boston*, 14 Allen, 475.

If the testimony is true, the verdict is not against the weight of evidence or against law.

Motion and exceptions overruled.
Judgment on the verdict.

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

ANDROSCOGGIN WATER POWER COMPANY *vs.* WILLIAM H. METCALF.

Androscoggin, 1875.—March 15, 1876.

The right of a plaintiff to waive tort and sue in assumpsit, is limited to cases where the defendant has converted property into money or its equivalent, and cannot be pressed one step further.

ON REPORT.

ASSUMPSIT for lumber furnished by the plaintiffs for the construction of the defendant's piazza in Lisbon, brought on the ground that the lumber was ordered for the defendant, through one Southard, acting as his agent. The defense was, that Southard constructed the piazza under a contract to furnish materials and labor, and had been fully paid therefor by the defendant. The authority of the carpenter being controverted, the plaintiff then claimed to recover upon the ground that the lumber had been converted to the defendant's use, that if he was not the purchaser, the conversion was tortious, and that the plaintiff had the right to waive the tort, and recover the value of the lumber in an action of assumpsit. The presiding justice so ruled, and thereupon the defendant consented to a default, the default to be taken off and the case to stand for trial, if in the opinion of the law court the ruling was wrong.

A. D. Cornish, for the defendant.

I. There was no express promise by the defendant, nor was there an implied one.

II. The rule that the plaintiff may waive the tort and sue in assumpsit, where there has been a conversion of his property, does

not apply. The rule is limited to cases where there has been a conversion into money. *Noyes* v. *Loring*, 55 Maine, 408. *Hastings* v. *Bangor House*, 18 Maine, 436. *Paine* v. *McGlinchy*, 56 Maine, 50. *Jones* v. *Hoar*, 5 Pick., 285. *Ladd* v. *Rogers*, 11 Allen, 209. *Glass Co.* v. *Wolcott*, 2 Allen, 227. *Smith* v. *Smith*, 43 N. H., 536. *Woodbury* v. *Woodbury*, 47 N. H., 11.

W. P. Frye, *J. B. Cotton*, and *W. H. White*, for the plaintiffs.

I. Upon the case as presented, the plaintiffs could maintain trover. *Kimball* v. *Billings*, 55 Maine, 147. *Hotchkiss* v. *Hunt*, 49 Maine, 213. *Parsons* v. *Webb*, 8 Maine, 38.

II. If the defendant, under the state of facts, after receiving the lumber, had converted it into money or its equivalent, the plaintiffs might waive the tort and maintain an action for money had and received. *Jones* v. *Hoar*, 5 Pick., 285. *Foye* v. *Southard*, 54 Maine, 147.

III. The doctrine may be pressed one step further. Greenleaf says: If one commit a tort by which he gains a pecuniary benefit, as if he wrongfully takes the goods of another, and sells them, or otherwise applies them to his own use, the owner may waive the tort and charge him in assumpsit on the common counts, as for goods sold or money received, which he will not be permitted to gainsay. 2 Greenl. on Ev., § 108. See also note 3.

VIRGIN, J. The doctrine that the waiving of a tort and suing in assumpsit are limited to cases where the defendant has converted the property into money or its equivalent, is too firmly established in this state to be "pressed one step further." *Noyes* v. *Loring*, 55 Maine, 408. *Paine* v. *McGlinchy*, 56 Maine, 50, and cases there cited.

Default to be stricken off.
Case to stand for trial.

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

GEORGE H. CLARK *vs.* JOSEPH H. COUSINS.

Androscoggin, 1873.—April 10, 1876.

Promissory note—defense to. Insolvency—discharge in.

The note in suit was given by the defendant to the plaintiff while they were both inhabitants of Nevada, and the discharge in insolvency was regularly granted under the laws of that state while they were yet citizens thereof. *Held*, a legal defense here.

ON EXCEPTIONS.

ASSUMPSIT, on a promissory note given by the defendant to the plaintiff in Nevada, May, 1866, for $260, and sued here August 5, 1871. The defendant admitted that the note was valid when made, but offered in evidence under his plea of the general issue with a brief statement, a certified copy of a decree of his discharge in insolvency by the district court of the first judicial district, county of Storey, and state of Nevada, September 12, 1866; he also offered to prove that the discharge included the note, and that both the parties resided in Nevada from the time the note was given to the time of the discharge. The presiding justice ruled that the evidence offered was not sufficient to justify a verdict for the defendant. To which ruling the defendant excepted.

The defendant thereupon submitted to a default with leave to have the default taken off and the case stand for trial if the ruling was wrong.

T. B. Swan, for the defendant.

W. P. Frye, *J. B. Cotton*, and *W. H. White*, for the plaintiff submitted without argument.

VIRGIN, J. The case finds that the note in suit was given by the defendant to the plaintiff while they were both inhabitants of the state of Nevada; that the discharge in insolvency was regularly granted under the laws of that state while the parties were yet citizens thereof; and that the discharge includes the note. This is a legal defense to the suit in this state, (*Stone* v. *Tibbetts*, 26

Maine, 110,) notwithstanding the subsequent change of residence of the defendant. *Felch* v. *Bugbee*, 48 Maine, 9.

Exceptions sustained.
Default to be stricken off.
Case to stand for trial.

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

ZELOTES RANDALL *vs.* CHARLES BRADLEY *et al.*

Androscoggin, 1875.—June 13, 1876.

Mortgage—right to redeem—right to take an assignment of.

The acceptance of a quitclaim deed of the grantor's right to redeem an estate under mortgage does not impose upon the grantee an obligation to pay the mortgage debt and redeem the estate; and he may afterwards become the assignee of the mortgage without thereby discharging it.

Twenty years possession under a mortgage is presumptive evidence of a foreclosure.

The right to redeem an estate under mortgage cannot be enforced in a suit at law; it can only be done in a suit in equity.

ON REPORT.

WRIT OF ENTRY, to recover about four acres of land in the city of Lewiston, a portion of a hundred acre farm described in two deeds from John Randall of March 24, 1845, the one a mortgage to Nathan Reynolds, the other, in consideration of parental regard and the canceling of mutual accounts, to his son Ezra "for his use and benefit during his lifetime and also the lifetime of his wife Mary, and after their decease the fee to be in Ezra, jr., Zelotes, and Horace, children and legal heirs of the said Ezra and Mary, and to their assigns forever . . subject to my mortgage of even date to Nathan Reynolds, to secure the payment of two notes of hand for the sum of $338 each, given by my son Ezra to said Reynolds, payable in three and six years from date and interest annually." Ezra Randall died in May, 1864, aged 68; Mary, in 1872, aged 77; Ezra, jr., in 1845, aged 22; Horace, in 1861, aged 27;

leaving in 1872, Zelotes, the plaintiff, the only living grantee in the deed, aged 44. There were eight heirs of Ezra Randall, viz.: Zelotes, Sarah, Mary, Dorcas, Margaret, Olive, John S. F., and Wm. G., who died November 12, 1868, leaving as his heir a daughter, Bertha. The others were living at the time of the trial in April, 1875.

Ezra Randall, December 4, 1846, in consideration of $323, paid by his son, J. S. F. Randall, quitclaimed to him all his right in the premises, and also all his "right of redeeming the same." The Reynolds mortgage and notes were assigned to J. S. F. Randall, August 21, 1847, and his title passed to the defendants. A certificate of entry of J. S. F. Randall to foreclose the mortgage was dated August 26, 1847, and recorded the next day. J. S. F. Randall and his grantees have occupied the premises from and since December 4, 1845, and no demand to account or offer to redeem has been made upon or to any owner or occupant of the premises. Ammi C. Read testified that he considered the farm at the time of the conveyance from Ezra to J. S. F. Randall, worth $2000.

A. M. Pulsifer, *W. W. Bolster*, and *J. R. Hosley*, for the plaintiff.

The counsel contended that the state of the title after the deeds from John Randall, was as follows: 1, a mortgage in Reynolds as security for Ezra's note; 2, a life interest in Ezra; 3, the remainder in his grandsons, Zelotes, Ezra, jr., and Horace, in joint tenancy, the grantor, John, meanwhile holding the fee in trust for his grandsons named to go to them or their survivor at the termination of the life estate; that the plaintiff had not been guilty of laches in not pursuing his remedy earlier; that his estate being one in expectancy, he could not bring his action on account of the precedent or life estate of twenty-seven years, till the year 1872, at the death of his mother Mary; and that the attempted foreclosure of the mortgage was void in this, that while the entry to foreclose it was made, August 26, 1847, the assignment of it was not recorded till a day later. *Reed* v. *Elwell*, 46 Maine, 270. *Treat* v. *Pierce*, 53 Maine, 71. They summed up with the following propositions of law and fact.

I. The equities are with the plaintiff.

II. There were no covenants in the release or quitclaim of Ezra Randall to J. S. F. Randall.

III. No title would inure to the grantee of Ezra by reason of his heirship from his son Horace.

IV. The expectant estates were so limited by John Randall's deed that in case of the death of any of the grantees during its continuance, it would not descend to their heirs.

V. The fee in expectancy was in trust during the life or precedent estate; being such, it was an estate in joint tenancy.

VI. The plaintiff, being the survivor, took the entire fee at the termination of the precedent estate.

VII. The defendants by mesne conveyances held under John Randall, the mortgageor, not under Nathan Reynolds, the mortgagee.

VIII. There was no possession during the life estate by the mortgagee or any one holding under him. The mortgage was extinguished. There can be no foreclosure where a mortgage is paid.

IX. In case the title of Ezra, jr., descended to his father, which is denied, Zelotes Randall has been and is now tenant in common with the defendants, holding three-eighths of the fee, if Ezra by his deed to J. S. F. Randall conveyed what he so inherited, if not he would hold five-twelfths in common with his brothers and sisters, not with the defendants.

X. The precedent or life estate was burdened with the duty to pay the mortgage.

XI. J. S. F. Randall, at the time he paid the mortgage debt to Reynolds, was owner of the precedent estate. Zelotes and Horace had the expectant estate, Ezra, jr., then being deceased.

XII. No expectant estate can be defeated by any act of the owner of the precedent estate.

J. W. May, for the defendants, argued that there was no merger in J. S. F. Randall, and that there was a valid foreclosure by him. He contended that John Randall having conveyed subject to the Reynolds mortgage the right of redemption was in all and each of his grantees; that the mortgage being a charge upon the

whole estate, each portion would have to bear its part of the burden; in such case if the owner of one part has to pay the entire mortgage, he may call upon the others for contribution; 1 Wash. on R. P., c. 16, § 8; if J. S. F. Randall had redeemed the mortgage there was a vested remainder which might intervene; before there could be a merger in J. S. F. Randall, it was necessary that the interests of the several grantees should have been conveyed to him; if his purchase of the mortgage was an extinguishment of it, he would be left without protection, whenever by the death of his parents, Ezra, jr., Zelotes and Horace should become entitled to possession; this would be unjust and inequitable, and therefore a merger did not not take place. *Gibson* v. *Crehore*, 3 Pick., 475. *Hunt* v. *Hunt*, 14 Pick., 374. *Savage* v. *Hall*, 12 Gray, 363. *N. E. Jewelry Co.* v. *Merriam*, 2 Allen, 390. *Johnson* v. *Johnson*, jr., 7 Allen, 196. 2 Wash. on R. P., 180. *Simonton* v. *Gray*, 34 Maine, 50. *Freeman* v. *Paul*, 3 Maine, 260. *Carll* v. *Butman*, 7 Maine, 102. *Thompson* v. *Chandler*, id., 377. *Hatch* v. *Kimball*, 14 Maine, 9. *Pool* v. *Hathaway*, 22 Maine, 85. *Campbell* v. *Knights*, 24 Maine, 372. *Bean* v. *Boothby*, 57 Maine, 295.

Long possession is sufficient evidence of a foreclosure to bar right of redemption. *Blethen* v. *Dwinal*, 35 Maine, 556.

But the foreclosure is immaterial in this action, as the plaintiff's remedy thereby is by bill in equity. R. S., c. 90, § 24.

W. P. Frye, *J. B. Cotton*, and *W. H. White*, for the defendants.

To the point that the plaintiff's claim was barred by limitation, the counsel cited *Roberts*, adm'r, v. *Littlefield*, 48 Maine, 61; *Chick* v. *Rollins*, 44 Maine, 104; 2 Wash. on R. P., 170.

The counsel denying the plaintiff's right to recover any portion, contended that in any event his right extended to only three-eighths of the premises, thus: Ezra, jr., Zelotes and Horace were living at the time of the conveyance and had a vested remainder; vested remainders are actual estates and pass by inheritance. Ezra, jr., having died before his father, his interest descended to his father; R. S., 1841, c. 93, § 1, spec. 2. This interest was conveyed to J. S. F. Randall. Horace died in 1861, his interest also descended to his father, and when his father died, the eight heirs

took each an eighth of it or one-twenty-fourth of the whole. The plaintiff's whole interest was therefore one-third and one-twenty-fourth, or in all three-eighths; and J. S. F. Randall's interest, one-third by purchase and one-twenty-fourth by inheritance, was precisely the same, three-eighths. The parties therefore would be tenants in common; and for this reason this action cannot be maintained.

WALTON, J. This is a writ of entry. Both parties claim title from the same grantor; the one through a mortgage, the other through a deed made subsequent to the mortgage. The question is, whether the mortgage has or has not been discharged. If it has, it lets in the plaintiff's title. If it has not, then the defendants have the better title.

The mortgage was made in 1845. In 1847, it was assigned to J. S. F. Randall. It is claimed that at the time of this assignment, J. S. F. Randall was under a legal obligation to pay the mortgage debt; that he was not therefore competent to take an assignment of the mortgage; that his attempt to do so extinguished it.

The evidence fails to satisfy us of J. S. F. Randall's obligation to pay the debt. It is true that his father was under a legal obligation to pay the mortgage debt. The notes were given by him. It is also true that before taking an assignment of the mortgage, J. S. F. Randall had taken a quitclaim deed of his father's interest in the premises, including his right to redeem the same. But we do not think the right to redeem necessarily carried with it an obligation to do so. J. S. F. Randall could therefore become the assignee of the mortgage without thereby discharging it. We think it was not discharged. The evidence fails to satisfy us of the existence of any facts which would legally have that effect. It is true that the deed to J. S. F. Randall, in terms, conveys the grantor's "right" to redeem the estate in question. But we do not think this language necessarily, or by fair implication, imposed upon the grantee an obligation to pay the mortgage debt and redeem the estate. The assignment of the mortgage to him did not therefore operate as a discharge of it. It still subsists in full force and effect; and the defendants and those through whom they claim, now are, and for more than twenty years have been, in the

undisturbed possession of the premises under and by virtue of the mortgage. Such a possession has been held to be presumptive evidence of a foreclosure. *Blethen* v. *Dwinal*, 35 Maine, 556; *Roberts* v. *Littlefield*, 48 Maine, 61.

It is unnecessary to determine whether the mortgage under which the defendants claim title has or has not been foreclosed; for if it has not, and the plaintiff still has a right to redeem the premises, it is a right which can only be enforced in equity; it cannot be enforced in a suit at law.

Our conclusion is that the defendants are rightfully in possession under a title paramount to that of the plaintiff; and their possession cannot be disturbed until the plaintiff's right to redeem, if any he has, has been established in a court of equity, and an actual redemption has been had. *Judgment for defendants.*

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

DANVILLE SNELL, in equity, *vs.* NAHUM MITCHELL *et al.*

Androscoggin, 1875.—June 28, 1876.

A bill in equity, praying for the specific performance of a contract, is addressed to the sound discretion of the court. A decree for specific performance cannot be claimed as matter of right.

If a contract for the conveyance of real estate is unconscionable, or ambiguous, or through fraud or mistake or want of skill on the part of the draftsman, does not truly embody the agreement of the parties, or if for any other reason, the court is of opinion that the contract is one which in equity and good conscience ought not to be specifically enforced, it will decline to interfere, and will leave the parties to such redress as can be obtained in an action at law.

Thus: where the contract required the plaintiff to pay one-half of the expenditures upon the farm mortgaged for the support of the plaintiff's father, who was also the defendant's father-in-law, and the parties disagreed as to whether the support of the father was a part of the expenditure to be shared; where also, by the contract, one party could be compelled to sell, but the other could not be compelled to buy; where the plaintiff delayed fourteen years before asking a conveyance, holding meanwhile the defendant's notes to the value of the farm given as security for the promise to convey,

which till then he had declined to surrender; where, after the fourteen years, the defendant had sold the premises, supposing, as he claimed, the contract was null and void by reason of non-performance by the plaintiff; where also aid was asked for relief from difficulties into which the plaintiff got himself in an attempt to defraud his creditors,—the court, in a case where all these questions were raised, declined to interfere to grant relief by decreeing specific performance of the contract for conveyance.

A court of equity will not knowingly decree an impossibility. *Thus*: where A. mortgaged a farm to B. to secure a bond for his maintenance, and then contracted with C. to convey to him the same real estate free of all incumbrance, in a bill in equity in favor of C. against A., the court in the absence of any waiver by C. or of any expression by him of a willingness to accept an incumbered title, refused to decree specific performance.

BILL IN EQUITY.

The bill prays for a specific performance of a contract for the conveyance of real estate, as set out in the following instrument.

"This agreement, made this 19th day of February, 1861, between Nahum Mitchell, of Turner, county of Androscoggin, of the first part, and Danville Snell, of said town, of the second part, witnesseth, that the said Mitchell, in consideration of the covenants on the part of the party of the second part, hereinafter contained, doth covenant and agree, to and with the said Danville, that he shall have one-half of the improvements and profits of certain lots of land deeded to said Mitchell by Caleb Snell; also the improvements and profits of one-half of the stock thereto belonging. And said Mitchell doth further agree to give said Danville, a deed of one-half of said lots of land, also a bill of sale of one-half of the stock thereto belonging, whenever said Danville shall deliver up to said Mitchell, a certain note given by said Mitchell to said Danville Snell, to the amount of $1253, dated February 19, 1861. And the said Danville, in consideration of the foregoing, agrees to and with the said Nahum, that he will be holden to pay one-half of all the expenditures upon said lots of land so long as he holds said note against said Mitchell, and further, that he will not sell or convey said note out of his possession." (Signed, Nahum Mitchell, Danville Snell, sealed and witnessed.)

The defendants' answer denied performance on the part of the plaintiff, and claimed that the contract was void for uncertainty, and that the plaintiff had waived performance.

The case shows that Caleb Snell, the owner of the Snell farm, in Turner, conveyed it by deed of warranty, to his son Danville, May 2, 1859; that August 6, 1860, Danville, to keep it from being taken for his wife's debts, quitclaimed to Caleb; that Caleb, in consideration of a bond for his maintenance, quitclaimed to his son-in-law, Mitchell, February, 1861, and on the same day took a mortgage back to secure performance; that on the next day, Mitchell and Snell entered into the mutual covenants before stated; that Mitchell, November 20, 1873, conveyed to his son-in-law, Watson, the whole farm in consideration of a bond for his own and Caleb's maintenance; that from 1861 to 1874, the plaintiff continued to live and work on the farm according to the terms of the contract as interpreted by him, contributing nothing towards his father's support; that in 1874, he was first told by the defendants in substance, that he had no rights there.

J. Jeffery, for the plaintiff.

G. D. Bisbee, for the defendants.

WALTON, J. This is a bill in equity in which the court is asked to decree the specific performance of a contract for the conveyance of real estate.

Such an application is addressed to the sound discretion of the court. Neither party to a contract can insist, as a matter of right, upon a decree for its specific performance. The courts of law are always open to them, and ordinarily an action at law furnishes an ample remedy for the breach of a contract; and when such is the case a court of equity generally declines to take jurisdiction. If a contract for the conveyance of real estate is in all respects fair, and free from ambiguity, and there are no insurmountable difficulties in the way of a specific performance, its performance will ordinarily be decreed. On the contrary, if the contract is unconscionable, or ambiguous, or through fraud or mistake, or want of skill on the part of the draftsman, does not truly embody the agreement of the parties; or if, for any other reason, the court is of opinion that the contract is one which in equity and good conscience ought not to be specifically enforced, it will decline to in-

terfere, and will leave the parties to such redress as can be obtained in an action at law. *Rogers* v. *Saunders*, 16 Maine, 92. *Bradbury* v. *White*, 4 Maine, 391. 3 Greenl. on Ev., § 361. 1 St. Eq., § 769.

It is impossible to lay down any very precise rules as to when a court of equity will or will not take jurisdiction for the purpose of decreeing the specific performance of a contract, as each case must depend very much upon its own peculiar circumstances. 1 St. Eq., § 742.

It is safe, however, to say that a court of equity will never knowingly decree an impossibility; that it will never knowingly require a party, under the pains and penalties of perpetual imprisonment, to do an act which it is out of his power to do.

Many reasons might be given for declining to decree the specific performance prayed for in this case.

I. The bill itself is very defective. It contains no description of the land on which to base a decree. If a decree for its conveyance is made, the court must search outside of the record for a description of it.

II. The contract is not free from ambiguity. The principal controversy is in relation to its meaning. And it is very much to be feared that important stipulations, to be performed by the plaintiff, were, through the inadvertence or want of skill of the draftsman, omitted altogether.

III. The contract lacks the element of mutuality. One of the parties could be compelled to sell, but the other could not be compelled to buy. This alone is often sufficient to induce the court to withhold a decree for specific performance.

IV. There has been great delay. For fourteen years the plaintiff delayed to elect whether he would take the land or not; and when he finally did elect to take it, it had been conveyed to another; and we are by no means certain that the purchaser is not entitled to be regarded as a *bona fide* purchaser, against whom the plaintiff should not be allowed to enforce his claims. True, the purchaser had knowledge of the agreement on which the plaintiff relies, but he swears, that by reason of non-performance by the plaintiff,

he supposed it had become null and void. If he did so believe, he can hardly be charged with bad faith.

V. It is rather a bold adventure for a party to come into a court of equity and ask its aid to get him out of a difficulty, into which he got himself in an attempt to defraud his creditors. The plaintiff testifies that he once had a deed of this land, and put it out of his hands to keep it away from his creditors; that he took security for a deed instead of a deed, to save it from debts made by his wife. The security was a witnessed note for $1253, (which the plaintiff still holds,) and an agreement to reconvey upon surrender of the note.

VI. But another, and in the opinion of the court, a sufficient reason for declining to make the decree prayed for, is the fact that it is out of the power of the defendants to comply with it, if it should be made. The farm, one-half of which the plaintiff asks to have conveyed to him, was originally the property of Caleb Snell, father of the plaintiff, and father-in-law to the defendant, Mitchell; and when he parted with his title, the only consideration expressed in the deed, was a bond for his maintenance and the maintenance of his wife; and the land was mortgaged back to secure the performance of that obligation; and the land is still under mortgage for that purpose, and was, when the agreement to convey to the plaintiff was made; and Caleb Snell still lives, and although upwards of ninety years of age, no one can say with certainty, that the whole value of the farm will not yet be needed to carry him through. Now the obligation which the plaintiff seeks to have specifically enforced, if it entitles him to any title at all, entitles him to an unincumbered one; and he has not signified his willingness to accept any other. Such a title the defendants cannot give. If the plaintiff had taken notice of the fact that the defendants could not give him an unincumbered title, and had offered to take such a title as they could give, this objection would be obviated. But this he has not done; and considering the magnitude of the incumbrance, and the uncertainty that attends it, in connection with the fact that the plaintiff still holds a witnessed note for the value of his half of the farm, the court does not feel at liberty to presume that the plaintiff would be willing to accept

any other title than the one prayed for. Such a title the defendants cannot give.

For these reasons the court declines to make the decree prayed for. *Bill dismissed with costs.*

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

THOMAS B. REED, attorney general, by information, *vs.* CUMBERLAND & OXFORD CANAL CORPORATION.

Cumberland, 1873.—August 6, 1874.

Quo warranto. Informations. Notice. Exceptions. Practice.

Exceptions will be sustained only when it appears affirmatively that the party filing them has been aggrieved by the ruling excepted to.

Upon filing an information in the nature of a *quo warranto* the time and manner of notice is discretionary with the court.

In such case an order for defendant to answer if after an appearance is a discretionary matter to which no exceptions lie;—if before appearance and before notice it is void.

No one who has not in some way become a party to a suit is in a condition to file exceptions to any of the proceedings therein.

ON EXCEPTIONS.

INFORMATION in the nature of a *quo warranto.*

Service was made upon Francis O. J. Smith, who appeared specially at the October term of this court, A. D., 1872, on the return day of the service ordered, and moved that "said petition" be dismissed for want of sufficient service upon said corporation, only four days' notice of the pending of the same having been given, which motion the presiding justice overruled and directed the corporation to make answer in writing to the allegations of "said petition" on the first day of the next January term. To which ruling, direction and order, said Smith excepted.

F. O. J. Smith, in support of his exceptions.

This information, in the nature of a *quo warranto*, filed by the attorney general, under the statute resolve of 1871, c. 233, is a

proceeding at common law, and though in form criminal, it is in its nature a civil suit and committed to the civil jurisdiction of this court by R. S., c. 77, § 4, with no modification of the rules of the common law.

To the point that when the writ of *quo warranto* is the appropriate remedy, all its peculiar characteristics must be retained, *vide* Davis *ex parte*, 41 Maine, 38.

The proceeding was specifically regulated by the statute of 6 Edward I, § 5, A. D., 1278. The notice thereby required was forty days. No statute in England or America has lessened this forty days' notice, unless R. S., c. 81, § 18, can be construed as embracing this proceeding. If so, thirty days notice is secured.

If the defendants are not rightfully in court they ought not to be compelled to plead.

T. B. Reed, attorney general, for the state.

DANFORTH, J. It is evident that the exceptions in this case must be overruled. Nothing appears in them to show that any wrong has been done to any party by the ruling of the court.

The first objection raised is to the overruling of the respondents' motion. This motion as the case shows asks for the dismissal of "said petition" "for want of sufficient service." It appears further that there was an order of court upon this petition, which we may presume directed what notice should be given, though this does not appear, and we may also suppose that such order had been complied with, as no objection is made on that ground. The objection as we learn from the argument is that the court had no authority to grant an order of notice in its discretion, upon such a process, but that its time is fixed by a rule of law. If the process is what it is denominated in the motion, a "petition" we know of no rule either of statute or common law, which necessarily prescribes the precise notice to be given. If it is a petition for permission to file an information in the nature of a *quo warranto* as would be necessary if its purpose was to vindicate private rights, clearly the notice should be such as the court might order. But in the respondents' argument it is referred to as an "information in the nature of a *quo warranto*."

If it were so, still the notice does not appear to be insufficient. Though the information has in many jurisdictions taken the place of the writ of *quo warranto*, the proceedings under it are somewhat different. In the writ, which, under our statute, would seem to be a legal process in this state, the notice may properly be given before the entry in court and must be by summons. In proceeding by information which is criminal in form, though in its nature but a civil remedy, the entry is first made in court, and such process is then issued as may be necessary to compel the appearance of the defendant. Formerly it was by a *venire facias;* more lately, a summons in some cases has been resorted to as in Massachusetts in *Commonwealth* v. *Fowler*, 10 Mass., 290; *Same* v. *Dearborn*, 15 Mass., 125, and *Same* v. *Smead*, 11 Mass., 74.

As the sole object of the notice is to secure the attendance of the defendant, as it is issued after the entry of the process and in many cases only at the discretion of the court, it would seem almost as a matter of course that the length and manner of notice must be such as the court may order, upon the filing of the information, even though there may be a definite legal rule as to notice in the case of a writ, which is a civil proceeding in form as well as in substance.

But as already seen, we have not the means to know certainly that the ruling is right, nor can we say that it is wrong. The process is not before us as it was before the court, where the ruling was made. This court sitting as a court of law, has no records and no original papers. These all belong to the court below, and cannot properly be removed therefrom. Hence the only way in which we can obtain such papers as may be necessary to a right understanding of the case, is to have them made a part of the case, and copies furnished.

The second ruling complained of, is an order "for the respondent corporation to make answer in writing to the allegations of said petition, on the first day of the next January term of this court." The objection to this is, that it was premature, because the proper service had not been made. It is undoubtedly true, that if the proper notice had not been given, and not waived by an appearance, the order was premature. But in that case, it

would be simply void. Any order, decree, or judgment even, before the appearance of, or due notice to a defendant, can have no effect whatever, upon the rights of such party. The notice, or that which is tantamount to it, alone lays the foundation for subsequent proceedings. Besides, it is to a party only, that the statute accords the right of filing exceptions; and how can a person become a party, until he has made an appearance. The respondent was properly in court as a party, or he was not. If he was in, the order was discretionary with the judge, and no exceptions will lie; if he was not in court, he was not in a condition to file exceptions, nor would there be any occasion for any.

Exceptions overruled.

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

ELIAKIM C. LONG *vs.* JABEZ C. WOODMAN *et al.*

Cumberland, 1871.—August 6, 1875.

Assumpsit. Frauds—statute of. Deed—parol evidence as to consideration.

Assumpsit lies to recover the price or value of real estate conveyed. The promise on which the action is based need not be express; it may be implied.

Where an express promise to pay for real estate conveyed is within the statute of frauds and cannot therefore be enforced, the law implies one, the implied promise is to pay what the land is reasonably worth.

Where a deed absolute in form is intended as security for the payment of money and the grantee at the time of the making and delivery of the deed promises the plaintiff that he will within a day or two give him a bond to reconvey on payment of principal and interest within a specified time, but afterwards declines to give the bond or to reconvey on tender of payment, *held*, that assumpsit lies to recover the value of the premises.

R. S., c. 82, § 111, providing that when costs have been allowed against a plaintiff on nonsuit or discontinuance and a second suit is brought for the same cause, the action may be dismissed unless such costs are paid at such time as the court appoints, *held*, not to apply where the declaration in the former action was in tort and disposed of on demurrer, and the latter action is in assumpsit.

ON MOTION AND EXCEPTIONS from the superior court.

ASSUMPSIT to recover the value of a lot of land of about one-half acre, and buildings thereon in Cape Elizabeth.

The plaintiff bought this lot of one Joseph Reed, January 9, 1868 at a price of $1000, and conveyed it March 8, 1868, to the defendants by a deed absolute in form, but intended as security for money borrowed, about $200, under an agreement that the defendants should give a bond of a later date to reconvey on payment of $400, in two years. The defendants neglected and refused to give the bond, and March 5, 1870, the plaintiff tendered principal and interest and demanded a reconveyance. This demand not being complied with, the plaintiff brought first an action on the case in tort. The defendants demurred to the declaration which was adjudged bad by the law court, and the defendants recovered costs. The plaintiff afterwards commenced this action which the defendants in the court below moved to dismiss because the costs had not been paid in the former suit. This motion was overruled; and it was then claimed in defense that the plaintiff was estopped by his deed to deny that he received the amount of the consideration named therein $390, and estopped also to show that a deed absolute in form was intended as a mortgage. The defendants in their testimony admitted that they did agree to give a bond and had not for certain reasons done so; and among other reasons that they had afterwards let the plaintiff and paid on his account other sums amounting to another hundred dollars which he neglected to repay. The jury returned a general verdict for the plaintiff for $648.48, and also found specially that the value of the property conveyed by the plaintiff to the defendants at the time of the conveyance, March 6, 1868 was $900, and that the plaintiff at that time received only $200 in money.

To the rulings of the presiding justice, in refusing to dismiss the action, and in admitting oral evidence as to the value of the premises and as to the amount of consideration, the defendants excepted, and also filed a motion to have the verdict set aside as against law and evidence.

A. Merrill, for the defendants.

P. Bonney, for the plaintiff.

WALTON, J. ASSUMPSIT lies to recover the price or value of

real estate conveyed. The action is of course based on a promise. But the promise need not be express; it may be implied. If none is in fact made; or if the one made is within the statute of frauds, and cannot for that reason be enforced, and the grantee refuses or neglects to perform it voluntarily, the law implies one. The implied promise is to pay what the land conveyed was reasonably worth.

This action is based upon the implied promise; not because no promise was in fact made, but because the one made was within the statute of frauds, and could not be enforced, and the defendants had neglected and refused to perform it voluntarily. The right to recover, if the proof was sufficient, cannot be doubted. The case is not distinguishable in principle from *Bassett* v. *Bassett*, 55 Maine, 127; or *Basford* v. *Pearson*, 9 Allen, 387. In the latter case the principle on which the action is maintainable is fully discussed.

The preliminary motion to dismiss the action because the costs of a former suit between the same parties had not been paid, was properly overruled. The former suit was not for the same cause of action; nor was it disposed of by nonsuit or discontinuance. The statute relied on in support of the motion does not therefore apply. R. S., c. 82, § 111.

The jury found for the plaintiff. No reason is perceived for setting the verdict aside. The rulings of the presiding judge appear to have been correct, and the evidence sufficient to justify the verdict of the jury. *Motion and exceptions overruled.*
Judgment on the verdict.

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

JOHN KELLOGG *vs.* IVORY W. CURTIS.

Cumberland, 1874.—December 30, 1875.

Promissory note—negligent signing of.

The defendant, having voluntarily signed as maker a negotiable promissory note, supposing he was binding himself to some other contract, and relying on the representations of the payee as to the contents of the paper, without examining it sufficiently to ascertain the fact for himself, is estopped by his own negligence from setting up the invalidity of the note against a *bona fide* holder thereof.

Where there are no exigencies to be weighed, whether the admitted facts constitute negligence or not is a question of law and not of fact.

ON EXCEPTIONS from the superior court.

ASSUMPSIT on a promissory note of the tenor following: "Town of Bingham, county of Somerset, December 15, 1870. One year after date, I promise to pay to the order of J. S. Newcomb two hundred dollars, value received, with use at the Second National Bank at Skowhegan." Signed, "I. W. CURTIS," and indorsed, "J. S. NEWCOMB. For remittance to Agricultural National Bank, Pittsfield, Mass."

The defendant duly filed the following denial of signature: "I on oath say, that while the signature to the instrument produced as the one declared on appears to be my genuine signature, I never signed the note declared on knowing it to be a note, or having any reason to suppose it was a note."

This denial was ruled to be insufficient under the rule to require the plaintiff to prove the signature.

The plaintiff offered evidence tending to show that he was the *bona fide* holder of the note, for valuable consideration paid therefor before maturity, without notice of fraud in the making of the note, or of equities between the original parties thereto. The defendant offered evidence tending to show that the note was procured by the fraud of the payee, and that there was notice thereof to the plaintiff sufficient to put him upon inquiry before he purchased the note.

The following is the only testimony in regard to the manner in which the note was originally procured of the defendant by the payee.

The defendant testified: "I am a farmer; about December 15, 1870, Ira Brown drove into my door-yard and inquired the distance to Bingham; asked if I used a mowing machine; said he was around appointing agents to sell a patent sickle bar, as he called it; he drew out a model and put it in operation; I said I thought it was rather a good thing; he wanted me to accept the agency of the town; I declined; he insisted, and said, 'if you knew my proposals, perhaps you would take it;' they were to give the agent one-half of the profits, and the price to sell for was ten dollars a pair; after a while I consented but did not agree to take any certain amount; he sat in his carriage, wrote what he called a commission to sell and left it with me; he then asked questions as to my post-office address, the nearest express station, the nearest convenient bank, and kept writing as he questioned and received answers; and then said, 'I want you to come and sign your name.' Said I, 'you can do it just a well as I.' Said he, 'I rather you would write it to show that it is correct.' He handed me the book. It was dark, and I use glasses. I held the book on my knee, wrote my name, and handed the book to him. He did not get out of his carriage. He was to send me a bundle of the sickle bar and a model. I received nothing from him. Brown pretended to be acting for Mr. Newcomb."

The presiding justice who tried the cause without the intervention of a jury, adjudged as follows: "Upon the foregoing testimony, which is uncontradicted, I find as matter of fact, that the note in suit was procured of the defendant by the fraud of the payee, without knowledge on the part of the defendant of the character of the paper signed, and without negligence on the part of the defendant.

I. And without deciding the contradicted question of fact, whether the plaintiff is a *bona fide* holder for value without notice and before maturity, I rule *pro forma* as matter of law, that a note so procured without negligence on the part of the maker, is invalid even in the hands of an innocent third person who has obtained it in the manner claimed by the plaintiff.

II. The testimony of Curtis, the maker of the note, in regard

to the circumstances under which the note was given, was admitted subject to objection."

To the rulings in matters of law numbered one and two, the decision being for the defendant, the plaintiff excepted.

G. W. Verrill, for the plaintiff.

J. H. Drummond, for the defendant.

PETERS, J. The principal question in this case was substantially settled by the decision in *Abbott* v. *Rose*, 62 Maine, 194. It was there held, that a person who negligently signs and delivers to another a printed blank note, not knowing it to be such, but supposing it to be some other agreement, was liable thereon, if the blanks were afterwards wrongfully filled, and the note then transferred to a *bona fide* holder for value, without notice of the fraud. In this case, instead of an unfinished written promise, the paper executed by the defendant is a completed negotiable note. Although obtained from the defendant by circumvention and fraud, we think he is liable thereon to an innocent holder of the note. We are aware that there are many cases in the different states, where the tendency of the decisions may be the other way. The authorities are conflicting. But in consideration of the importance that attaches in a commercial community to a free and safe circulation of negotiable paper, and taking into account the temptations which impel men to resort to evasion and falsehood to avoid negotiable obligations given by them in speculations which result in loss and disaster, we are satisfied that our view of the law upon this question is most in accordance with the principles of justice and equity to all parties concerned. It is admitted, in all the cases where a different policy or doctrine is accepted, that a liability may exist, if there is any fault or negligence on the part of the maker of such note. In our opinion, the facts of this case clearly show a heedlessness by the defendant and want of care. We by no means mean to be understood as saying that a person may be holden in every case where his signature to a note has been surreptitiously obtained. Many cases might occur where the maker would be in no fault. But the de-

fendant signed a paper which he knew was to be effectual for some purpose by means of his name thereto, and was in fault for intrusting it with an adversely interested party, without knowing himself what it was. By this act he inflicts a loss upon an innocent party unless he bears the loss himself. We think he should bear the penalty of his own folly and mistake. *Caveat emptor* does not apply in such a case.

It is contended that the defendant is not liable, because the obtaining the note from him in the manner in which it was done, was an act of forgery, and not merely a fraud. In *Foster* v. *McKinnon*, 4 Law R., C. P., 704, much quoted in cases, it is said that the maker of such a note "never intended to sign, and therefore, in contemplation of law, never did sign the contract to which his name is appended; . . . that his mind never went with the act." It might be forgery as far as the original parties to the note are concerned, or in a criminal prosecution of the offender, as virtually settled in *State* v. *Shurtleff*, 18 Maine, 368. But the answer to this objection is, that in a suit by an innocent holder, the maker is estopped by his own fault and negligence from setting up a defense of forgery. *Abbott* v. *Rose*, *supra*. *Van Duzer* v. *Howe*, 21 N. Y., 531. The principle is clearly and correctly enunciated in a late case in Missouri, not yet reported, thus: "Where it appears that the party sought to be charged intended to bind himself by some obligation in writing, and voluntarily signed his name to what he supposed to be the obligation he intended to execute, having full and unrestricted means of ascertaining the true character of such instrument before signing it, but neglecting to avail himself of such means of information, and relying on the representations of another as to the contents of the instrument, signed and delivered a negotiable promissory note, instead of the instrument he intended to sign, he cannot be heard to impeach its validity in the hands of a *bona fide* holder." Am. L. Reg., Sept., 1875, 480. See also *Nebeker* v. *Cutsinger*, 48 Ind., 14.

It is, however, further contended that the defendant is not liable, because the judge presiding found as matter of fact that the note was given by the defendant without negligence on his part. But it was an error on the part of the judge to make such finding.

What constitutes negligence in a case like this, where the facts are clear and unequivocal, is a question of law. The testimony of the defendant is uncontradicted. No fact is in doubt or dispute; no question about motive or intent to be judged of. There are no attendant circumstances or exigencies to be weighed or considered, affecting the rights of the parties. The whole evidence, with all possible inferences which can be legitimately based upon it, cannot exculpate the defendant from the negligence imputed to him. Therefore it was not competent for the judge to make the deduction upon the facts that he did make. The point was one of law, and not of fact; and wrongly decided. This conclusion is well sustained by the authorities. *Gilbert* v. *Woodbury*, 22 Maine, 246. *Davis* v. *Greene*, id., 254. *Todd* v. *Whitney*, 27 Maine, 480. *Sawyer* v. *Nichols*, 40 Maine, 212. *Lane* v. *O. C. & F. R. R. Co.*, 14 Gray, 143. *Gavett* v. *M. & L. R. Co.*, 16 Gray, 501. *Gahagan* v. *B. & L. R. Co.*, 1 Allen, 187.

Exceptions sustained.
New trial granted.

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

PORTLAND AND OGDENSBURG RAILROAD COMPANY *vs.* THE INHABITANTS OF STANDISH.

Cumberland, 1874.—December 31, 1875.

Town. Railroad. Vote to aid railroad—what essential to validity of.

In order to authorize a subscription by a town to the stock of a railroad company, to aid in the construction of the road under Public Laws of 1867, c. 119, not only the vote to raise the necessary funds and to use them in aid of the road, but also, that directing the particular method of affording assistance (whether by loan, or by subscribing for stock, or in some other manner,) must appear to have been carried by the assent of two-thirds of the voters present, and voting at the town meeting at which the subject was acted upon.

Where the town clerk's record of the doings at such town meeting, after mentioning the state of the vote upon the proposition to aid in the construction of a railroad to the amount indicated, declares that it was voted that such sum be hired and appropriated to pay for a specified number of shares,

without saying by what majority this vote was carried, no implication of law arises, that the proportion of legal voters present, and voting upon this proposition necessary for its adoption by the meeting, were in its favor.

The maxim "*omnia præsumuntur rite . . acta*," &c., cannot be held so applicable to such a state of facts as to authorize an inference that two-thirds of the voters at the meeting were in favor of the subscription; but it is rather to be supposed that it was not thought necessary to ascertain anything more than that it received the assent of a majority of those acting upon the subject.

On report.

Assumpsit to recover twenty thousand dollars alleged to be subscribed by the defendant town for two hundred shares of the capital stock of the plaintiff company, and to aid in the construction of their railroad, under Public Laws of 1867, c. 119. The first count was upon an account annexed for the various assessments upon these shares, averaging due May 21, 1870, with interest thereafterwards to the date of the writ, January 15, 1872. The second count declared upon an agreement to subscribe for these shares; the third stated the same fact with the making and demand of the assessments; while the fourth recited the holding of a town meeting by the defendants, upon the fourteenth day of January, 1869, at which it was voted by more than a two-thirds majority of those present to raise by loan twenty thousand dollars to aid in the construction of the plaintiffs' railroad, and was then voted that the town hire that sum for twenty years, and appropriate it to the purchase of two hundred shares of the stock of the road, to aid in its construction, and declared that the defendants, when called upon, after the road had been built through their town as required by said vote, refused to subscribe or pay for the same. A fifth count for money had and received, was added with a specification of the facts stated in the preceding count. There was no question raised but that this meeting of the fourteenth of January, 1869, was regularly called and held under a warrant stating the object to be, to see if the town would aid in the construction of the plaintiffs' railroad by subscribing for shares of its stock. The record of the doings of that meeting, stated that it was voted to raise twenty thousand dollars by loan to aid in the construction of the Portland and Ogdensburg Railroad, provided said road shall be located and built through the town of Standish, between

Sebago pond and Saco river; which question was said to have been "decided by ballot, as follows, to wit: whole number of ballots cast was one hundred and eighty-one by yes and no; in favor of the motion, one hundred and twenty-one—yes, (121;) noes—sixty, (60.)"

The record then proceeded: "Article 3d, voted, that the town will hire the sum of twenty thousand dollars for a term of not less than twenty years, but payable at the pleasure of the town after five years; and that said sum be, and the same is hereby appropriated to the payment for the same two hundred shares of the capital stock of the Portland and Ogdensburg Railroad, to be subscribed for by the town in aid of the construction of that railroad."

This is all the record contained, and no other testimony as to the state of the vote upon the foregoing article was offered. The road was located and built through Standish between Saco river and Sebago pond, but the town never subscribed for any of the stock. Before locating their road, the directors were unofficially informed by some of the inhabitants, of these votes, and requested the selectmen to make the subscription, which they declined to do, though it was less than five per cent. of the town's valuation. Still the directors proceeded to assess the town for these two hundred shares, and brought this suit upon the defendants' failure to pay for them. Upon these facts, substantially, the cause was submitted upon report.

N. Webb, for the plaintiffs.

The record shows a clear two thirds majority upon the proposition to render aid; this was the essential point, which required the assent of that proportion of the voters; the particular manner of affording the assistance was non-essential, and could be determined by a majority. But the fair implication from the record is, that it received the necessary support, whatever that may be; otherwise it could not have been declared and recorded as a vote. When the record states that a certain thing was voted to be done, but is silent as to the method of ascertaining the vote, it must be presumed that it was correctly determined, agreeably to the maxim applicable to the doings of all public officers, "*omnia præsumun-*

tur rite . . acta," &c. *Lexington* v. *Headley*, 5 Bush., (Ky.,) 508. *Covington* v. *Boyle*, 6 Bush., 204.

H. J. Swasey & Son and *J. & E. M. Rand*, for the defendants.

Public Laws of 1867, c. 119, § 1, authorizes towns to raise money and to appropriate the same, in such manner as they deem proper, to aid in the construction of a railroad, by a two-thirds vote. The manner in which aid shall be rendered is thus required to be determined by the same preponderance of votes, as settles whether or not aid shall be given at all. *Andrews* v. *Boylston*, 110 Mass., 214.

BARROWS, J. It will not suffice for the maintenance of this action that honor and fair dealing would seem to call upon the inhabitants of Standish to fulfil the expectations which the votes of the town apparently induced the plaintiffs to indulge. Unless the case shows that those expectations and the consequent action of the railroad company in building their road through the town were based upon some valid corporate act of the town, creating such a contract between the town and the railroad company as is set forth in the writ, the plaintiffs cannot recover.

There is one defect in the plaintiffs' proof (if no more) which we regard as fatal.

The power of the town to bind itself in any manner in the premises, is found in the Public Laws of 1867, c. 119, which authorizes a town at any legal meeting duly notified and holden for that purpose, to raise money to an amount not exceeding a certain per cent. of the valuation of the town, "and to appropriate the same to aid in the construction of any railroad in this state, in such manner as they shall deem proper, provided that two-thirds of the legal voters present and voting at such meeting, shall vote therefor."

To exercise this power effectively, so as to bind the town, it must be shown that not only the raising of the money, but its appropriation to aid in the construction of the railroad and the manner of its appropriation were all settled by the requisite two-thirds vote.

Two-thirds of the voters at the meeting might be in favor of raising the money to aid in the construction of the railroad, but unless two-thirds of those present and voting could agree as to the manner in which it should be appropriated to that end, the action of the town in the execution of the power given by the statute would be defective and invalid.

For example, if a portion of those constituting the two-thirds majority in favor of raising the money were in favor of loaning it to the railroad company on a mortgage of the stock and franchise of the road, and a portion were disposed to apply it in payments upon stock to be subscribed for, and the requisite two-thirds vote could not be obtained to appropriate it in either manner, the vote of a majority merely would not constitute a valid appropriation of it for either purpose.

We cannot assent to the plaintiffs' proposition that the manner of the appropriation in aid of the road is a mere non-essential incident to the principal question. It is a matter of vital moment, placed by the express terms of the statute within the proviso which requires a two-thirds vote.

The foundation of the plaintiffs' case must fail unless there is proof of a two-thirds vote appropriating the money to the payment for stock to be taken by the town.

The record of the town meeting held January 14, 1869, exhibits a vote to raise by loan the sum of twenty thousand dollars to aid in the construction of the Portland and Ogdensburg Railroad provided said road shall be located and built through the town of Standish between Sebago pond and Saco river, with the following statement appended: "The question was decided by ballot as follows, to wit: whole number of ballots cast was one hundred and eighty-one (181) by yes and no; in favor of the motion, one hundred and twenty-one—yes, (121); noes, sixty (60)."

The requisite majority seems to have been obtained on the vote to raise the money. But it still remained to be determined in what manner the town would deem it proper that the money should be appropriated: and all that appears in relation to that matter is that the town voted to "hire the sum of $20,000 for a term of not less than twenty years but payable at the pleasure of

the town after five years, and that the said sum be and the same hereby is appropriated to the payment for the same two hundred shares of the capital stock of the Portland and Ogdensburg Railroad, to be subscribed for by the town in aid of the construction of that railroad."

The plaintiffs' counsel claims that the word "voted" in the record "implies that the proportion of the legal voters present and voting upon the proposition necessary for its adoption by the meeting were in favor."

As a general thing votes are passed by majorities. The exceptions requiring any greater proportion of the whole number are so infrequent that a town clerk would hardly consider his record complete if it did not exhibit all votes thus passed. If it was understood that any particular proportion of the whole number voting was required in order to make the vote valid and binding, we should expect to find the state of the vote recorded. In the case before us it appears that as a part of the record of the vote to raise the money, the details are scrupulously given in words and figures. We think the true inference from the omission to make any such statement respecting the vote now under consideration is, that it was not supposed to be necessary to have a clear two-thirds vote for the proposition, and therefore no steps were taken to ascertain how the vote stood except that a majority voted for it. It is insisted by the plaintiffs' counsel that the maxim "*omnia præsumuntur rite*," &c., is applicable, and hence the proper presumption from the record of the vote as it stands is that the required majority was obtained for it.

Where, as here, it is incumbent upon the plaintiff to establish the existence of a contract with a municipal corporation, and such contract can be legal and binding only when agreed to by something more than a mere majority vote, we think its establishment should not be left to depend upon a presumption so loose and unsatisfactory. A fact so important should be verified on the spot; and when thus verified, the means of proving it are not far to seek. Assuredly we have no inclination to relieve towns from any legal obligations which they may voluntarily assume for the purpose of securing to their inhabitants the advantages of railroad

transportation for themselves and their commodities. But while plenary proof of a contract to that end is so readily attainable whenever one is in fact made, it is but just that the railroad company which claims the benefit of it should establish its existence without resorting to the vague and unreliable presumption upon which the case is rested here. In the absence of all proof except the record before us, we think the plaintiffs have failed to make it appear that two-thirds of the legal voters present and voting at the meeting, voted for any proposition which could be regarded, even if accepted and acted on by the railroad company, as creating such a contract as the plaintiffs have alleged.

It is needless, perhaps to add that without proof of this fact, no liability whatever on the part of the town is shown to exist.

Thus, even if it could be successfully argued that the votes of the town, had they passed by the requisite majority, would have amounted to a proposition which when accepted by the railroad company would constitute a contract to take and pay for two hundred shares of the capital stock of the company, without a formal subscription by the agents of the town, and that the assent of the railroad company thereto is sufficiently shown by the building of the road in conformity with the condition in the vote, and by the request to the selectmen to subscribe, and the subsequent assessments upon the shares as if subscribed for and taken by the town, still, the foundation of the plaintiffs' claim would be fatally defective.

It is not necessary for us here and now to determine whether or not an actual formal subscription for the stock was indispensable.

Plaintiffs nonsuit.

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

WALTER F. PHILLIPS *et als. vs.* HENRY O. MOSES.

Cumberland, 1875.—February 22, 1876.

Payment—application of.

A creditor, having two demands against his debtor, one of which is lawful, and the other arises out of a transaction forbidden by statute, cannot apply an unappropriated payment to the illegal items without the consent of the debtor.

In the absence of an appropriation by the debtor or with his consent, the law will apply the payment to the demand which it recognizes, and not to that which it prohibits.

The debtor's consent to apply payments to illegal items may be express or inferred from the course of dealing between the parties, his acts or omissions evincive of consent, and all the circumstances of the case; and such consent, once given, cannot be revoked, unless the creditor agrees to it.

ON MOTION.

ASSUMPSIT.

The plaintiffs, September 13, 1873, sued the defendant in the superior court for a balance due on account to date, of $3481.68. The accounts were sent to an auditor, who found due the plaintiffs $2077.04.

There was evidence at the trial afterwards before the jury that the defendant, who was a retail druggist at Bridgton, had been a regular purchaser on open account current from the plaintiffs, who were wholesale druggists at Portland, from 1868 to about the time the suit was commenced; that the amount of such purchases of all kinds was $21,711.28, and included therein were purchases of alcohol and other spirituous liquors to the amount of $6842.26; that payments were from time to time made by the defendant to the plaintiffs without designating specially for what items intended, and were passed by the plaintiffs upon their ledger to the credit of the whole account; that all the payments amounted to $19,616; that near January, 1872, there was a settlement in which the books were balanced to the July previous; that at about the time of the settlement the defendant's store at Bridgton was burned, and new arrangements made, in accordance with which his purchases thereafter for the year 1872 were adjusted and paid, leaving due at the date of the writ, as the plaintiffs claimed, charges for the years

1871 and 1873 to the amount allowed by the auditor, that amount being only the balance after deducting all charges for alcoholic liquors.

The defendant denied the settlement, and testified that the account was continuous and ran all the way from $1200 to $3500; that at the time he was burned out it was about $2400; that he never paid at any particular time more than he thought was due; that he intended to appropriate his payments to the legal part of the account; that he never said he did not intend to pay for the liquors, because he did intend to pay for the whole.

The jury returned a verdict for the defendant, and the plaintiffs filed a motion to set it aside.

N. Webb and *C. Hale*, for the plaintiffs, submitted that the defendant himself appropriated the money paid, in payment for the liquors as well as the legal items; that he must have intended his payments for some purpose; that if he did not intend to pay for the spirits as well as other drugs, then he kept his account overpaid a great part of the time, and paid in all nearly $5000 more than was due; that the jury had fallen into a manifest error, whether from prejudice or a misunderstanding of the charge and the effect of the auditor's report and other evidence, was not necessary to consider. The error should be corrected.

S. C. Strout & H. W. Gage, for the defendant, contended that as matter of fact he did not appropriate the payments.

BARROWS, J. One who has sold and delivered goods which may be the subject of lawful sale does not forfeit his right to recover the price thereof because he has, concurrently in point of time, made sales to the same party, in violation of law, of other goods, the sale of which is prohibited by statute. He may strike out of his account the illegal items which the law will not aid him to recover, and have judgment for what appears to be legally due. *Towle* v. *Blake*, 38 Maine, 528. *Boyd* v. *Eaton*, 44 Maine, 51. *Monroe* v. *Thomas*, 61 Maine, 582.

The purchaser of goods, the sale of which is prohibited as against public policy, e. g., intoxicating liquors, if he pays for them, has no right of action at common law, (and at present none

by statute in this state,) to recover back the purchase money. *Mudgett* v. *Morton*, 60 Maine, 260.

It is clear, therefore, that he cannot make such payments in any manner available as an offset against a demand for goods lawfully sold; nor when once appropriated with his consent to such illegal items, can he withdraw that consent against the will of his creditor, and claim to have them reckoned as payment for legal purchases. *Plummer* v. *Erskine*, 58 Maine, 59. *Richardson* v. *Woodbury*, 12 Cush., 279. *Treadwell* v. *Moore*, 34 Maine, 112.

The right of the debtor to control the appropriation of a payment at the time of making it is unquestionable, even though he sees fit to appropriate it to a claim arising in violation of law. If he waives his privilege and makes his payment upon his indebtedness generally, without designating its application, his creditor having several lawful demands may appropriate the payment to such of them as will be most beneficial to himself. This is allowed even in cases where some of the demands are not recoverable at law, provided the contracts out of which they arise are not absolutely illegal and prohibited.

There is a well marked distinction in this matter of the right of the appropriation by the creditor between demands growing out of contracts which the law simply declines to enforce, and those which it directly prohibits.

Thus, under a statute which declared that no person should be entitled to maintain an action for or recover any sum of money due on account of spirituous liquors unless such debt shall have been contracted at one time to the amount of twenty shillings or upwards, a creditor of that description was held entitled to appropriate payments made generally on account, to those items, and recover the balance due for other articles. *Philpott* v. *Jones*, 2 Ad. & El., 44.

And a like right of appropriation was held by this court to exist when a part of the sum due the plaintiff was not legally recoverable by reason of the statute of frauds; *Murphy* v. *Webber*, 61 Maine, 478; and where infancy was set up as a bar to the recovery of a portion of the debts; *Thurlow* v. *Gilmore*, 40 Maine, 378.

But the law recognizes no such right of appropriation in the

creditor when one of his demands is positively unlawful. If a person has two demands, one clearly lawful, the other accruing from a transaction forbidden by law, and an unappropriated payment is made to him, the law will afterwards appropriate it to the demand which it acknowledges and not to the demand which it prohibits. *Wright* v. *Laing*, 3 B. & C., 172. *Rohan* v. *Hanson*, 11 Cush., 44. In brief, while the debtor can make an irrevocable appropriation of a payment to illegal claims, the creditor cannot, without the consent, express or implied, of the debtor.

The debtor's consent, once given, cannot be recalled except by mutual agreement. It is not necessary that such consent should be embodied in any set form of words. It may be inferred from acts, circumstances, course of dealing, knowledge of such appropriation by the creditor and tacit consent thereto, as well as by words evincive of an intention to make such appropriation, or of assent to such appropriation already made by the creditor.

The foregoing rules were given to the jury by the presiding judge in a charge to which no exceptions are taken, and the main question for us is, whether the testimony in the case is of such a character as requires us to set aside the verdict for the defendant as being against evidence.

Without rehearsing the facts proved and admitted, or the testimony given, to any extent, it is sufficient to say that in view of the length of time during which these transactions continued, the course of dealing between the parties, the great number of sales, and the frequency, mode and amount of the defendant's payments, and his own statements upon cross-examination, that he never paid at any particular time more than he thought was due, (though his payments were greatly in excess of the legal items,) that at the time he was burned out his account amounted to $2400, and that he never said he did not intend to pay for the liquors because he did intend to pay for the whole, it must be said that the undisputed facts and his own avowals overpower his assertion that he intended to appropriate his payments to the legal part of the accounts so completely, as to lead us to the conclusion that the jury either misapprehended the testimony or the instructions, or were

governed by some bias or prejudice which misled them as to the force and effect of the testimony in the case.

Motion sustained.
New trial granted.

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

STATE *vs.* JONATHAN WATSON.

Cumberland, 1875.—February 26, 1876.

Evidence—testimony of experts. Witness—previous conviction of.

There is nothing in the knowledge or experience of a city fireman, as to the influence of the wind in directing the course of a fire from one building to another in the open country, or as to fires creating their own currents, that qualifies him to give evidence as an expert.

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Upon the trial of an indictment for arson of farm buildings, where it was a material question whether fire was communicated from one building to another; *held*, that the opinion of an experienced city fireman upon the question whether under all the circumstances the fire would be thus communicated is not competent evidence; *held*, also, that the defendant has no cause of complaint, because he is not allowed to ask such witness whether or not it is a common occurence for fire to be communicated from leeward to windward across a space greater than that which separated the buildings burned; *held*, also, that such witness cannot be asked whether in his experience large wooden buildings or large fires make their own currents, frequently eddying against the prevailing wind.

The rule of law, (R. S., c. 82, § 94,) that the record of a previous conviction of a witness for a criminal offense may be shown to affect his credibility; *held* applicable to a case where a party, offers himself as a witness in his own behalf in a criminal proceeding although no evidence of his previous good character has been offered; *held*, also, that such record is conclusive evidence of his guilt of the crime of which he was then convicted and cannot be contradicted by him.

ON EXCEPTIONS from the superior court.

INDICTMENT for arson under R. S., c. 119, §§ 1, 2.

The case and the questions raised are stated in the opinion.

N. Webb and *H. B. Cleaves*, for the defendant.

Under the general principle that where the inference requires

the judgment of persons of peculiar skill and knowledge on the particular subject, the testimony of such as to their opinion and judgment upon the facts is admissible evidence to enable the jury to come to a correct conclusion, the counsel cited the following cases where experts had been admitted; an observer of the habits of certain fish in overcoming obstructions in the ascent of rivers; *Cottrill et al.* v. *Myrick*, 12 Maine, 222; a seaman as to the proper storing of a cargo; *Price* v. *Powell*, 3 Const., 322; a mason as to the time requisite for the walls of a house to become so dry as to be safe for human habitation; *Smith* v. *Gugerty*, 4 Barb., S. C. R., 614; a master engineer and builder of steamboats as to the manner of a collision, 18 Ohio, 375; a practical surveyor as to whether piles of stones and marks on trees were monuments or boundaries; *Davis* v. *Mason*, 4 Pick., 156.

C. F. Libby, for the state.

Barrows, J. Watson was convicted upon certain counts in an indictment charging him with wilfully and maliciously setting fire to a barn at Cape Elizabeth, belonging to Simon Jordan, with intent to burn said Jordan's dwelling house which was thereby burnt and consumed; and with arson of the same dwelling house by wilfully and maliciously setting fire thereto.

The scene of the alleged crime was a farm house in the open country. It was claimed on the part of the state that the defendant set fire directly both to the house and barn, and that his statement, made at the time to neighbors who came to the fire, that the house caught from the barn, was untrue.

It was in proof and not controverted that at the time of the fire the wind was blowing fresh and strong from the south-west; that it had been snowing for some three hours; that no water or snow was used on the fire, and that the buildings were all of wood; that the fire broke out in the barn nearest the house, and north-easterly from it (the distance from the corner of the house to the corner of the barn being twenty-six and a half feet,) that the fire had made some progress when discovered, which was before any fire was discovered in the house, the ell of which was found to be on fire on the inside a very short time after fire was seen in the barn.

The defendant called witnesses long connected with the fire department of the city of Portland to whom he presented a plan of the buildings, and after stating the distances between them, the materials of which they were constructed, the direction of the wind, the state of the weather, and the fact that no water was used upon the fire, he inquired whether or not in their opinion the dwelling house and connected buildings would take fire from the barn; whether or not it is a common occurrence for fire to be communicated from leeward to windward across a space greater than twenty-six feet; whether or not in their experience large wooden buildings, or large fires make their own currents, frequently eddying against the prevailing wind.

The testimony was excluded, and this exclusion is the basis of the exception principally relied on by the defendant.

We do not think it can be sustained.

The general rule which confines the testimony in a case on trial to the proof of facts pertinent to the issue, is too wholesome to be impaired by the multiplication of exceptions which open the way to proof of men's opinions, and facts of remote, uncertain and questionable import, unless it is very clear that the principle upon which those exceptions are supported has been violated.

Any one who has listened to the "vain babblings and oppositions of science falsely so called," which swell the record of the testimony of experts when the hopes of a party depend rather upon mystification than enlightenment, will see the wisdom of the rule, and look carefully to the legitimacy of any exceptions that may be offered.

The principle upon which such exceptions rest is well discussed by Shaw, C. J., in *N. E. Glass Co.* v. *Lovell*, 7 Cush., 319.

In the class of cases where the opinion of a witness is competent evidence, it becomes so not because the witness may be supposed, when compared with the jury, to possess superior powers of perception, intuition and judgment, or superior ability to draw correct inferences from proved facts; but because the nature of the question at issue is such that men of ordinary experience and intelligence must be supposed to be incapable of drawing conclusions

from the facts in evidence without the assistance of some one who has special skill or knowledge in the premises.

In the case of *Jefferson Ins. Co.* v. *Cotheal*, 7 Wend., 73, it was held that the only cases in which opinion is evidence are those where the nature of the question involved is such that the jury are incompetent to draw their own conclusions from the facts without the aid of persons possessing peculiar skill and knowledge respecting such facts.

Hence it follows that where an inference is to be drawn respecting matters which "may be presumed to be within the common experience of all men of common education moving in the ordinary walks of life, there is no room for the evidence of opinion; it is for the jury to draw the inference." *N. E. Glass Co.* v. *Lovell*, *ubi supra.*

Accordingly in the last named case where it became material to determine whether certain packages of glass-ware were stowed on or under the deck of a vessel which was stranded on Hart Island, and the plaintiffs offered evidence tending to show that if they had heen stowed under deck they or the remains of them would have been found there, and the defendants offered evidence tending to show that they might have been washed out, the opinion of a witness who had been acquainted with the navigation about there for thirty years and had been stranded there, and had been employed in saving and getting off wrecked vessels, and was near the place at the time of the wreck, upon the question whether, taking into view all the circumstances, the goods could have been broken to pieces in the hold or washed out of the hold as the defendants contended, was held inadmissible.

And in *Jefferson Ins. Co.* v. *Cotheal*, *ubi supra*, witnesses long and familiarly acquainted with the business of insurance were not allowed to give their opinion as to the materiality of a representation or concealment, nor whether the risk had been increased by the erection of a boiler house adjoining the premises covered by the insurance.

In *Joyce* v. *Maine Ins. Co.*, 45 Maine, 168, and *Cannell* v. *Phœnix Ins. Co.*, 59 Maine, 582, the opinions of witnesses who had had large experience in the business of insurance as to the

comparative risk upon occupied and unoccupied dwelling houses, and their testimony as to the fact that rates of insurance were increased when dwelling houses were vacant, and as to the relative number of losses upon occupied and unoccupied buildings were all held inadmissible.

These cases were decided in accordance with the rule and principle above stated, which may be regarded as well settled, the main difficulty being in the practical application of it to the ever varying circumstances of the cases in which it is sought to establish an exception.

In the case before us the incidental question was whether the fire was communicated from the barn to the dwelling house; and it was plainly one within the scope of common experience, to be determined by and upon the facts and circumstances proved, from which the jury were fully competent to draw their own conclusions.

It was not a question upon which the opinions of those who had witnessed many fires either in city or country could be competent evidence. If the door were to be opened to opinions in such a case, there is seldom a case in which it could be closed; and the trial of causes would degenerate into a canvassing of the opinions of witnesses, often loosely given upon imperfect and prejudiced views of the facts upon which the jury alone ought to pass.

Nor had the facts which the defendant proposed to prove by these witnesses any such relevancy to the issue which the jury were trying as would entitle them to admission.

Indeed if the case could have been regarded as one where the testimony of experts was competent, we should still be inclined to say that if the presiding judge had held that the experience of the city firemen, though they were doubtless accustomed to great conflagrations and to fires of all sorts among crowded buildings peculiarly situated as to their surroundings, was not such as to qualify them to give an opinion that would be likely to be serviceable to the jury under the circumstances here developed, the defendant would have had no cause of complaint. The question was how those isolated farm buildings were burnt, not what happens or is likely to happen with more or less frequency in the conflagrations of compact cities.

The defendant having offered himself as a witness, the state was permitted to impeach him in that character by presenting the record of his conviction of a felony. He complains of this, insisting that as he had offered no testimony to his good character, the government should not have been allowed to attack his character, by proof of the commission of any other crime than that for which he was on trial. The objection would be well taken if it appeared that the evidence was offered or used for any other purpose except to affect his credibility as a witness. So far it was competent, made so by R. S., c. 82, § 94. *State* v. *Watson*, 63 Maine, 128.

That record was conclusive as between the state and the defendant of the truth of the matters therein alleged and contained.

The defendant should not be permitted to contradict it. *State* v. *Lang*, 63 Maine, 215.

The defendant shows no just ground of complaint against any of the rulings. *Exceptions overruled.*

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

HORATIO MERRILL *vs.* EDWARD P. MERRILL.

Cumberland, 1875.—February 28, 1876.

Exceptions. Practice.

When exceptions to the rulings of a presiding justice trying a cause without the aid of a jury, are sustained, a trial *de novo* follows, unless it is otherwise expressly decided, and stated in the rescript.

ON EXCEPTIONS.

ASSUMPSIT for money had and received. The writ was dated October 10, 1871, and returnable to the January term, 1872. At the April term, 1873, the case was submitted to the presiding justice, (Virgin) with the right to except. The plea was the general issue, with a brief statement of the statute of limitations. When the cause came up for trial, the plaintiff moved for leave to amend

the writ by adding a count declaring on a promissory note. The presiding justice declined to allow the amendment, and the plaintiff excepted.

From the testimony introduced by the parties, the presiding justice found as matters of fact; that on July 7, 1857, the defendant gave his promissory note of that date for $1780, payable in six months from date, with interest; that the note was signed by the defendant, in the presence of an attesting witness; that on or about the time of its date, the note was delivered by the plaintiff to one S. H. Merrill, (the defendant's father) to keep until the defendant should pay to S. H. Merrill, the sum of $180, which S. H. Merrill had advanced to the plaintiff, and which amount the plaintiff indorsed upon the note, and two other sums of $200, and $26, advanced and indorsed in like manner; that the defendant had never paid but $50, towards the sums thus advanced by his father; that the note was destroyed in the great conflagration of July 4, 1866, while in the possession of S. H. Merrill; that the defendant had, since the date of the note, and prior to the date of the writ, resided without the state six years and six months.

Upon the foregoing facts, the presiding justice ruled as matter of law, that the statute of limitations was a bar to the action, and the plaintiff alleged exceptions which the full court afterwards sustained in accordance with their rescript as follows:

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

The docket entry shows "July 23, 1874, exceptions sustained."

At the October term, 1874, the plaintiff moved that judgment be entered in his favor, upon the facts decided and reported by Mr. Justice Virgin at the April term, 1873, which last motion Mr. Justice Walton presiding, sustained, and ordered judgment for the plaintiff as therein prayed for, and the defendant excepted.

T. B. Reed, for the defendant.

A. Merrill, for the plaintiff.

VIRGIN, J. By R. S., c. 77, § 19, it is made the duty of the justice presiding at terms holden for jury trials "to decide any cause without the aid of the jury, when the parties enter upon the docket an agreement authorizing it."

This section is § 12, c. 246, of Public Laws of 1852, condensed, but without any change of the law. The object of the provision was to enable the parties to obtain the judgment of the judge upon the facts in addition to his rulings of the law. *Min. and Sch. Fund* v. *Reed*, 39 Maine, 41. His decision of the facts thus obtained is not simply and in all respects a substitute for a verdict; for there is no provision for revising the former on motion as there is the latter. His rulings, however, are expressly open to exceptions by an aggrieved party, R. S., c. 77, § 21. And when exceptions to his rulings are sustained, then his finding of facts like a verdict is set aside, and a trial *de novo* follows, unless it is otherwise expressly decided and stated in the rescript. *Mosher* v. *Jewett*, 63 Maine, 84. *Robinson* v. *Trofitter*, 106 Mass., 51.

Exceptions sustained.

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

BENJAMIN J. WILLARD *vs.* JOHN F. RANDALL *et al.*

Cumberland, 1875.—March 1, 1876.

Trial. Fraud. Sale.

Where the seller orally agreed to sell an article "at its cost," at the same time misrepresenting what the cost was, thereby inducing the purchaser to pay more than the cost price therefor; the question was properly left to the jury, whether the transaction was, in effect, a sale at a price called by the seller, and supposed by the purchaser to be, the cost price of the article, or a sale at the absolute and actual cost thereof.

Thus: The plaintiff testified: "The defendant said if I would take one-quarter of the property I should have it at cost, and he said the cost for the whole was $3750." The defendant testified: "I told the plaintiff the property would be $3750; that was just what it cost us, and we would sell him a quarter for just what it cost." The plaintiff paid at the rate of $3750, which was in fact some $900 above the actual cost to the defendant. In an action to recover the overplus; *held*, that it was a question of fact for the jury whether it was a sale at the actual cost or at the sum erroneously stated.

ON EXCEPTIONS from the superior court, and ON MOTION of the defendants to set aside the verdict as against evidence.

ASSUMPSIT on a contract by the defendants to sell to the plaintiff one-fourth of the steam yacht "Josephine Hoey," with the franchise of the ferry between Portland and Cape Elizabeth and other property connected, at the price paid by the defendants. The breach alleged was that they did not sell at that price but at a larger price.

The case showed that the defendants had a bill against the former ferry company for coal; and that the defendants purchased the franchise and other property of the ferry company from its assignee in bankruptcy, and also the yacht to run upon the ferry, and agreed to sell the plaintiff one-fourth of the whole at what it costs the defendants; the plaintiff testifying that Randall said he should have one-fourth at cost, and said that the whole cost was $3750; the defendant testifying that he fixed the price and then told the plaintiff it was just what it cost and that he would sell at cost; that in fact he received from the plaintiff more than $200 above the cost, and applied the overplus towards the payment of a coal bill against the old ferry company.

Symonds, J., at the trial, instructed the jury, among other things:

"If all that this testimony shows is a misstatement made by Randall at the time of his conversation with Willard as to the original cost of the boat, then that does not constitute such fraud as will enable the plaintiff to maintain this action. But there is a clear distinction between a misrepresentation as to the original cost, and the case of an agreement to sell at the original cost. If a man agrees to sell property at the original cost of that property to him, then that stipulation becomes a part of the contract. It is not a stipulation by which a party is induced to enter into a contract, but is a part of the contract itself, that the property shall be sold at the original cost. . . . . So that the question which is here presented to you for your consideration in determining the question of liability, will be, whether the conversation about the original cost of this property to the defendants was a mere misstatement of that fact, by which the plaintiff was induced to enter into

the contract, or whether it was a part of the contract itself, one of the items of the agreement that this property should be sold to Willard at the original cost. If that was a part of the agreement itself, and not a mere misstatement by which Willard was led to enter into a contract of sale, and if, after such agreement had been made to sell to Willard at the original cost, there was a fraudulent misstatement of the amount of that original cost, and that statement was relied upon by Mr. Willard, he not having means of knowledge in regard to it himself, and not being guilty of want of care in entering into the contract, these conditions being fulfilled, then the plaintiff would be entitled to maintain the action which is here presented. So you will perceive it must appear, in order to enable the plaintiff to maintain this action, that the plaintiff relied upon this contract. If it should appear to you that the figures stated at the time, the amount fixed by the parties, $937.50, was what determined Willard in his action, and not the consideration that he was to have it at the original cost, here would be no case for the plaintiff. If the plaintiff relied upon the description of the steam yacht, and also upon the price which was fixed, clearly the plaintiff would not have a cause of action here. It must appear that the agreement to sell at the original cost, was the consideration which induced the plaintiff to purchase, and that he relied upon that at the time of the transaction. If you find for the plaintiff, the plaintiff is entitled to recover the difference between the sum he paid, $937.50, and what was in point of fact one-quarter of the original cost of the property purchased, and upon that sum you can allow interest by way of additional damage."

The defendants' counsel requested the following instructions to be given to the jury, which the court refused to give except as given in the charge.

I. That the plaintiff cannot recover in this case unless the jury find that the bargain for the purchase and the sale of the property was fully entered into before any mention or statement of actual price was made.

II. If before the plaintiff agreed to purchase, the defendant made known to him any sum claimed to be the cost, and the plain-

tiff made his bargain with full knowledge that the seller alleged the cost to be that sum this action cannot be maintained.

III. That even if the defendants did, at the first of their conversation with the plaintiff, propose to sell to him a portion of the property at cost, yet if the plaintiff did not accept that proposition but made further inquiry as to the amount to be paid, and after statement of a definite amount, made the purchase, this action cannot be maintained.

IV. The plaintiff is not entitled to recover unless he exercised reasonable diligence in making the purchase.

To which instructions and refusals to instruct, the verdict being for the plaintiff, ($218.45,) the defendants excepted.

N. Webb and *B. D. Verrill*, for the defendants.

The instructions of the court are erroneous because:

I. They submit to the jury as matters of fact determining the legal rights of the parties, matters which by law do not affect those rights, to wit: whether the plaintiff purchasing relied upon the statament of the defendant selling, that he was selling at cost; whether the plaintiff was or not guilty of want of care in entering into the contract, and whether there was or not a fraudulent misstatement of the amount of the original cost of the property. *Holbrook* v. *Connor*, 60 Maine, 578. *Bishop* v. *Small*, 63 Maine, 12.

II. They submit to the jury as a question of fact what was the actual agreement between the parties, instead of giving the legal construction of such negotiations and conversation as might be found to have taken place between them. *Holbrook* v. *Connor*, 60 Maine, 578.

III. They ignore the legal propositions that the relations of buyer and seller are not confidential, and that where confidential relations do not exist no violation of a statement, promise, or agreement of a seller that he is selling at cost, affords any ground of action. *Holbrook* v. *Connor*, 60 Maine, 578. *Medbury* v. *Watson*, 6 Metc., 246.

IV. They do not make it a condition necessary to recovery by the plaintiff that he must have made the bargain and trade to buy at the original cost before he was informed how much that cost

was or was claimed to be. If there be any ground of action in a case like this, it must be on this basis, which might be said to render the relations of the parties semi-confidential. Hence the first three requested instructions should have been given. See cases before cited.

The evidence establishes these facts: that the defendants had actually bought all the property, including the steamer, before they had any talk with Willard about selling to him; that Randall gave Willard the cost price or figures before any trade was made; and that Willard in fact relied upon the description and price of the boat, and upon the value of the franchise and other property.

A. A. Strout and *G. F. Holmes*, for the plaintiff.

The agreement to sell at cost price became a substantive part of the contract of sale, as much so as would be a contract to sell for the price fixed by valuers, or by referees, or by a third person. *Id certum est quod certum reddi potest. Brown* v. *Bellows*, 4 Pick., 179. *Nutting* v. *Dickinson*, 8 Allen, 540. *Howe* v. *Huntington*, 15 Maine, 350.

The distinction between a contract for sale at the price given by the vendor, and one preceded by a mere misrepresentation as to such cost price, being fully stated in the charge, the jury must have found that the agreement was to sell at the price given by the vendor.

PETERS, J. The plaintiff claims, under the money counts, to recover a sum alleged to have been by him overpaid the defendants for an interest in a steamboat. He claims that he was induced to pay more than the contract price by the fraud of the defendants. He does not claim that he was defrauded in making the contract, but he alleges that he was defrauded in making a settlement of it. He does not, therefore, rescind the contract, but relies upon it to enable him to recover of the defendants the amount paid to them in excess of what, by the terms of the contract, they were entitled to receive.

In support of his cause, the plaintiff undertakes to show, that the bargain with the defendants was to sell him an interest in the

boat at the price which the defendants actually paid, or were to pay, to other parties therefor; or, in other words, at the rate that the boat actually "cost" the defendants; and that, by the misrepresentation of the defendants as to what the cost was, they received more. The defendants' version of the transaction differs from this. They claim that a fair construction of it is this: that they agreed to sell, not at cost, but at a price fixed and certain, which was represented by them to be equivalent to the cost to them. And they deny any liability, because a representation, as to what an article cost them, made to induce a sale, is not an actionable representation, as declared in *Bishop* v. *Small*, 63 Maine, 12, and settled in the cases cited in that case; the doctrine being confined to a representation of what it cost the vendor, and not its cost to other persons. *Manning* v. *Albee*, 11 Allen, 520.

The margin between the respective positions of the parties was a narrow one, and the issue of fact to be decided was close. We are not convinced, however, that the jury erred.

Nor do we perceive any error in the summing up by the learned judge. On the contrary, his rulings appear to us to have been clear and sufficient, and exceedingly apposite to the facts in the case. The positions taken for the defendants were presented by the court to the jury with all the force they could legally bear. A sale at cost is a valid sale for whatever the cost may actually be, when correctly ascertained, although supposed to be, or represented to be, a different sum at the time of sale. And both parties are bound by that standard, unless the contract can be avoided for fraud or mutual mistake. That the price can be made certain, makes it certain. But a sale for a fixed price and definite consideration, binds the parties at such price, although the sum paid was supposed to be the cost price, when it was not. In the one case, the supposed "cost" merely induces a contract to be made. In the other, the real "cost" becomes a material part and condition of the contract itself.

The defendants were not injured by a refusal to give their requests. The explanations of the case had already been full. The idea underlying the first three requests seems to be this: that if the sale was to be at cost, and at the same time a price was named as

the cost, and acceded to by the purchaser as such, the transaction was in effect a sale at what was called cost, and not a sale at actual and absolute cost. But this was an argument of fact for the jury, rather than a proposition of law to be passed upon by the court. In this state, the jury are to ascertain the words used by the parties, and the meaning of them. Had the court followed the requests, it would have been, in some degree, a usurpation of the province of the jury.

The fourth request does not bear upon the case. The plaintiff complains of no fraud practiced on him, "in making the contract." He only complains of a fraud in the settlement of the contract. But the request, as far as applicable to the issue, had already been given.

We do not distinguish this case, in its essential features, from that of *Lord* v. *French*, 61 Maine, 420.

Exceptions and motion overruled.

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

HUGH DOHERTY *vs.* HUGH DOLAN.

Cumberland, 1875.—March 1, 1876.

Damages.

In an action for damages for the breach of an agreement to convey land; *held*, I, that the plaintiff is entitled to recover what the land was worth, at the date of the breach, more than what he was then owing for it, with interest thereon; *held*, II, that this rule of damages is not to be varied, because the defendant, through unanticipated causes which he could not control, although acting in good faith, was unable to convey; and *held*, III, that the plaintiff at his election, the failure to convey being total, would be entitled to recover the exact consideration actually paid upon the contract by rescinding the contract, which would be effected by the institution of a suit for money had and received.

ON EXCEPTIONS from the superior court.

CASE for damages in not conveying real estate according to a memorandum in writing.

The plaintiff had paid $1000 on the receipt of the memoran-

dum, August 14, 1874, agreeing to pay the balance, making $10,250 in all, when a proper deed should be made out.

There was evidence tending to show that the property was incumbered, and the defendant thereby unable to give a clear title thereto, that the plaintiff offered to pay the defendant the purchase money due by the terms of the memorandum before the suit was brought, and that the property was worth $10,000.

Upon the question of damages, the presiding justice instructed the jury as follows: "I instruct you for the purpose of this case that the plaintiff if entitled to recover at all, is entitled to recover the $1000, which it is admitted he paid toward the purchase money of this property. It is entirely unnecessary to consider the other elements of damage, such as loss of time and loss of interest, because the whole claim of the plaintiff here for damages is $1000. He fixed his claim for that in his writ, and cannot in any event recover more than that."

The defendant, the verdict being for the plaintiff for $1000, alleged exceptions.

T. H. Haskell, for the defendant.

M. P. Frank, for the plaintiff.

PETERS, J. The defendant contends that the election as to the time when a deed was to be made out, was with him. If that is so, he has $1000 of the money of the plaintiff prepaid to him, which he can keep as long as he pleases, and never make the deed. The implication from the argument is, that a deed is to be delivered within some time, and that must be a reasonable time. In this ruling the court was right.

In another respect, however, we think an error was committed at the trial. The judge should have ruled, that the plaintiff could recover as damages what the land was worth at the time the defendant should have furnished the deed, less so much of the consideration agreed to be given for it, as remained unpaid. That could not exceed $1000, as no more was claimed in the writ. But it might be less. If the value of the property was but $10,000, then the damages under this rule would have been but $750, while the direction was peremptory that the damages should be

$1000, if the plaintiff could recover at all. Herein the learned judge erred.

The action is based upon the contract, setting out that it had been broken upon the part of the defendant. It is not a suit for the consideration paid, but a suit for the damages necessarily resulting to the plaintiff, because the defendant had refused to convey. The general rule of damages in this form of action is well settled. If the plaintiff had paid nothing down, and the land was worth at the date of the breach more than he was to give for it, the difference would be his profit, and he could recover that amount. If there was no difference between the contract price and the value of the land, when it should have been conveyed, and nothing was paid, then his damages would be nominal only; or if in such case, the land was worth less than the contract price, he would then have nominal damages for the technical breach. So, if the plaintiff had paid the contract price in full, he could recover the value of the land at the time it should have been conveyed to him, whether the value was then more or less than the contract price. And so it logically follows, there being a part payment, and the land worth less than the contract price at the time a conveyance should have been made, that the damages recoverable would be what the land was then worth, less the amount of the price for it that remained unpaid. By paying the full price, the vendee is entitled to the land or its value, whatever the value may be. The recovery of damages, according to these rules, puts him in as good condition as if the contract had been performed. He gets exact indemnity. *Warren* v. *Wheeler*, 21 Maine, 484. *Hill* v. *Hobart*, 16 Maine, 164. *Robinson* v. *Heard*, 15 Maine, 296. *Russell* v. *Copeland*, 30 Maine, 332. *Lawrence* v. *Chase*, 54 Maine, 196.

The plaintiff, however, while he admits that this is a correct statement of the general rule, in cases where a vendor refuses to convey to the vendee when he has the power to do so, contends, that a different rule prevails in cases where the vendor, through unanticipated causes which he cannot control, although acting in good faith, is unable to convey; contending that in such case the

measure of damages is the amount of consideration actually paid and interest thereon. If this position is a correct one, the verdict would stand.

This rule, as contended for by the plaintiff, is undoubtedly the established law of the English courts. Many of the American state courts have adopted it. It prevails in New York, although much doubt of its correctness has been expressed by individual members of the courts of that state. See remarks of Denio, J., in *Conger* v. *Weaver*, 20 N. Y., 140; of Mason, J., in *Pumpelly* v. *Phelps*, 40 N. Y., 59; see also, *S. C.*, *sub nomine*, *Brinckerhoff* v. *Phelps*, 24 Barb., 100. The supreme court of the United States does not sustain the doctrine. *Hopkins* v. *Lee*, 6 Wheat., 109. In Sedgwick on Damages, (6th Ed., 218,) after reviewing many English and American cases, it is by the author strongly disapproved. We do not discover that the precise point, namely, whether the measure of damages depends at all upon the cause of the failure to convey, has ever been noticed in any reported case in our own state. Still it can hardly be regarded here as a new question. We think it is virtually settled by decisions in analogous cases. In the case of personal property, the measure of damages has uniformly been based, in this state, upon the value of the articles when they should have been delivered, and not upon the consideration paid therefor. *Smith* v. *Berry*, 18 Maine, 122. *Furlong* v. *Polleys*, 30 Maine, 491. *Berry* v. *Dwinel*, 44 Maine, 255. *Bush* v. *Holmes*, 53 Maine, 417.

The reason assigned in the New York cases, (and in cases elsewhere) for the adoption of the rule there adopted, is the analogy that is claimed to exist between actions for the breach of a covenant to convey land, and actions for the breach of a covenant for the quiet enjoyment of land and for warranty of title. *Baldwin* v. *Munn*, 2 Wend., 399. *Peters* v. *McKeon*, 4 Denio, 546. But that can be no argument for the doctrine here, but conclusive argument against it, inasmuch as, while the rule of damages in those courts, under the covenants of quiet enjoyment and warranty of title, is the consideration paid for the land and interest, the measure in this state is the value of the land at the time of eviction. *Hardy* v. *Nelson*, 27 Maine, 525. *Elder* v. *True*, 32 Maine,

104, and cases there cited. Still it is not to be admitted that a complete similitude exists between the two classes of covenants, in their legal bearing and effect. There is less harshness in applying our rule to contracts to convey, than to the case of covenants in deeds. Improvements are not so likely to be made upon the land in the former as in the latter case by the person in possession. The correctness of the comparison is questioned in the opinion of the majority of the court in *Pumpelly* v. *Phelps*, *vide supra*.

We think the rule that we are disposed to adhere to, as adapted to all cases, a reasonable one. The pecuniary damages are the same to the vendee, whether the motive of the vendor in refusing to convey is good or bad. It is a difficult thing to ascertain whether or not a vendor is actuated by good faith in his refusal to convey. There can easily be frauds and deceits about it. The vendor is strongly tempted to avoid his agreement, where there has been a rise in the value of the property. The vendee, by making this contract, may lose other opportunities of making profitable investments. The vendor knows, when he contracts, his ability to convey a title, and the vendee ordinarily does not. The vendor can provide in his contract against such a contingency as an unexpected inability to convey. He can also liquidate the damages by agreement. The measure of relief, afforded by our rule, is a fixed and definite thing. The other rule is not easily applied to all cases, and the books are burdened with discussions and refinements in relation to the modifications and restrictions and qualifications which, in different jurisdictions, have been annexed to it. See notes to Sedgwick on Damages, before cited.

But the ruling would have been right in this case had the action been for money had and received, and it could have been made so by amendment. The declaration is somewhat in the nature of a general count, as it is, although not strictly and technically such. The cause was tried in the same manner and upon the same proofs as if the writ contained the money counts. If it had contained them, the plaintiff would have been entitled to recover the $1000 paid by him and interest on it, upon the ground that, by the institution of the suit, the contract was by him re-

scinded. He had a right to rescind. The defendant did not keep his contract. His failure was a total one. For that reason it is clear, upon the authorities, that the money paid was recoverable back. *Keys* v. *Harwood*, 2 C. B., 905. *Planche* v. *Colburn*, 8 Bing., 14. *Miner* v. *Bradley*, 22 Pick., 457. *Canada* v. *Canada*, 6 Cush., 15. *Appleton* v. *Chase*, 19 Maine, 74. *Wright* v. *Haskell*, 45 Maine, 489. Parsons on Contracts, vol. 2, p. 191. *Lawrence* v. *Taylor*, 5 Hill, 107. *Reddington* v. *Henry*, 48 N. H., 273. *Loder* v. *Kekule*, 91 E. C. L., 128.

We think it would best accord with justice to the parties to allow the verdict to stand, if the plaintiff desires it, upon terms.

Therefore, we advise the court below to permit an amendment of the declaration, by the substitution of a count for money had and received, in lieu of the present count, upon the condition that the plaintiff shall recover no costs in the action, and the defendant none. *If this is done, the exceptions to be overruled; otherwise to be sustained.*

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

THE MAINE BAPTIST MISSIONARY CONVENTION *vs.* THE CITY OF PORTLAND.

Cumberland, 1875.—March 1, 1876.

Tax. Definition of "charitable institutions." Words.

The purpose and design of the plaintiffs, who are incorporated by this state, being the promulgation and diffusion of Christian knowledge and intelligence, through their agency as an institution of domestic missions, their organization falls within the description of "charitable institutions," the property of which is exempted from taxation by the statutes of this state.

ON FACTS AGREED.

ASSUMPSIT to recover some $1200, assessed for taxes for 1872, 1873 and 1874, on two stores in Portland devised to the plaintiffs by the late Byron Greenough. The taxes were paid by the

plaintiffs under protest that the property was exempt. The only point in controversy is the question of exemption.

The plaintiffs were incorporated in 1867 by the consolidation of the Maine Missionary Society and the Maine Baptist Convention, the former incorporated in 1823 for the purpose of diffusing Christian knowledge, and the latter in 1830, to cultivate Christian acquaintance, to communicate intelligence respecting the state of religion, and to gather statistics of the denomination. The new corporation succeeded to all the property, powers, privileges and duties of the two bodies; and has hitherto successfully performed all the functions and prosecuted the objects entrusted to the parent corporations by pecuniary means derived solely from donations.

G. F. Emery, for the plaintiffs, made an elaborate argument.

T. B. Reed, for the defendants, submitted without argument.

PETERS, J. It is plain enough that the property of the plaintiffs should not have been assessed. Our statute of exemption from taxation is very broad in its terms, more so perhaps than that of any other state. It embraces "the real and personal property of all literary institutions, and the real and personal property of all benevolent, charitable and scientific institutions incorporated by this state." It may be difficult to say what a "benevolent" institution is, if it differs from one that is merely charitable. *Saltonstall* v. *Sanders*, 11 Allen, 446. *Chamberlain* v. *Stearns*, 111 Mass., 267. The main purpose and design of the organization of the plaintiffs, seem to be the promulgation and diffusion of Christian knowledge and intelligence through their agency as an institution of domestic missions. There can be no doubt that the plaintiffs fall within the description of charitable institutions intended by the statute. The word "charity," as found in our decisions and statutes, "is not to be taken in its widest sense, denoting all the good affections which men ought to bear to each other, nor in its restricted and usual sense, signifying relief to the poor, but is to be taken in its legal signification, as derived chiefly from the statute of 43 Eliz., c. 4. Those purposes are deemed charitable which are enunciated in that act, or which by analogy are deemed

within its spirit and intendment." Bou. Law. Dic., Charities, and cases there cited. It has been repeatedly decided that missionary societies, foreign or domestic, are, in a legal sense, charitable institutions. *Bartlet* v. *King*, 12 Mass., 537. *Sohier* v. *The Wardens, &c., of St. Paul's Church*, 12 Metc., 250. *First Universalist Society in North Adams* v. *Fitch*, 8 Gray, 421. *Jackson* v. *Phillips*, 14 Allen, 539. *Fairbanks* v. *Lamson*, 99 Mass., 533. *Going* v. *Emery*, 16 Pick., 107. *Tappan* v. *Deblois*, 45 Maine, 122. *Preachers' Aid Society* v. *Rich*, id., 552. *Everett* v. *Carr*, 59 Maine, 325. No other statutory provisions apply to this case. The provisions of c. 6, § 6, clause 4, and clause 8 of § 14, relate to local parishes, and not to an institution such as the plaintiffs are described to be. *Defendants defaulted.*

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

BENJAMIN B. STEVENS *vs.* JOHN DOHERTY.

Cumberland, November, 1875.—March 7, 1876.

Pleading. Practice.

Under R. S., c. 82, § 19, allowing a brief statement of special matter of defense to be filed with the general issue, a demurrer to the "plea," *eo nomine*, does not cover the brief statement.

The demurrer should be to the brief statement which is defective and not to the plea which is not defective.

ON EXCEPTIONS from the superior court.

TRESPASS *quare clausum.*

The plea was the general issue with a brief statement.

The plaintiff demurred to the plea, and the defendant joined the demurrer.

The presiding justice ruled the plea good and overruled the demurrer, and the plaintiff excepted.

E. S. Ridlon, for the plaintiff, contended that it was no justification in law as claimed in the brief statement that the premises were used for unlawful purposes, or that the acts complained of were done under the direction of the city marshal.

J. O. Winship, for the defendant.

APPLETON, C. J. This is an action of trespass *quare clausum*. The defendant pleaded the general issue and filed a brief statement, in which he alleged that the plaintiff was using the premises from which he was ejected for unlawful purposes and in violation of the laws of Maine, and that the acts complained of were done by the direction of the city marshal of the city of Portland.

The plaintiff demurred to the defendant's plea, which the court adjudged good. The general issue duly pleaded could not be adjudged other than a good plea. The demurrer is not to the brief statement. It is not necessary to consider whether that is good or not, as the demurrer does not reach it and no exceptions are taken to its sufficiency. *Exceptions overruled.*

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

GEORGE H. PITMAN *vs.* JAMES B. THORNTON *et al.*

Cumberland, 1875.—March 8, 1876.

Equity. Practice. Referee.

The court, at *nisi prius*, has the power to accept, reject or recommit the reports of masters and referees, in cases in equity, at any time until there has been a final decree.

In practice, the case is not finally disposed of, until a decree has been formally adopted by the court and placed on file, in readiness to be spread upon the record.

If a judge at *nisi prius* "as matter of law," allows a motion to recommit a report of a referee, after it has been accepted, exception may be taken to such allowance.

ON EXCEPTIONS.

BILL IN EQUITY, for the redemption of a mortgage.

At the January term of this court, 1874, this case and another case in equity between the same parties reversed, and two actions at law in the superior court with all other matters in dispute between the parties were referred to a single referee. At the April term, 1874, the referee made report in this case that plain-

tiff was entitled to redeem the defendants' mortgage, and that upon the payment by the plaintiff to the defendants of $10,556.25 less the costs of reference $218, and costs of court to be taxed by the court with interest on the balance from May 15, 1874 until payment or tender of payment be made, the defendants should release to the plaintiff said mortgage with all their right, title and interest, as well as that of the testator under the same, including all the repairs and improvements upon the premises therein described made by them or either of them and that the proper decree should be entered accordingly. The docket shows that this report of the referee was received, filed, offered for acceptance, and accepted without objection. After the final adjournment of the term of the court at which the report was accepted, the counsel for the plaintiff entitled to the decree in his favor, drew it, filed it with the clerk, and gave notice thereof to the defendants counsel who filed no "corrections of the decree."

At the April term, 1875, a contention arising as to the form of the decree, the defendants' counsel moved a recommitment to the referee on the ground that the award was not sufficiently certain to effect the purpose, intent and finding of the referee in that by the refusal of the plaintiff to pay the sum which the referee found the defendants entitled to recover, the defendants would lose certain items claimed in their suit at law and disallowed in that suit because included in the award in this equity suit. The plaintiff's counsel objected that the motion for recommitment came too late; that the award having been accepted at a previous term of the court could not lawfully be recommitted. But the presiding justice allowed the motion for recommitment, "as matter of law" and the plaintiff accepted.

J. Howard and *N. Cleaves*, for the plaintiff.

I. "Objections to any report offered for acceptance, shall be made in writing and filed with the clerk, and shall set forth specifically the grounds of the objections, and these only shall be considered by the court." Rule of this court, 21st.

The objections, if any such existed, could have been made at that term only, and before the acceptance.

If not then made, they were then waived, by operation of law, and in fact.

II. The report of the referee having been accepted at that term, it could not be afterward recommitted without the consent of all parties.

While the court might accept, reject or recommit the report when offered for acceptance at that term, its power and duties in that respect, were at an end when the acceptance was made and the term closed.

No further fees or costs were taxable after that term.

III. The powers of the referee, as well as his duties to the parties and the court were then exhausted, and the court had no further control over him. He was *functus officio*, and surely could not be resuscitated after two full terms had intervened, and a third term was just expiring.

Strictly speaking, and in fact, the case was not pending in court, after the April term, 1874. It stood upon the docket of the court after that term, only for entry of such decree and judgment as might be ordered in vacation by any member of the court, under the 19th rule of the court in chancery practice.

It stood like a case where a verdict has been rendered by a jury, and accepted without objection, and the jury had been discharged and the term closed, and when it only remained for judgment to be entered by the clerk, with or without an order from any member of this court, as of that term.

In such a case the relations between the court and jury would have been terminated, and could not be revived.

And so in this case, *mutatis mutandis*, in respect to the award, the referee and the decree.

"When the report is accepted, judgment shall be entered thereon as in case of submissions by rule of court," &c. R. S., c. 108, § 5.

"If the report is accepted, the consequence is a judgment in conformity with it. There can be no variation from it." *Commonwealth* v. *Pejepscot Proprietors*, 7 Mass., 413.

The court "can neither enlarge nor diminish, being only an instrument to execute what the referees have previously determined." Ibid.

The power of arbitrators and referees is exhausted when they have once finally determined matters before them. *Bayne* v. *Morris*, 1 Wallace, U. S., 97, citing Russell on Arbitration, 135.

And after such determination has been accepted by the court, it has no more power to authorize any further or other award without the consent of the parties, than it would have to authorize an award without a submission. Morse on Arbitration and Award, 226.

IV. But the defendants, not having complied with 19th rule of the court in chancery practice—in that they did not file "corrections of the decree" and give notice thereof, as required by that rule—were not in a condition to object to the decree filed by the plaintiff, and were not entitled to file a motion for recommitment. They had voluntarily sacrificed or waived that right, and were estopped from making such motion. They have contested the decree offered by the plaintiff; and before that had been passed upon by the member of the court to whom it was submitted, this motion was irregular and illegal.

V. If there should be a recommitment of any of the cases, all should be recommitted. This, however, cannot be done by this court, as two of the cases were referred in the superior court.

A. A. Strout and *G. F. Holmes*, for the defendants.

I. In all proceedings in equity interlocutory decrees are at all times within the control of the court. No appeal lies from them, and they may be recalled and reversed at any time before a final decree is signed and filed. *Park* v. *Johnson*, 7 Allen, 378. *Perkins* v. *Fourniquet*, 6 How, 206. *Fourniquet* v. *Perkins*, 16 How, 82.

II. Even in a common law proceeding the court may recommit, for good cause, after acceptance has been noted upon the docket. Such a recommittal is proper where otherwise the party would be sent to a writ of review. *Maybury* v. *Morse*, 39 Maine, 105.

PETERS, J. This is a bill in equity, and the cause was referred under an ordinary rule of court. An award was returned and accepted, at *nisi prius*, in Cumberland county, at the April term of court in 1874. The referee stated his conclusions merely, and

determined "that the proper decree be entered accordingly." No form of decree being decided upon by the referee, it was necessary that one should be passed upon and settled by the court. Questions arose between the parties, as to what the form of the decree should be, and none having been adopted, at the April term of the court in 1875, upon motion of the respondents, the whole case was again sent to the referee. The presiding justice allowed the motion for recommitment, "as a matter of law," in order to afford to the complainants an opportunity to except thereto. (See *Rowell* v. *Small*, 30 Maine, 30). So that this question is precisely presented: Had the court the legal power to exercise the discretion to recommit?

The award of a referee, in a suit in equity, stands upon the same footing as a master's report, except that more authority is usually conferred upon a referee than upon a master. In either case the court has the power to accept, reject or recommit reports, according to the exigencies demanding its interference, at any time until there has been a final decree. *Asp* v. *Warren*, 108 Mass., 587. *Mayberry* v. *Morse*, 39 Maine, 105. The complainants, however, contend that the acceptance of the award in 1874, and the adjournment of that term of the court, *sine die*, operated as a final disposition of the case, equivalent to the effect of a final decree; and that after that time there was no remedy open to the respondents but by a new and independent proceeding through a bill of review.

According to the general practice in English chancery, and wherever that practice is adopted by any of the United States, proceedings are regarded as at an end in a case, when the decree has been signed and enrolled. The enrolled decree is the sentence and final decision of the court. It is then a record. It can then be pleaded as a bar or estoppel, and execution can issue upon it. In our practice, (where decrees are not enrolled,) a final decree and judgment thereon are considered as equivalent to an enrolment, and have the same effect; and a decree is regarded as recorded, when formally drawn out and finally adopted and placed on file, although it may not be spread upon the records until some time afterwards.

It is apparent enough that there had not been a final disposition of the case at bar. If the referee had dictated what the form of the decree should be, it might have been so. But while he determined the fact that the complainants might redeem the mortgaged premises upon the payment of a certain amount, no time was fixed by the referee within which such payment should be made or the right of redemption be lost as a consequence of nonpayment, and those matters were left by him to be perfected by the subsequent action of the court. The case was properly retained upon the docket till the pending questions had become adjudicated. There had been no final decree. There was no decree at all. There had been merely an award that there should be a decree. This conclusion is abundantly supported and illustrated by the following authorities. The other points, raised by the learned counsel of the complainants, in this view, become unimportant. *Stone* v. *Locke*, 48 Maine, 425. *Clapp* v. *Thaxter*, 7 Gray, 384. *Thompson* v. *Goulding*, 5 Allen, 81; *Park* v. *Johnson*, 7 Allen, 378. *Mills* v. *Hoag*, 7 Paige, 18. Barb. Ch. Prac., vol. 1, 356, *et passim.* 2 vol., Dan. Ch., 175.

Exceptions overruled.

APPLETON, C. J., WALTON, BARROWS and VIRGIN, JJ., concurred. DANFORTH, J., did not sit.

STATE *vs.* JOHN HOWLEY, appellant.

Cumberland, 1875.—March 8, 1876.

Trial. Evidence.

An officer's return upon a search and seizure warrant, should be read before the jury, as exhibiting what is to be proved, but not as any part of the proof itself, to sustain the prosecution.

A process of search and seizure cannot be maintained, by showing that immediately before the complaint was made, the complainant, who was an officer, attempted to seize liquors, but was prevented by a scuffle with the respondent, during which the liquors were destroyed.

Under R. S., c. 27, § 34, providing for the seizure of liquors, and the vessels containing them, without a warrant, and for keeping them till a warrant can be procured, the liquors and the vessel containing them were destroyed

in a scuffle between the officer and the respondent. *Held*, I. At the trial the return of the officer should be read in the opening, to the jury, but should not be read in evidence. II. The liquors, not having been "kept," the complaint cannot be sustained. III. "Keep" should be construed strictly. The officer, not having kept the liquors, had no right to procure the warrant. The wrongful act of the defendant, preventing him from keeping them would not give him that right.

EXCEPTIONS from the superior court.

SEARCH AND SEIZURE process under R. S., c. 27, § 34, which provides that intoxicating liquors kept in the state, intended for unlawful sale, and the vessels containing them, may be taken by an officer, and kept a reasonable time, until he can procure a warrant (for search and seizure.) The officer found the liquor in the possession of the defendant, and in the effort to make the seizure, the vessel was destroyed and the liquor spilled. The officer, the next day, made a complaint and procured a warrant (for search and seizure,) on which he arrested the defendant, who was found guilty by the municipal judge of Portland, and appealed to the superior court, where on a trial, the judge against objection, allowed the officer's return on the warrant to be read; and refused to instruct the jury that upon these facts the defendant should be acquitted.

The defendant, the verdict being guilty, excepted.

C. P. Mattocks & E. W. Fox, for the defendant.

C. F. Libby, county attorney, for the state.

PETERS, J. Objection is made, that the officer's return on a search and seizure warrant, was read to the jury. It should be read before them, in the opening, as a part of the statement of the case, but should not be regarded as evidence at all. The officer's return is a part of the allegations to be proved, but is no part of the proof itself. It has the same effect in this process, that a return in replevin has in that process. *State* v. *Stevens*, 47 Maine, 357. *State* v. *Lang*, 63 Maine, on page 215. The case does not show that the return was read "in evidence," or that it was allowed by the court to have that effect; although perhaps the exceptions are not clear as to that.

Upon the other point, we think the exceptions must be sus-

tained. It seems, the officer undertook to make a seizure without a warrant, and was prevented from consummating it, by a scuffle with the respondent, during which the liquor was destroyed. The next day a complaint was made, and a warrant obtained, and the question is, whether, upon this evidence, the complaint can be sustained. We think not. The search and seizure statutes are aimed against a present, and not the past, possession of liquors. The person is liable, who, at the date of the complaint, has liquors, and not the person, who before that time has had them in his possession, with intent to sell. There might be other forms of punishment, but this complaint, upon this evidence, cannot stand. Section 34, c. 27, R. S., is not applicable. By that provision an officer may seize liquors without a warrant; but in such case he must "keep" them till a warrant can be obtained; so that, when a warrant is procured, the officer can take the liquors thereupon. The warrant is usable *nunc pro tunc*. But here the officer had nothing in his possession for the warrant to retroact upon. Nor does section 41, of the same chapter, reach this case. In that case, the officer had a warrant. Here, there was none.

Exceptions sustained.

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

JOHN D. CHASE *et als.*, in equity, *vs.* SOPHIA C. DAVIS *et als.*

Cumberland, November 12, 1875.—March 15, 1876.

Equity. Will. Trust.

A testator appointed by will, two persons to act as executors and trustees, vesting them with certain discretionary powers. Both were qualified, but subsequently one died, and another was appointed by the judge of probate, and qualified. *Held*, that in the absence of any provision in the will, showing a different intention on the part of the testator, the trustee appointed will have the same powers, including those depending upon discretion, as were vested in those named in the will.

The property devised in trust, is devised in two different items in the will. The one giving real estate specifically described, the other a residue, including real and personal. The latter item referred to the former, as to direc-

tions for the disposition of the income and proceeds, and vested the trustees with authority, at their discretion, after five years, to convey said trust estates to the beneficiaries. *Held*, that the discretion of the trustees extended to the whole trust estate, and their authority to convey, covered the whole, or any part.

S. C. was owing the testator a note, a portion of which was forgiven by the will. He was also given by the will, one-fifth of the residue left after paying legacies, said one-fifth to be holden by trustees for his benefit, to be conveyed to him at the discretion of the trustees, after five years. *Held*, that the balance due on said note remained, an existing debt in favor of the estate, but that the legacy of one-fifth of the residue would give one-fifth of the note to the trustees for S. C.'s benefit. *Held*, also, that upon the conveyance of the property by the trustees to S. C., four-fifths of the note would be a charge upon the legacy.

Where in a will, a legacy of a sum of money simply is given, and a devise of real estate, the former, being a general, and not a specific legacy, is not, in the absence of any direction to that effect, a charge upon the latter, which is a specific legacy.

BILL IN EQUITY.

Samuel Chase, late of Portland, died August 9, 1867, leaving a will which was afterwards allowed by the probate court, providing for the disposition of his estate, as follows:

I. To Stephen B. Chase, (his son-in-law,) $1000.

II. To John D. Chase, (his son,) forgiveness of the full amount of his promissory note, for $4706.87, also a gift of $800, to be paid by the executors, as they may find convenient.

III. To Samuel Chase, jr., (his son,) forgiveness of $4000, in part of a promissory note of $8378, in addition to $1500, indorsed thereon as a gift.

IV. Three brick stores, and other specified real estate, one-fifth each, to his children, John D. Chase, Sarah Chase, wife of Stephen, and Naomi Buttrick, widow; the remaining two-fifths to John D., and Stephen B. Chase, in trust for Samuel Chase, jr., and for his daughter, Sophia Davis, widow, the rent and income to be paid them.

Item four further provides, that after the lapse of five years from the decease of the testator, the brick stores and the other specified real estate may be sold by the executors, if in their judgment, they shall deem such sale for the best interest of all concerned, the proceeds of the sale of the two-fifths held in trust, one-fifth each, for Samuel and Sophia, to be held by the trustees

for the same uses as is herein provided in relation to the income of the real estate; the proceeds to be invested in stock or public securities deemed safe and judicious, etc.

V. The residue of the estate real and personal, one-fifth each, to John D., Sarah, and Naomi, and the remaining two-fifths to John D. Chase and Stephen B. Chase, in trust for Samuel, jr., and Sophia, the income and proceeds to be appropriated as in item four; and if after five years from the decease of the testator, the trustees shall, in the exercise of their best judgment, consider it for the best interest and happiness of Samuel and Sophia, to transfer and convey to them their respective portions of said trust estate, the trustees are authorized to execute such transfer.

John D. Chase and Stephen B. Chase, named executors in the will, were duly qualified. Stephen B. Chase, deceased, while in office as trustee, and Howard B. Chase was afterwards duly appointed and qualified, and is now trustee in his place. Samuel Chase, jr., was insolvent so that there was no reasonable expectation of collecting the balance of the $8000 note. The five years and more having elapsed, and the plaintiffs, considering it as they alleged, for the best interest and happiness of Samuel and Sophia, that the transfer should be made to each of them, as provided in the fifth clause of the will, submitted to the court, with a prayer for relief, the following questions, as to their powers and duties:

I. Whether the discretion, which is vested in the trustees by the fifth clause of said will, is limited to the trustees named in said will, or can be exercised by your orators as their successors.

II. Whether the discretion vested in the trustees by the fifth clause of said will, is limited to the portion of the residue which is vested in the trustees by said clause, or includes the portions of real estate specifically described and vested in said trustees, by the fourth clause thereof.

III. Whether your orators can lawfully convey to Samuel Chase, jr., and Sophia C. Davis, respectively, the whole estate devised to trustees by said will, or any part of it, and if yes, what part.

IV. Whether the one-fifth of said estate vested in trust for Samuel Chase, jr., and his heirs, can lawfully be charged with the whole of said balance due from Samuel Chase, jr., or whether the

loss coming to said estate by his insolvency, must be so borne and divided, as though the same was an uncollectable claim against a stranger to the estate, or how the same shall be borne.

V. Whether the legacies of $1500, and $800, given by the first and second clauses of said will, in case of deficiency of personal assets, can be lawfully charged, in whole or part, upon real estate devised by said fourth clause.

W. L. Putnam and *A. B. Holden*, for plaintiffs.

J. Howard & N. Cleaves, for Samuel Chase, jr.

H. C. Peabody, for Sophia C. Davis, Sarah Chase, and Naomi C. Buttrick.

To the point that the executors, (who were also the trustees,) are entitled to charge upon the one-fifth vested in trust for Samuel Chase, jr., the whole of the balance due from him after deducting $4000 and $1500, as provided in the third clause of the will, the counsel cited *Hobart* v. *Stone*, 10 Pick., 215. Redfield on Wills, Part II., p. 581.

DANFORTH, J. This is a bill in equity to determine the construction of the will of Samuel Chase.

It appears by the will that certain property was given to John D. Chase, and Stephen B. Chase, to hold in trust for Samuel Chase, jr., and Sophia C. Davis, which trust in certain contingencies, requires the exercise of personal discretion. Said trustees were also appointed executors of the will, and were duly qualified to act in each capacity. Subsequently the said Stephen died, and Howard B. Chase, one of the plaintiffs, was appointed and qualified as trustee and executor, in his place.

Upon these facts the question is submitted, "Whether the discretion which is vested in the trustees by the fifth clause of said will, was limited to the trustees named in said will, or can be exercised by their successors." In this respect, as in all others when it can be done without a violation of law, the will is to be so construed as to carry out the intention of the testator. In the clause of the will referred to, there is no provision made as to what is to be done, in case of the death, resignation, or refusal to

act, of either or both of the trustees; nor do we find anything that leads to the conclusion, that in any event the provisions of the will were not to be carried out; no indication that the legacies were to fail. Under these circumstances, we must presume the testator relied upon the law to supply what he had failed to do, and which was enacted for such cases. R. S., c. 68, § 6, is amply sufficient for this purpose, and gives to the successors the same powers including matters of discretion, as were vested by the will in those originally appointed.

The second question is, "whether the discretion which is vested in the trustees by the fifth clause in the will, is limited to the portion of the residue which is vested in the trustees by said clause, or includes the portions of the real estate specifically described and vested in said trustees, by the second clause thereof." As no real estate is described or referred to in the second clause of the will, but in the fourth item, is specifically described and vested in trustees, we suppose it to be this real estate referred to, and answer the question accordingly.

The real estate given in the fourth item is specifically described, the property given in the fifth item, is the residue, and includes personal property. The conditions of the trust, the disposition of the income, and in case of sale, the proceeds are the same in both cases. In the fifth item, after constituting the trusts, and providing that "the income and proceeds thereof be appropriated as provided in item fourth of this will;" the testator further provides, that in a certain contingency, the trustees at their discretion, may convey to the beneficiaries, their respective shares of "said trust estate." The words, "said trust estate," would naturally include all the property left in trust, and we find nothing in the will tending to show that the testator used them in any other sense. That one part is a specific legacy, and another part is a general one, is a sufficient explanation of the fact that all is not put into one item; but no reason appears, why in other respects any distinction should be made. As the testator in all other respects, treated the two legacies as one, our conclusion is, that the trustees have the same discretion over each, and that they may, in the

exercise of their discretion, if they see fit, convey to said beneficiaries, the whole or any part of the property vested in them in trust. This is also an answer to the third question.

In regard to the fourth question, it was clearly the intention of the testator that the balance due on the note against Samuel Chase, jr., after deducting the $1500 and $4000, referred to in the will, should remain an existing debt, and be collected by the executors as a part of the assets of the state. But as the collection of the debt would increase the residue to that extent, it is equally clear, that under the fifth item of the will, one-fifth part of it would go to the trustees for the benefit of the maker. In making up this residue the amount due on the note must be counted as assets. In the division, the maker gets one-fifth, and the other legatees four-fifths. The result is, that in accordance with well settled principles of law, four-fifths of the amount due on the note is a charge upon the legacy to Samuel Chase, jr., for the benefit of the other legatees. *Hobart* v. *Stone*, 10 Pick., 215.

As regards the fifth question, we find no such legacy as $1500, in the first or second, or any other clause in said will. In the first clause is a legacy of $1000, and in the second clause one of $800. Both of these legacies are general, and in no sense specific. The real estate devised in the fourth item, is a specific legacy. As a general legacy cannot be a charge upon a specific one, so the legacies of $1000, and $800, can, neither in whole or in part, be a charge upon the real estate devised in the fourth item of the will.

The plaintiffs will be entitled to a decree in conformity with the principles of this opinion, costs to be paid by the estate.

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

ROBERT J. BELLAMY *et al. vs.* LYDIA M. OLIVER.

Cumberland, 1875.—April 7, 1876.

Pleading. Abatement.

A plea in abatement without the required affidavit, or with a defective one, is bad on demurrer.

An affidavit bearing date of a day preceding the commencement of the term at which the writ to be abated is entered, is fatally defective.

EXCEPTIONS from the superior court.

REPLEVIN for a sewing machine. The writ was returnable at the December term, 1873, (Tuesday, December 2, being the 1st day of the term.)

The defendant pleaded in abatement the non-joinder of the husband. To the plea was a verification in the form following:

Cumberland, ss., December 1st, 1873. Signed and sworn to before me, EDGAR S. BROWN, Justice of the Peace.

To this plea the plaintiff filed a demurrer, which was joined. The presiding justice, *pro forma*, overruled the demurrer, and adjudged the plea good. The plaintiff excepted.

J. H. Drummond, for the plaintiff.

A. Merrill, for the defendant.

APPLETON, C. J. This is an action of replevin, to which the defendant pleads the non-joinder of her husband in abatement. To this plea the plaintiffs demurred, and the demurrer was joined. The court overruled the demurrer, and adjudged the plea good, to which ruling exceptions were duly filed.

By the 10th rule of practice of the superior court of Cumberland county, pleas in abatement "must be filed within two days after the entry of the action, the day of the entry to be reckoned as one, and if consisting of matter of fact not apparent on the face of the record, shall be verified by affidavit."

Pleas in abatement are not to be favored. Defects may be taken advantage of by general demurrer. A plea in abatement

"must be promptly and exactly entitled in the cause and be positive as to the truth of every fact contained in the plea, and should leave nothing to be collected by inference; it should be stated that the plea is true in substance and fact," and not merely that the plea is a true plea; and if there be no affidavit, or if it be defective in any particular, the plaintiff may treat the plea as a nullity, and sign judgment, or move the court to set it aside. 1 Chitty Pl., 463. Such is the English rule.

The utmost strictness is required in pleas in abatement. *Tweed* v. *Libbey*, 37 Maine, 49. The plea must be filed within the time specified in the rule of court, and not afterwards. *Thompson* v. *Hatch*, 3 Pick., 512. The absence of an affidavit verifying the facts alleged in the plea is fatal to its validity. *White* v. *Whitman*, 1 Curtis, C. C., 494. The plea is bad, if it have no verification, or a defective one. *Fogg* v. *Fogg*, 31 Maine, 302. Indeed, when one pleads in abatement, he should take good heed that "his footsteps slip not."

The affidavit in the present case bears date on the Monday before the return day of the writ sought to be abated. Until its return, it was uncertain whether the action would be entered. There could be no appearance nor plea filed before the entry of the action on the first day of the term at which it was returnable. A plea in abatement cannot be filed before the defendant has appeared. *Wakefield* v. *Marden*, 18 E. C. L., 231. There can be no valid plea before the commencement of the term, nor can one be legally filed. If the writ is not entered, the remedy of the party is by complaint for not so entering the suit. The plea being sworn to before the return day of the writ, or the entry of the action, the affidavit is defective. If an affidavit (verifying a plea in abatement which refers to the declaration,) is sworn before the declaration is delivered, the plaintiff may treat the plea as a nullity and sign judgment. *Bower* v. *Kemp*, 1 C. & J., 288. *Johnson* v. *Popplewell*, 2 C. & J., 544. "How can a man know by foreknowledge," observes Bailey, J., "what the declaration will contain." So, how can he know that the action will be entered. There can be no plea in abatement until the first day of the term or the entry of the action. After the return day and entry the plea

was not sworn to, and if not sworn to, it cannot avail the party filing it. The plea and the affidavit alike presuppose a pending suit, thereby sought to be abated. The affidavit can no more precede the entry of the action, than the filing of the plea. The plea may be treated as a nullity, if the affidavit be sworn before the declaration is delivered or filed. MacNamara on Nullities, 52.

In abatement for the non-joinder of a party, the plea must show that the residence of the party not joined was within the jurisdiction at the time of the plea pleaded, which must be after the entry of the action. But if the plea can be filed, and the affidavit taken one day before the return day and entry of the action, it may be two days, or two months, or indeed the next day after service. In *White* v. *Gascoyne et al.*, 3 Exch., 35, it was held that the affidavit in support of a plea in abatement, for the non-joinder of other co-defendants, must state the residences at the time of plea pleaded; and therefore, an affidavit which states the residences of such co-defendants, at the time of the commencement of the suit, is bad, although the plea gives their residences at the time of pleading thereof, and the affidavit states the plea to be true in substance and fact. The affidavit takes effect at its caption. It is obvious, therefore, that an affidavit one day or one month before plea pleaded, cannot relate to a subsequent day or month, nor show where the residence of a party was, when such plea should thereafter be filed.

A plea is bad without verification. The verification should state the plea to be true in substance and fact unqualifiedly. It is not enough that the plea be good. It must be verified by an affidavit in all respects sufficient. *Exceptions sustained.*

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

STATE *vs.* THOMAS A. PIKE.

Cumberland, 1874.—April 7, 1876.

Indictment. Evidence. Exceptions. Jury. Trial.

An exception will not lie to the ruling of a judge merely because it is erroneous. To sustain the exception, the party claiming it must show he was aggrieved by the ruling.

In an indictment for manslaughter, by hauling the deceased by the hair of the head, and throwing her violently upon a sofa, *held*, that other acts of violence upon the same evening, may be shown.

A government witness testified on cross-examination that he had been confined in jail, and on the re-direct examination, that it was for "getting tight." The question was objected to on the ground that the record of the court sentencing him, was the only proper evidence. *Held*, admissible, it not appearing that he was confined by the sentence of any court.

An expert was asked whether such a wound as he found might be produced by a hard substance, having no sharp angles or points. And then, whether it might be produced by a substance padded like a sofa. *Held*, admissible.

An expert was asked how long a time two men should give to a *post mortem* examination to arrive at a correct conclusion as to the cause of the death, and whether four hours would be sufficient. *Held*, inadmissible.

Exception was taken to the judge's charge as a whole, not to any particular or specific portion of it. *Held*, not good practice.

A series of requested instructions, embracing, as abstract propositions, correct law, was refused by the court. *Held*, not to be error, if the law arising from the evidence was given by the court, with such fullness as to guide the jury to a correct result.

Requested instructions should be refused if drawn up in such a way as to have the effect of a one-sided argument, although, as abstract propositions of law, they are correct.

The judge, on being informed that the jury were unable to agree, called them into court in the absence of the defendant's counsel, and read to them from a printed volume of Massachusetts reports the opinion of the court on the duty of the jury to endeavor to harmonize their views, and to agree upon a verdict. *Held*, not objectionable.

The defendant, within two days after the verdict, moved for a new trial for newly discovered evidence. *Held*, that the decision of the judge, the motion being addressed to his discretion, was not reviewable by the law court.

On motion for a new trial, the defendant offered to prove, by the affidavit of a juror, misconduct in the jury room. *Held*, inadmissible.

The person killed was first named in the indictment, "Margaret E. Pike," and so named in the clause alleging the killing, but was intermediately styled "the said Margaret." *Held*, sufficient.

On exceptions from the superior court.

Indictment of the defendant for manslaughter of his wife, Margaret E. Pike, at Portland, May, 1874, by seizing and dragging her by the hair of her head, and throwing her with force and violence upon a sofa, giving her mortal wounds, of which she died. The jury, some eight hours after the cause was submitted to them, returned a verdict of guilty. Meanwhile they were called into court, the defendant's counsel not being present, and listened to the reading by the judge of an opinion of the supreme court of Massachusetts, in *Commonwealth* v. *Tuey*, 8 Cush., 1, on the importance of endeavoring to harmonize their views and to agree upon a verdict.

The rulings of the court to which the defendant excepted, appear in the opinion.

C. P. Mattocks and *E. W. Fox*, for the defendant.

C. F. Libby, county attorney, for the state.

Walton, J. This case is before the law court on exceptions.

I. The defendant excepts to the refusal of the presiding judge to allow exceptions to one of his rulings. The judge placed his refusal upon the ground that the right to except to that particular ruling had been waived. The facts are these: The defendant was indicted for manslaughter. He first pleaded in abatement; and then, after his plea in abatement had been adjudged bad on demurrer, he pleaded further that he was not guilty. The presiding judge declined to allow exceptions to the ruling upon the plea in abatement, upon the ground, that by pleading over, the defendant had waived his right to except. The defendant then excepted to that ruling. We think the ruling, holding that the defendant, by pleading over, had waived his right to except to the ruling upon his plea in abatement, was clearly erroneous. When a plea in abatement is adjudged bad on demurrer, the judgment is always *respondeat ouster*. By pleading over, the defendant does no more than obey the mandate of the court. To hold that he thereby waives his right to except, would be equivalent to holding that in such cases, a defendant can never except. He must plead over; and if his right to except is thereby waived, then the

conclusion is inevitable, that his right to except is waived in every case. Of course such cannot be the law. We must therefore examine the plea in abatement, (which, being copied into one of the defendant's bills of exceptions, is, in our judgment, properly before us for consideration,) and see if the defendant was aggrieved by the ruling. If he was, the exceptions must be sustained. If he was not, then the exception must be overruled, notwithstanding the ruling was erroneous; for it is well settled, that a ruling, however erroneous, will not sustain an exception, if the excepting party is not thereby injured. On examination, we find that the plea alleges several grounds for quashing the indictment, every one of which is based on a separate and distinct issuable fact. The plea is therefore clearly bad for duplicity; and the ruling of the presiding judge, holding it to be bad, was correct. How, then, was the defendant aggrieved by the refusal to allow exceptions? Very clearly, he was not aggrieved. True, the refusal was based on the erroneous assumption, that by pleading over, the defendant had waived his right to except; still, inasmuch as his plea was clearly bad, and the exceptions, if allowed, could not have been sustained, the defendant was not thereby aggrieved; and upon this ground, the exceptions upon this branch of the case, must be overruled.

II. The government was allowed to introduce evidence to prove that the name of the deceased was Margaret E. Pike. The exceptions state that this evidence was seasonably objected to, "upon the ground that it was nowhere alleged in said indictment, that the name of the person alleged to have been killed, was Margaret E. Pike." We apprehend this objection was made without a careful examination of the indictment; for the indictment does distinctly allege the name of the person killed to be Margaret E. Pike; and of course it was not only the right, but the duty of the government to prove it as averred.

III. The government was allowed to prove acts of violence by the defendant upon the deceased, other than those which it was claimed caused her death. We think the evidence was admissible. It is undoubtedly true, as the learned counsel for the defendant contends, that neither proof of another distinct felony, nor proof

of another distinct assault upon the deceased was admissible. But the evidence in this case was not of that description. It was limited to acts of violence on the same evening, and only a short time before her death; and for aught that appears in the bill of exceptions, was limited to acts which constituted the beginning of the quarrel which resulted in the defendant's throwing his wife upon a sofa so violently, as to cause her death immediately, or in a very short time after. We think the evidence was admissible.

IV. A government witness testified, on cross-examination, that he had been confined in jail; and then, in answer to a question from the prosecuting officer, that he was so confined for "getting tight." The question was objected to upon the ground that the records of the court which sentenced him to jail, was the only proper evidence to prove the offense for which he was confined. It is a sufficient answer to this objection, that it nowhere appears that he was confined in jail by virtue of the sentence of any court. For aught that appears, he may have been confined by a police officer, without any trial or sentence. If so, the evidence was admissible. Nothing appearing to show that the evidence was inadmissible, the objection is not sustained.

V. The government was allowed to ask one of the physicians who made a *post mortem* examination of the deceased, whether such a wound as they found, might have been produced by coming in contact with a body of hard material, where there were no sharp angles or points; whether it might have been produced by a hard substance padded, like a sofa; whether the clot of blood which they found could have existed twelve hours without causing death; and whether the appearance of the extravasated blood in the neck, was an indication of mechanical violence or disease. The information sought to be obtained by these questions is among the ordinary purposes for which medical experts are examined; and we see nothing objectionable in the form of the questions. We think they were properly allowed.

VI. A witness called by the defendant as a medical expert, was asked this question: "For the purpose of arriving at a correct conclusion in the case of the death of a person, where you don't know to your own satisfaction, what caused the death, how long a

time should two men give to a *post mortem* examination?" And the witness was further asked whether four hours would be sufficient. These questions were excluded; and we think, properly. It does not appear that the witness was present at the *post mortem* examination of the deceased; or that he had any knowledge of the case, or the kind, or extent, of the examination needed; and it is not to be assumed that every *post mortem* examination will require the same length of time. The questions were too general; and if the witness was willing to answer them, his answers would have been entitled to no weight whatever. They would have been no more than the opinion of one, who, so far as appeared, had no knowledge on which to base it. We think the questions were properly excluded.

Some other evidence, offered by the defendant, was excluded; but as the defendant's counsel do not refer to it in their argument, we shall not notice it further than to say, that we have examined it, and entertain no doubt that it was properly excluded.

VII. Exception is taken to the judge's charge; not to any particular or specified portion of it, but, in the language of the exceptions, to "all matters stated in the charge." The opinion which this court entertains of such a bill of exceptions will be found in *State* v. *Reed*, 62 Maine, 135, and need not be repeated. It is a sufficient answer to say, that in our judgment, the jury was very fully and accurately charged. The judge stated to them the nature and the elements of the crime with which the defendant was charged; what it was necessary for the government to prove to authorize or justify a verdict of guilty; that the burden of proof was upon the government; that, to sustain that burden, all the elements of the crime must be proved beyond a reasonable doubt; and it seems to us that all this was done in a very full, clear, and impartial manner; and that no other or further instructions were necessary.

It is not error for a court to refuse to give an extended series of instructions, although, as abstract propositions of law, they may be correct, if the law arising upon the evidence is given by the court with such fullness as to guide the jury to a correct result. In fact, requested instructions should be refused, if drawn up in

such a way as to have the effect of a one-sided argument, although, as abstract propositions of law, they are correct. *State* v. *Barnes*, 29 Maine, 561. *Dunn* v. *Moody*, 41 Maine, 239. *Norton* v. *Kidder*, 54 Maine, 189. *Hovey* v. *Hobson*, 55 Maine, 256. *Darby* v. *Hayford*, 56 Maine, 246. *Rumrill* v. *Adams*, 57 Maine, 565. *Bourne* v. *Stevenson*, 58 Maine, 499. *State* v. *Reed*, 62 Maine, 129. *Waite* v. *Vose*, 62 Maine, 184. *State* v. *Watson*, 63 Maine, 128. *Roberts* v. *Plaisted*, 63 Maine, 335. *Drake* v. *Curtis*, 1 Cush., 395. *Kellogg* v. *Northampton*, 4 Gray, 65. *Ins. Co.* v. *French*, 2 Cin., (Ohio) 321. *State* v. *Ott*, 49 Mo., 326. *Porter* v. *Harrison*, 52 Mo., 524. *Adams* v. *Smith*, 58 Ill., 417. *Railway Co.* v. *Whitton*, 13 Wallace, 270.

The foregoing are some of the recent decisions which sanction the right and hold that it is sometimes the duty of the court to withhold requested instructions, when the jury have been already sufficiently instructed; and in several of the cases the practice of preparing requested instructions in such a form, that, if given, they will have the effect of a one-sided argument, is severely censured. The practice is certainly one which ought not to be encouraged.

For the reasons already given, we think the instructions asked for in this case were properly withheld. The jury had already been accurately, and as fully instructed, as the nature of the case required.

VIII. Complaint is made because the presiding judge, on being informed by the jury that they were unable to agree, called them into court, and in the absence of the defendant's counsel, read to them as instructions, a portion of the opinion of the court in *Commonwealth* v. *Tuey*, 8 Cush., 1. The portion read relates entirely to the duty of jurors to endeavor to harmonize their views, and finally agree upon a verdict, if they can do so without the surrender of conscientious convictions. We see nothing objectionable in the course pursued by the presiding judge. The portion of the opinion read contained such suggestions only as it is always fit and proper to make to a jury when there is danger of a disagreement. The fact that the prisoner's counsel were not present does not appear to have been the fault of the court.

Certainly, there is no rule of law requiring the court to send for counsel who choose to absent themselves while their cases are being considered by the jury. Nor does it appear that their client's case was in the slightest degree prejudiced by their absence.

IX. Having been found guilty by the jury, the defendant, within two days thereafter, moved for a new trial, on the ground of newly discovered evidence. This motion was addressed to the discretion of the presiding judge, and his decision thereon is not reviewable upon exceptions.

X. The defendant then moved for a new trial for alleged errors of the court, and misconduct of the jury. The only alleged error of the court relied upon is the one already considered under head eight; namely, the reading to the jury, in the absence of the prisoner's counsel, of a portion of the opinion of the court in *Commonwealth* v. *Tuey*, 8 Cush., 1. This, as we have already stated, was, in our judgment, no error at all.

To prove the alleged misconduct of the jury, the defendant offered the affidavit of one of the jurors who tried the case. The presiding judge declined to receive the affidavit upon the ground that the law of this state does not permit the verdict of a jury to be impeached by the testimony of the jurors themselves as to what took place in the jury room during their deliberations. We think the ruling of the presiding judge upon this point was correct. This court decided in *Heffron* v. *Gallupe*, 55 Maine, 563; and again, in *Greeley* v. *Mansur*, 64 Maine, 211, that jurors are not competent witnesses to impeach their own verdicts. And see *Woodward* v. *Leavitt*, 107 Mass., 453, where the question is thoroughly examined, and the same conclusion reached as had been previously arrived at by this court.

This motion, like the preceding, was addressed to the discretion of the presiding judge; and no error in law appearing, his decision upon the facts is conclusive.

XI. The defendant next moved in arrest of judgment for alleged defects in the indictment. The indictment contains two counts. At the beginning of each count, when the name of the deceased is first mentioned, she is called Margaret E. Pike. She is afterwards referred to, as "the said Margaret." It is claimed

that the indictment is fatally defective, because her full name is not given every time she is mentioned. We think the indictment good as it is.

It is undoubtedly true, that in indictments for manslaughter, as well as in indictments for murder, the name of the deceased should be correctly stated. But when the name has been once fully and accurately stated, we can perceive no possible objection to afterward referring to the deceased, as "the said ——," giving the christian name only, provided there is no other person mentioned in the indictment, of the same christian name, to whom the words "the said ——," could refer. We think the motion in arrest of judgment, was properly overruled.

We believe we have now considered all the questions raised by the exceptions in this case; and our conclusion is, that the entry must be, *Exceptions overruled.*

Judgment on the verdict.

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

ELIZA W. MERRILL, by Julia E. Merrill, next friend, in equity, *vs.* WILLIAM E. BICKFORD *et als.*

Cumberland, 1875.—April 11, 1876.

Will. Annuity. Words.

When the same sentence by which land is devised imposes upon the devisee the duty of paying an annuity, and no other fund is provided out of which the payment is to be made, such annuity is a charge upon the land.

"During their natural lives," when used to indicate the duration of an annuity means so long as either of the persons named shall live.

An annuity payable to the husband during the natural lives of himself and wife, does not cease at the death of the husband. Such an annuity is not payable to the wife, but becomes assets in the hands of the husband's administrator.

BILL IN EQUITY.

The facts were agreed, and are sufficiently stated in the opinion to raise the legal points.

A. Merrill, for the plaintiff.

C. R. Ayer and *W. H. Clifford*, for the defendants.

WALTON, J. The will of Judith W. Edgecomb, among other bequests and devises, contains the following:

"*Twelfth.* I give and bequeath to W. F. Bickford a lot of land known as the Coleman lot, and being the same I purchased of Thos. E. Fox; also four oxen and two cows, the same now on the farm; and said Bickford shall pay or cause to be paid to Thos. H. Merrill, my brother, the sum of sixty dollars per year during the natural lives of said Thos. H. Merrill and his present wife."

I. Was this annuity a charge upon the land therein devised? We think it was. When the same sentence or clause by which land is devised imposes upon the devisee the duty of paying an annuity, or other sum of money, and no other fund is provided, out of which the payment is to be made, such annuity or legacy is a charge upon the land; and if the devisee accepts it, he takes it subject to such charge.

II. This annuity was to continue "during the natural lives of said Thos. H. Merrill and his wife." Would it cease upon the death of one of them? We think not. We think the annuity is payable so long as either lives. *Douglas* v. *Parsons*, 22 Ohio St. R., 526.

III. Thos. H. Merrill is dead. His widow still lives. Is she entitled to the annuity? We feel compelled, very reluctantly, to answer this question in the negative. It was made payable to Thos H. Merrill, and, although its payment survives, there is nothing to indicate an intention on the part of the testatrix that it should, in any event, or at any time, be payable to the widow. It will therefore be assets in the hands of the administrator of Thos. H. Merrill, and can only be given to the widow by a decree of the judge of probate. This suit not being prosecuted by the proper party, the decree prayed for cannot be made, and the bill must be dismissed. *Bill dismissed.*

No cost for either party.

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

City of Portland *vs.* City of Bangor.

Cumberland, 1874.—May 3, 1876.

Constitutional law. Pauper.

The fourteenth amendment of the federal constitution, provides that no state shall deprive any person of liberty without due process of law. *Held*, that the *ex parte* determination of two overseers of the poor is not such process.

The city of Portland sued the city of Bangor for supplies furnished the alleged pauper, in the workhouse of the plaintiff city, committed under a warrant of two overseers of the poor. *Held*, that the commitment was illegal, that the plaintiffs could not recover, and that the decisions in Nott's case, 11 Maine, 208, and in *Portland* v. *Bangor*, 42 Maine, 403, holding to the contrary, are inconsistent with the fourteenth amendment of the federal constitution.

On motion.

Assumpsit for alleged pauper supplies.

Harriet S. Ray, the alleged pauper, was committed to the Portland workhouse in 1871, under a warrant signed by two overseers of the poor, on an *ex parte* hearing, on the ground that she was an able bodied, dissolute vagrant, exercising no lawful business and liable to become chargeable to the city. This action was brought for her board while in the workhouse for two months ending September 17, 1871, at $2.50 per week. The verdict was for the plaintiffs for $24.49; the defendants filed a motion to have it set aside, as against law and evidence.

A. G. Wakefield, city solicitor, for the defendants.

T. B. Reed, city solicitor, for the plaintiffs, relied upon Angeline G. Nott's case, 11 Maine, 208, and *Portland* v. *Bangor*, 42 Maine, 403.

Walton, J. It was decided in Angeline G. Nott's case, 11 Maine, 208, that the statute of this state which declares that two or more overseers of the poor of any town or city, may, by a writing under their hands, commit to the work house, "all persons able of body to work, and not having estate or means otherwise to

maintain themselves, who refuse or neglect so to do, and all such as live a dissolute, vagrant life, and exercise no ordinary calling or lawful business, sufficient to gain an honest livelihood; and all such as spend their time and property in public houses to the neglect of their proper business," violates no provision of our state constitution; and, in *Portland* v. *Bangor*, 42 Maine, 403, that the expenses thus incurred for the support of either of these classes of persons while thus confined in the workhouse, are in contemplation of law, pauper supplies, and may be sued for and recovered as such of the town or city where such persons have their settlements.

If such an arbitrary exercise of power violates no provision of our state constitution, it very clearly violates the fourteenth amendment of the federal constitution. That article declares that no state shall deprive any person of life, *liberty*, or property, without due process of law; and while it may not be easy to determine in advance what will in every case constitute due process of law, it needs no argument to prove that an *ex parte* determination of two overseers of the poor is not such process. *Dunn* v. *Burleigh*, 62 Maine, 24.

If white men and women may be thus summarily disposed of at the north, of course black ones may be disposed of in the same way at the south; and thus the very evil which it was particularly the object of the fourteenth amendment to eradicate will still exist.

The objection to such a proceeding does not lie in the fact that the persons named may be restrained of their liberty, but in allowing it to be done without first having a judicial investigation to ascertain whether the charges made against them are true. Not in committing them to the workhouse, but in doing it without first giving them an opportunity to be heard.

If the decisions in Nott's case, and in *Portland* v. *Bangor*, above cited, were correct when made, the power therein sanctioned can be exercised no longer. It is abrogated by the fourteenth amendment of the federal constitution; and was at the time when the proceedings on which this action is founded were had. The proceedings being illegal, the action cannot be maintained. The ver-

dict upon the undisputed facts of the case is contrary to law. It must therefore be set aside. *Motion sustained.*

Verdict set aside.

New trial granted.

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

PORTLAND, SACO & PORTSMOUTH R. R. Co., *vs.* BOSTON & MAINE R. R. Co.

Cumberland, 1873.—May 16, 1876.

Railroad. Constitutional law. Pleading. Trial.

The act of February 4th, 1872, c. 32, which prohibits any railroad company from constructing or maintaining any track or running any engines or cars on any street or highway so near any depot of any other railroad as to endanger the safe and convenient access to such depot and the use of it for ordinary depot purposes, being only a public regulation for the safety of the public, no constitutional objection exists against its application to a road chartered before its passage.

The rule of court, 59 Maine, 605, by which the judgment on a demurrer to a bill in equity is made final, was mainly intended to prevent the filing of demurrers intended only for delay. When good cause is shown, the court at *nisi prius*, have power to allow a repleader upon terms.

BILL IN EQUITY.

J. H. Drummond, for the defendants, argued in support of the demurrer to the bill.

The bill is founded upon the act approved Feb. 24th, 1872, which took effect on the day of its approval.

This statute does not apply to the Boston & Maine Railroad. Their charter to construct a railroad through North Berwick became a law on the date of its approval, February 17th, 1871. By that charter the defendants were obliged to locate their railroad within one year from the date of approval; that year expired February 17th, 1872, just one week prior to the passage of the statute of 1872, on which this bill is founded.

A statute is not to be held retrospective when it affects rights,

unless such shall be the necessary construction. *Given* v. *Marr*, 27 Maine, 212; *Veazie* v. *Mayo*, 49 Maine, 156, see especially p. 158; *Welcome* v. *Leeds*, 51 Maine, 313.

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

APPLETON, C. J. The defendants have both demurred and answered to the complainants' bill, but the cause has been argued before us on the demurrer alone.

The act of February 4th, 1872, c. 32, which prohibits any railroad company from constructing or maintaining any track or running any engines or cars on any street or highway so near any depot of any other railroad as to endanger the safe and convenient access to and use of such depot for ordinary depot purposes, can be regarded only as police regulation for the safety of the public. No constitutional objection is raised against its validity.

The bill alleges that the defendants are about constructing a railroad in direct violation of the provisions of this section. The demurrer admits the truth of these allegations. It must therefore be overruled.

The rule of court., 59 Maine, 605, by which the judgment on a demurrer to a bill in equity is made final was mainly intended to prevent the filing of demurrers, intended only for delay. When good cause can be shown, the court at *nisi prius*, have ample power to allow a repleader upon just and reasonable terms.

Demurrer overruled.

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

WALTON, J. I concur, but inasmuch as the location of the railroad has been permanently changed and ought not to be reinstated, I think it would be better to make the judgment of the court final and not allow a repleader.

PATRICK MORGAN *vs.* MANIS BOYES.

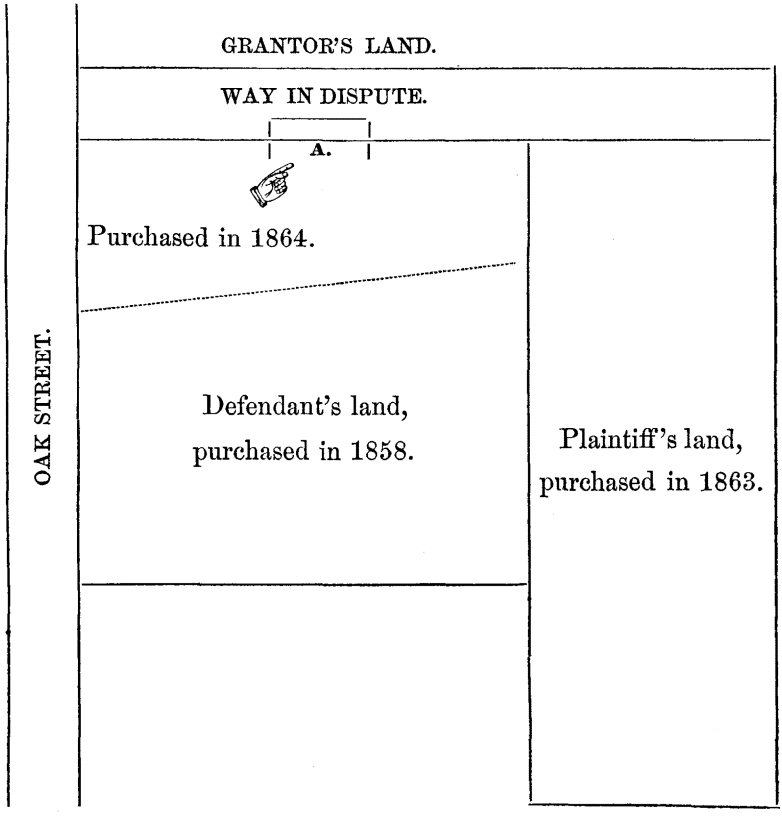
Cumberland, 1875.—June 6, 1876.

TRESPASS *quare clausum fregit* will not lie in favor of one who has a right of way across a proprietor's land against another for using the way under permission of the proprietor.

Thus: A. and B. owned adjoining lots purchased of the same proprietor who covenanted with A. to open a way on one side of both lots to the public street for A.'s use and then gave B. verbal permission to use it also. A. obstructed B.'s entrance thereto and brought trespass *quare clausum fregit* against B. for removing the obstruction; *held*, that the action would not lie.

ON REPORT from the superior court.

TRESPASS *quare clausum fregit.*



☞A. At this point was a gate, which the defendant used to enter upon the way in dispute. The plaintiff built a fence just inside of it, so as to prevent the defendant from passing through. The defendant removed it, and this removal is the act complained of as a trespass. The plaintiff claims the right to the exclusive use of the way, denying the defendant's right to enter upon it at all.

F. O. J. Smith, for the plaintiff.

J. C. Cobb & F. M. Ray, for the defendant.

WALTON, J. This is an action of trespass *quare clausum fregit.* The only question is whether the plaintiff's possession, or right of possession, is such as will support the action. We think it is not. He has only a right of way over the *locus in quo.* Such a right does not carry with it a right to the exclusive possession of the land. The owner may still use it for any purpose which does not materially impair, nor unreasonably interfere with its use as a way. He may use it as a way himself, or permit others so to use it. The defendant had such permission so to use it. His entry was not therefore a trespass. Certainly it was not a breach of the plaintiff's close. It in no way interfered with the plaintiff's use of it as a way. Nor was the removal of the obstruction, placed there by the plaintiff for the express purpose of preventing the defendant's use of the way, a trespass. The obstruction was a nuisance, and the defendant had a right to remove it.

Judgment for defendant.

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

SIMEON K. YEATON *et ux. vs.* LEONARD B. CHAPMAN.

Cumberland, 1875.—June 6, 1876.

Trial. Evidence. Words.

Cumulative evidence offered by the plaintiff, after the defendant has closed his evidence, may be excluded if the court, (not the party,) has seasonably notified counsel that such a course will be pursued. No particular form of notice is necessary. Any remark will be sufficient, which conveys to counsel the information that such a rule will be enforced.

Where the plaintiff, in support of his action, called a witness, who testified to statements made by the defendant, in a conversation, and rested his case, and the defendant testified, giving a contradictory version of it, further evidence on the part of the plaintiff to the same conversation, was *held* to be cumulative, and not rebutting.

ON MOTION AND EXCEPTIONS from the superior court.

SLANDER for calling the plaintiff's wife, a whore.

The plaintiffs introduced a witness, Leach, who testified to a conversation between Chapman, the defendant, and one Winslow, and that in the summer of 1873, he heard Chapman say something about searching the Brewer House, (occupied by plaintiffs,) for liquors, and that he said he found nothing but whores. The plaintiffs proposed to rest their case. The defendant's counsel gave notice that they should ask that the plaintiffs be confined to strictly rebutting evidence.

The presiding justice said, "I suppose the counsel understand the rule." The counsel for the plaintiffs thereupon introduced other evidence, but nothing as to the conversation testified to by Leach. The defendant then testified to his conversation with Winslow, contradicting Leach. The plaintiff thereupon called Winslow, for two purposes: to sustain Leach, and to contradict Chapman. The court excluded the evidence. The plaintiffs, the verdict being for the defendant, excepted.

B. & A. W. Bradbury, for the plaintiffs, contended that Winslow's testimony should have been admitted, because he was not notified by the court that the rule would be enforced, and further, that though the evidence was cumulative as to Leach, it was rebutting as well, for it would impeach Chapman.

T. B. Reed, for the defendant.

WALTON, J. Two questions are presented for consideration.

I. Is the verdict so clearly against the weight of evidence as to require us to set it aside. We think it is not.

II. Was the testimony of John T. Winslow properly excluded. We think it was. The plaintiffs, in support of their action, relied upon an alleged statement of the defendant. They called a witness, who gave his recollection of the conversation. They had another witness present, who heard the conversation, but they did not then call him. After they had rested their case, and the defense had been heard, and the defendant had given his recollection of the conversation, (which differed materially from that given by the plaintiffs' witness,) they proposed to call their other witness, (John T. Winslow,) and examine him in relation to it. The defendant objected, upon the ground that the evidence would be cumulative, not rebutting. The objection was sustained, and the evidence excluded. We think the exclusion was proper. The evidence related to a fact on which the plaintiffs relied in support of their action. It did not relate to new matter brought forward by the defendant. It related to a fact first introduced into the case by the plaintiffs, and on which they relied in support of their action, and in relation to which they had already examined one witness. The testimony of another witness to the same fact, would, therefore, be cumulative, not rebutting evidence. And if the plaintiffs were seasonably notified that when they had once rested their case, and the defense had been heard, they would be confined to rebutting evidence, the evidence was properly excluded. That such notice was seasonably given, we cannot doubt. When the plaintiffs' counsel first proposed to rest their case, the defendant's counsel stated that he should ask to have them confined strictly to rebutting evidence; and the presiding judge replied that he supposed the counsel understood the rule; and thereupon, the plaintiffs' counsel, instead of resting their case, as they at first proposed, proceeded to call another witness; and afterwards, when the evidence under consideration was objected to as cumulative, and not rebutting, they did not object to want of notice,

but claimed that it was rebutting. We cannot therefore doubt that the plaintiffs' counsel understood that when they had once rested their case, and the defense had been put in, they would be confined to rebutting evidence.

Motion and exceptions overruled.

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

JOSEPH RIDLON *et al. vs.* CHARLES H. CRESSEY and trustees.

Cumberland, 1875.—June 6, 1876.

Attachment. Insolvency.

Prior to the passage of the act of 1875, c. 39, an attachment of real estate was dissolved by the death of the debtor and a decree of insolvency; and attachments already dissolved were not restored by that act.

An act that should undertake to restore an attachment already dissolved, where the property had been conveyed to a *bona fide* purchaser, would be unconstitutional and void.

R. S., c. 66, §§ 16 and 17, and act of 1875, c. 39, construed.

ON EXCEPTIONS from the superior court.

ASSUMPSIT. The real estate of the defendant was attached on the writ, and subsequently by him conveyed by deed of warranty. The action was defaulted, December term, 1870, and continued for judgment. The death of the defendant was suggested, December term, 1874. Emeline Cressey, administratrix, appeared January term, 1875, and suggested the insolvency of the estate, which had, on the same month, been duly decreed insolvent by the probate court. The plaintiffs thereupon filed a motion, representing "that upon the writ in said case, there is a legal and subsisting attachment of real estate, made during the lifetime of said intestate, Charles H. Cressey, which real estate said Charles sold or conveyed after said attachment, and subject thereto, and no title or interest thereto, was in said Charles at the time of his death, and the same cannot become assets belonging to his estate, to be distributed among his creditors. They therefore pray for judg-

ment to be entered, and execution to issue, in the same form as if the estate were solvent, for the purpose of levying the same on the said real estate thus attached."

The presiding judge allowed the motion, and the defendants excepted.

G. B. Emery, for the defendant.

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

WALTON, J. Execution cannot issue in this case, as prayed for. The judgment, if one is rendered, must be satisfied in the manner provided in cases of appeal; that is, it must be entered on the list of debts entitled to dividends; it cannot be satisfied by a levy on real estate. R. S., c. 66, §§ 16 and 17. The decree of insolvency dissolved the attachment. R. S., c. 81, § 65. *Bullard* v. *Dame*, 7 Pick., 239. *Parsons* v. *Merrill*, 5 Metc., 356. And the act of 1875, c. 39, did not restore it for two reasons; first, the action was then pending, and actions pending at the time of the passage of an act, are not affected by it. R. S., c. 1, § 3; second, an act that should undertake to restore an attachment already dissolved, and where the property had been conveyed to a *bona fide* purchaser, would be unconstitutional and void. And we may add, that there is nothing in the act showing any intention on the part of the legislature, that it should have a retrospective effect. *Exceptions sustained.*

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

PATRICK O'MALIA *vs.* EBEN WENTWORTH.

Cumberland, November 4, 1875.—June 13, 1876.

Truancy. Habeas Corpus. Complaint.

The municipal court of the city of Portland has jurisdiction of the offense of truancy.

The warrant for the arrest of a truant may be served by a truant officer.

The sentence for truancy may be to the reform school; and the alternative sentence required by the statute may be to the house of correction.

Execution of the sentence may be delayed for such reasonable time as the court thinks proper, as such delay will only shorten the term of imprisonment, all sentences to the reform school being during minority.

Complaints made to the municipal court of the city of Portland need not contain a recital of the city by-laws on which they are founded.

An application for a writ of *habeas corpus*, to obtain the release of one imprisoned on criminal process, is addressed to the sound discretion of the court; and the writ will not be granted unless the real and substantial merits of the case demand it. And in examining to see whether the imprisonment is or is not illegal, the court will not, as a rule, look beyond the precept on which the prisoner is detained. The writ will not be granted for defects in matters of form only; nor can it be used as a substitute for an appeal, a plea in abatement, a motion to quash, or a writ of error.

ON EXCEPTIONS from the superior court.

ON PETITION for habeas corpus by the plaintiff, a minor under sentence of confinement in the reform school against the superintendent thereof.

The justice of the superior court ruled *pro forma*, denying the right of the petitioner to discharge, and the petitioner excepted.

C. E. Clifford & W. H. Clifford, for the petitioner.

C. F. Libby, for the defendant.

WALTON, J. This is an application for a writ of *habeas corpus* to obtain the release of Patrick O'Malia, now detained at the reform school in Cape Elizabeth, for truancy.

I. It is claimed that his detention is illegal because the warrant on which he was originally arrested and brought before the municipal court for trial, was served by a truant officer. We think the truant officer was the proper person to make the arrest. Truant officers alone are to make complaints and execute the judgments of the court. R. S., c. 11, § 14. We think the word "judgments," as here used, is not limited to the sentence, or final decree in the case; we think it is used in a broader sense, and includes an interlocutory as well as a final judgment; the determination to have the truant arrested and brought to trial, as well as the determination to send him to the reform school. Surely, it could never have been the intention of the legislature to employ two officers in so small a business, one to arrest the truant, and another to commit him.

II. The detention is claimed to be illegal, because the offense of truancy is not sufficiently described in the complaint and warrant. We cannot look at the complaint and warrant. We can only examine the precept by which he is detained. If on inspection thereof, he appears to be lawfully imprisoned, or restrained of his liberty, the writ must be denied. R. S., c. 99, § 8.

III. Another objection to the complaint is that, it does not contain a recital of the city ordinance on which the prosecution is founded. The same answer lies to this objection as to the one just considered. We cannot look at the complaint to see whether it is sufficiently formal or not. And another sufficient answer is that, the act establishing the municipal court of the city of Portland expressly declares that in prosecutions on the by-laws thereof, such by-laws need not be recited in the complaint. Act of 1856, c. 204, § 4.

IV. Another objection to the legality of the imprisonment is that it should have commenced earlier. It appears that execution of the sentence was suspended "upon the good behavior of the respondent," and that he was not actually committed to the reform school till nearly a year after the sentence was passed. We think his present imprisonment cannot be held to be illegal simply because it ought to have commenced earlier. As all sentences to the reform school are during minority, the delay could not operate to the prejudice of the petitioner. It only made his imprisonment so much the shorter.

V. Another objection is that there is a variance between the mittimus and the complaint and warrant; that the mittimus contains an averment that the accused was a boy between the ages of eight and sixteen years, while the complaint and warrant contain no such averment. The mittimus is correct. Every commitment to the reform school should contain such an averment; for it is only boys between those ages that can legally be sent to the reform school. And as already stated, we cannot look at the complaint and warrant to see whether they contain this averment or not. We can only look at the mittimus.

VI. Another objection is that the alternative sentence was illegal. The alternative sentence was thirty days in the house of cor-

rection. It is claimed that it should have been a fine of twenty dollars. As the boy was actually received at the reform school, and is there now, it is not important to inquire whether imprisonment in the house of correction would or would not have been legal. The statutes and by-laws bearing upon the question are somewhat obscure. But we have carefully examined the question and we are satisfied that the alternative sentence was authorized.

We have now examined all the grounds on which it is claimed that the petitioner's detention at the reform school is illegal. In our judgment none of them are sufficient to justify his release. It was long ago settled that persons imprisoned on criminal process are not to be released on *habeas corpus* for defects in matters of form only. The writ cannot be used as a substitute for a plea in abatement, a motion to quash, or a writ of error. Nor can it be substituted for an appeal. An application for the writ is addressed to the sound discretion of the court; and the writ will not be granted unless the real and substantial justice of the case demands it.

Exceptions overruled.
Writ denied.

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

THOMAS B. REED, attorney general, by information, *vs.* CUMBERLAND & OXFORD CANAL CORPORATION.

Cumberland, 1875.—July 5, 1876.

Information. Exceptions. Corporations. Practice. Constitutional Law.

A party has no legal or constitutional right to file a plea or answer, or to claim a trial by jury, after the time has elapsed within which, according to the regular course of proceeding in the court where he is called to answer, he should have done it. The refusal by the presiding judge to grant him further time for such purpose is matter of discretion, and not the subject of exceptions.

An information in the nature of a *quo warranto*, presented by the attorney general, acting *ex officio*, in behalf of the state, is the appropriate remedy in cases of nonfeasance, or malfeasance, abuse of power, or misuse of privilege by a corporation chartered by the state; and judgment of ouster and seizure against the delinquent, is the proper judgment thereon.

On exceptions.

Information in the nature of a *quo warranto.*

The case is presented here on a second bill of exceptions. The case as presented on the first bill of exceptions is found on page 53 of this volume.

F. O. J. Smith, *B. Bradbury*, and *C. P. Mattocks*, for the defendants.

T. B. Reed, for the state.

Barrows, J. This process, which is in substance and in fact, one instituted and urged in behalf of the state, was commenced by the filing of an information in the nature of a *quo warranto*, by the then attorney general, acting *ex officio*, at the April term of the court in this county, A. D. 1872.

The docket entries and other papers which make part of the case, show that the corporation was called upon to appear and plead at the October term, 1872; but instead of doing so, filed a motion to dismiss, which was overruled, and they were ordered to answer on the first day of the January term then next ensuing.

To this ruling and order they excepted, and without making any answer as required by the order, awaited the result of the hearing on their exceptions by the law court.

At the July law term, 1874, their exceptions were overruled; but lest the defendant corporation might thereby be precluded from setting up some defense that had merits, the extraordinary favor was shown of allowing them a further time of sixty days before proceeding to judgment as upon *nil dicit.*

The sixty days were suffered to elapse, and no movement indicating the existence of any defense was made.

Some time during the October term, 1874, instead of filing a plea in any proper issuable form, they placed upon the files, without leave granted, or any further extension of time by the court, a paper of an anomalous character, partly in the form of an answer in chancery, and partly a demurrer. The exceptions state that the defendants' counsel averred that "the delay was through inadvertence, and claimed the right, and asked the privilege of then

filing the answer," and that they also "claimed the right of trial by jury, as guarantied by the constitution of the United States."

The right, under the existing circumstances, was not admitted, nor the privilege granted, and at the January term, 1875, the motion of the state that the court proceed to judgment of ouster and seizure forthwith, by reason of the default of the defendant, was allowed.

And to this the defendants excepted; and thus the case is again presented to this court. We see no merit in the exceptions. The presiding judge might properly have refused to allow them. The refusal to grant further time to plead, was matter of discretion, and not the subject of exceptions. *Thornton* v. *Blaisdell*, 37 Maine, 190. *Franklin Bank* v. *Stevens*, 39 Maine, 532.

There are no constitutions or laws which give parties the right to file answers or pleas, or to claim trial by jury, after the time has elapsed, within which, according to the regular course of proceeding in the court where they are called to answer, they should have done it. The recusant is then at the mercy of the court.

In the present case that mercy had been abundantly exercised, and the defendant had been indulged to the very verge of a denial of justice to the state, before the order now excepted to, was made.

The docket entries upon the county and district dockets should be so corrected as to entitle the case properly, thus:

"The State of Maine, by information of Thomas B. Reed, attorney general, *vs.* The Cumberland & Oxford Canal Corporation."

The process itself seems to be regular, and to be the appropriate remedy for nonfeasance or malfeasance, abuse of power, or misuse of privilege, by a corporation chartered by the state; and the judgment ordered was the proper judgment. *Commonwealth* v. *Union Ins. Co.*, 5 Mass., 230. *Commonwealth* v. *Tenth Mass. Turnpike Corp.*, 5 Cush., 509. *Same* v. *Same*, 11 Cush., 171.

Exceptions overruled.

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

S. D. BURBANK *et als. vs.* JOHN W. MCDUFFEE.

Cumberland, 1875.—July 3, 1876.

Peddler.

The statute, c. 44, § 1, does not apply to goods forwarded from without the state, upon the order of a purchaser, though such order was procured through an agent of the sellers, who was unlawfully traveling, and offering goods against the prohibition of R. S., c. 44, § 1.

Where the plaintiffs in New York, forwarded goods to the defendant in Maine, on his order, procured by their unlicensed traveling agent, *held*, in a suit for the price of the goods, that the fact that the agent in procuring the order was in violation of R. S., c. 44, § 1, because not licensed, was no defense, and that for goods thus forwarded upon the order of the purchaser, the sellers were entitled to recover.

The person unlawfully traveling and selling, or offering goods for sale, without license, and against the provisions of R. S., c. 44, § 1, is alone liable to the penalty, and the goods unlawfully carried by him, are alone subject to the forfeiture therein prescribed.

ON EXCEPTIONS from the superior court.

ASSUMPSIT for jewelry in two items, forwarded by the plaintiffs from their office in New York, to the defendant at Lewiston, the first lot charged March 21, 1874, at $31.50, the second, April 1, 1874, at $9.83.

The justice presiding who tried the cause without a jury, and with right of exception, allowed the second item, but disallowed the first, under a ruling to which the plaintiffs excepted, which is stated in the opinion.

N. Morrill and *G. C. Wing*, for the plaintiffs.

M. P. Frank, for the defendant.

APPLETON, C. J. These plaintiffs received from the defendant an order dated February 28, 1874, for certain goods which they forwarded on 21st March, to the amount of $75.38. The defendant returned goods to the value of $43.88, leaving a balance of $31.50 due.

The plaintiffs received a second order dated March 26, for cer-

tain articles of the value of $9.75, which they forwarded the defendant on April 1, 1874, in a registered letter.

It appearing that one Chandler, a traveling salesman for the plaintiffs, procured the defendant to give the first order, the presiding judge ruled that under the provisions of R. S., 1871, c. 44, § 1, the plaintiffs could not recover for the goods so ordered and retained, and rendered judgment for the plaintiffs, only for $9.83, being for the goods forwarded April 1, 1874.

By R. S., 1871, c. 44, § 1, "no person, except as hereinafter provided, shall travel from town to town, or place to place in any town, on foot, or by any kind of land or water conveyance, carrying for sale, or offering for sale, any goods, wares or merchandise, whole or by sample, under a penalty of not less than fifty, nor more than two hundred dollars, and the forfeiture of all property thus unlawfully carried," &c., &c.

The statute relates to hawkers and peddlers. It imposes a fine on the person traveling in violation of its provisions. It forfeits goods "unlawfully carried." It forbids the traveling and "the carrying for sale, or offering for sale," but not the selling. It does not make the sale void, unless by implication, and that a forced one. But forfeitures and the confiscation of honest debts are not to be implied. They must be the results of express legislation, and not a matter of inference. In *Harris* v. *Runnells*, 12 Howard, (U. S.) 79, it was held, that when the sale was an offense by reason of a statute, but the act itself was not immoral, and the sale itself was not declared void by the statute, there was no implication from the mere infliction of the penalty, that the contract was void.

The sale was effected by an order drawn by the defendant upon the plaintiffs. Suppose it be conceded, that the defendant gave his order by the procuration of the plaintiffs' agent, still the act does not prohibit this. In the act relating to intoxicating liquors, R. S., c. 27, § 20, "the offering to obtain, or obtaining orders for the sale of any spirituous, intoxicating or fermented liquors," &c., is made penal. But the statute under consideration has no prohibition against "offering to obtain, or obtaining orders," and imposes no penalty upon so doing. It is not for the court to inter-

polate by judicial construction, what the legislature did not deem it wise to insert.

These plaintiffs are not within the prohibitions of the section upon which the defense is based. They have violated no law. They have incurred no penalty. They are residents of another state and have not traveled in violation of any law of this state. No penalty could be recovered of them. All they have done is to forward the defendant's goods upon his order.

The forfeiture of goods is restricted to "all property thus unlawfully carried." But the goods sold the defendant were not "thus unlawfully carried." They were lawfully forwarded from New York in pursuance of the request of the defendant under his own hand and no reason can be given why he should avoid the payment of a just debt. The defense is destitute of common honesty, and it would be little to the credit of the law, if it could be sustained.

When the unlawfully traveling peddler has paid the fine imposed for his unlawful traveling and his "property thus unlawfully carried" round by him for sale has been declared forfeited, the penalties of the statute are exhausted. It would be judicial legislation to add to the penalties of the statute.

Besides, the sale was not made in this state. The defendant transmitted his order for certain goods. No contract of sale was made here. The contract was not completed till the order was accepted. The acceptance was in New York. *Sortwell* v. *Hughes*, 1 Curtis, C. C., 244. It was optional with the plaintiffs to send the goods or not.

It does not become necessary to consider whether the statute in question is constitutional or not. *Ward* v. *Maryland*, 12 Wallace, 418. *Exceptions sustained.*

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

EDWARD B. JAMES *et al. vs.* MOSES F. JOSSELYN.

Cumberland, 1875.—July 5, 1876.

Contract. Coal.

Under R. S., c. 41, § 13, providing for the weighing of coal by a sworn surveyor "unless the parties otherwise agree"; *held*, that proof that the purchaser had accepted the coal without objection, and upon presentation of the bill offered to give his note for it, and that he had paid for former lots weighed as this was by the plaintiff's book-keeper, does not amount to proof that the parties otherwise agreed.

ON EXCEPTIONS from the superior court.

ASSUMPSIT on account annexed for coal in the spring of 1873, in four items amounting to $35.55. The justice, after the evidence for the plaintiffs was out, ordered a nonsuit and they excepted.

T. B. Reed, for the plaintiffs.

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

BARROWS, J. After the plaintiffs had offered evidence tending to show the sale and delivery by them upon the defendant's orders of several little lots of stove coal as charged in the account annexed, and had rested their case, the defendant moved for a nonsuit for want of proof of a compliance with R. S., c. 41, § 13, which provides that in all sales of coal not made by the cargo the seller shall cause the coal to be weighed by a sworn weigher who shall make a certificate thereof to be delivered to the purchaser, "unless the parties otherwise agree"; and prohibits the maintenance of a suit for the price of the coal in the absence of such agreement unless the seller shall have delivered such weigher's certificate to the buyer before bringing his action.

Thereupon the court upon motion of plaintiffs' counsel allowed the case to be reopened in order to obviate the objection.

It turned out that the coal was not weighed by a sworn weigher but by the plaintiffs' book keeper, who laid certificates of the weight on the window sill of the office for the drivers of the coal carts.

The only remaining question was whether there was evidence sufficient to authorize the jury to find that the parties had "otherwise agreed"— i. e., that they had agreed to dispense with the sworn weigher and his certificate. All that the plaintiffs' counsel claim as having a tendency to show such an agreement is testimony that the defendant had bought coal more than once of these plaintiffs within the year next previous to the time when this bill accrued and had seen it weighed in the same way on their scales —had always accepted their weight; and, the fall before, on the presentation of this account had proposed to give his note for it.

But in reply to the direct question put by the court to the plaintiff, "Was there any agreement between your firm and Mr. Josselyn as to who should weigh this coal"—the plaintiff answered, "No sir; nothing whatever was said about it," and upon further questioning he declined to say that the defendant saw the coal charged in the bill weighed; and the book keeper testified that he did not know that the defendant knew he was not a sworn weigher, that he never told him he was not. Both the plaintiff and his book keeper had previously negatived the making of any agreement respecting the coal except that which arose from the delivery of the coal by them upon the defendant's orders.

The presiding judge thereupon ordered a nonsuit; and the question presented seems to be this: can the agreement of the parties referred to in § 13 be inferred from the mere fact that the purchaser has accepted the coal without objection and proposed to give his note for it, coupled with proof that he has paid for former lots weighed by the same person but without proof that he knew that such person was not a sworn weigher? Doubtless anything in the acts of the parties from which it might fairly be inferred that it was mutually understood and agreed that the purchaser would not require the coal to be weighed by a sworn weigher would be tantamount to an express arrangement to that effect.

But the proof offered here has no tendency to show that the defendant ever consented to dispense with the protection afforded by the statute, or knew that its requirements had not been fulfilled when he proposed to give his note for the account.

The report seems to have been made up in order to see if the

coal dealer can recover in cases in which the statute has been totally disregarded.

We cannot be expected to aid in thus nullifying a statute of this state. *Exceptions overruled.*

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

CUMBERLAND AND OXFORD CANAL CORPORATION *vs.* GEORGE F. HITCHINGS.

Cumberland, 1872.—August 5, 1876.

Nuisance. Trespass. Damages.

The measure of damages for a continuing nuisance, or a continuing trespass, for which successive actions may be maintained till the wrong doer is compelled to remove the nuisance or discontinue the trespass, is the loss sustained at the date of the plaintiff's writ and for which a recovery has not already been had, and not the diminution in the value of the estate.

When one wrongfully places an obstruction upon the land of another, he is under a legal obligation to remove it, and successive actions may be maintained until he is compelled to remove it.

The filling up of a canal wrongfully is a trespass for which successive actions may be maintained till the obstruction is removed.

ON EXCEPTIONS from the superior court.

TRESPASS for filling about two hundred yards of the canal bed immediately below Vaughan's bridge in 1867. The filling was admitted and justified under authority of the city of Portland in the construction of a street. The justice instructed the jury *inter alia*: "Whatever diminution there is in the value of the property by reason of the trespass is an element of damage." The defendant, the verdict being for the plaintiffs, excepted.

J. W. Symonds & C. F. Libby, for the defendants.

F. O. J. Smith, C. P. Mattocks & E. W. Fox, for the plaintiffs.

WALTON, J. It is now perfectly well settled that one who creates a nuisance upon another's land is under a legal obligation to

remove it. And successive actions may be maintained until he is compelled to do so.

In *Holmes* v. *Wilson*, 10 Ad. & E., 503, (E. C. L. R., vol. 37,) where the trustees of a turnpike road built buttresses to support it on the land of A., and A. thereupon sued them and their workmen in trespass for such erection; it was held that after notice to the defendants to remove the buttresses, and a refusal to do so, A. might bring another action for trespass against them for keeping and continuing the buttresses on the land, and that the former recovery was no bar.

And in *Bowyer* v. *Cook*, 4 C. B., 236, (E. C. L. R., vol. 56,) where the defendant was sued in trespass for placing stumps and stakes on the plaintiff's land, and the defendant paid into court 40 s., which the plaintiff took out in satisfaction of the trespass, and then gave the defendant notice, that, unless he removed the stumps and stakes, another action would be brought against him, it was held, that the leaving of the stumps and stakes on the land was a new trespass, for which another action could be brought and maintained.

And in *Russell* v. *Brown*, 63 Maine, 203, where the defendant erected a building which extended nine inches on to the plaintiff's land, it was held by this court that a second action of trespass could be maintained for the continuance of the building on the plaintiff's land, notwithstanding the recovery and satisfaction of a judgment for the original erection.

The doctrine of all these cases is, that a recovery of damages for the erection of a building, or other structure, upon another's land, does not operate as a purchase of the right to have it remain there; and that successive actions may be brought for its continuance, until the wrong doer is compelled to remove it.

And, as a necessary result of this doctrine, it has been held,—and we think correctly,—that in the first action brought for such a trespass, the plaintiff can recover such damages only as he had sustained at the time when the suit was commenced. Because, for any damage afterwards sustained, a new action may be maintained; and the law will not allow two recoveries for the same injury.

Thus, in *Battishill* v. *Reed*, 18 C. B., 696, (E. C. L. R., vol.

86,) where the defendant erected a building with eaves overhanging the plaintiff's premises, it was held that the measure of damages was not the diminution in the value of the premises, but the inconvenience suffered at the date of the plaintiff's writ. The right to maintain successive actions, as well as the measure of damages, are fully considered in this case. The same limitation upon the measure of damages is sustained in *Duncan* v. *Markley*, 1 Harper, 276; *Blunt* v. *McCormick*, 3 Denio, 283; *Thayer* v. *Brooks*, 17 Ohio, 489.

This rule is not applicable when the injury to real estate is in the nature ofwaste, as where a building is demolished or trees are destroyed or fences broken down. In such cases there is no legal obligation resting upon the wrong doer to repair the mischief he has done. He is liable only for the damages. And, inasmuch as but one action can be maintained, he is of course liable for the whole damage, prospective as well as retrospective, in that one suit.

But when something has been unlawfully placed upon the land of another, which can and ought to be removed, then, inasmuch as successive actions may be maintained, until the wrong doer is compelled to remove it, the damages, in each suit, must be limited to the past, and cannot embrace the future.

Such being the law, it is plain that the rule of damages given to the jury in this case was inappropriate.

The injury complained of was the filling up of the canal. The defendant, acting under authority from the city of Portland, had extended Commercial street over and across the canal by means of a solid embankment. No opening was left for the passage of either boats or water. Assuming that this embankment was unlawfully placed there—that the canal should have been bridged, not filled up—and we have a nuisance upon the plaintiff's land; something placed there which can, and, in contemplation of law, ought to be removed. For such an injury successive actions may be maintained till a removal is compelled. The damages must therefore be limited to such as the plaintiff had sustained at the date of the writ. The rule given to the jury, namely, that the measure of damages was the diminution in the value of the prop

erty, was inappropriate, and must have led to an erroneous result. For an injury in the nature of waste, it would have been appropriate. For an injury resulting from a continuing nuisance, it was inappropriate. *Exceptions sustained.*
New trial granted.

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

VIRGIN, J., did not sit.

SUMNER ADAMS *vs.* ALEXANDER MACFARLANE.

Cumberland, 1875.—August 5, 1876.

Pleading. Abatement. Arbitration. Trial.

The service of a writ by arrest of the defendant, will not be ground of abatement, or illegal, simply because he was not a resident, nor within the state, when the writ was made, and the oath that he was about to depart, &c., (required by R. S., c. 113, § 2, to authorize the arrest,) was taken.

A promise to pay in six months, the amount awarded by an arbitrator, is not avoided by delay of the arbitrator to make the award within that time, provided the promisor consents to the delay. Such consent is in effect a waiver of the delay.

On submission to arbitration of mutual accounts between the parties, an agreement that an annexed statement of disbursements and collections shall be taken by the arbitrator to be correct, does not preclude the arbitrator from hearing evidence in relation to items not included in such statement. The term correct in that connection does not mean complete.

A subsequent instruction in the judge's charge to the jury, will not by implication revoke a previous instruction.

Thus: where the instruction was given near the close of the charge, that "if the defendant did sign the guaranty under a misapprehension of the amount of the plaintiff's claim, and was deceived as to the amount, if he was undeceived before the hearing by the arbitrator, and by himself or his agent proceeded to the hearing with full knowledge and without objection, he cannot now be entitled to repudiate his guaranty for that cause;" *held,* that it could not be fairly construed as revoking a previous instruction to find for the defendant without further considering the case, if the plaintiff had fraudulently misrepresented or concealed the amount of his claim, but must be held to apply to and cover a case of misapprehension, mistake or self-deception only on the part of the defendant, as to the amount of liability he was incurring, that thus construed, the defendant could not complain of it.

On exceptions and motion from the superior court.

Assumpsit on a written guaranty by the defendant of performance of promises of one Cutter, a manufacturer of grindstones, and resident in Nova Scotia, of whom the plaintiff was the selling agent in the United States, three years from March 20, 1867.

On the failure of Cutter to fulfill his absolute promise to pay the amount actually due, or his alternative promise to pay what D. W. Fessenden should find due, the plaintiff then resident of Boston, sued out the capias writ in this case against the defendant, described as of Wallace, in the province of Nova Scotia. The plaintiff made the statute oath to authorize the arrest at Portland, May 12, 1874, and on May 19, 1874, the defendant was found in this state, arrested at Portland, and released on bond.

At the return term, September, 1874, the defendant pleaded in abatement, because, that at the time when said writ was sued out, and from thence always, until, and at the time, when said Adams made oath, on the twelfth day of May, 1874, and during the whole of said day, said Macfarlane was neither a resident of said state, nor within its limits, and never had been a resident of said state, nor had been for a long time, to wit, for two months, within the limits thereof, but was at all times in the Dominion of Canada, and a citizen and resident thereof.

To the ruling of the justice on the plaintiff's demurrer that the plea was bad, the defendant excepted.

At the December term, 1874, there was a trial at which the defense relied on was the fraud of the plaintiff in understating his claim, and where the validity of an award as a measure of damages was contested, because not seasonably made, because not accompanied with a detailed statement, and on the ground that the arbitrator took into account matters not submitted to him.

The verdict was for the plaintiff for $13,975.96, (the amount of the award and interest,) which the defendant moved to have set aside. He also filed other exceptions which, together with a more full statement of the facts, appear in the opinion.

W. L. Putnam, for the defendant.

J. S. Abbott and *N. Cleaves*, for the plaintiff.

BARROWS, J. The case is presented by the defendant upon two bills of exceptions, and a motion to set aside the verdict as against law and evidence. The action is assumpsit on a contract subscribed by the defendant.

The first bill of exceptions was filed to the overruling of the defendant's plea in abatement, to which the plaintiff demurred.

This plea is not one which we feel called upon to favor in furtherance of justice. *Hazzard* v. *Haskell*, 27 Maine, 549.

The papers and testimony in the case show that the contract declared on was entered into and executed in this state, that then and for some time afterwards, the plaintiff was a resident here, and that much of the business was transacted here. It was taking no unjust advantage of the defendant, and might well be supposed to be for the interest of both parties to have the controversy investigated here where much of the testimony was likely to be found.

If there is such a service as to give the court jurisdiction of the defendant the writ should not abate.

The cause of abatement set forth in the plea is, "that at the time when said writ was sued out, and from thence always, until, and at the time when said Sumner Adams made oath that said Adams had reason to believe, and did believe said Macfarlane was about to depart, and reside beyond the limits of this state, as is certified on said writ, to wit, on the twelfth day of May, in the year of our Lord eighteen hundred and seventy-four, and during the whole of said day, said Macfarlane was neither a resident of said state, nor within its limits, and never had been a resident of said state, nor had been for a long time previous, to wit, two months within the limit thereof, but was at all said times in the Dominion of Canada, of which said Dominion at all said times, said Macfarlane was a citizen and resident."

Now, unless the plea contains matter, which, of itself, and without resorting to any inference of fact, is sufficient ground of abatement, alleged with such precision, and certainty as to exclude all such supposable matter as would, if alleged on the opposite side, defeat it, if it is bad on demurrer. *Tweed* v. *Libby*, 37 Maine, 49. *State* v. *Sweetsir*, 53 Maine, 438.

The supposed cause of abatement is in substance an insufficient service—insufficient, it is claimed, because the arrest was unlawful.

If the service is by an unlawful arrest, it seems to be good ground of abatement if seasonably pleaded, or upon seasonable motion, if the defect or illegality appears in the record. *Cook* v. *Lothrop*, 18 Maine, 260. *Sawtelle* v. *Jewell*, 34 Maine, 543. *Shaw* v. *Usher*, 41 Maine, 102. *Bailey* v. *Carville*, 62 Maine, 524. *Willington* v. *Stearns*, 1 Pick., 497.

If it be conceded that we may go beyond the averments in the plea, and look into the record to ascertain that the service was by arrest, and that the plaintiff was a resident of Massachusetts at the time when the writ was sued out, still we think there is not enough to show the arrest illegal.

If it be true that the acceptance of jurisdiction in personal actions between foreigners depends upon comity and sound judicial discretion, so far as we know, that comity and discretion are always favorably exercised when the court has actual jurisdiction of the parties and the subject matter of the suit. It must be a case where there was at least reason to suspect a disposition to oppress, or to obtain an unfair advantage on the part of the plaintiff, which would induce us to close our doors to a citizen of a neighboring state, claiming redress against another non-resident upon whom personal service within our borders had been made in a suit upon a contract, made in this state, and mainly to be executed here. The question remains whether the facts alleged in the plea in abatement, exclude the supposition of a lawful arrest. By R. S., c. 113, § 2, it is provided that "any person, a resident within this state or not, may be arrested and held to bail . . . . on mesne process on contract express or implied, if the sum demanded amounts to ten dollars," upon certain conditions which are substantially identical with those prescribed in the Revised Statutes of 1841, c. 148, § 2. The construction of that section was before the court in *Marston* v. *Savage et al.*, 38 Maine, 128, and the court held that the proof of the facts necessary to the exercise of the right to arrest, is the oath of the creditor, his agent, or attorney, that he has reason to believe and does believe that they exist, and that when no fraud is imputable to the credi-

tor, and the certificate required by the statute is indorsed upon the writ, an arrest may be legally made, and the obligors in the bond given, cannot be permitted to defend, by showing that in point of fact, the debtor was not about to depart and reside beyond the limits of the state, &c.

It would seem that the arrest of either a resident or non-resident of the state is legal, if the certificate indorsed on the writ shows that the plaintiff has made the requisite oath, unless the plaintiff's good faith in so doing is impeached.

Now, it is not averred in the plea under consideration, that the plaintiff did not have good reason to believe, and did not believe the various facts alleged in the certificate. The only averments are of certain facts apparently inconsistent therewith. But, as we have seen, the validity of the arrest is not affected by the simple non-existence of those facts where the plaintiff has acted in good faith, when he made oath to his belief and reason to believe therein.

The plea is insufficient in substance. It presents no facts which are decisive against the validity of the arrest. The case which the defendant's counsel has ingeniously argued, of a "non-resident lurking upon our borders prepared to arrest and impede other non-residents invited to cross our territory," is not presented by it.

The demurrer to the plea was rightly sustained, and the first bill of exceptions must be overruled.

The case developed at the trial was this: The defendant was trustee for the parties interested in a Nova Scotia grind-stone quarry, which one Cutter was operating under a lease. In March, 1867, the plaintiff became Cutter's selling agent in this country, under a written agreement, and was to receive as his compensation, his expenses and one-half the profits under certain limitations, and with certain exceptions, and was to have a lien upon the stones and funds in his possession to secure him for his disbursements and liabilities, and for advances which he agreed to make, not to exceed $5000 at any one time. The following year by a supplementary agreement, Cutter agreed in writing to allow the plaintiff upon settlement, "$2 per ton on all stones he has sold, over and above the expenses of same, if the amount in the

agreement which I entered into with him, should not prove satisfactory upon final adjustment."

In December, 1869, the plaintiff was liable upon his acceptances of Cutter's drafts, to an amount exceeding $10,000, and Cutter was largely indebted to him for expenses incurred, interest, and commissions. The plaintiff was unable to meet the drafts as they fell due, and one or more of them was protested. He commenced suit against Cutter, and attached stones which had been sent to this country for sale, the value of which was at that time variously estimated by the parties to the contract presently to be noticed, at from $12,000 to $18,000. Under these circumstances, the defendant, Macfarlane, in whose favor there was a draft for $1600, and who seems to have indorsed the other drafts for Cutter, came here with Cutter, and a member of the firm of A. W. Masters & Co., in whose favor $6100 of the outstanding acceptances had been drawn, and after several days' examination of the plaintiff's books and accounts in pursuance of a written contract drawn up at the request of this defendant, the plaintiff released his attachment, discontinued his suit, and gave up his lien on the stones in his possession, which went forthwith into the hands of this defendant, Macfarlane, and Masters & Co., who, waiving all demands or notice to themselves, subscribed a written, absolute, and unconditional guaranty, (indorsed upon the contract) of performance by Cutter of his promises and agreements therein contained. Upon this contract of guaranty this suit is brought. It is apparent that the defendant and Masters & Co., while they were nominally only sureties for Cutter, had such a direct interest to procure from the plaintiff the release of his attachment and lien upon Cutter's property, in order that it might be applied to the payment of their own claims and immediate liabilities, that as to him they stood rather in the relation of principals, to whom the consideration moved from him through Cutter. In any event, however, they are to be bound only according to the terms of their contract, and it is necessary to ascertain what they did actually promise and undertake.

The contract sets out the relation sustained by the plaintiff to Cutter, under the agreements just recited, (which are referred to)

and the fact that the plaintiff had rendered services, made advances, and accepted drafts, on Cutter's account, for which Cutter was indebted to him to an amount as yet unliquidated, with the further facts of the commencement of the plaintiff's suit, and the attachment of property to enforce his lien under the original contract; whereupon in consideration of the premises, and plaintiff's promise to discontinue his suit, discharge his attachment, release his lien, and surrender possession of the property, and to discount one-half of the amount due him for compensation for his services as agent, since January 1, 1868, and to make reasonable efforts to collect what remained due for grind-stones sold and delivered under his agency, Cutter on his part promised that he would, on or before May 1, 1870, "adjust and settle all the mutual accounts pertaining to the aforesaid business . . . including interest and services and expenses, taking the annexed statement of disbursements and collections as correct to this date," and that he would pay the full amount that should be found due to said Adams upon such adjustment, less one-half the amount for Adams's services, since January 1, 1868, in three and six months from May 1, 1870, and would cause Adams's acceptances to be surrendered to him, or save him harmless thereon; and that in case he should fail to perform his agreement to adjust and settle the accounts before May 1, 1870, "then the said Adams may cause a statement and adjustment of said accounts to be made by Daniel W. Fessenden, of Portland, by the fifteenth day of May, 1870, or as soon thereafter, as the same can be completed," which adjustment made without notice to Cutter was to be as binding upon the parties as if made by themselves in person, and the amount thereof less the discount of fifty per cent. on the services before mentioned, was to be paid in three and six months from May 1, 1870, with interest thereon from that date.

It was "in consideration of the premises, and of the guaranty of the performance of said Cutter's aforesaid contract by Alexander Macfarlane and A. W. Masters & Co.," that the plaintiff entered into this agreement.

The first count in the writ alleges the foregoing facts and agreements, performance by plaintiff, and failure to perform on the

part of Cutter, and an adjustment made by Fessenden, unavoidably delayed until December 22, 1870, of the causes of which delay Cutter and defendant were cognizant and assented thereto; that said statement and adjustment were made upon notice to Cutter, and an appearance by him with counsel, and that the award was seasonably made known to all the parties.

The second count sets out the facts and agreements as stated in the first count, prompt and seasonable proceedings on the part of the plaintiff, to procure an adjustment by Fessenden, and claims that in case his award is invalid by reason of the delay in making the same, the defendant is nevertheless bound by the terms of the agreement to respond for Cutter's failure to adjust the accounts and pay what was in fact due.

The verdict was for the amount of the award made by Fessenden. The defense was based upon an allegation that plaintiff procured the defendant's guaranty by falsely representing that his claim did not exceed $4000 or $5000. The defendant further claimed that in any event the award was not binding, because not seasonably made, because no statement was returned with it, and because it included matters not covered by the submission. Was the award valid so as to constitute the proper measure of damages?

The jury were duly instructed that they "must be satisfied in order to render it binding, that it included only, and had reference only to matters submitted to him by the agreement of reference."

It is strenuously and ingeniously argued by defendant's counsel that certain items which do not appear in the schedule annexed to the contract of December 15, 1869, (while they evidently form part of the mutual accounts pertaining to the business between Cutter and the plaintiff,) were beyond the jurisdiction of Mr. Fessenden, that they help swell the item of interest, and are not capable of being separated from the award, which must therefore be regarded as altogether invalid. He claims that they are excluded by the phrase in the contract, "taking the annexed statements of disbursements and collections as correct to this date," which phrase, he argues, cuts off all claim for any disbursement previous to December 15, 1869.

But we cannot give it this effect. "Correct" could not have meant complete, so as to exclude all omitted items of disbursements or collections; for the business of the agency was to cease from that time, except the collection of bills for stones previously sold and delivered, and there could have been nothing to which the stipulation that Cutter should "adjust and settle all the mutual accounts," could apply, if nothing remained to be done but the mere arithmetical computation of interest and commissions.

We think that the meaning and intent of the phrase is not that the schedules should be peremptorily deemed to include all that was to be the subject of adjustment, except the amount of interest and commissions, and the credits to be given for collections subsequently made, but that the schedules should be taken to be correct as far as they went, and as to the items therein specified. The defendant argues, that the stipulation that a particular claim of Adams for expense on stone sold Isaiah Blood, (mention of which is made in the schedules,) should be the subject of further investigation, is tantamount to an exclusion of all other claims for expenses up to that time. This does not follow. It was because the stone sold to Blood, and the claim for duties and expenses on it appeared in the schedule, that it became necessary to provide specially for the correction of that item of an account, which was in all other respects to be taken as agreed to, so far as its statements went.

The tenor of the agreement to abide the determination of Mr. Fessenden, and pay the amount which should be found due by him in case Cutter did not adjust and settle before the first of May, is such, that mistakes made by him would not be the subject of inquiry or revision here. Nor does the ingenuity of counsel satisfy us that any were made, if they were subject to correction.

Another objection urged against the validity of the award is, that notice of the amount found due was not accompanied by a detailed statement of the items. As to this, the instruction was, that the award would not be vitiated for want of such statement, if neither party had called for it, and Mr. Fessenden had had the means of furnishing it at any time when requested. The case shows that this was the fact; that the statement which accompa-

nied the contract, and which was agreed to as correct, embodied the greater part of the details; that of the few remaining items not many were in dispute; and we think the call in the agreement is sufficiently answered by the preservation of the materials for the statement, without making such statement a part of the notice to the parties.

It is further objected that the award was not seasonably made, that it should have been made within three months after May 1, 1870, in order to enable Cutter or the defendant to pay according to the terms of the contract.

As the adjustment was to be made by Mr. Fessenden "by the fifteenth day of May, A. D. 1870, or as soon thereafter as the same can be completed," a reasonable time was allowable having regard to the character of the work and the position of the parties. The jury were instructed hereupon that if the question depended merely upon the construction of the papers in the case the award must be held not seasonably made and that the material inquiry here was whether there had been a waiver as to the time of making the award not only on the part of Adams and Cutter but on the part of the defendant Macfarlane. We will consider the questions that arise here upon the assumption that the judge did not err in holding that the award was not seasonably made and that it could be deemed binding only in case there was a waiver.

It is well settled that parol proof of a subsequent waiver of any of the stipulations in a written contract, or of a right under such contract is admissible even when the contract is under seal, and that such waiver may be inferred from the acts of the parties and the proof in the case. *Brinley* v. *Tibbets*, 7 Maine, 71. *Gage* v. *Coombs & trs.*, 7 Maine, 394. *Medomak Bank* v. *Curtis*, 24 Maine, 36. *Wiggin* v. *Goodwin*, 63 Maine, 389. *Cummings* v. *Arnold*, 3 Metc., 486. *Monroe* v. *Perkins*, 9 Pick., 298.

The instruction, if there was evidence upon which to base the claim of waiver, was unexceptionable. Such a waiver by the defendant of any objection arising from the delay in making up the award by Fessenden is directly alleged in the writ.

We think there was evidence which justified both the instruc-

tion and the finding of the jury that there was such a waiver. It is impossible to read the letter of Macfarlane to Cutter without believing that the writer intended at that time that Cutter should be present at that hearing as his agent to protect his interests—that he did not at that time intend to set up such a claim as is now preferred in his behalf. He suggests that if Fessenden can be induced not to proceed there will be a failure of an adjustment by reference and then perhaps, a satisfactory arrangement may be procured.

The defendant and Cutter were interested to have all the delay that could be obtained.

By the agreement of the 15th December, 1869, Macfarlane had bound himself unconditionally and by an independent stipulation to see to it that Cutter should settle and pay what was in fact due.

The procurement of an adjustment and statement by Fessenden was only an alternative arrangement to save litigation about the items of the account in court; it was permissive merely, and not obligatory upon the plaintiff, who could have maintained his suit without it upon Cutter's failure to adjust and pay according to the agreement, and would be exposed only to the additional burden of proving the items of his account to the jury. Under these circumstances it is apparent that both Cutter and the defendant had much to gain and nothing to lose by the keeping back of the award. The testimony of Mr. Fessenden shows that what Cutter said before and at the time of the hearing amounted to an express waiver with regard to this matter of time and covers the delay before and after the hearing when it is taken in connection with the testimony of the referee as to the cause of the delay. Cutter is not called by the defendant and the defendant in his own testimony does not deny that Cutter was acting by his authority and for his benefit in requesting Mr. Fessenden to take his own time for making the award. There is a preponderance of evidence in favor of the waiver alleged in the first count.

It is claimed that there was an erroneous instruction which permitted the jury to find a waiver by the defendant of the fraud which he alleges the plaintiff used to procure the guaranty from

him and that the jury found this waiver also without sufficient evidence. We do not think the instructions can properly be thus construed. The jury were repeatedly and emphatically instructed that the first question to be settled was, whether the defendants guaranty was procured by fraudulent misrepresentation or concealment of material facts, and if that were settled in defendant's favor they need go no further in the examination of the case, for their verdict must be for the defendant.

The instruction which it is claimed subsequently furnished the jury a different rule runs thus: "If the jury should be satisfied from the evidence that the defendant did sign the guaranty under a misapprehension of the amount of the plaintiff's claim and that he was deceived as to the amount, if they should be satisfied that he was undeceived before the hearing by Fessenden, and by himself or his agent proceeded to the hearing with full knowledge and without objection, he cannot now be entitled to repudiate his guaranty for that cause."

The jury could not have understood this as revoking or revising the previous reiterated directions to find for the defendant without further considering the case if they settled the question of fraud in his favor. Nothing is said in it about fraud or waiver. The instruction differs widely from those which relate to the question of waiver in connection with the delay in the award. It covers a case of misapprehension by defendant, of mistake, or of self-deception as to the amount of liability he was incurring, but it has no connection with, or bearing upon, the positive instructions given with regard to the effect of willful misrepresentation or willful concealment on the part of the plaintiff. This last the jury were told was "a vital question," "which lies at the threshold of the case," and if settled against the plaintiff, "of course it would be unnecessary to consider the case further."

Limited to a case of misapprehension or self-deception we suppose it would not be contended that the instruction gives the defendant any cause for exception.

The jury were instructed that as a condition precedent to the fulfillment of the agreement on the part of Cutter it was necessary for Adams to furnish his books and accounts and if such an

adjustment was defeated by any act or failure of the plaintiff then he would not be entitled to recover on either count.

The defendant's counsel contends that upon this point the jury erred. But we think they were justified in finding that the delay was throughout the fault of Cutter, except so far as it was caused by the personal engagements of the referee, to which the express waiver applies.

Under the instructions given, the verdict for the plaintiff was made to depend upon the finding by the jury that Adams was not guilty of the alleged fraud, that the failure to adjust according to the undertaking in the contract was the fault of Cutter and that this defendant through Cutter as his agent waived the implied stipulation that the adjustment by Fessenden should be more promptly made if it was to be relied on as conclusive upon the question of amount.

The defendant has no reason to complain that the case was made to turn upon these questions and, while they were fairly disputable, there is nothing in the testimony so conclusive in favor of the defendant's view as to justify us in setting aside the verdict. There is no pretense that there was ever any binding agreement between Adams and Cutter to postpone the time of payment without the knowledge and assent of this defendant.

Of the second series of instructions requested, the first, second and third were rightly withheld. The contract clearly bound Cutter, and the defendant as his surety, by a distinct, positive and independent stipulation, to adjust and settle before May 1, 1870, and to pay what might be found due; and there was a breach of this which made the defendant liable (unless the plaintiff had done something to discharge him,) to pay what a jury might ultimately find due, if no adjustment was made by Fessenden. If the plaintiff saw fit to dispose of any question as to amount before bringing his action by procuring an *ex parte* adjustment by Fessenden, he was at liberty to do it. By a subsequent understanding between the parties, apparently, this was converted into a hearing, at which Cutter might appear, and the delay which resulted, was assented to by the defendant, and manifestly was in no respect prejudicial to him.

The fourth in the second series of instructions was given substantially:

Neither Cutter nor the defendant could be exonerated by the fact that the plaintiff claimed more than he was found entitled to recover. Upon the presentation of his books and accounts, it was incumbent on them to ascertain what was justly due, and settle, or offer to settle upon that basis. This they neglected.

We have considered all the objections which were relied on in the able argument for the defendant, and are satisfied that the instructions were quite as favorable to the defendant as the law would allow, and that there was no bias, corruption, or evident mistake on the part of the jury which requires us to send the case to a new trial. *Motion and exceptions overruled.*

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

CHARLES COURTENAY *vs.* H. A. FULLER *et al.*

Cumberland, 1874.—August 5, 1876.

Evidence.

Though an oral agreement, if made contemporaneously with a written contract is not admissible to vary it, yet such an agreement, if made subsequently, is, even though such subsequent agreement be the adoption, in terms, of the contemporaneous agreement.

Thus, where the plaintiff performed labor on a railroad, under a written contract, which he was induced to sign on account of an oral agreement made at the same time, which provided that certain kinds of earth work should be measured and paid for as loose rock, and this oral agreement was subsequently adopted and acted upon by the parties; *held*, that the subsequent adoption of the oral, contemporaneous agreement placed it upon the same footing in respect to the written contract, as if it were a new and independent agreement; *held*, also, that it was a sufficient consideration for the new promise, that the party claiming the benefit of it consented to complete the business in faith of it; *held*, further, that whether there had been such an agreement and adoption of it were questions of fact for the jury, and that, as bearing upon these questions, the oral agreement and the extra allowance by the defendant under it, were legally admissible in evidence.

On motion and exceptions from the superior court.

Assumpsit for a balance of $2,566.90, on account annexed for labor in 1872–3 on the P. & O. R. R.

The work was commenced, and a portion of it done under an oral agreement of prices at twenty-five cents a yard for earth excavation, $1.60 for solid rock, eighty cents for loose rock, and eighty cents for rip rap. After settling one month's estimate, a contract in writing was signed and sealed by the parties, at these prices. At the time of the execution of the written contract, there was an oral agreement made in the interest of the plaintiff, and acted upon by the parties afterwards. On final settlement, the defendants claimed, that the extent of the oral agreement, was, that the old specifications on the road, instead of the new, should be adopted as to measurements, so that all rock which contained over a cubic foot should count as loose rock, and be payable for as such, whereas under the new specifications annexed to the contract, everything up to thirteen cubic feet would count as earth. The plaintiff claimed that the engineer, Peverly, was not limited in his measurements, by either of the specifications, but was to reckon enough of the earth as loose rock to allow him a fair price for the whole work done. On the plaintiff's theory more pay was due him; on the defendants', the plaintiff had been fully paid.

The verdict was for the plaintiff, for $1,103.52, which the defendants moved to have set aside, as against law and evidence.

Exceptions were also taken by the defendants.

I. Because the witness, Hogan, was allowed to testify what would be a fair price averaging the whole work, that being as the defendants claimed, a question for the engineer, according to the plaintiff's own testimony.

II. Because, although the defendants insisted on the principle, that written contracts are not to be altered by prior and contemporaneous conversations, the judge, in his instructions, overlooked the distinction that there was no evidence of any new agreement, made after the execution of the contract, but only admissions of previous conversations, and the fact that the defendant, Harding, allowed twenty-five per cent. additional to the written contract

price; these, as the defendants claimed, not proving a new agreement.

III. Because the plaintiff's witness, Fortune, was allowed to testify to his statement to the engineer, Peverly, of what arrangement was made between the plaintiff and the defendant, Harding.

W. L. Putnam, for the defendants.

B. & A. W. Bradbury, for the plaintiff.

DICKERSON, J. Extrinsic verbal evidence is admissible to prove a new and distinct agreement upon a new consideration, whether it be a substitute for the written contract, or in addition to and beyond it. It is a sufficient consideration for the new promise, that the party claiming the benefit of it went on and completed the business in faith of it.

We see no objection to applying this principle to cases where there has been a verbal agreement to change the written contract, wholly, or in part, made contemporaneously with it, where such verbal agreement has been adopted by the parties subsequently to the execution of the written contract. The subsequent adoption of the verbal, contemporaneous agreement in the latter case, places it upon the same footing, in respect to the written contract, as the subsequent parol agreement in the former one. Greenl. on Ev., §§ 302 and 303. *Munroe* v. *Perkins*, 9 Pick., 298.

It is conceded in the case at bar that there was a written contract in respect to the work in controversy, and also, that there was a contemporaneous verbal agreement to modify the written contract which was subsequently recognized by the parties. The difference between the parties arises mainly in respect to the nature and extent of the modification, the plaintiff contending that it gave him a fair price for the whole work done, and the defendants insisting that it simply changed the basis for estimating the quantity of loose rock excavated. If the plaintiff's theory is correct, he is entitled to more pay than he has received; if the defendants' theory is the true one, the plaintiff has been fully paid.

The case was submitted to the jury under the instructions of the court upon these respective theories. The evidence was conflicting, and consisted of contemporaneous conversations, and acts

of the parties subsequent to the execution of the written contract. It was the province of the jury to determine whether there was a modification of the written contract, and if so, what it was. They saw and heard the witnesses, and returned a verdict for the plaintiff. There is nothing in the case to show that they were influenced by corruption, prejudice or bias, or that they misapprehended or disregarded the evidence. The question is not whether the court would have rendered such a verdict, but whether the verdict is so manifestly erroneous as to require the court to set it aside. We think it is not.

Our conclusion also is, that the exceptions must be overruled. The presiding judge, in his instructions to the jury, took the precaution, not only to make the written contract their sole guide for determining the rights of the parties, in the absence of any parol agreement to alter or modify it, but also to explain to them the evidence necessary to prove such agreement, and its effect, when established. He also gave full and explicit instructions as to the legal effect of the decision of the engineer, in the premises, under the written contract, and under its modified terms as respectively claimed by the parties. After a careful examination of these instructions we are unable to find anything in them with which the defendants have legal cause for complaint. On the contrary they present the law of the case in its various aspects, with singular clearness, precision and accuracy.

Nor is there any error in the judge's ruling in admitting testimony under the defendants' objection. The testimony of the plaintiff's witness, Hogan, that seventy-five cents per cubic yard would be a fair price for the whole quantity excavated, was clearly admissible upon the question of damages, should the jury determine that the plaintiff was entitled to a fair price for his work, as he claimed.

Nor do we perceive any valid objection to the testimony of the plaintiff's witness, Fortune, that he told the engineer that the defendant, Harding, had agreed to allow him to say what was a fair price for the work, and how the allowance was to be made. It was the duty of the engineer to make the estimates, and if there had been such a modification of the written contract, it was neces-

sary that he should know it; and it is immaterial whether he was advised of the change by the witness, or not. He would have no authority, nor would he be likely to change his estimates upon information not derived from the parties themselves.

The requested instructions, so far as they were applicable to the case and consistent with the rules of law, were substantially given. It was a question of fact for the jury to determine whether the allowances made subsequently to the execution of the written contract and in excess of those therein provided, were intended by the parties as an adoption of the contemporaneous verbal agreement to modify the terms of the written contract. The requested instruction upon that branch of the case, if given, would have taken this question of fact from the jury.

Motion and exceptions overruled.
Judgment on the verdict.

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

MARY J. LAPAN, petitioner for certiorari, *vs.* COUNTY COMMISSIONERS of Cumberland County.

Cumberland, 1875.—August 5, 1876.

Certiorari. Records. County Commissioners.

A writ of certiorari lies only to correct errors in law; and where the record contains no error, the writ cannot be issued.

County commissioners have a right to amend their records in accordance with the facts upon such evidence as the board in its discretion may deem sufficient.

PETITION FOR WRIT OF CERTIORARI, to quash the record of the county commissioners in the matter of the division of the county into jury districts.

Shortly before the entry of the petition at the January term of this court, 1875, the records of the county commissioners did not show a compliance with the provisions of R. S., c. 106, §§ 6 and 7. At about the time the petition was entered, the county commis-

sioners amended their record of March 8th, 1871, which as amended showed a compliance with the statute, and which amendment rendered nugatory a plea in abatement to an indictment against this petitioner on the ground that the grand jury finding it were not legally selected. At the April term of this court the justice presiding ruled *pro forma*, as matter of law that the petition could not be granted, and the petitioner excepted.

M. P. Frank, for the petitioner.

C. F. Libby, county attorney, for the commissioners.

VIRGIN, J. The *pro forma* ruling that upon the facts disclosed by the documentary evidence in the case, the prayer of the petitioner could not, as matter of law, be granted, was correct. A writ of *certiorari* lies only to correct errors in law; and where the record contains no error, the writ cannot be issued.

The petitioner's complaint is in general terms that the county commissioners did not, within one year after the census of 1870, divide the county into jury districts in accordance with the provisions of R. S., c. 106, §§ 6 and 7.

The original record of March 8th, 1871, did not show a compliance with the statute mentioned. The county commissioners declare that the division was in fact made at that time; and at the January term, 1875, upon the evidence then before them, they amended their record in accordance with the facts. This they had an undoubted right to do. *Dresden* v. *Co. Com.*, 62 Maine, 365. *Gloucester* v. *Co. Com.*, 116 Mass., 579 and cases. In the record as amended, there is no error. *Exceptions overruled.*

APPLETON, C. J., WALTON, BARROWS, DANFORTH AND PETERS, JJ., concurred.

FREDERIC C. POPE *et als. vs.* ISAAC JACKSON.

Cumberland, 1875.—August 5, 1876.

Replevin. Pleading. Trial. Fixtures.

The objection to the maintainance of replevin by all of several plaintiffs because only one of them has given the bond required by R. S., c. 69, §§ 1 and 2, is not open to the defense under the plea of *non cepit*. It should have been taken by abatement.

The plea of *non cepit* admits the capacity of all the plaintiffs.

Where, in replevin, the brief statement alleges the property to be in the defendant and not in the plaintiff, the title of the latter is directly put in issue with the burden resting upon him.

A mortgagee cannot hold as a fixture an embossing press owned and put into a building by a lessee of the mortgageor. In this case the presses weighed about five thousand pounds each and were standing upon the floor without any other attachment to the realty except by a steam pipe, three-quarters of an inch in diameter, one end of which was fixed to the boiler in the factory, thence extending under the bed of the highway, with the other end connected with the presses by a coupling with a right and left screw, (the steam being used simply for heating purposes.)

ON REPORT from the superior court.

REPLEVIN for two embossing presses.

The defendant pleaded *non cepit* and further for brief statement: "that at the time when the taking of the said goods and chattels is supposed to be, the property of the same was in the said defendant, to wit, at said Windham; without this, that the property of the same goods and chattels, was in the said plaintiffs, as they by the writ and declaration above suppose; and this he is ready to verify: Wherefore he prays judgment and a return of the same goods and chattels to be adjudged to him, and for his costs."

To which the plaintiffs filed replication as follows: "And for counter brief statement and replication in the above entitled cause, the said plaintiffs say that they ought not to be precluded from having and maintaining their said action, because they say that at the time of the taking of the said goods and chattels described in their said writ, the property of the said goods and chattels, was not in the defendant, as he has alleged in his brief statement and plea, and this they pray may be inquired of by the country."

After the evidence was out, the case was made law on report.

J. Howard, N. Cleaves and *H. B. Cleaves*, for the plaintiffs.

A. A. Strout and *G. F. Holmes*, for the defendant.

VIRGIN, J. Pleadings. The defendant's objection to the maintainance of this action by all of the plaintiffs as surviving partners of F. C. Pope & Co., for the alleged reason that only one of them has given the bond required by R. S., c. 69, §§ 1 and 2, cannot be sustained. It was not seasonably taken. It should have been pleaded in abatement. The plea of *non cepit* admitted the capacity of all the plaintiffs. *Strang* v. *Hirst*, 61 Maine, 9. *Brown* v. *Nourse*, 55 Maine, 230.

Neither is the plaintiffs' point as to the burden of proof tenable. The plea of *non cepit* alone does not deny the plaintiffs' title in the chattels replevied, but rather admits the fact. Neither does a brief statement alleging property in the defendant, except by implication; and in such case, the burden is on the defendant to sustain his affirmative allegation. But when the brief statement alleges the property to be in the defendant and not in the plaintiff, the title of the latter is thereby directly put in issue with the burden resting upon him. *Dillingham* v. *Smith*, 30 Maine, 370. *Moulton* v. *Bird*, 31 Maine, 296. *Cooper* v. *Bakeman*, 32 Maine, 192.

The brief statement here is not drawn in the modern, concise form, but the denial of the plaintiffs' title is expressed by what Mr. Stephens denominates "that peculiar and barbarous formula, (*absque hoc*) 'without this, that,'" &c.; which constitutes in pleading a technical form of negation, and is equivalent to *et non*, and is sometimes called a formal traverse, or a traverse with an *absque hoc*. Steph. Plead., (ed. 1871,) 181, *et seq.* Gould Plead., c. 7, §§ 6, 7 and 8. Lawes Plead., 116, *et seq.* This form of plea was adopted in *Presgrave* v. *Saunders*, 1 Salk., 5, and in *Quincy* v. *Hall*, 1 Pick., 357. When the defendant thus pleads property and traverses property in the plaintiff, the counter brief statement should take issue on the title of the plaintiff; since a traverse of property in the defendant is not material. Com. Dig. Pleader, 3 K., 12.

Facts. Some of the material facts are only vaguely developed by the evidence reported; but we think the following sufficiently appear.

Prior to December, 1870, the firm of Isaiah Pope & Co., owned certain real estate on Pleasant river, in Windham, comprising a grist-mill, woolen-factory, and another building situated on the opposite side of the highway, designated by the witnesses as the "long building," or "long shed." The mills and factories were operated by the firm, and the "long building" used for storing wool, drying cloth, etc. At the date mentioned, a new firm consisting of I. P. & Co. with F. C. Pope added was formed and commenced the business of manufacturing felt. They were to occupy any part of the buildings of I. P. & Co., necessary to their business, I. P. & Co. having put some machinery into their factory adapted to that business, including a steam boiler, etc.

In 1871, but prior to Nov. 13th, Charles Staples & Co. manufactured the two embossing presses in controversy for F. C. Pope & Co., which were placed in the "long building," and subsequently paid for. The presses weighed about five thousand pounds each, and stood upon the floor without any other attachment to the reality except by a steam pipe three-quarters of an inch in diameter, one end of which was fixed to the boiler in the factory, thence extending in a wooden box under the bed of the highway, with the other end connected with the presses by a coupling with a right and left screw. The steam through this pipe was used simply for heating purposes.

On Nov. 13th, 1871, the several members of I. P. & Co., by their mortgage deed, conveyed the premises to the defendant. In addition to a description of the land on which the buildings stood, the mortgage included in terms, "the buildings, mills and factories, together with the machinery, belts, tools and fixtures of every name and nature contained therein."

The presses were not the property of I. P. & Co., when the mortgage was executed, but belonged to Staples & Co., who sold them to F. C. P. & Co. in February following.

Isaiah Pope died the following April, whereby the firm of F. C. Pope & Co. became dissolved, being then insolvent. They no

longer occupied the premises which were soon afterwards surrendered to the defendant, he receiving possession under his mortgage.

At best F. C. Pope & Co. were tenants at will, they having had no written lease. Whatever might have been the rule for determining the right of removal of the presses as between F. C. Pope & Co., owners of the presses, and Isaiah Pope & Co., owners of the realty—had that question arisen prior to the surrender of the premises to the defendant—now the question must be settled in accordance with the rule which prevails as between mortgageor and mortgagee. *Lynde* v. *Rowe*, 12 Allen, 100.

If the presses by being placed in the "long building," did not lose their character as personalty, and take on the attribute of realty, they did not pass by the mortgage; for Charles Staples & Co., and not the mortgageors then owned them, and their status has never been changed. If, however, they did thereby become incorporated with the realty, the time, whether before or after the execution of the mortgage, would be immaterial, and they cannot be replevied by these plaintiffs.

There is much conflict among the decisions of the various courts on the general subject under consideration. But we entertain no doubt that the presses in controversy formed no part of the realty on which they were erected, and are removable by the owners without the consent of this mortgagee. Not simply because they were not permanently physically annexed to the freehold; for the absence of such an incorporation with the soil has long since ceased to be regarded as the crucial test. *Strickland* v. *Parker*, 54 Maine, 263, and cases there cited. Thus a ponderous article, as a wooden cistern, (*Blethen* v. *Towle*, 40 Maine, 310); or a portable hot air furnace, (*Stockwell* v. *Campbell*, 39 Conn., 362,) standing upon the bottom of a cellar, has been held sufficiently affixed by gravitation. It is not the mere fastening that is so much to be regarded, as the nature of the thing, its adaptation to the uses and purposes for which and to which the building is erected or appropriated. *Farrar* v. *Stackpole*, 6 Maine, 154. *Corliss* v. *McLagin*, 29 Maine, 115.

The nature of the presses, the character of the building in which they were placed, no less than the object in view and the

relations subsisting between the parties at the time, all tend to show that it was not the intention to make a permanent accession to the freehold, but a mere temporary attachment for manufacturing purposes. The "long building" was not a factory or mill in which these implements were placed to carry out the obvious purpose for which it was erected, as in *Parsons* v. *Copeland*, 38 Maine, 537. The factory proper, containing the water wheels, steam boiler, machinery, shafting, &c., all which were particularly adapted and essential to the use and enjoyment thereof, and all placed there by the owners of the realty, and all operated by the general motive power, was on the other side of the highway. The presses formed no link in the chain of machinery. To be sure they were heated by steam through the small pipe under the street, connected with the boiler in the factory. This connection being made by a coupling, could be as readily severed as the casting off of a belt. The presses were no more fixtures than the "five grindstones" and "tack machines," in *Pierce* v. *George*, 108 Mass., 78; or the "planing machines," "saws and saw-benches," in *Voorhes* v. *McGinnis*, 48 N. Y., 278; or the "planer and matcher," and the "moulder," in *Rogers* v. *Brokaw*, 25 N. J. Eq., 496; in which last case, (it being between mortgageor and mortgagee,) the chancellor says: "Movable machines, like these, whose number and permanency are contingent on the varying circumstances of business, subject to its fluctuating conditions, and liable to be taken in or out, as exigencies may require, are different in nature and legal character from steam engines, boilers, shafting, &c., designed to be permanent, and indispensable to the enjoyment of the freehold."

The mortgage was not executed by F. C. Pope & Co., but by Isaiah Pope & Co., to secure an indebtment of the latter firm. When executed, the presses being the personal property of Staples & Co., and in nowise fixtures, were not affected by it. If, after they were purchased by F. C. Pope & Co., they had become fixtures, there might have been some necessity of discussing what effect, if any, the mortgage (executed by four of the five members of a firm, although in behalf of another firm having the same per-

sons as members,) might then have. But under the existing facts, we have no occasion to turn our attention to that question.

Judgment for plaintiffs, and
$1.00 *damage for detention.*

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

INHABITANTS OF INDUSTRY *vs.* INHABITANTS OF STARKS.

Franklin, 1872.—August 5, 1875.

Town. Selectmen. Contract.

Selectmen have the right to prosecute and defend pauper suits in which their towns are interested, and their written contracts to this end will bind the towns, although not authorized by any special vote.

In a suit between two towns involving the whereabouts of a pauper settlement, a third town interested in the result was permitted to assume the prosecution of the suit under a written contract signed by their selectmen and town agent to indemnify the plaintiffs, and pay the costs in case the defendants prevailed. The defendants prevailed, and the plaintiffs were compelled to pay them their costs. In an action on the contract against the third town; *held*, 1, that the town officers by whom the contract declared on was signed, had authority to make it; 2, that it was not against public policy, nor illegal on the ground of maintenance; 3, that it was not void for want of consideration.

ON FACTS AGREED.

ASSUMPSIT upon a written contract signed by the selectmen and town agent of the defendant town.

One Betsey Nichols fell into distress in the town of Industry, and was there supplied by the overseers of the poor of that town as a pauper. Her legal settlement not being there, but being either in Starks or Anson, and uncertain which, and both of these towns refusing to acknowledge the pauper or pay for the supplies, Industry brought suit against both; whereupon the selectmen and town agents of Starks and Industry, without being authorized by any special vote, contracted in writing that the inhabitants of Starks should assume the pending suit between Industry and

Anson and pay all taxable costs that Anson might be entitled to recover against Industry in case Anson prevailed. Starks assumed the prosecution of the suit, at the March term of this court in 1871, and Anson prevailed, but Starks refused to pay the costs. Thereupon Industry paid the amount of the judgment recovered by Anson, and brought this suit against Starks upon the contract of indemnity.

S. Belcher, for the plaintiffs.

H. Knowlton & H. Belcher, for the defendants, contended, that the town officers had not authority to make the contract, that it was against public policy, illegal on the ground of maintenance, and void for want of consideration.

WALTON, J. The court is of opinion that the town officers, by whom the contract declared on was signed, had authority to make it; that it was not against public policy, nor illegal on the ground of maintenance; nor void for want of consideration. *Goodspeed* v. *Fuller*, 46 Maine, 141.

Judgment for plaintiffs for $198.24, *and interest from date of the writ.*

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

BENJAMIN S. GORDON *vs.* WILLIAM B. MERRY.

Franklin, 1874.—March 1, 1876.

Trespass. Jurisdiction.

Trespass *quare clausum* may be brought and maintained in the supreme judicial court in the county where the land is situate, though neither the plaintiff nor the defendant resides in that county.

ON EXCEPTIONS.

TRESPASS *quare clausum fregit.*

S. Belcher, for the defendant, submitted without argument.

H. L. Whitcomb, for the plaintiff.

BARROWS, J. The plaintiff and defendant both reside in Somerset county. The action is trespass *quare clausum*, alleging an injury committed in Franklin county, upon plaintiff's land there situate.

To enable the parties to present promptly a question of jurisdiction raised by the defendant, the presiding judge, at the return term, ruled, *pro forma*, that the action should be dismissed, because it was not brought in Somerset county, where both the parties live.

By the common law, actions of trespass, or on the case, for injuries to lands or other real estate, are local, and must be brought in the county or place where the cause of action arises and the property is situate. Chitty on Plead., vol. 1, p. 271.

It is true, that where an injury has been committed in one county, to land situated in another, the venue may be laid in either. *Ibid.* But that does not appear to be this case.

The defendant's objection seems to have been based on R. S., c. 81, § 9, which provides that "personal and transitory actions," (with certain exceptions) "shall be brought, when the parties live in the state, in the county where any plaintiff or defendant lives . . . and when not so brought . . . shall be abated," &c. But this provision applies only to actions which are both personal and transitory. The action of trespass, though a personal action, is, as we have seen, when it is brought for the recovery of damages for an injury to the realty, not transitory, but local. It does not belong to the class of cases which are required by § 9, to be brought in a county where either a plaintiff or defendant lives. *Whidden* v. *Seelye*, 40 Maine, 247, was trover for personal property after it was severed from the land, and the injury to the realty was not the gist of the action, and it was well held to be both personal and transitory, and cognizable by any court that had jurisdiction of the parties.

Doubtless, also, by force of the statutes which give jurisdiction to trial justices in all civil actions where the debt or damage does not exceed twenty dollars, and the title to real estate is not in question, an action of trespass *q. c.* might be maintained before

such justice in a county where the defendant resided, unless by the pleadings the title to the realty was brought in question, although the defendant did not reside in the county where the cause of action arose. *Morton* v. *Chase*, 15 Maine, 188. But neither this nor other statute provisions, which may be held to give this court in certain cases jurisdiction of actions of this description in counties other than those in which the cause of action arises, can be regarded as changing the common law character of the action in cases to which they do not apply, nor as ousting this court of jurisdiction over actions of trespass upon lands situated in the county where the suit is brought, whether either of the parties to the suit, resides therein or not.

The *pro forma* ruling was erroneous.

Exceptions sustained.
Case to stand for trial.

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

ANDREW P. BENJAMIN *vs.* COTTON WEBSTER.

Franklin, 1875.—March 1, 1876.

Limitation of actions.

A partial payment within six years, upon a sum due on account for the sale of a single article of property, takes the balance of the claim out of the statute of limitations.

ON EXCEPTIONS.

ASSUMPSIT for one sawing machine and fixtures sold and delivered to the defendant, February 18, 1867, at an agreed price of $67.00, on which the plaintiff paid $20.00 down, and on August 19, 1867, $15.00, all of which appeared by the plaintiff's deposition, the defendant offering no evidence. The writ was dated August 13, 1873. The presiding justice ruled as matter of law, that the statute of limitations did not bar a recovery, and ordered judgment for the plaintiff, for $33.00, and interest from the date of the writ. The defendant excepted.

H. L. Whitcomb, for the defendant.

H. E. Dyer, for the plaintiff.

PETERS, J. The plaintiff sold to the defendant a sawing machine and fixtures, receiving part payment down. This was more than six years before the suit. Another partial payment was made within six years. The action is for the balance unpaid. The defense is the statute of limitations. The defendant contends that "mutual dealings," referred to in R. S., c. 81, § 84, "means something more than the sale of a single article at one time with part payment at the time, and a further payment made afterwards." We do not concur in this view. Dealings may be as essentially mutual between parties, whether there may be one item or many items on each side. It is the nature, and not the extent, of the dealings, that gives them the character of mutuality. The accounts were regarded as mutual in the case of *Baker* v. *Mitchell*, 59 Maine, 223, where but a single item of credit was given. To the same effect is the case of *Penniman* v. *Rotch*, 3 Metc., 216. Nor does it make any difference that the credits given by the plaintiff were not independent items of charge against him, upon which he might be sued by the defendant. It is enough that the credits were purely payments upon the plaintiff's account. Where an item of credit is intended as a specific payment of only a particular charge in a plaintiff's account, in a case where there are several items, and not as a payment upon the account generally, such payment would not have the effect to take the whole account out of the operation of the statute. But a partial payment within six years towards an account generally, whether of one or more items, would have that effect; and, *a fortiori*, would the part payment of a particular item take that item out of the statute. It is to be admitted, that there are authorities opposed to this interpretation of the statute, but we think that the weight of authority, as well as the effect of our own cases, establishes the point that it makes no difference whether the credits are payments merely, or items of charge. See *Penniman* v. *Rotch*, *supra*. *Dyer* v. *Walker*, 51 Maine, 104, cited by defendant, was before the statute as it now reads, and does not support the defendant's position. See also *Hagar* v. *Springer*, 63 Maine, 506.

Moreover, we do not see why the plaintiff's case does not come within the exception contained in section 96 of the statute of limitations, where it is provided that, "nothing herein contained shall alter, take away, or lessen the effect of payment of any principal or interest made by any person." Under this clause of the statute, it should appear that the payment was made only as a part of a larger debt, as otherwise it would not be deemed as an admission of any more debt than it pays; and that it is a payment upon an ascertained or specific sum due, and not upon a mere claim of *quantum meruit*. But the contract, upon which the partial payment is made, need not necessarily be a written one, but may be an oral contract as well. Such payment is *prima facie* evidence of a promise by the debtor to pay the balance of the debt, and conclusive evidence of the same, unless the circumstances under which the payment is made, or some proofs in the case, show to the contrary. We think that, upon this ground, the action is maintainable, notwithstanding the plea of limitations.

Exceptions overruled.

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

ELLA E. MCLEERY *vs.* SALLY MCLEERY.

Franklin, 1874.—March 7, 1876.

Dower.

A father died, leaving a widow. His homestead descended to his two sons. In consideration of their having the use and income of the whole estate, the sons, in writing, promised the widow an occupancy of a portion of the premises, and certain farm stock for her use, and a certain yearly payment. Afterwards, one son conveyed to the other. The latter then conveyed the entire premises to his mother by a warrantee deed. Then he died, leaving a widow. In an action of dower by the widow of the son, against the widow of the father, *held;* 1. that the agreement between the sons and the mother, did not operate either as an assignment of dower to her, or as a release of dower by her; 2. that the condition of the senior widow, as to her own dower, is the same, essentially, as if it had been specially assigned to her; 3. that her right of dower was not extinguished by merger in the

fee conveyed to her by her son; 4 that she is not estopped by the covenants of warranty in such deed from availing herself of her right of dower in this action, inasmuch as such right was paramount to and independent of the title procured by the deed; 5. that there are two dowers in the estate; the senior widow having one-third of the whole, and the junior widow, one-third of the remaining two-thirds; and that the junior widow is not now, nor will she be at the death of the senior widow, dowable in any greater proportion thereof.

On report.

Dower.

The facts appear in the opinion.

S. Belcher, for the plaintiff.

P. H. Stubbs, for the defendant.

Peters, J. Wm. McLeery was seized of the messuage described in the writ. At his death, the tenant, who is his widow, became entitled to dower in it. Subject to her right of dower, the estate descended to his two sons. One of the sons, the husband of the demandant, acquired his brother's interest in the estate, thus owning the whole. At his death, his widow also became entitled to dower. Both husbands are dead, and their wives survive. Here, then, two widows are dowable in the same estate. Their respective rights were as follows: The tenant (wife of the father), having the elder title in dower, would have for her dower one-third of the whole. The demandant (wife of the son), being the younger widow, would have one-third of the remaining two-thirds of the estate. Thus, the tenant would have three-ninths, and the demandant two-ninths thereof. This result comes from the principle established in the familiar maxim of ancient origin, that "dower ought not to be sought from dower." Nor will the junior widow be dowable in the one-third that may be assigned to the senior widow, upon the death of the latter; and for this reason. In order to recover dower, she has to count upon her husband's seizin. But during his lifetime he had no seizin of the one-third which goes to his mother as dower. When his mother's dower is assigned to her, she partakes seizin therein by relation from her husband, continuing his seizin, and to that extent defeating the seizin of the son, who in such one-third has only a reversion. Had

the son received the title of the estate from his father by deed, and not by descent, the rule would be otherwise. In such case the son would have had a seizin in his lifeti me of the whole estate, sufficient to give his wife dower in the two-thirds during his mother's lifetime, and in the whole estate when the mother's title to dower ceased. *Geer* v. *Hamblin*, N. H., stated in 1 Maine, 54. *Brooks* v. *Everett*, 13 Allen, 457. Kent's Com., vol. 4, 64. See also, under appropriate heads, Wash. Real Estate and Scribner on Dower, for a more particular elucidation of the principles stated.

But the question arises, whether the demandant may not be dowable in the whole estate, instead of two-thirds thereof, upon the ground that the title of the elder widow to dower has been in some way extinguished or lost, and this is claimed by the demandant to be the case from several causes.

First. She contends that the paper given by the sons to the mother has that effect. And, upon the other hand, the tenant claims that her acceptance of the paper amounted to an assignment of her dower. But our opinion is that the agreement had neither the one effect nor the other. It neither assigned dower nor extinguished it. It was not an extinguishment of dower, because there is no release or conveyance under her hand or seal, nor does she in any way design or attempt to surrender her right. Nor could it operate as an assignment to her of her dower. A portion of the consideration to her in the agreement consists of the executory promises of the sons, which may never be fulfilled. The agreement (not signed by her), merely related to "the use and income" of her dower by the sons until set out to her. It operated only to suspend her claim for a time. *Sargent* v. *Roberts*, 34 Maine, 135. *Austin* v. *Austin*, 50 Maine, 74.

Then a question arises, whether the demandant may not have dower in the whole estate until the dower of the tenant has actually been assigned to her. It is held by text-writers, and is so decided generally, that the maxim *dos de dote peti non debet* does not apply where there has not been an actual assignment to the first widow. This is upon the principle that the husband of the second widow may be considered as seized in his lifetime of the estate charged with the right of dower of his mother, as against

all others but her. A stranger cannot avail himself of the contingency that the first widow may never enforce her right. When she does enforce it, then an assignment already made to the second widow becomes wholly defeated or diminished thereby. *Dunham* v. *Osborn*, 1 Paige, 634. *Reynolds* v. *Reynolds*, 5 Paige, 160. *Safford* v. *Safford*, 7 Paige, 259. To the same effect are the cases cited *supra*. See also *Young* v. *Tarbell*, 37 Maine, 509. But the answer to this position, is, that the rule does not apply to this case. The tenant is not a stranger. She is in possession claiming her estate of dower. Her condition is the same essentially as if a special assignment had been made to her. There is no need of a separation of her estate in dower from her estate of inheritance, for any practical purposes. She does elect to enforce her claim, by a resistance to the claim of the second widow. If the demandant should recover according to her claim, the tenant might, perhaps, have an action against her to recover a part of it back again. We think the legal rights of the parties can be as well settled in the present action as in any other way.

Then it may be argued that the tenant's right of dower has been lost by consolidation with the fee conveyed to her by her son. In *Leavitt* v. *Lamprey*, 13 Pick., 382, it was decided that a second widow was not entitled to dower in the whole of an estate against the tenant to whom the senior widow had conveyed her right after she had recovered judgment for dower therein, but before it was set off to her. While in *Atwood* v. *Atwood*, 22 Pick., 283, it was held that a prior right of dower which had been released to the tenant before any suit to enforce the same, could not be set up to diminish the claim of a second widow who claimed dower in the whole estate. But we have already expressed the opinion that in the case at bar the senior widow is in the same condition and bears the same relation with all parties interested as she would if her dower had in point of fact been set out to her. She is entitled to a life estate of one-third. She is in actual possession of it as well as of the reversion, and she is defending her possession. In this state the doctrine of merger is not favored in law or equity. It is clear enough that if this was a proceeding in equity a merger could not be regarded as taking effect. It is man-

ifestly for the interest of the tenant to keep her two titles distinct, in order that the demandant may recover no greater amount of dower than she would have been entitled to if they had continued to be held by different persons. The tendency in the courts has been to admit the application of the same principle in proceedings at law, in cases where the forms of the transfers are such that it can reasonably be effectual. The tenant having all of the estate, including her right of dower therein, may certainly be regarded as having her estate of dower as effectually as if she had recovered judgment therefor. She cannot sue herself to obtain it. She has it. Having the whole estate, she has all the parts. *Campbell* v. *Knights*, 24 Maine, 332. *Holden* v. *Pike*, *Id.*, 427. *Simonton* v. *Gray*, 34 Maine, 50. *Strong* v. *Converse*, 8 Allen, 557. *Savage* v. *Hall*, 12 Gray, 363.

The point, however, upon which the demandant places the greatest reliance and stress, is that the tenant is barred from her claim of dower, upon the technical ground of estoppel. It is contended that, by accepting from her son a deed of the premises with the usual covenants of warranty, she admitted that he was fully seized of all the premises as of fee, and, the argument is, that she is now estopped to show the contrary. In support of this view, *Lewis* v. *Meserve*, 61 Maine, 374, is cited for authority. The tenant, admitting *Lewis* v. *Meserve* to be correctly decided, denies that it can apply to a case like the one at bar. We think the distinction is well taken. That case was decided with exact correctness, having reference to the actual question then before the court for their determination. There it appeared that the tenant who resisted the claim of dower obtained *all* his title from the husband of the demandant, and there was no pretense that he had any kind or claim of title from any body else. He merely set up that some one else might have a title paramount to his. But he had no relation with it, if it was so. The court were clearly of the opinion that he was estopped to deny the seizin of his own grantor, who was the husband of the demandant in that suit. All the cases are in accord as far as that case goes. The point is there briefly alluded to, the decision of it not being really necessary to the result of the case. But the present case is a different one.

Here the tenant does claim a title of dower outside of and superior to the right and title of her grantor. She had no occasion to purchase what already belonged to her, nor is it to be supposed that there was any design by her to do so. Her grantor had already acknowledged and submitted to her superior claim. The reasonable presumption is that she paid for the premises, deducting from the price for the entire premises the value of what was already her own. It would seem hard and inequitable that the mere form of the instrument of conveyance should have the effect to deprive her of a valuable interest and right which she already possessed. Such a result was undoubtedly never dreamed of by the parties concerned when the conveyance was made. Nor does the law require it to be so. We are aware that there have been contrary decisions upon the point presented. Nor is there a satisfactory consistency upon it in the decisions of our own state. But we regard the opinion in the leading and important case of *Foster* v. *Dwinel*, 49 Maine, 44, as a settlement of the question, so far as the rights of this tenant are concerned. That case has been much commended by several text-writers since it was promulgated, and believing that the arguments and conclusions of the court therein are based upon sound logic and good sense, we see no good reason why it should not be adhered to in a state of facts like those presented in the present case. Bigelow on Estoppel, 71. 2 Scribner on Dower, 227.

Judgment for demandant for her dower in two-thirds of the premises described in the writ.

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

BENJAMIN F. MORRILL *vs.* ROBERT GOODENOW.

Franklin, 1875.—March 13, 1876.

Trover. Promissory notes.

Trover will not lie for a note given for an illegal consideration.

A note given for no other purpose than to aid in the suppression of a criminal prosecution is given for an illegal consideration.

The defense of illegality is not avoided by putting a seal on the note. Sealed instruments are open to this defense as well as instruments not under seal.

When it appears from the plaintiff's own showing, that the note declared on was given for an illegal purpose, as, for instance, to aid in the suppression of a criminal prosecution, the court may properly order a nonsuit.

ON EXCEPTIONS.

TROVER.

S. C. Belcher, for the plaintiff.

H. L. Whitcomb, for the defendant.

WALTON, J. This is an action of trover for the alleged conversion of a promissory note. The case is substantially this:

The plaintiff and one Dyer, (the latter a physician,) were indicted for procuring an abortion by the use of violence upon the person of the plaintiff's wife. The full court had decided that she would be a competent witness at the trial notwithstanding she was the wife of one of the parties indicted. *State* v. *Dyer*, 59 Maine, 303. She was undoubtedly an important witness, perhaps the only one by which the indictment could be sustained. She had filed a libel for divorce against her husband, in which she claimed alimony. It was presumed, says the principal witness for the plaintiff, that if she could be satisfied by money, she would not be anxious to prosecute the indictment. And he further says that her attorney agreed to urge her to stop the prosecution of the indictment, if the alimony claimed was paid. The amount was more than the husband was willing to pay. Thereupon Dyer agreed to pay $500 of the amount, and made his note for that sum running to the plaintiff, and put it into the hands of the plaintiff's attorney. The note, says the plaintiff's witness, was to be paid when the indictment should be *nol prossed*. The attorney

declined to deliver the note to his client, for the reason, as he avers in his defense, that the conditions upon which it was to be delivered had not been performed, and the maker forbid his delivering it. This action is by the client against his attorney for the non-delivery of the note.

The presiding judge directed a nonsuit. The court is of opinion that the nonsuit was properly ordered.

I. That no action can be maintained upon a promissory note founded on an illegal consideration, is a rule of law too well settled to require the citation of authorities in support of it.

II. Nor will an action of trover lie for the conversion of such a note. The defense of illegality is founded upon considerations of public policy, and will prevail, whatever the form of the action may be. The illegality renders the note void and of no value for any purpose.

III. Nor can the defense of an illegal consideration be avoided by putting a seal upon the note, as was attempted in this case. A seal will in general avoid the defense of want or failure of consideration, but not a defense founded on the illegality of the consideration. This was the precise point settled in *Collins* v. *Blantern*, 2 Wilson, 341. 1 Smith's Leading Cases, 154.

IV. And when, as in this case, the illegality is apparent upon the plaintiff's own showing, a nonsuit may properly be ordered.

V. It is plain that the note, for the alleged conversion of which this suit is sought to be maintained, was founded on an illegal consideration. It was given to aid in suppressing a criminal prosecution. So far as we can discover this must have been the only motive which operated upon the mind of the maker. The note was to be paid, says the plaintiff's witness, when the indictment was *nol prossed.* It was given for money to be paid to the principal government witness to induce her not to prosecute. Such a purpose was illegal and rendered the note void. *Shaw* v. *Reed*, 30 Maine, 105.

Exceptions overruled.
Nonsuit confirmed.

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

THOMAS BATES, in equity, *vs.* GEORGE HURD *et al.*

Franklin, 1874.—May 2, 1876.

Equity. Trusts. Accounting.

A distinct written statement of a trust in lands, its subject and nature, the parties and their relation to it and each other, subscribed by the party to be charged therewith, is sufficient to meet the requirements of R. S., c. 73, § 11, whether addressed to or deposited with the *cestui que trust* or not, or whether intended when made to be evidence of the trust or not; and will be regarded as creating and declaring a trust that will be valid against the trustee and those claiming under him with notice thereof.

It is not necessary to make the heirs of a deceased trustee parties to a bill in equity to enforce a trust where the land in which it is claimed has been duly sold by the administrator of his estate under license from the probate court.

N. B. subscribed a valid declaration of a trust in favor of his brother, the plaintiff, in certain lands, and mortgaged them in his lifetime. The female defendant administered on the estate of N. B., had knowledge of the trust, returned the farm in her inventory as subject to the trust, sold it as administratrix, bought it of the purchaser, and has been in possession ever since with her husband the co-defendant, receiving the rents and profits, and disregarding the plaintiff's claim; the plaintiff claims no rights as against the mortgagee, who has never been in possession. *Held,* that he need not make the mortgagee a party under such circumstances, but may have a decree in equity against the respondents, declaring the land while in their hands subject to the trust which he seeks to enforce; and for his share of the rents and profits accrued (to be ascertained by a master unless agreed upon) with costs.

BILL IN EQUITY to declare a trust and for an account.

P. H. Stubbs, for the plaintiff.

H. L. Whitcomb, for the defendants, submitted without argument.

BARROWS, J. In 1847 one Kennedy gave to Nicholas Bates and his brother Thomas, the plaintiff, a bond conditioned for the conveyance of certain parcels of land, (estimated at about two hundred and fifty acres,) upon payment of the obligee's notes. In 1851, before the maturity of all the notes, an adjustment was made, by which, in satisfaction of the bond, he made conveyances of the bonded land in two separate parcels;—one to Wm. W.

Bates, a third brother, and the other to Nicholas, who (with Wm. W. and the plaintiff) subscribed and delivered to Kennedy a receipt indorsed upon the bond, setting forth that he had received the deed of his portion, "for himself and in trust for his brother Thomas Bates, according to what the said Thomas has or may pay towards the same real estate which amounts at present to seventy-five dollars." The price of the parcel thus conveyed to Nicholas was $450, and Nicholas seems to have admitted a resulting trust in favor of the plaintiff to the amount of one-sixth of the purchase, which was binding upon him and all claiming under him with notice.

Indeed the writing subscribed by Nicholas Bates seems to be tantamount to a declaration of an express trust, so as to satisfy R. S., c. 73, § 11.

The words "created and declared" in that statute seem to be construed by the courts to be synonymous with "manifested and proved" as they stood in the original seventh section of the statute of frauds, 29 Car. II, c. 3. *Forster* v. *Hale*, 3 Ves., jr., 707. S. C., 5 Ves., 308. *Unitarian Society* v. *Woodbury*, 14 Maine, 281. *Barrell* v. *Joy*, 16 Mass., 221. *Pinnock* v. *Clough*, 17 Vt., 508.

From the cases just cited and numerous others we see that a letter, memorandum or recital subscribed by the trustee, whether addressed to, or deposited with the *cestui que trust* or not, or whether intended when made to be evidence of the trust or not, will be sufficient to establish the trust when the subject, object and nature of the trust, and the parties and their relations to it and each other, appear with reasonable certainty.

The existence of a trust in favor of the plaintiff, which he may enforce against Nicholas Bates and his representatives, and all claiming under him with notice of the trust, may be regarded as established.

Nicholas Bates mortgaged the property to Kennedy to secure a balance of the purchase money, and subsequently made two other mortgages thereon to Philip M. Stubbs, the scrivener who drew the conveyances from Kennedy and wrote the indorsement upon the bond containing the declaration of the trust. Both of

these last named mortgages were assigned to Prince Thompson, who had no knowledge of the trust, and has given notice of foreclosure, but has never been in possession of the property.

Nicholas Bates died in January, 1866, leaving a widow, Keziah M. Bates, now Keziah M. Hurd, who is one of the respondents, and who took out letters of administration on his estate, inventoried the land, as subject to the mortgage to Prince Thompson, "and being also held as a trust estate for Thomas Bates to the amount of about $140." This sum is apparently the amount of the $75 originally paid in by the plaintiff towards the purchase money, with interest up to the time of the making of the inventory. The widow continued in possession of the land, receiving the rents and profits until November, 1868, when she made sale thereof by license from the probate court, without making mention of the trust, to Daniel Day, who mortgaged it back to her for part of the purchase money, and took possession. The widow married George Hurd, the other respondent, and on September 9, 1870, took a quitclaim deed from Day, and since then the two defendants have occupied or had the exclusive use, income and profit of the premises.

The plaintiff does not claim any rights as against the mortgagees. The heirs of Nicholas Bates are no longer interested, as the sale by the administratrix devested them of all right and title in the premises.

The administratrix in her inventory admitted the plaintiff's rights, and is fully chargeable with notice of them. The other respondent, her husband, seems to have occupied only under her. But a joint reception by them of the rents and profits is admitted in the agreed statement. He is therefore responsible to the plaintiff on this score with her. The testimony establishes the fact that the plaintiff made a claim upon the administratrix for his interest, and that there was more or less negotiation between them looking to an adjustment. It is unfortunate for both that an equitable adjustment could not be reached without litigation.

In the hands of these respondents it is obvious that the property is subject to the trust which the plaintiff seeks to enforce.

They object that he might have had an adequate remedy at law

by a suit for his share of the income. But cases of trust are, under our statute, specially made the subject of remedies in equity, and moreover it might be desirable for him to have the decree to which he is entitled in equity as against them, in view of the possibility of a redemption.

Unless the parties can agree as to the proper sum to be allowed for the past rents and profits, a master must be appointed to ascertain them.

Bill sustained. Estate declared subject in the hands of these respondents to the trust asserted. Costs for the complainant. Master to be appointed at nisi prius, if required.

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

FRANCES E. NORTON *vs.* JOHN J. PERRY *et al.*

Oxford, 1873.—August 18, 1875.

School district.

When more than one-third of the voters of a school district present and voting at a school district meeting, object by their votes to the location of the majority, it is sufficient, under R. S., c. 11, § 32, that the clerk of the district make a record of such fact.

The clerk is not required to record the names of the voters objecting. It is enough that he records the state of the vote.

The certificate of the municipal officers of a town, of their determination where a school house is to be placed after an application, notice to all parties interested, and a hearing as required by § 32, is conclusive upon the district.

If the location is defective by reason of the vague description of the premises to be taken, such defect will not revive or render valid a preceding and different location, without a sufficient statute majority, and to which more than one-third present and voting objected and subsequently within the time required by statute, applied under the provisions of the statute, to the municipal officers of the town in which the district was situated, to make a location.

When a location by the municipal officers is void by reason of its insufficient and defective description of the premises to be taken, the district must proceed anew to make a valid location.

The municipal officers have ten days within which to give their certificate to the clerk of the district, of their determination of the place where the school house is to be placed.

They may make their certificate, notwithstanding at some previous time, they may have been unable to agree, and may have so certified, if their certificate is not recorded, and is withdrawn, and their determination is duly filed within the ten days.

On report.

Trespass *quare clausum*, for breaking and entering the plaintiff's close in school district No. 3, the village district in Oxford, and erecting a school house thereon, under proceedings which appear in the synopsis of the arguments of counsel, and in the opinion.

A. Black, *A. A. Strout & G. F. Holmes*, for the plaintiff.

The meeting of the voters of this district, called for the purpose of making this location, first assembled December 20, 1871, and after several adjournments, voted April 1, 1872, by a vote of forty-seven in favor, to twenty-seven opposed, as recorded by the district clerk, to take a hundred square rods of the plaintiff's land for this location. April 26, 1872, four of those voting with the minority upon this question applied to the municipal officers to determine it. Upon due notice, these officials had a hearing of the parties, May 6, 1872, and on the thirteenth of that month, certified to the district clerk their decision, selecting as a site for the school house, certain land of one Durrell.

On June 5, 1872, four other voters of the district applied to the municipal officers to lay out a lot upon the plaintiff's land, as designated by the vote of the district, April 1, 1872; one of the officers refused to act upon this application, but the other two assumed to lay out such a lot as requested. On September 2d, following, the defendants entered upon the lots so laid out, and committed the acts for which this suit was brought. They justify as a building committee of the district. No question is made as to the plaintiff's original title to the land; and if she is found entitled to recover, judgment is to be entered for one dollar damages and legal costs.

The purpose of this suit is to determine which, if either of these locations is legal, and binding upon the district.

The counsel objected, among other defects, to the notice of the meeting of December 20, 1871, which was called by the selectmen, without any statement in their warrant that there was no agent, or that he neglected or refused to act, though a statement of such refusal was entered upon the records. At the adjourned meeting of April 1, 1872, forty-seven voters were in favor of placing the school house upon the plaintiff's land, and twenty-seven were opposeed, as appeared upon the record. On the twenty-sixth day of the same month, four of this minority appealed to the selectmen, stating these facts, and upon due notice, a hearing was had, as requested, on May 6, 1872. Upon the ninth day of that month, both of the selectmen competent to act, (the third being a resident of the school district) filed with the clerk of the district, a statement of their inability to agree, but on the thirteenth, they withdrew it, the clerk not having made any record thereof, and filed with him a certificate of the decision at which they had arrived, and this he recorded. The objection to this paper is the vagueness of the description, on account of which the majority of the district have undertaken wholly to ignore the action of the selectmen in this matter, and to proceed as if they had done nothing. The designation was sufficient to identify the lot to be appropriated for the school house, and that is all that is essential. To lay it out would require distinct action upon the part of the municipal officers. *Jordan* v. *School District No.* 8, *in Cape Elizabeth*, 60 Maine, 540.

The defendants' justification is the aforesaid vote of the district to place the school house upon the *locus in quo*, and a laying out of the lot by only two of the selectmen, one of whom was a resident of the district, and a party defendant to this action. Against this, the plaintiff shows a location by two disinterested selectmen, upon a proper appeal to them.

The definition given of "object," by Webster, has been cited, "to oppose by word or argument;" but this is not the only mode of objecting; or at any rate, the word "no," in response to the question proposed by the moderator, is a sufficient objection. There can be no more efficient mode of objecting to a measure,

than to try and defeat it by voting against it. It would be impracticable to have a written protest, signed by those who dissent from the opinion of the majority, ready to be spread upon the record.

At all events, the appeal being regularly taken, the vote became a nullity, whether the subsequent action of the selectmen was sufficient to locate the school house upon the Durrell land or not.

John J. Perry, for the defendants.

The warrant for the school district meeting of December 20, 1871, in its direction to an inhabitant, expressly recites that it is addressed to him, because the agent, upon proper application, refused to call it. *Soper* v. *School District No.* 9, *in Livermore*, 28 Maine, 193.

Assuming, then, the legality of this meeting of December 20, 1871, the district had the right thereat to fix the location of their school house. R. S., c. 11, § 24, item 2.

The power to determine where their house shall be placed is given, in the first instance, directly and unqualifiedly to the district. *Goodwin* v. *Nye*, 60 Maine, 402.

This district having expressed its decided preference, it can be defeated only by antagonistic proceedings strictly in accordance with the letter of the statute. No such were had. The municipal officers who attempted to designate the Durrell lot May 6, 1872, had no jurisdiction, because the minority in the meeting of December 20, 1871, did not "object thereto" after the will of the majority was declared, but tacitly acquiesced in the result. The statute says, "present and voting" shall "object thereto;" first, those opposing a proposed location must vote against it, and then, if outnumbered, must "object thereto." See Webster's definition of "object." The purpose to take an appeal must thus be indicated at the time the decision is made.

Even if these officers had jurisdiction originally, they lost it, when on May 9, 1872, they certified to the clerk that they could not agree. Their power then passed to the superintending school committee. R. S., c. 11, § 32. The selectmen were *functus officio* when they had agreed, or had ascertained their inability to agree. Id. They were as much concluded by their own action

as third persons, and could not legally withdraw their certificate of a fact that determined all their authority in the premises.

But their last report does not fix upon any lot. It is too vague and indefinite to indicate "where the school house should be placed." R. S., c. 11, § 32.

The selectmen were applied to June 5, 1872, to lay out a lot; the owner refusing to sell, gave notice on the twenty-fourth day of that month, that they would meet for that purpose on July 1, 1872, when they laid out the lot now in controversy.

The building committee, charged with the duty of erecting the house, could do nothing else than to build it upon the lot thus selected by the district and by the municipal officers, the attempted designation of the Durrell lot having failed utterly, and the other proceedings therefore, remaining unimpeached.

APPLETON, C. J. This is an action of trespass *quare clausum.* The alleged trespass is the erection of a school house upon the land of the plaintiff. The defendants justify as a building committee chosen by school district No. 3, in the town of Oxford, for the erection of a school house upon the *locus in quo.*

The question presented is, whether there has been a legal location of the school house lot upon the plaintiff's land. Assuming that the plaintiff's land may be taken from her under the right of eminent domain, against her consent, and the compensation therefor fixed by others, without her participation therein, the proceeding must be in strict accordance with the provisions of the statute by virtue of which they were had. If not so, then the plaintiff's estate would remain unaffected, and her right of action unquestioned.

The power "to determine where their school houses shall be located," is given directly by statute to the several school districts, in the first instance. R. S., c. 11, § 24, item 2.

A meeting of the voters of school district No. 3 in Oxford called by the selectmen of that town was held at their school house upon the twentieth day of December, 1871, and continued by repeated adjournments to the first day of April, 1872. It was called for the purpose of taking action relative to the location and construction of a new school house. At the adjourned meeting of April

1st, it was voted: "to accept the report of the committee . . . establishing and locating a lot for a school house on the north-east corner of the F. E. Norton lot, so called, bounded by Pleasant street and by land of George F. Tewksbury and that one hundred square rods be taken for said purpose;" "voted, to poll the house to make certain the vote on accepting the report of the committee on location of the lot for a school house. Moderator reported forty-seven in favor of accepting the report of the committee of lot for a school house and twenty-seven against it, and it was declared a vote to accept the report of the committee." The above is a transcript from the records of the doings of the district at the adjourned meeting aforesaid.

By R. S., c. 11, § 32, "at any district meeting called for the purpose of removing a school house, or locating one to be erected, if more than one-third of the voters be present and voting, object thereto, the clerk shall make a record of the fact."

The record in this case shows that "more than one-third of the voters present and voting" voted against the acceptance of the report of the committee by which the location of the lot was made on the plaintiff's land. It is argued, that this does not bring the case within the statute, and that those objecting should have interposed a written objection. We think not. To vote against the acceptance of a report is to object against its acceptance. It is the precise and only mode of objecting contemplated by the statute.

Nor is it required that the clerk shall record the names of the persons so objecting by their votes. He is to "make a record of the fact," that is, the state of the votes, and that is all that is required.

Within thirty days after the vote locating the lot on the plaintiff's land, certain members of the district, more than three, after rehearsing the proceedings in relation to the location, and describing themselves "as legal voters in said district numbered three in said town of Oxford, and of the number so present and voting and objecting at said meeting as aforesaid," made written application to the municipal officers "to appoint a time and place in the district to hear the parties and give such notice as is required for a district meeting." A meeting after due notice was had at the time and

place appointed. The selectmen, the defendant, Perry (a member of the board), being an inhabitant of the district, after hearing the parties, at first did not agree "where the school house" should be placed, and so certified to the clerk, but before the certificate was entered of record, they withdrew the same and within the ten days allowed by statute, made and returned their certificate to the clerk of the district, in which they certify that they "have agreed and determined that said school house to be erected as aforesaid shall be located on land owned by C. F. Durell, bounded on the south-west by High street, on the south-east by land of Lemuel Crooker," which the clerk forthwith entered "on his records."

After the clerk has made a record of the fact that more than one-third of the voters present and voting object to the location of the majority, it is then provided by § 32, that "the municipal officers on written application of any three or more of said voters, or any committee of the district, made within thirty days thereafterwards, shall, as soon as may be, appoint a time and place in the district to hear the parties, and give such notice as is required for a district meeting; and after such hearing, they may decide where the school house shall be placed; and shall, within ten days, give a certificate of their determination to the clerk of the district, who shall forthwith enter it on his records; and the district shall proceed to erect, or remove the school house, as if determined by a sufficient majority of the voters present at said meeting; but no such officer residing in the district, shall have any vote in such determination; and when a majority of them reside therein, or do not agree, the superintending school committee shall do all the duties herein required of the municipal officers," &c., &c.

It is not contested that the application to the municipal officers of Oxford was made by three or more of the voters of the district present, voting and objecting to the location voted by the majority of the district; that it was made within thirty days after the vote of the district and that the notice required by the statute was duly given of the time and place of hearing. The municipal officers then had, under § 32, jurisdiction of the question where the school house should be placed, and they gave a certificate of their determination within ten days, to the clerk of the district, who forthwith entered it on his records.

This determination, if valid, is binding and conclusive upon all parties. But to its validity various objections are taken, which we propose to consider.

The location is said to be indefinite in its language. This is denied. But suppose it to be so, then the case presented is that of a determination of the municipal officers which must fail from their vague and uncertain description of the place taken for the school house. The case shows there was "no sufficient majority of the voters present" at the meeting of April 1st, 1872, to finally determine its location. The voters objecting have carried the case by proceedings in the nature of an appeal before another tribunal. The appellate court have rendered a void decision; one which cannot be enforced. The location by the district by a mere majority is no longer in force, because of the appeal taken. Now suppose the location is void for misdescription, it does not render valid a location not made by "a sufficient majority" and vacated by subsequent proceedings. If the district by the requisite majority had made a location void for indefiniteness of description, it must proceed *de novo*, if desirous of a valid location. So, if the appellate tribunal attempt to make a location which fails from the vagueness of the reference to the premises to be taken, a new meeting must be called and the subject again presented to the district for their consideration. In fine, if a location void by reason of its uncertainty is made by the district by a "sufficient majority," or by the municipal officers upon proceedings before them, the result must be the same in each case; that is, the location being void new proceedings must be had, precisely as if they had never before been commenced. So, if the location be void, as the counsel for the defendants contend, the one from which an appeal has been taken is not thereby revived. On the other hand, if the location by the municipal officers was a valid one, it is obviously binding. In either event, therefore, the first location of the district ceases to have validity.

It is objected that the certificate of the municipal officers that they were unable to agree is a bar to all future proceedings on their part. We think not. They have ten days within which to determine the location of the school house. They may be unable to

agree for eight days, and agree on the ninth. A disagreement is not a determination; it is an inability to determine. They have the full time prescribed by statute, within which to form their determination, and they do not lose the statutory time by any temporary disagreement.

The doings of the municpal officers are to be entered by the district clerk "on his records." This was not done, so far as the disagreement was concerned. The certificate of the inability to agree was withdrawn before such entry. Besides, such certificate is only a statement of the then state of mind of the municipal officers, but which they may change within the time given within which they are to "decide where the school house shall be placed."

Further, if it were as contended, the result claimed would not necessarily follow, for when a disagreement takes place, "the superintending school committee shall do all the duties herein required of the municipal officers." R. S., c. 11, § 32.

It follows, that the lot on the plaintiff's land not having been "legally designated," upon the facts as proved or admitted, that the justification set up by the defendants is not established, and that there must be judgment for the plaintiff for one dollar damage and costs, as per agreement. *Defendants defaulted.*

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

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

EPHRAIM S. CROCKETT *vs.* JOHN H. MILLLETT *et al.*

Oxford, 1875.—October 7, 1875.

Flowage. Mills. Action.

A plaintiff whose land has been overflowed by a reservoir dam erected by the defendants upon their own land, but for the use of a mill not owned by them nor standing upon their land, may maintain an action on the case for the damages caused by such dam. The process by complaint, under R. S., c. 92, § 1, cannot be sustained upon these facts.

ON EXCEPTIONS.

CASE, commenced September 1, 1873, to recover for injuries

alleged to have been caused to the plaintiff by the erection and maintenance by the defendants of a dam (and flash-boards placed thereon) across Foye's brook, whereby its waters were prevented from running into Pennessewassee pond as they had previously done, and were thrown back upon and overflowed the land of the plaintiff.

The cause was referred to Hon. Charles Danforth, who made his report at the September term, 1874, of this court, as follows:

"The title to the land described in the plaintiff's writ has been in the plaintiff since December 13, 1849. The dam complained of in the writ was built by the defendants in 1865, and has since been maintained by them. This dam causes the water to flow the land described in the writ, doing damage; and the defendants, having a title to the land upon which the dam stands, claim the right of flowage by prescription. They claim further that the rights of the parties cannot be settled in this form of action, but that the process should be by complaint under the statute. Prior to 1865, and in substantially the same place as where the present dam stands, two dams had been erected by the owners of the land for the purpose of raising water for working mills standing thereon. The first with the mill thereon was built by one Foye, about the year 1815, and was maintained till a period somewhere between 1830 and 1835, when both mill and dam were burned down. The second dam with a mill thereon was built in 1836–7 by John Millett, who had succeeded to the title in the land and privilege, and was maintained by him until 1854, when the mill, becoming decayed, was abandoned by him, and the dam soon went down. In 1863 the defendants, having obtained the title of said John Millett to the land and privilege, built the present dam, not for the purpose of working mills of their own, but as a reservoir dam to hold water for the use of mills further down the stream owned and run by other parties. This dam was built under an agreement to lease and it was leased to the owners of the mills below as a reservoir dam and has been so used by them during all the time for which damages are claimed in this action. Since the erection of this dam, flash-boards have been put upon it by means of which the water is caused to flow higher upon the land described in the

writ, than by the former dams, and its use as a reservoir detains the water upon the land to a later period in the season. The two prior dams had flowed the plaintiff's land and damage had resulted therefrom. The present dam, without the flash-boards, flows no higher than the former. The increased height of flowage in consequence of the flash-boards, and the longer detention of the water upon the land in consequence of the use of the present dam as a reservoir, causes greater damage than resulted from the use of the prior dams. If upon the foregoing facts this action can be maintained, I find, and so award, that for this increased injury to his land, the plaintiff is entitled to recover the sum of thirty dollars, as damages, with the costs of reference . . . . and costs of court to be taxed by the court. If otherwise, judgment is to be entered for the defendants and for their costs . . . . . ."

The presiding justice accepted this report and ordered judgment for the plaintiff according to its terms, ruling that the action was maintainable; to which the defendants excepted.

H. Upton & G. L. Farnum, for the defendants.

This is an action at common law to recover damages caused by flowage, for which the statute remedy, R. S., c. 92, is exclusive.

Though the owner of the mill operated by the head of water thus raised is primarily liable, the owner of the dam is also responsible by complaint for the damages its erection occasions. *Nelson* v. *Butterfield*, 21 Maine, 220. *Wolcott Manufacturing Company* v. *Upham*, 5 Pick., 292. *Shaw* v. *Wells*, 5 Cush., 537.

A reservoir dam is within the flowage act. *Bates* v. *Weymouth Iron Company*, 8 Cush., 548. *Fiske* v. *Framingham Manufacturing Company*, 12 Pick., 68.

A. Black, for the plaintiff.

In Vermont a mill act similar to ours has been held unconstitutional. *Tyler* v. *Beacher*, 44 Vermont, 648. And though our court said in *Jordan* v. *Woodward*, 40 Maine, 317, that it was constitutional, yet they said that it went to the verge of the right of eminent domain; and in that case and in *Jones* v. *Skinner*, 61 Maine, 25, that its peculiar provisions would not be extended. An examination will show that they do not cover the case of flowage caused by one who owns no mill.

This structure ceased to be a mill-dam when the mill went down. *Baird* v. *Hunter*, 12 Pick., 556. *Fitch* v. *Stevens*, 4 Metc., 426.

APPLETON, C. J. This is an action on the case to recover damages caused by a dam erected by the defendants upon their own land. The plaintiff owns the land overflowed. The defendants own the land upon which their dam is built, but they own no mill. They erected and now maintain the dam as a reservoir dam for the benefit of mill owners below, but they have no interest in the mill for the use of which the water is retained, nor in the land upon which the mill is erected.

The plaintiff has been injured by the defendants' dam, and is entitled to compensation therefor. The question presented for determination is whether this action is maintainable, or whether the process should not have been a complaint under R. S., c. 92, § 1.

Under the act of 1821, c. 45, it was decided in *Farrington* v. *Blish*, 14 Maine, 423, that a complaint for flowing lands under that statute must allege that the respondent has erected a water-mill on his own land or the land of another with his consent, that it became necessary to raise a suitable head of water to work said mill, whereby the plaintiff's land was overflowed, etc., with an averment of damage thereby sustained. In that case the complainant obtained a verdict, but judgment was arrested, because the complaint contained no averment, "that the respondents had erected or caused to be erected, on their own land, or on the land of another person by his consent, any water-mill whatever; or that they had any concern or interest in any such mill; or that it was necessary to raise any head of water for the working of any mill."

By R. S., c. 92, § 1, "any man may erect and maintain a water-mill and dams to raise water for working it, on his own land, upon and across any stream not navigable," &c. It has been decided, after a careful review of the legislation relating to flowage, that under the present statute, the complaint must allege the defendant's ownership of the land on which the dam causing the flowage is erected, and that if this allegation is omitted, it would be bad on demurrer. *Jones* v. *Skinner*, 61 Maine, 25. This act is

substantially like the statute of 1821, and the construction given to that must apply to this.

The mill is the principal. The dam is subservient to it. The mill and the dam must both be upon the land of the mill owner to bring the case within the statute. *Farrington* v. *Blish*, 14 Maine, 423.

It is apparent that in accordance with the decisions of this court a complaint under the flowage act cannot be maintained. But there is a remedy for the injury sustained, and that is by an action on the case, which was the common law remedy before any legislation on the subject. *Exceptions overruled.*

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

CYRENIOUS W. CROOKER, in equity, *vs.* EBENEZER R. HOLMES.

Oxford, 1875.—October 8, 1875.

Equity. Mortgage—redemption of. Promissory note.

A demand upon a mortgagee to render a true account under R. S., c. 91, § 13, left at his house is sufficient when its reception is not denied by the answer, the respondent claiming that he should not be held to account at all.

When a bill to redeem is brought by a second mortgagee against the assignee of a prior mortgage, the latter cannot interpose the objection that the second mortgage is fraudulent as to creditors of the mortgageor.

Where the maker of a note promises to pay a certain sum when he shall sell the place he lives on, the debt is absolute, though its payment may be postponed; it is the duty of the maker to sell within a reasonable time, that he may discharge his indebtedness; he cannot avoid liability by putting it out of his power to perform his contract.

When a note secured by mortgage is barred by the statute of limitations, yet if not paid, a recovery may be had on the mortgage. So, if the note be not due; unless there be a clause in the mortgage to prevent such recovery.

The mortgagee cannot be injuriously affected by the subsequent acts of the mortgageor, to which he is not a party, though they may be fraudulent.

BILL IN EQUITY inserted in a writ of attachment, dated February 23, 1874, brought to redeem certain described premises from the incumbrances thereon mentioned in the opinion.

They were formerly occupied as the homestead farm of Seth Crooker to whom one portion was conveyed by Albion K. P. Elwell, March 27, 1860, and the other portion was conveyed to said Seth Crooker by Thomas J. Thurston, June 18, 1860. Upon the last day of March, 1870, Seth Crooker mortgaged the whole farm to Joseph McDonald to secure payment of a note of a hundred and fifty dollars in one year. This mortgage, with the note it secured, was transferred to the defendant October 2, 1872, and on the fourth day of that month Mr. Holmes proceeded to obtain a foreclosure of it by publication. November 7, 1870, Seth Crooker mortgaged to Cyrenious W. Crooker so much of the farm as was conveyed to him by A. K. P. Elwell to secure the note for two hundred dollars which is copied in the opinion.

Subsequently to these conveyances Eben C. Andrews sued Seth Crooker, attached all his interest in real estate in Oxford county, and July 6, 1871, caused to be sold upon his execution by the officer holding the same, all said Seth Crooker's interest in said farm and right of redeeming the same to Seth T. Holbrook, who conveyed the same to Ebenezer R. Holmes by deed dated September 2, 1872. The complainant further stated that being desirous of redeeming the premises from the first mortgage, "on the twenty-second day of October, 1873, to wit, on the tenth day of February, 1874, he made written demand for a true account of the sum due on said prior mortgage, and of the rents and profits," &c., &c., but that none was ever furnished him. Wherefore he prayed for such account, and to be admitted to redeem. The respondent, in his answer, admitted the existence of deeds and transfers similar to, but not identical with, those mentioned in the bill, but said the deed from Seth Crooker to the complainant was fraudulent and void; and set up a former indebtedness by note from both the Crookers to him which he exchanged for the single note of Seth Crooker, and claimed to have it allowed him.

The respondent also alleged that upon the twenty-seventh of March, 1871, Seth Crooker mortgaged the premises ostensibly for $350, to Austin Partridge, who afterwards transferred said mortgage for value to the respondent; but the respondent believed this mortgage also was fraudulent as to the creditors of Seth

Crooker and intended to defraud them. He denied that any legal demand for an account was ever made upon him.

The demand was in writing, signed by the complainant's solicitor, and by him (Mr. Black) left at the respondent's dwelling house February 10, 1874.

The complainant, being examined by the respondent, testified that the note and mortgage to him were for money he sent to his father, Seth Crooker, now deceased, while the complainant was in the army. Seth Crooker died without having made any sale or conveyance in fee of the farm.

A. Black, for the plaintiff.

A. A. Strout & G. F. Holmes, for the defendant.

In order to be entitled to redeem the complainant must have a valid subsisting title. His title was never valid, but was void because fraudulent. It was also subject to a contingency which can never happen. His right to the two hundred dollars which the mortgage purports to secure can now never vest in him. *Bigelow* v. *Willson*, 1 Pick., 485.

The demand for an account should have been given in hand. *Roby* v. *Skinner*, 34 Maine, 270. *Farwell* v. *Sturdivant*, 37 Maine, 308.

APPLETON, C. J. This is a bill in equity to redeem a mortgage.

It appears that, on March 31, 1870, Seth Crooker mortgaged his homestead farm, consisting of two parcels of land purchased of different grantors, to Joseph McDonald to secure the sum of one hundred and fifty dollars, payable in one year. October 2, 1872, McDonald assigned his note and mortgage to the respondent, who in two days after that assignment, commenced proceedings to foreclose the said mortgage.

November 7, 1870, Seth Crooker mortgaged a part of his farm, being that purchased of one Elwell, to this complainant to secure a note of the following tenor:

"Poland, Nov. 7, 1870.

For value received, I promise to pay Cyrenious W. Crooker, or order, two hundred dollars without interest, payable when I sell my place where I now live in Oxford, Maine.

Witness, David Dunn. SETH CROOKER."

It remains to consider the various grounds urged by the counsel for the respondent against the maintenance of the bill.

I. The demand to render a true account was in writing and is in entire conformity with the provisions of R. S., c. 90, § 13, in its terms. It was left at the residence of the respondent. No question is made in the answer as to its reception. The right of the complainant to require an account is denied, and none was either rendered or prepared. The demand was sufficient.

II. It is alleged that the plaintiff's mortgage is fraudulent, but so far as the defendant is concerned as the assignee of a prior valid mortgage, he cannot interpose that ground of defense. His debt is secure. Whether fraudulent or not is a matter immaterial to him, as it in no way diminishes his security. Nor as such assignee has he any right to defend in behalf of the creditors of his mortgageor. *Powers* v. *Russell*, 13 Pick., 69.

But there is no evidence that the complainant's mortgage is fraudulent. The burden to show it so is on the respondent. The complainant testifies that the note was given for money loaned, and there is no evidence tending to disprove his assertion.

June 17, 1871, one Eben C. Andrews, having previously recovered judgment and execution thereon against Seth Crooker, sold at auction his right of redeeming the premises incumbered by the mortgages heretofore described to one Seth T. Holbrook, who September 2, 1872, conveyed to the respondent the title thus acquired.

February 10, 1874, the complainant by his attorney duly authorized, made a written demand upon the respondent to render him "a true account of the sum due on the mortgage, and of the rents and profits and money expended in repairs, if any," by leaving the same at his residence in Oxford, with a three cent postage stamp. To this demand no reply was made. The complainant thereupon, on the twenty-third day of the same month, commenced this bill to redeem the mortgage assigned by McDonald to this respondent, offering therein to pay whatever may be due thereon.

The respondent admits the execution of the mortgage of Seth Crooker to McDonald, its assignment to him, the sale of the

equity of redemption and its transfer to him, but denies that there is any consideration for the complainant's mortgage, and asserts that it was fraudulent and for the purpose of defrauding prior and subsequent creditors. Other facts set up in the answer will be considered.

III. It is claimed that the debt will never become payable, and can never be enforced.

The maker of the note promises to pay when he shall sell the place he lives on in Oxford, Maine. The debt is due *in presenti.* Its payment is postponed to a future time, but the debt none the less exists. The debt is absolute, the time of its payment indefinite.

In *De Wolfe* v. *French*, 51 Maine, 420, this court decided that where a debt is due absolutely, and the happening of a future event is fixed upon as a convenient time for payment merely, and the future event does not happen as contemplated, the law implies a promise to pay within a reasonable time.

In *Sears* v. *Wright*, 24 Maine, 278, where a note was payable "from the avails of the logs bought of M. M., when there is a sale made," it was held not payable upon a contingency but absolutely and when a reasonable time had elapsed to make sale of the logs, and that it was the duty of the maker to sell them. But whether it be logs to be sold or a farm can make no difference. The maker of the note is to make sale within a reasonable time to enable him to discharge his indebtedness.

If a party puts it out of his power to perform his contract, his liability at once accrues. It matters not whether by his neglect this be so, or whether it be intentional. The maker of a note by his indebtedness and suffering judgment and execution to issue against him and a levy to be made is not to be thereby permitted to defeat a debt justly due. It was the fault or neglect of the complainant's mortgageor that he was unable to sell his farm. Had he paid his debts, the sale of the equity would not have happened. But the complainant is not to suffer on that account.

Even though a recovery could not be had upon the note, it not being paid, it does not follow that the mortgagee could not maintain his suit. Where a note secured by mortgage is barred by

the statute of limitations, yet if not paid a recovery may be had on the mortgage. *Thayer* v. *Mann*, 19 Pick., 535.

IV. The respondent in his answer alleges that Seth Crooker, on March 27, 1871, mortgaged his homestead to one Austin Partridge to secure a note of three hundred and fifty dollars, which mortgage he alleges to be fraudulent on the part of the mortgageor. This mortgage was after the complainant acquired his title. It does not appear that he was present at its execution; that he had anything to do with it; or even that he had knowledge of its existence. Whether fraudulent or not, it cannot in any way affect the complainant injuriously.

V. It seems that some eight years ago or thereabouts this respondent held a small note given by Seth Crooker and this complainant as surety. This note he subsequently surrendered and in lieu of it took the note of Seth Crooker alone. The complainant was not present when this exchange was made and had nothing to do with it. He cannot be regarded as a debtor of the respondent. Nor is it perceived how these facts can have any bearing, adverse or otherwise, upon the maintenance of this bill.

Bill sustained, with costs for the complainant, who is found entitled to redeem the mortgaged premises. A master is to be appointed to ascertain the amount due.

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

INHABITANTS OF BETHEL *vs.* INHABITANTS OF ALBANY *et als.*

Oxford, 1875.—February 26, 1876.

Town—disputed lines.

The decision of commissioners (appointed under R. S., c. 3, § 43,) in ascertaining, determining and marking upon the face of the earth the common line between towns, is conclusive.

By § 44, the compensation of the commissioners is to be apportioned "in equal proportion," upon the petitioners and respondents as parties, irrespective of the number of towns in either party.

On exceptions.

Petition under R. S., c. 3, § 43, for the appointment of commissioners to determine a disputed line between the petitioning town of Bethel on the north, and the respondent towns of Albany, Greenwood and Woodstock on the south.

At the September term, 1873, Samuel F. Perley, Rufus Prince and Augustus H. Walker were appointed commissioners, who, on due proceedings had, returned their report at the September term, 1874, describing the line and stating the costs of the commission at $718.25.

The petitioners objected to the acceptance of the report on the ground that the commissioners' line, not being straight, was not the line established by the act incorporating Bethel, approved June 10, 1796. But the presiding justice overruled the objection, ordered the report accepted, and a warrant of distress to issue against Bethel for one-half of the costs of commission. The petitioners alleged exceptions.

R. A. Frye, for the petitioners.

A. S. Kimball, for the respondents.

Virgin, J. The petitioners allege exceptions, I. To the refusal of the presiding justice to reject the report of the commissioners; and II. To his order requiring the petitioners to pay one-half of the commissioners' costs.

I. Towns are created and their territorial limits defined by the legislature alone, and no other authority can change them. *Westbrook* v. *Deering*, 63 Maine, 231: *Ham* v. *Sawyer*, 38 Maine, 37. When the precise locality of the common limit between adjoining towns is, from any cause, so involved in doubt as to become the subject of a controversy among them, the statute has provided a tribunal and conferred upon it exclusive authority to settle it. Its authority is limited to ascertaining and determining and marking upon the face of the earth the line described in the charter; and such line when thus ascertained and marked "shall be deemed in every court of law and for every purpose the true dividing line between such towns." R. S., c. 3, § 43. *Lisbon* v. *Bowdoin*, 53 Maine, 324.

The statute does not require any revision of the report or other action thereon, on the part of the court. And when their report shows that the commissioners have really tried to perform their duty as defined in the statute, there would seem to be no power to reject it simply because it may be possible that they may have erred in judgment in ascertaining the true line. *Lisbon* v. *Bowdoin*, supra.

We will add, however, in this connection, that it does not affirmatively appear that any mistake has been made in this case. The only evidence relied upon by the petitioners on which they base their allegations of error in the line designated by the commissioners, is a copy of the original act of incorporation of the town of Bethel, passed in 1796, which describes the line in controversy as commencing at a "hemlock tree marked III; thence east twenty degrees north, nine miles, on Oxford and State's land, to a beech tree marked I." Whereas the line ascertained and described by the commissioners has four different courses, deflecting in the whole one degree and fifty minutes from a straight line. This evidence does not necessarily show error.

It is true that where two termini of a line between towns are established, and no intermediate conflicting point is indicated in the description, the line will be deemed to be a straight one. *Henniker* v. *Hopkinton*, 18 N. H., 98. But any intermediate monument outside of the straight line, being more certain than the course, will govern it. In the line in question, "on Oxford and State's land" is an intermediate monument between the "hemlock" and "beech" trees. Whether it is in or outside of a straight line drawn between them, we have no means of knowing. The commissioners declare, however, that they "have ascertained and determined" the line described and marked by them "to be the true dividing line between said towns," &c. And from their well known experience and legal knowledge we presume that to the facts as they found them evidenced by ancient marks upon the face of the earth, they applied the well settled principle of law, that where the line described in a deed or charter, and that indicated by monuments established in the original survey and location of the tract or township, do not correspond, the latter, being the best

evidence of the true line, must govern, however they may differ. *Brown* v. *Gay*, 3 Greenl., 126. *Ripley* v. *Berry*, 5 Greenl., 24. *Esmond* v. *Tarbox*, 7 Greenl., 61. *Cate* v. *Thayer*, 3 Greenl., 71. *Williams* v. *Spaulding*, 29 Maine, 112. *Kellogg* v. *Smith*, 7 Cush., 375. *Missouri* v. *Iowa*, 7 How., 660.

II. By R. S., c. 3, § 44, the court is authorized to allow the commissioners a proper compensation, and to issue a warrant of distress for its collection "of said towns in equal proportion." "Said towns" relate to the two towns mentioned in § 43,—the "town petitioning" and "an adjoining town;" only two being contemplated. This is made certain by the original statute of 1832, c. 43, § 2, the latter clause of which is, "and the court may issue a warrant of distress for the collection of one-half of the same of the petitioning town and the other half of the other town interested." In other words, the compensation of the commissioners is to be apportioned "in equal proportions" upon the two parties irrespective of the number of towns. *Exceptions overruled.*

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

INHABITANTS OF CANTON *vs.* FRANCIS O. J. SMITH *et al.*

Oxford, December, 1875.—March 5, 1876.

Covenant. Town. Bond.

A public act authorizing town aid to railroads need not be noticed in the article in the warrant to see if the town will vote such aid.

A town meeting is called for the purpose of each and every article in the warrant, though one article requires a majority vote, and another a two-thirds vote.

A town meeting, called to vote aid to a railroad under a statute which requires a two-thirds vote, may adjourn by a majority vote, and the adjourned meeting is the continuation of the original meeting.

A vote that a bond shall be given, in all respects to the acceptance of the selectmen, gives discretionary power not only as to the obligors, but also as to the form and substance.

The value of legal bonds is *prima facie* the amount due upon them.

On exceptions.

Covenant broken on a contract under seal agreeing to complete a railroad or return bonds given in aid of its completion.

Plea, performance with a brief statement alleging a partial performance and waiver as to residue, and a failure of consideration on the ground that the bonds not having been authorized were invalid; and that the contract was void, not having been authorized by the town's vote.

The facts, so far as to raise the legal points, are these: In February, 1868, the Portland & Oxford Central Railroad Company, of which one of the defendants was president, and the other director and principal manager, had a charter for a railroad from Mechanic Falls, through Hartford to Canton, which had not been constructed from H. to C. The president of the road appealed to the plaintiff town to vote aid in its construction, under a statute authorizing them so to do by a two-thirds vote. An article was accordingly inserted in the warrant for their annual town meeting called March 2, 1868, which adjourned without action thereon to March 7 and then voted (149 to 9) in substance, to empower the selectmen and treasurer to issue bonds equal to five per cent. of the property valuation of Canton, to be exchanged for a like amount of stock of the P. & O. C. R. R. corporation; said vote to be upon condition that the directors should give an obligation binding the corporation and themselves individually to complete the road with the year 1868, the bonds to be issued monthly as the work progressed. Certain of the directors declined to give such obligation, and no bonds were issued under that vote. A special meeting was called December 19, 1868, and voted in substance, that, whereas, &c., (reciting the vote of March 7, and the failure of action thereon,) therefore voted to extend the time for completion to December 31, 1869, and to empower and instruct the selectmen and treasurer to issue bonds in aid therefor, to the full amount voted, and in accordance with the vote of March 7; provided, however, that there shall be executed and delivered within thirty days a bond for the completion of said extension, which shall be in all respects satisfactory to, and accepted by, the selectmen and treasurer of said Canton.

The defendants thereupon gave their personal obligation (in suit) and received in behalf of the corporation, bonds issued as the work progressed to the amount of $22,500. The road was partially constructed so that cars were run over it. It was, however, admitted at the trial, that the road was not completed within the year 1869, or ever, and that the bonds had never been returned.

The verdict was for the plaintiff, in accordance with the instruction of the presiding justice, for the face of the bonds and coupons issued thereon, due at the date of the writ, with interest on their amount to the time of the verdict, $30,404.30.

The defendants excepted.

F. O. J. Smith & B. Bradbury, for the defendants, contended that though the meeting of March 2, was legally called and notified for general business, it was not called as the statute requires, for the purpose of voting town aid to railroads; that "called for the purpose," means specially called; that an article requiring a two-thirds vote could not legally be acted on under a warrant containing articles requiring only a majority vote; that the warrant should recite or refer to the statute allowing towns to aid railroads by a two-thirds vote; that admitting the article to be legally before the meeting of March 2, no legal action could be had thereon at an adjourned meeting; that if any adjournment was legal as to the article, it must be by a two-thirds vote, no evidence that this adjournment was not by a majority vote; that the obligation in suit was not in accordance with either vote, neither vote authorizing the insertion of the clause requiring the return of the bonds or their equivalent; that if any verdict can be sustained not this, as there was a partial performance and the bonds, delivered as the work progressed, were not worth their face; that the stock received in exchange for the bonds should have been surrendered before the commencement of the action; and that the interest was compounded.

J. H. Drummond, for the plaintiffs.

DANFORTH, J. This is an action upon a written agreement under seal, in which the defendants undertake, in consideration of certain votes of the plaintiff town, to complete or cause to be

completed the Portland & Oxford Central Railroad, from Hartford Centre to Canton village, or, in case of failure, to refund to said town every bond issued by it in aid of said extension, or its equivalent in money, and all interest due and paid or unpaid.

At the request of the plaintiffs, the jury were instructed that "upon the whole evidence the plaintiffs are entitled to recover." Certain instructions were also given with regard to interest.

The jury returned a verdict in accordance with these instructions, and the defendants except to them.

The material facts in the case are not disputed. Certain bonds were issued to said road under the alleged votes of the town, and accepted by the directors or the defendants. The extension of the road has not been completed within the time specified, or at any time, nor have the bonds so issued and received or their equivalent been refunded.

It is, however, contended that the agreement upon which the action is founded is null and void, because it is not such a one as was contemplated by the vote of the town; that the provision in regard to refunding the bonds is not made a part of the agreement by that vote. This provision is certainly vital to the action, and if unauthorized the verdict cannot be sustained.

But this agreement was a voluntary act on the part of the defendants. They were not under arrest and required to give a bond not authorized by law to procure their release, nor was the obligation signed under any duress of person or property. Besides, the town subsequently authorized and required such a bond as "shall be in all respects satisfactory to, and accepted by, the selectmen and treasurer of said Canton." This vote of December 19, 1868, was a modification of the former one. It authorized not only a change of obligors, but also of the form as well as substance of the writing. A narrower construction than this would do violence to the language of the vote. The bond then is such as the defendants were willing to sign, was authorized by the vote, and has, by the commencement of this action if not otherwise, been ratified and accepted by the town.

The road has not been completed as required, and the alternative remains to be done, the refunding of the bonds or their equivalent.

But it is claimed that no such bonds as are binding upon the town have been issued in aid of this extension. That certain instruments purporting to be valid bonds of the plaintiff town have been issued in consideration of the agreement in suit, received by the defendants or the corporation represented by them, and still retained, is conceded. If, however, the objection is founded in fact, perhaps it must prevail. But we think it has no such foundation.

That the meeting of March 2, 1868, was a legal one, duly notified, is admitted in the defendants' argument, and so appears by the records. The act of 1867, c. 119, by virtue of which the vote for the loan of the town's credit was passed, is a public one, of which every person is presumed to have knowledge and of which all interested must take notice. It was therefore unnecessary to allude to it in the article in the warrant under which the vote in question was passed. Nor was it necessary under the act to call the meeting for that and no other purpose. True, it must be called for that purpose, as it was, by the insertion of the proper article in the warrant. It was no less for that purpose because other articles were put into the same warrant calling attention to other business to be done. A town meeting is called for the purpose indicated in each and every article in the warrant. Nor can the adjournment of the meeting by a majority vote be any objection to its legality. The adjourned meeting was merely a continuance of the original one and, while the meeting lasts, the voters have the same control of the business before them as they originally had. The two-thirds vote applied to all matters connected with, or which became a part of, the loaning of the town's credit. The adjournment neither added to or took from its liability in that respect.

But if any defects existed in that meeting, they were all cured by the subsequent action of the town at the meeting of December 19, 1868. This meeting appears to have been duly notified, and called for the sole purpose of considering the propriety and conditions of issuing these extension bonds. The former vote had been spread upon the records and was so referred to by the latter as to become a part of it, except so far as it was modified thereby. The

bonds were really issued under and by virtue of the latter, and it is necessary to refer to the former only for the purpose of ascertaining the terms and conditions of that under which the officers acted; and for this purpose only is it a necessary part of the declaration in the plaintiff's writ.

The objection that the stock, received in exchange for the bonds, was not surrendered before the commencement of the action cannot prevail. By the terms of the agreement this surrender was not made a condition precedent. The defendants bound themselves to refund the bonds, then, "in which case, all certificates of railroad stock which may have been issued to said town in exchange for the bonds of the town, shall be delivered up to the said Smiths at their request." Thus the bonds have been duly issued, are binding upon the town, and have been received by the defendants or the corporation which they represent. The defendants having failed to comply with their part of the agreement in completing the extension of the road or refunding the bonds, it only remains for them to discharge their obligation by paying an equivalent with the "interest due and paid or unpaid."

But it is said that if any verdict can be sustained, this one cannot, because the damages are too large; that there has been a partial performance of the contract by the defendants, and a corresponding acceptance by the plaintiffs, while the verdict is for a total failure.

If the defendants or the corporation had contracted to build a road in a certain specified manner, the title to which when finished was to be in the plaintiffs, and a question had arisen whether the work had been done in accordance with the contract, or as to a waiver of the time in which it was to have been done, the argument of the counsel would be entitled to great consideration. But such is not this contract. In its construction it is undoubtedly proper to take into consideration the proposal of the directors and the votes of the town as well as the written agreement. With the light thus obtained there is no difficulty in ascertaining its meaning. The purpose of the contract was solely to secure the extension of the road to Canton within a certain specified time. This must be accomplished or there must be a failure, and, if a failure,

it must necessarily be total and entire. If the extension was completed the contract would be fulfilled, otherwise it would not be; and in case of failure the only alternative was to refund, not a part of the bonds, but "each and every one" so issued. True, it was contemplated and agreed that bonds should be delivered from time to time as materials were furnished and the work progressed, yet the obligation to refund still remained in force. The fact, that they were to be refunded in case of final failure, conclusively shows that they were not to be in payment of work done or materials furnished, and that no inference of waiver or acceptance can be drawn from such delivery. There was in fact nothing to accept or waive except the time, and, this being a special provision of the contract, the municipal officers had no authority in regard to it and could have none without a vote of the town.

So in regard to the alleged settlement. The officers of the town could not have discharged the defendants from their agreement if they had desired to do so. We do not however understand from anything that appears in the case that such was the purpose or effect of the alleged settlement. Whether the agreement in suit were to be enforced or otherwise, it was certainly proper that the parties should ascertain what amount of bonds had been issued and the balance of interest paid by the town, as well as the amount of stock received. Nothing further than this appears to have been done or attempted.

The bonds issued before the last vote, if so issued, must rest upon the same ground as the others. The only objection to their validity is that they were issued before any obligation such as the vote contemplated was executed. But neither party can take advantage of such a defect. The subsequent vote authorized the full amount, and the defendants' obligation covered each and every bond issued for the road extension.

As to the value of the bonds the plaintiffs needed no evidence. Having been legally issued, the amount due on them would be their equivalent in money, certainly, until the contrary is shown. Sedgwick on the Meas. of Dam., 5th ed., 563.

The instruction of the presiding justice as to interest was clear-

ly correct and it does not appear that the jury were not governed by it. *Exceptions overruled.*

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

STATE *vs.* INHABITANTS OF OXFORD.

Oxford, January, 1876.—March 15, 1876.

Indictment. Way.

When a fine is imposed upon a town convicted under an indictment for a defective way, a notice of such fine from the clerk to the assessors is not defective merely from an omission to state the term at which such fine was imposed.

The statute provision that such fine shall forthwith be certified by the clerk to the assessors is directory, and an omission to comply therewith is not fatal to all prior proceedings.

When such fine is imposed upon condition to be complied with at a future time, it is sufficient to notify the assessors "forthwith" after the fine has become absolute by the failure of the town to comply with the condition.

A highway in two counties located by the commissioners of both counties acting jointly, cannot be discontinued in whole or in part by one of said boards acting separately.

ON EXCEPTIONS.

INDICTMENT for a defective way.

J. J. Perry, for the defendants.

G. D. Bisbee, county attorney, for the state.

DANFORTH, J. It appears that at the December term, 1870, of this court for Oxford county an indictment was found against the town of Oxford for a defective way and at the September term, 1871, a verdict of guilty was rendered; whereupon exceptions were allowed, and overruled August 14, 1872. Nothing further appears to have been done until the March term, 1873, when this entry was made upon the docket, "Fine of two thousand dollars imposed; unless the road is repaired or discontinued before next term an agent to be appointed outside of Oxford." A certificate

of this entry was sent to the assessors of the respondent town. At the next following term, the presiding justice having been of counsel, no action was had other than a continuance of the case to the December term, 1873, when an agent was appointed. December 27, 1873, a notice of the fine and of the appointment of an agent was served upon one of the assessors of said town. At the September term, 1874, the court ordered the fine to be paid to the agent on or before the first day of December then next. A notice of which order was duly served upon the assessors September 26, 1874. At the March term, 1875, more than four months having elapsed since the assessors had notice of the fine and they having failed to assess the amount or to comply with the order of court, upon motion of the attorney for the state, the presiding justice directed a warrant for the collection of the fine to issue. To this direction exceptions are taken.

It may be conceded as claimed by counsel that all the preliminaries prescribed by the statute to lay the foundation for the warrant must be complied with before it can issue. In this respect several alleged defects are relied upon.

The first objection is an alleged defect in the notice of the imposition of the fine served upon the respondents December 27, 1873. It is claimed that the notice was of a fine imposed at the December term, 1873, when in fact the fine was imposed at the previous March term, and that it was not given "forthwith" as required by the statute. The first of the objections does not seem to have a foundation in fact. It is true the notice is dated as of the December term when it was undoubtedly issued, but the language is, "a fine of two thousand dollars has been imposed" without indicating the time when it was done. No injury could result to the town from this omission, if such it were; for the time for making the assessment must date from the service of the notice and not from the time when the fine was levied. But we do not deem it an omission, as the statute nowhere requires it, nor does there seem to be any necessity for it.

The second objection to the notice is equally invalid. It is true the statute, R. S., c. 18, § 71, requires that when a fine is imposed the clerk is to certify it "forthwith" to the assessors. This pro-

vision, however, is not a condition precedent to the assessment of the amount, but is merely directory to the clerk. It is true that the notice must first be given, but it cannot be true that the legislature intended that all prior proceedings in such cases should fail merely from a temporary neglect of the clerk from which as already seen no harm could accrue to the respondents.

But another sufficient answer to this objection is that in contemplation of law the notice was given forthwith. It was given at once, or as early as it could have been after the fine became absolute. When first imposed it was only conditional. It must be presumed that for the benefit of the town, for no other reason appears, no agent was to be appointed and of course no fine collected, if the road should be repaired or discontinued before the then next term. Of this condition the town authorities must be presumed to have had knowledge. There was then no fine to be assessed or collected and no occasion for notice until the failure of a compliance with the condition appeared. This could not appear at the next term as that was holden by a justice who had been of counsel in the case; but at the subsequent term it did appear action was taken and notice both of the fine and an appointment of an agent forthwith given.

Another objection urged is that the agent was not legally appointed. It is true as claimed, that he was not appointed at the same term at which the fine was imposed. It is also true that there is no law requiring it. The statute, R. S., c. 18, § 70, provides: "The court imposing them (fines) is to appoint one or more agents to superintend the collection and application of them." This was done, not perhaps at the same term but by the same court. A change of terms does not change the court, though it may, the presiding justice.

It is further claimed that before the appointment of the agent the road had been discontinued and thus one of the contingencies named in the order having been complied with, the power to appoint ceased. If this were true in fact it might be a valid objection to anything more than a nominal fine and costs. But we find no facts upon which it can rest. The testimony relied upon is the record of the proceedings of the commissioners for the county, of

Oxford, and it is claimed that these records cannot be impeached collaterally. This is undoubtedly a sound legal proposition if that board had jurisdiction. But if otherwise their judgment is a mere nullity and must be so treated. *Small* v. *Pennell*, 31 Maine, 267.

In this case the records neither show a jurisdiction nor a want of it. They describe a way lying within the county of Oxford but they do not show that it is not a part of a way lying in two or more counties. On the other hand the case finds that the way in question is a part of a way in two counties and that it was located by the joint action of the commissioners for Oxford and Cumberland counties. Still it is claimed that in such cases after the location, the commissioners of one of the counties though which such a way runs, have jurisdiction upon a petition for the discontinuance of that part which lies within their own county. If there were no other statute provisions than those referred to by the counsel possibly his position might be sustained. It is however a familiar principle of law that nothing is to be presumed in favor of the jurisdiction of an inferior tribunal, nor are we to infer a conflict of jurisdiction unless a fair construction of the statutes requires it. Commissioners derive all their authority from the statutes and to them alone we must look for its extent and limitation.

The chapter of the Revised Statutes relating to ways provides two distinct and separate tribunals for the location, alteration and discontinuance of highways; the commissioners for each county and those of two or more counties acting jointly. It would indeed be a serious defect in the law if the jurisdiction of those two tribunals were in any respect conflicting. But no such defect exists. The duty of the former is confined to roads in their own county, and no provision of law has been pointed out which is even claimed to authorize any jurisdiction beyond this. The duty of the latter relates to ways in two or more counties and is confined to such ways. There can be no conflict between two such tribunals. But it is argued that notwithstanding this road was located by the joint action of two boards, still when so located the authority of the two boards ceased and either might legally

discontinue that part which lies within its own county. This presents the singular anomaly of giving a part of a tribunal the power to undo, immediately, that which it required the whole to establish ; which would be quite as objectionable as a conflict of jurisdiction.

A little attention to the law will show that the power to create and destroy rests in the same tribunal. R. S., c. 18, § 16, provides that "when a petition is presented respecting a way in two or more counties, the commissioners . . may call a meeting of the commissioners of the counties," &c. By § 17 of same chapter, each county must be represented by a majority of its commissioners, otherwise no action can be had except to adjourn. Thus two or more boards acting jointly have jurisdiction "respecting" this class of ways. "Respecting" must necessarily refer not only to such ways to be located, but also to such when already located. The language is unlimited in its meaning and so must be in its construction. If there could be any doubt as to this proposition, it is removed by referring to the revision of 1841, from which the provision is taken, with a change of words, to be sure, but with no evidence of any intended change of meaning. In c. 25, § 23, of that revision, the words are, "petitions for laying out, altering or discontinuing" such ways, and in § 26 it requires a majority of all the commissioners, each county being duly represented, to discontinue as well as to lay out. The inference is therefore inevitable, that over ways like the one in question the joint board has exclusive jurisdiction, not only to locate, but also to alter or discontinue.

Nor does it avail to divide the roads into such parts that one of them may lie wholly within one of the counties. That tribunal which has jurisdiction of the whole must have it of each and every part of which that whole is composed. *Jones* v. *Oxford County*, 45 Maine, 419. *Sanger* v. *Commissioners of Kennebec*, 25 Maine, 291.

The case therefore shows no reason why the warrant should not issue as ordered, and the entry must be

Exceptions overruled.

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

CYRUS H. HOLDEN *vs.* ROBINSON MANUFACTURING COMPANY.

Oxford, January, 1876.—April 12, 1876.

Watercourse. Evidence.

Upon the question as to the floatability of a stream upon which a dam has been built and is standing, it is not competent for a witness to give his opinion as to the possibility or expense of running logs, at any particular time upon the stream, without using the water raised or kept back by the dam.

ON MOTION AND EXCEPTIONS.

CASE for obstructing the stream passing from Thompson pond to the Little Androscoggin river in Oxford, by the defendant's dam, and hindering the passage of the plaintiff's logs. On the question of the floatability of the stream in its natural state, evidence was introduced by both parties. The verdict was for the plaintiff, for $175.23, which the defendants moved to have set aside as against law and evidence. They also filed exceptions to the exclusion of certain testimony of the witness, Holbrook, offered by the defendants, which appears in the opinion.

J. J. Perry, for the defendants.

A. A. Strout & G. F. Holmes, for the plaintiff.

DANFORTH, J. The defendant corporation had rebuilt, and was the owner of, a dam across the stream leading from Thompson pond to Little Androscoggin river. The plaintiff, desiring to drive some logs, which he had cut upon land bordering upon said pond to the river, had got them as far as the dam, and found *that* an insuperable obstacle to his further progress by water. Passage through the dam being refused by the defendant's agent, the logs were taken the remainder of the way, at an alleged increase of expense, by land. This increased expense is the object of this action. Hence the issue between the parties is, whether the stream in its natural state was floatable and a public highway or otherwise with its incidental question of damages.

Upon this issue certain testimony was offered by the defendant

which upon objection was excluded. The dam in question was called Robinson's dam.

The first exception is to the exclusion of testimony from Seth I. Holbrook, that "when Robinson was hauling the plaintiff's logs from Robinson's dam down to the Little Androscoggin river, in my opinion it would not have been possible to have driven these logs, using only the natural waters of the stream, from Robinson's dam down the stream into the Little Androscoggin river." The exclusion of this testimony was correct. Were it a statement of the fact, instead of an opinion, it would still have been immaterial. It relates to a particular time, when, perhaps, by reason of a drought there might not have been sufficient water, though at other seasons proper for driving logs there might have been an abundance.

In order to make a stream floatable, it is not necessary that it should be so at all seasons of the year. It is sufficient if it have that character at different periods with reasonable certainty and for such a length of time as to make it profitable for that purpose. Nor would it in any degree tend to mitigate the damages. The plaintiff's logs were at the dam. It does not appear that there was any want of water to get them through. No question is made upon this point. If, therefore, the plaintiff was rightfully there with his lumber, he should have been permitted to pass at once, or without unnecessary delay, regardless of any conjectural difficulties he might afterwards meet with, and, in the absence of such permission, he would be entitled to recover at least the difference in expense between taking it through the dam by water and taking it round it by land.

But this testimony is a matter of opinion, and not only so, but founded upon a state of facts not in the case. True, the witness was somewhat accustomed to driving logs and might perhaps aid the jury with an opinion as to the cost of driving and perhaps as to the possibility of doing so under a given state of facts; though ordinarily the floatability of a stream does not depend upon the skill of any particular persons in driving logs, but rather upon its character and the amount of water flowing in it. These facts are susceptible of direct proof and such as an ordinary jury would have

no difficulty in comprehending and applying. The witness further predicates his opinion upon the assumption that the natural waters of the stream were running. But the natural waters of the stream were not running, and it does not appear that he knew or could know at that time what the natural waters were. The dam was then diminishing the waters below and increasing those above. The amount of water then, which would have run there at that time if the dam had not obstructed the stream, must have been a matter of conjecture in the mind of the witness and too uncertain to found an opinion upon.

No point seems to be made under the second exception. The question was admitted. The answer as reported in the exceptions is plainly inadmissible as what the witness might or might not want to do, is an entirely immaterial fact. Besides the report of the testimony shows that an answer responsive to the question was immediately given and received.

The two remaining exceptions are to the exclusion of questions calling for the opinion of the witness, first, as to the possibility of driving the logs at that time of the year from Thompson Pond to the Little Androscoggin river, "without the assistance of the water held back by Robinson's dam;" and second, as to the comparative cost of driving these logs between these points "without the assistance of Robinson's water," and driving them to the dam, then hauling them across the land. The suggestions already made as applicable to the first exception will apply in part at least to these. The opinion if given must necessarily have been founded upon conjecture. They require the witness to discriminate between the water which would naturally run in the stream at that time, and the water held back by the dam. We have no reason to suppose that the witness could do this, and, if he could, the law would not allow it.

The first question is whether the stream is floatable without the dam. If it is not, the plaintiff could not avail himself of the fact that it is made so by the defendant's dam. If the stream was originally private property, exclusively so, any improvements made upon it by the owner would give the public no rights in it. But if

on the other hand the stream is by nature floatable, those who have occasion to use it as such may do so and may also have the benefit of such improvements as may be put upon it, having reasonable regard to the rights of the owner. The character of the stream cannot be changed by the improvements put upon it. A floatable stream may be private property but its use as such must be subject to the easement of the public. In the same way the improvements remain private property but subject also to the right of way in the public. Hence no such distinction as these questions contemplate is allowable and they were properly excluded. *Wadsworth* v. *Smith*, 11 Maine, 278.

The jury have found that this stream without any improvements is floatable and upon such testimony that from a careful examination of it we cannot say they were incompetent or were influenced by improper motives. *Motion and exceptions overruled.*

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

VIRGIN, J., having been formerly consulted, did not sit.

RUFUS DUNHAM *vs.* ARTEMAS FELT *et al.*

Oxford, November 12, 1875.—May 5, 1876.

Poor debtor. Bond.

In an action of debt on a poor debtor's bond of the general form prescribed by statute, a certificate of discharge, signed by two justices of the peace and quorum of the county, is *prima facie* evidence that one of the alternative conditions has been performed.

Such certificate, when there is no evidence to control its *prima facie* force, constitutes a bar to the action, whether the instrument is construed as a statute bond or as a common law bond.

ON EXCEPTIONS.

DEBT on poor debtor's bond dated August 9, 1873, which was not approved by the creditor or by two justices as provided by law. The presiding justice gave the plaintiff permission to make such approval.

The defendant introduced a certificate of discharge dated Janu-

ary 31, 1874, signed, "Charles A. Kimball, trial justice, chosen by Thomas R. Day, deputy sheriff, for the creditor," and "A. K. Knapp, trial justice, chosen by the debtor."

S. F. Gibson & C. E. Holt, for the plaintiff, contended that this was a statute bond, and further that while certificates of magistrates in cases of this kind have been rightly held to be *prima facie* evidence that the requirements of the statutes have been complied with, yet in this case the creditor having the right to select one of the magistrates, and the certificate being silent as to the absence or presence of the creditor, that the selection of Kimball for him by the deputy sheriff, Day, was unauthorized, the poor debtor's court not legally constituted, their discharge invalid, and that condition of the bond not complied with.

S. R. Hutchins, with whom was *E. Foster, jr., & C. H. Hersey*, for the defendants, contended that this was not a statute bond, not being approved in writing, either at the time of the trial, or even since. The certificate is fair on its face. A magistrate may be chosen by an agent or attorney of the creditor, or in a certain case by an officer. The selection here was by an officer, whose action was in legal presumption authorized.

WALTON, J. This is an action on a poor debtor's bond. One of the questions argued is whether the bond is a valid statute bond, or a bond good only at common law. We do not find it necessary to determine this question; for whether the bond be regarded as a statute bond, or a bond good only at common law, the certificate of the justices introduced in defense, was *prima facie* evidence that one of its alternative conditions had been performed; and no evidence being offered by the plaintiff to control its *prima facie* force, it constituted a full and complete bar to the action. Such in effect was the ruling of the presiding judge at *nisi prius*. We think the ruling was correct. *Smith* v. *Brown*, 61 Maine, 70. *Ayer* v. *Fowler*, 30 Maine, 347. *Bachelder* v. *Sanborn*, 34 Maine, 230. *Exceptions overruled.*

Judgment for defendants.

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

MIRIAM SPAULDING *vs.* DAVID RECORD *et als.*

Oxford, 1874.—June 1, 1876.

Poor debtor.

It is the right of the creditors to choose one of the justices to take the disclosure of a poor debtor under R. S., c. 113, §§ 24 and 42, and when this right is denied him the justices taking the disclosure have no jurisdiction and their proceedings are void.

Parol evidence is admissible to prove that the justices had no jurisdiction.

ON REPORT.

DEBT on poor debtor's bond.

A. M. Pulsifer, *W. W. Bolster* and *J. R. Hosley*, for the plaintiff.

W. K. Kimball, for the defendants.

DICKERSON, J. This is an action on a poor debtor's bond. The defendants claim that one of the conditions of the bond has been fulfilled, and introduce the record of the discharge of David Record, the original debtor and principal defendant, in "proof thereof, signed by George D. Bisbee and Gilbert Barrett, two justices of the peace and quorum, and dated the 18th day of April, A. D. 1873.

The plaintiff contends that the justices had no jurisdiction of the case for the reason that neither of them was selected by the creditor. Though the record shows that George D. Bisbee, one of the justices, was chosen by the creditor, we think that it is erroneous. The parol evidence shows that Seth Sampson, esq., was the creditor's attorney in the original suit, that he brought the suit on the bond and was present at the taking of the disclosure and claimed the right to choose one of the justices as attorney for the creditor. Bisbee testifies that he was selected by William F. Spaulding, son of the creditor, but Spaulding swears that he was not agent or attorney for the creditor, that Sampson requested him to get Bisbee to approve the bond, that he did so, and that "he supposed that he chose him for the whole

thing." Bisbee doubtless labored under the misapprehension that Spaulding had authority to choose him as justice for the plaintiff; but his mistake ought not to be allowed to deprive the plaintiff of her legal rights. It was the right of the plaintiff to choose one of the justices, and her counsel was present and insisted on this right. The proceedings of the justices were *coram non judice*, and constitute no bar to the forfeiture of the conditions of the bond. It is competent in such cases to prove by parol evidence that the justices had no jurisdiction. *Williams* v. *Burrill*, 23 Maine, 144. *Ware* v. *Jackson*, 24 Maine, 166.

Judgment for plaintiff for the penal sum mentioned in the bond in suit. Execution to issue for the amount due upon the judgment or execution on which the principal defendant was arrested.

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

OCTAVIUS K. YATES *vs.* MARY A. LURVEY.

Oxford, 1875.—June 6, 1876.

Married woman.

An action lies against a married woman for medical attendance rendered at her request, and for which she expressly promises to pay.

ON EXCEPTIONS.

ASSUMPSIT on account annexed for some forty visits of a physician extending over two years, stating a balance of $35.00. It was agreed that the services were rendered, and the prices reasonable, that the defendant was a married woman, owning property in her own right, that the husband went for the plaintiff in the first place, and that the defendant at the first visit promised and agreed to pay for the services which were rendered entirely for herself and her children by her former husband, and were charged to the

defendant on the plaintiff's books. The presiding judge ruled the action maintainable, and the defendant excepted.

S. F. Gibson & C. E. Holt, for the defendant.

H. C. Davis, for the plaintiff.

WALTON, J. The only question is, whether an action will lie against a married woman for medical attendance rendered at her request, and for which she expressly promises to pay. We think it will. The common law in this particular is entirely abrogated in this state. By statute a married woman is now made liable for any debt contracted by her, in her own name, for any lawful purpose; and an action may be maintained against her therefor, either alone, or jointly with her husband. R. S., c. 61, § 4.

The case finds that the plaintiff is a regular physician, that he rendered the services sued for, that the prices charged are reasonable, that the defendant promised at his first visit to pay for his services, that they were exclusively for her and her children by a former husband, and were rendered entirely upon her credit, and charged to her upon the plaintiff's books. That the plaintiff is entitled to judgment upon such a statement of facts we cannot doubt, notwithstanding the defendant is a married woman.

Exceptions overruled.
Judgment for plaintiff.

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

JOHN C. GOODWIN *vs.* NAHUM A. HERSOM.

York, 1875.—August 6, 1875.

Evidence. Pleading. Variance.

In an action on the case against a surgeon for negligence in which injuries were alleged to have ensued from his want of ordinary care and skill in the treatment of a fracture, *held*, that proof that he gave assurances to the plaintiff that he possessed and would exercise extraordinary skill, and effect a cure, was not admissible to support the declaration, since the plaintiff must recover, if at all, in accordance with his allegations.

ON EXCEPTIONS.

CASE, alleging substantially that the defendant, on the sixteenth day of June, 1872, at Sanford, &c., was a physician and surgeon employed by the plaintiff, to treat his dislocated and fractured ankle and foot, which the defendant attempted and undertook to do, but did it so negligently, carelessly and unskilfully, that, by want of skill and necessary and proper setting, care and attendance thereto, &c., &c., the said foot and ankle became inflamed, sore and festering for six months, and permanently stiff and fixed in an unnatural position, so as to be almost useless, &c. The declaration contained two counts, both setting out the case with the customary amplifications, but both based upon an asserted failure to exercise ordinary care and skill. *Ad damnum*, $5000.

At the trial the plaintiff and his brother testified that the former thought he had a bad leg, and wanted to go to the Massachusetts General Hospital, but that Dr. Hersom ridiculed the idea, saying he had been a surgeon in the army; was fully competent; that it was a simple fracture which he could attend to as well as anybody, and would warrant the patient as good a leg as the other, or as it ever was.

Among other instructions, the presiding justice gave the following, to which the plaintiff excepted, the verdict having been against him:

"The parties might have entered into a contract between themselves. The doctor, on his part, might have engaged that he would treat this patient for a given sum, and entered into a con-

tract that he would bring about a result, and warrant that result. That would have been a contract upon which, if there had been a breach of it on the part of the defendant, the plaintiff might have sustained an action of assumpsit. This is not an action of assumpsit; it is for a tort, and hence you will lay out of mind, in the consideration of this case, so far as the maintaining of the action is concerned, any testimony relating to an alleged warranty on the part of the doctor. So far as that testimony goes, it is only admissible to show, if it was made, what the doctor thought of his own ability. Whether he made such a conversation with this plaintiff or not has nothing to do with the maintenance of this suit; the plaintiff may not be able to maintain it if he did make such conversation."

W. J. Copeland, for the plaintiff, contended that if the defendant did not have such skill as he professed to have, he was liable under the circumstances of this case in tort, for not having it; that if he had such skill it was negligence if he did not exercise it, and that the instructions of the court that "whether he made such a conversation or not has nothing to do with the maintenance of this suit," was erroneous, as the defendant, whatever his pretensions and representations of skill were, would, under such instructions, be held to ordinary skill only.

A. Low & I. T. Drew, for the defendant.

Barrows, J. The plaintiff must recover, if at all, in accordance as well with his allegations as with his proof.

He does not allege in his writ that the defendant made any pretensions to extraordinary skill as a surgeon, or undertook to warrant a prompt or perfect cure, or that he was induced to employ the defendant by means of any such pretensions or promises.

The only issue presented and joined in these pleadings by the parties, was, whether the defendant was guilty of a want of the ordinary skill and care which every professional man impliedly undertakes to bestow upon a case committed to his charge.

In view of the testimony introduced by the plaintiff and recited in the exceptions, the instruction was appropriate, in order to

direct the attention of the jury to the issue upon which they were to pass; and it affords the plaintiff no just cause of complaint.

Exceptions overruled.

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

CORNELIUS SWEETSER *et al.*, appellants, *vs.* ENOCH H. MCKENNEY.

York, 1874.—August 6, 1875.

Forcible entry and detainer. Landlord and tenant. Estoppel. Trial.

One cannot maintain the process of forcible entry and detainer against a party who holds his written agreement leasing the tenement to such party "for five years and as much longer as he desires" at a certain rate per annum, if such party performs all that is required of him by the terms of the lease, although the original five years have long since elapsed, and the plaintiff has given his tenant notice to quit.

As between the parties to such a lease, the right of occupation by the lessee, so long as he fulfils its condition, is not liable to be defeated at the option of the lessor.

The lessor is estopped by the receipt of the rent and by his own written agreement from asserting that the lessee's possession is unlawful.

Where the defendant in a process of forcible entry and detainer asserts no right in the premises except by virtue of a contract with the complainant, he is not liable to be defaulted in the appellate court for want of the recognizance called for by R. S., c. 94, § 6, when the case has been tried in the court below and judgment rendered in his favor there.

ON EXCEPTIONS.

COMPLAINT for forcible entry and detainer, inserted in a writ of attachment dated January 13, 1873, appealed from the municipal court of Biddeford.

The presiding justice, after the evidence was out, ruled that the defendant's lease, (the tenor of which is stated in the opinion,) gave him a right to remain in possession so long as he complied with its terms, whether the plaintiffs were owners or lessees of the land on which the building was erected, and notwithstanding the plaintiffs' notice to quit. If the ruling was correct, judgment to be entered for the defendant; if erroneous, the case to stand for trial.

J. M. Goodwin & W. F. Lunt, for the plaintiffs.

R. P. Tapley, for the defendant.

BARROWS, J. The plaintiffs bring this process of forcible entry and detainer against the defendant to get possession of a tenement which he claims to hold by virtue of an agreement or lease from them signed by both parties at Biddeford, January 11, 1861, under which he has been in possession since its date, and which is of the following tenor:

"George H. Adams, Cornelius Sweetser and E. H. McKenney agree as follows:

Adams and Sweetser agree to lease to E. H. McKenney the room formerly occupied by the municipal court together with the whole attic in Washington block, Liberty street, for five years and as much longer as he desires, provided the land upon which said block stands is bought or leased for a longer time, at the rate of $50 per year commencing with January 1, 1861. Said E. H. McKenney shall also have the privilege of making any alterations and improvement he desires, and of removing all his glass in sky-light and other fixtures upon leaving, provided he shall deliver up the premises in as good condition as he finds them."

The plaintiffs built the building about 1853 upon land which they at first leased, and for which they paid rent until November, 1872, when they bought the land and since then have been the owners of the fee in the premises. November 9, 1872, they gave the defendant written notice that his tenancy in the rooms occupied by him would cease January 1, 1873, and therein requested him to quit and deliver up possession accordingly. He refusing, they brought this process, and the question is whether upon this state of facts the defendant had a right by virtue of the foregoing agreement to remain in possession so long as he complied with its terms, notwithstanding the plaintiffs' notice to quit.

The plaintiffs insist that the instrument relied on by the defendant could be operative as a lease for five years only—that it is void for any longer period because of its uncertainty and for

want of proof that at the expiration of the five years the plaintiffs had either become the owners of the land or leased it for a longer definite time, and for want of notice from defendant to plaintiff of his election to renew the lease for any further fixed time.

As between these parties presenting themselves in their present attitude and under existing circumstances as to title and occupation, perhaps it may not be necessary to determine whether the positions thus taken by the plaintiffs are or are not technically correct.

We think that in any view which could be taken these plaintiffs are estopped by their agreement from maintaining this process to oust the defendant from the possession which they gave him so long as he lives up to that agreement and desires to remain.

We feel bound to give effect to the written agreement of the parties according to its tenor and intent. The stipulation that he was to have the rooms "as much longer as he desires" was part of the consideration for which he took a lease and paid the $50 annual rent for five years. All the conditions being performed on his part, the plaintiffs might as well ask to be relieved from fulfilling the stipulation that he should be permitted to remove his sky-light and fixtures.

The plaintiffs are precluded by their own written agreement from asserting that the defendant unlawfully refuses to quit the premises, for they have received during the five years of the original term and up to the time of the commencement of these proceedings a certain sum annually which the defendant paid in part in consideration of their written promise here produced that he might occupy the premises not only during those five years, but as much longer as he desired, paying the same rent.

The plaintiffs cannot be permitted to ignore the promise upon the faith of which the defendant has acted, and by means of which they secured a tenant for the original term. The whole of the contract between the parties is to be regarded. It has been executed in part, and seeing nothing illegal in its terms the court will not aid one party to break it, while it is performed by the other.

In *Horner* v. *Leeds*, 1 Dutcher, 106, by the instrument under consideration certain premises were "demised, granted and to farm

let" for the manufacture of salt "for any term of years the said (lessee) may think proper from date." Hereupon the court say "literally this means that the demise is for a term of years only but that term is during (the lessee's) pleasure."

They do not therefore treat the instrument as nugatory, but turning their attention to the construction of it as a whole, and finding that the return for the land was to be in substance the dividends upon two shares in the salt works valued at $50 each constituting a portion of the profits of the contemplated business and that the assignee of the lessee had abandoned the works, they held that the lease was thereby determined.

Thus they gave full force and effect to the agreement of the parties, holding that the character of the rent implied a stipulation to continue the business and modified the effect of the phrase "during the lessee's pleasure."

In *Hurd* v. *Cushing*, 7 Pick., 169, a lease for an indefinite period of time and so long as the salt works then intended to be erected should continue to be used, seems to have been construed as a lease for the life of the lessee determinable by his ceasing to occupy the salt works.

And in *Cook* v. *Bisbee*, 18 Pick., 527, a lease was made of the land "on which Kingston furnace (so called) now stands" with land and water privileges appurtenant to one R. for "the sum of ten dollars a year (so long as he shall keep the said furnace and buildings on said land,) in full for the rent of the premises." The furnace had not been put in blast for some years; portions of it had been removed, and one of the buildings had been converted into an auger shop when the heirs of the lessor gave the assignees of the lessee notice to quit though the rent had been regularly paid and tendered.

The court say that the lease though inartificially drawn "must be construed most in favor of the lessee when the words are doubtful" and they held that in the absence of evidence affirmatively proving an abandonment, the tenants might take their own reasonable time to rebuild the furnace and that the lease was not terminated.

And in *Effinger* v. *Lewis*, 32 Penn., 367, the court recognize

the principle that parties may contract for an estate in land by lease determinable only at the will of the lessee. In the cases which we have quoted the leases seem to have been under seal; but under our statutes a seal does not seem to be essential to their validity as between the parties to them, provided they are in writing, and signed by the maker or his attorney. R. S., c. 73, § 10. We are not called upon to determine here what might be necessary to make one effectual against any person except the lessor, his heirs, devisees and persons having actual notice thereof.

The plaintiffs seem to have had from the outset such an interest in and control of the land on which the buildings stood as to enable them to make good their contract with the defendant and never seem to have thought of questioning his right to the possession under it until they had become practically the owners of it. We see no way in which they can maintain their claim to the possession of the tenement as against him upon the testimony here presented.

The plaintiffs do not rely in argument upon the exceptions filed at the May term, 1873, to the overruling of their motion to the presiding judge to order a default for want of the recognizance on the part of the defendant which they claim is called for by c. 94, § 6.

Such claim cannot be sustained in this case. The case was not removed as contemplated in that section but tried in the court below,—judgment rendered for defendant and the case brought hither by plaintiffs on appeal claimed.

Whether that course were proper or not, no such result as the plaintiffs claim, could follow in the appellate court.

But we do not think § 6 is applicable in any way to a case where the defendant claims to hold under a contract with the plaintiffs themselves, but only when by his brief statement he asserts title in himself or in some third party under whom he claims.

Why these exceptions should have been printed with the case when the plaintiffs make no point upon them does not appear.

Upon our view of the whole case the entry must be

Exceptions overruled.
Judgment for defendant.

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

CHARLES E. SNOW *vs.* BOSTON AND MAINE RAILROAD.

York, 1875.—September 13, 1875.

Railroad. Trial. Evidence.

When the value of real estate taken for a railroad or the amount of damage caused by such taking is in question, persons acquainted with it may state their opinion as to its value, or as to the amount of damage done if all is not taken.

At a trial under the act of 1873, c. 95, relating to damages for land taken for railroad purposes, the granting or refusal of a view by the justice presiding is matter of discretion and not reviewable by the law court.

ON EXCEPTIONS.

This was an appeal from the decision of the county commissioners relating to damages for land of Snow, taken for railroad purposes in North Berwick, brought to this court in accordance with Public Laws of 1873, c. 95. At the trial the plaintiff moved that the jury be permitted to view the premises, which motion the court denied.

The court excluded the opinion of the land owner as to the amount of damages sustained by him; allowed him to testify as to his opinion of the value of his whole lot before a portion was taken by the railroad, but excluded his opinion of the value of the remainder of the premises after a portion was so taken. The plaintiff introduced John Johnson, a municipal officer of North Berwick, who lived in the vicinity of the land taken, had bought and sold land in the vicinity, was acquainted with petitioner's land, and its value. He was allowed to give his opinion of the value of petitioner's whole lot before the taking, but his opinion of the value of that portion left after taking was excluded. The plaintiff excepted.

W. J. Copeland, for the plaintiff.

G. C. Yeaton, for the defendants.

DANFORTH, J. This is an appeal under the act of 1873, c. 95, relating to damages for land taken for railroad purposes, and comes before us upon exceptions to the ruling of the court at *nisi prius*.

The first objection is that the jury were not permitted to view the premises upon plaintiff's motion.

The act referred to is independent of and distinct from that found in R. S., c. 18, § 13. The appellant had his election to pursue his remedy under either, and he chose the former. By that no provision is made for a view by the jury, and if one is permissible, it rests in the discretion of the court to grant or refuse it. To the exercise of that discretion no exceptions will lie.

Upon the ruling excluding the testimony offered, we think the exceptions must be sustained. The owner of the land was not permitted "to give his opinion as to the amount of damages sustained by him," nor as to the value of the land left. The opinion of another witness, "acquainted with the petitioner's land and its value," as to the value of the portion left after the taking, was also excluded.

This testimony was excluded, not on the ground of any want of knowledge on the part of the witnesses of the property in question, but for the reason that such opinions were incompetent evidence.

The question at issue was the amount of damage to the petitioner's land by the location of the railroad. The difference in value before and after the location would be a valid test of that damage, and it would seem to be immaterial whether the testimony was admitted in this form or in answer to a direct question as to the amount of the damage. In either case it must come as an opinion, and in either case it is a question of value.

The real question then is, whether the opinion of a witness as to the value of property with which he is acquainted, or as to the amount of injury done to it, is proper evidence for the consideration of the jury. Such an opinion as to the value of the whole, is conceded to be admissible; why not, then, as to the part left? The reason for its exclusion, given by counsel, that it would instruct the jury as to the amount of the verdict to be rendered, would seem to be a very good reason for its admission. Instruction is what the jury want. They would not be bound by it, any more than by other testimony, but it would be more or less valuable in enabling them to come to a correct conclusion.

There appear to be two grounds upon which opinions are admissible in evidence. The first is the case of experts, where the knowledge upon which the opinion is founded relates to "questions of science, skill or trade, or others of the like kind," and is the result of special study, or experience, or both. In such case, the opinion is competent as coming from a person who is supposed to know more of the subject matter than ordinarily falls to the lot of jurymen, and may rest upon the personal knowledge which the witness may have in relation to that about which he is testifying, or upon information derived from other witnesses, or even upon a hypothetical case.

The second is where the opinion is founded upon knowledge equally open to all, and relates to the ordinary affairs of life, such as pertain to every day business transactions. In this case the opinions given must be the result of personal knowledge, and thus to a certain extent become matters of fact. Take for instance the matter under consideration, the value of property. While its market value must necessarily, to some extent, be an opinion, it still very largely partakes of a question of fact. In such case, if opinions were rigidly excluded, the damage to property or its value could never be clearly proved. It is very much like the proof establishing the identity of a person, in regard to which one may testify with very great confidence, and yet his testimony is an opinion resulting from a personal knowledge of the party to be identified. So too, in relation to the appearance of a man as indicating whether he is under the control of any particular feeling or passion, as well as in a great variety of similar cases, in which it would be difficult, or perhaps impossible, to define distinctly the line between fact and opinion. This may be an exception to the general rule of evidence, but it is an exception founded in the necessity of the case, and one of great value in ascertaining the truth. It is often the only available and frequently the most satisfactory testimony. Whether a person manifested anger or any other passion, upon a particular occasion, depends so largely upon the peculiar and indescribable appearance of the face and other indications at the moment, that an eye-witness may be morally sure of the fact, and yet utterly unable to communicate

to another, such indicia with sufficient distinctness to give any satisfactory idea of the existing fact.

The same principles apply, with perhaps less force, to the value of property or the extent of an injury to it. The value or the amount of damage to property must necessarily be a matter of opinion, and the judgment of one well acquainted with its situation and character, its surroundings and facility of market must be more satisfactory than any description without such judgment. It is true this, like all oral testimony, may at times prove unreliable ; but its value can be readily and satisfactorily tested by cross-examination.

In accordance with these views we find the authorities. In *Haskell* v. *Mitchell*, 53 Maine, 468, it was held proper to allow a witness to state "the difference in value between the horse as represented and as actually existing." The same principle was settled in *Whiteley* v. *China*, 61 Maine, 199. These cases refer to personal property, but the same principle is applied to real estate, as shown by the cases cited and relied upon.

In *Shattuck* v. *Stoneham Branch Railroad*, 6 Allen, 115, the very question now in issue was involved; and the owner of the land was allowed to "testify to his opinion of the amount of damages which he has sustained;" and it was there held as well settled law, "that where the value of property, real or personal, is in controversy, persons acquainted with it may state their opinions as to its value." "Also where the amount of damage done to property is in controversy, such persons may state their opinion as to the amount of damage." The case of *Swan* v. *County of Middlesex*, 101 Mass., 173, is a case in point and supported by many authorities there cited.

In *Clark* v. *Rockland Water Power Company*, 52 Maine, 68, similar testimony was held inadmissible; but the witness was offered as an expert, and his opinions were excluded solely on the ground that "he had no special knowledge of the value" of the property in question. *Exceptions sustained.*

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

VIRGIN, J., did not concur.

STATE *vs.* HORACE WENTWORTH, appellant.

York, 1875.—October 6, 1875.

Intoxicating liquors. Evidence. Trial. Witness. Complaint.

A sale of spirituous liquors by a servant in the shop of his master is *prima facie* a sale by the master.

Proof of sales by the master is admissible evidence as tending to show that the sale of the servant was with the assent and by the authority of the master.

When instructions were given to a servant not to sell, it is for the jury to determine, whether they were given in good faith, or were colorably given.

A defendant in a criminal prosecution who becomes a witness, "at his own request," waives the constitutional privilege of exemption from furnishing or giving evidence against himself.

The privilege of exemption from answering questions, which being answered truly would disclose the guilt of the witness, is the privilege of the witness alone.

It would seem that the objection to answering is one which the witness alone, and not his counsel, can interpose.

When the master not merely denied the authority of his servant to sell spirituous and intoxicating liquors, but testified that he forbade his selling, it was *held* competent on cross-examination to inquire of him if he had spirituous and intoxicating liquors in his shop, and if he had sold such liquors.

Acts of a party, who is a witness at his own request, may be inquired about on cross-examination, though tending to prove his guilt, for the purpose of negativing the truth of his statements made on his direct examination.

The cases *Tilson* v. *Bowley*, 8 Maine, 163, and *Low* v. *Mitchell*, 18 Maine, 372, questioned so far as they relate to cross-examination.

Technical accuracy is not required in setting forth the record of a former conviction under R. S., c. 27, § 55, relating to spirituous liquors and prohibiting their sale.

ON MOTION AND EXCEPTIONS.

Complaint to the municipal court of Biddeford, for selling one pint of intoxicating liquors to Charles T. Goodwin, November 6, 1874, alleging "that the said Horace Wentworth" had "once before been convicted of a single sale under section twenty-eight of chapter twenty-seven of the Revised Statutes of the state of Maine, in the county of York, to wit: on the twelfth day of October, A. D. 1874, in the municipal court of the city of Biddeford."

At the trial at *nisi prius* to sustain the allegation of sale the government offered evidence of sale made by one Libby, a clerk of the defendant to the witness Goodwin, about November 6, 1874. The government officer then inquired of the witness whether he had purchased any of Wentworth prior to this time.

The defendant's counsel seasonably objected, and urged among other reasons, that the government having selected the act upon which they claimed a conviction, and that act being an alleged sale by Libby to Goodwin, they could not then offer proofs of another act at a different time done by the defendant in person and claim a conviction therefor; that the defendant could not in this complaint be then called upon to answer to any other act than that of a sale by Libby to Goodwin; and that it was immaterial how many times Goodwin may have purchased of Wentworth in person before the sale charged in the complaint; but the question and the affirmative answer thereto were admitted to show the assent of the defendant.

The defendant being called as a witness in his own behalf, was interrogated by the government counsel concerning sales of intoxicating liquors made by himself personally. His counsel objected to the inquiries for the reasons (among others) urged against the inquiries made of Goodwin, and claimed that he was not obliged by law to answer concerning sales made by himself prior to the sale charged in the complaint; that the waiver of his privilege to give no evidence tending to criminate himself applied only to the charge under consideration and set forth in the complaint. The presiding judge remarked that the full court had decided otherwise and ruled that the defendant must answer any question put to him by the county attorney in regard to any sales of intoxicating liquors in that store by himself to any person within thirty days. To these rulings the defendant excepted.

To sustain the allegation of a former conviction the government offered the record of the municipal court of the city of Biddeford, attested by Abel H. Jelleson, which consisted of the complaint, warrant, officer's return and the following:

"STATE OF MAINE, YORK, ss.—At a municipal court of the city of Biddeford, in the county of York, holden at the municipal

court room, on the twelfth day of October, A. D. 1874, Edmund Warren of Alfred, in said county of York, on the twelfth day of October, A. D. 1874, in behalf of said state, on oath complained to Abel H. Jelleson, judge of said court, that Horace Wentworth of said Biddeford, on the twelfth day of October, A. D. 1874, at said Biddeford, in said county, without any lawful authority, license or permission therefor, did then and there sell a quantity of intoxicating liquors, to wit: one pint of intoxicating liquor to one Bridget Lee, against the peace of the state and contrary to the form of the statutes in such case made and provided.

And now said Horace Wentworth is brought into court upon a warrant issued by the judge of said court, on complaint aforesaid, to be tried thereon; and said complaint is read to him, and he pleads and says he is guilty of the offense charged against him.

It is therefore ordered by the court that said Horace Wentworth forfeit and pay a fine of thirty dollars, to and for the use of said state, and costs of prosecution, taxed at five dollars and thirteen cents, and stand committed till sentence be performed."

To the admission of this the defendant's counsel objected, and suggested among other things, that the count or allegation was so informal and insufficient in law, that no evidence could legitimately be introduced under it; that it does not allege a prior conviction of the violation of any particular provision of chapter 27, of Revised Statutes of the state of Maine; that it does not allege a prior conviction of a sale of intoxicating liquors; that the record does not purport to be a finding or an adjudication of an illegal sale of intoxicating liquors, or of any offense, and does not show a conviction under section twenty-eight of chapter 27 of the Revised Statutes of the state of Maine.

The presiding judge admitted the record, subject to the defendant's objections, and ruled that it was sufficient in law to sustain the charge of prior conviction as alleged in the complaint.

The defendant also duly filed a motion in arrest of judgment, which the court overruled.

Concerning the evidence of sales made by the defendant, by his own hand, the presiding judge in his charge remarked to the jury:

"Wentworth himself has been on the stand. You remember what his testimony was, whether he testified frankly, and answered the questions candidly and consistently. Is there any testimony in this case that he had been guilty of selling intoxicating liquors within thirty days of the time it is alleged he sold this to Goodwin? If there is, that is not any evidence directly sustaining this prosecution, except so far as I shall now state to you. He had a clerk in his store, one or more. The proof is, so far as there is any proof by the government, that he did not purchase of Wentworth himself, but he purchased of the clerk. If Wentworth has been proved to you to be guilty of selling intoxicating liquors contrary to law in that drug store within thirty days of that time it may have more or less tendency, as you shall judge, to show that Wentworth permitted liquors to be sold there and to show whether or not, if he did permit liquors to be sold there to certain parties, he authorized or winked at the sale of them by his clerk. He testified, as I understood him, unqualifiedly that he had always instructed his clerks not to sell.

You can see what that testimony is, and weigh it. Perhaps a witness or a party situated as the doctor is, might say to his clerk, 'now, Libby, from this time you enter my store, understand that you must not sell any intoxicating liquors here. I have it for prescriptions, and it is necessary in order to preserve certain medicine from souring, that they should be preserved in alcoholic preparations, and understand, although here is whiskey and rum, you must not sell any; if there is going to be any sale of that, I will attend to that.' If such a sincere remark was made to his clerks, you can see that it would not be proper to convict the doctor upon a sale contrary to, and against his own express directions. If he gave any such directions to his clerk with a wink or anything of that kind, he was a dishonest man; he might say, 'Libby, you must not sell any of this,' you understand he might convey the idea to Libby, he might sell, but he must be very careful to whom he sold. But then that is imaginary. I do not pretend that there is anything of the kind in the case."

To the aforesaid rulings, directions, and course of remarks by the presiding judge, the defendant, the verdict being against him, excepted.

R. P. Tapley, for the defendant, contended that the testimony as to the sales by the defendant personally at other times, had no tendency to show his assent to the sale of November 6, by his clerk Libby; to the point that evidence offered with a view of showing that the defendant had committed other similar offenses, in order to lead to an inference that he was more likely to have committed this, would be inadmissible, he cited *Com.* v. *Miller*, 3 Cush., 243; to the point that a sale by a clerk with a knowledge of the fact by the principal was not sufficient evidence of agency, the counsel cited *Com.* v. *Putnam*, 4 Gray, 16; in the case at bar, he said the instruction was, substantially, that evidence that Wentworth had previously sold was sufficient evidence of Libby's agency to sell, and contended that the authority of the clerk conferred by his clerkship, is, to do acts according to law, and not in violation of law, and in order to make a party criminally responsible for the act of another, as his own act, it should clearly appear he authorized and directed the act; the same degree of proof is required, of the authority to do the act, that is required to show the act has been done, such as removes all reasonable doubt concerning its commission; the criminal conduct of the principal is not the act of the clerk, it is the procuring the act to be done by the hand of the clerk; though ratification is equal to previous authorization, so far as civil liability is concerned, it does not impose a criminal liability; the act when done must be the act of the principal to constitute it an offense as to him; the offense is committed and perfected when the sale is made.

The counsel contended there was nothing in the case to found the authority of Libby upon except the proved sales by Wentworth previously, and the instruction of the court concerning the legal effect of that fact, that the jury understood the fact as authorizing them to find he had such authority, and that they considered it conclusive upon them, and found the authority against the evidence in the case.

He cited *Low* v. *Mitchell*, 18 Maine, 372, to the point, that, although by taking the stand as a witness, the defendant waived the privilege of refusing to give evidence tending to criminate himself, the waiver only applied to the charge under considera-

tion, and set forth in the complaint; and contended that the provision of R. S., c. 134, § 19, that "in all criminal trials the accused shall, at his own request, but not otherwise, be a competent witness," grants the privileges, and imposes the liabilities of a competent witness, no other; and that the questions to the defendant transcended the limits of a legitimate cross-examination, covering not only matters not testified about in chief, but matters of privilege. These and other objections of the counsel appear in the opinion.

W. F. Lunt, county attorney, for the state.

APPLETON, C. J. This was a complaint against the defendant for a single sale of spirituous liquors to one Charles T. Goodwin.

I. The sale was made in the defendant's shop by a clerk in his employ. By R. S., c. 27, § 28, the liability of the master equally accrues whether the sale be by him, his clerk, agent or servant. Being master he is responsible for those in his employ. A sale by a servant in the shop of his master is *prima facie* a sale by the master. The facts that the defendant was in possession of the shop, that he was the owner of the liquors sold and that the sale was made by his servant furnish evidence which unexplained, is amply sufficient to authorize a jury to find the master of the shop guilty. *Com.* v. *Nichols*, 10 Metc., 259. *State* v. *Brown*, 31 Maine, 520. *Com.* v. *Morgan*, 107 Mass., 199.

II. The witness to whom the sale was made was inquired of by the prosecuting officer of government, whether prior to this time he had purchased liquors of the defendant, to which he answered that he had. This evidence was offered to show the assent of the defendant and was properly received. In *State* v. *Bonney*, 39 N. H., 206, on proof of a sale by the defendant's servant, it was held competent to prove that the defendant was engaged in the sale of liquors for the purpose of showing that the servant was authorized by his master to make such sale. Indeed a servant would be little likely to sell without authority. Still less would it be presumed that he would sell in defiance of the will of his master and against his express commands. Sales of liquors by the master show that they were there for sale; and if for sale, it is a reasona-

ble inference in the absence of proof to the contrary that those, who are there to sell other articles, are there to sell the liquors, which the master sells.

III. The instruction to the jury to determine whether the directions given to the clerk not to sell any spirituous liquors were in good faith or not, was proper. If the command was merely colorable and given with the intent that it should be disobeyed and received and acted upon by the servant with the understanding that such was the intent, it would assuredly constitute no answer to this complaint. In *State* v. *Simons*, 17 N. H., 83, the defense was, the liquors were a gift and not a sale. In delivering the opinion of the court, Gilchrist, J., says: "They were instructed to inquire whether the language used by the parties to the alleged sale and their accompanying acts, were used by them to effect a sale of the liquor under such disguises as would render the detection of the crime difficult; or whether on the other hand, it was the purpose of the defendant to bestow, and of the other parties to receive, the liquors as a gift. Offenses against the law are commonly committed under the protection of some false pretenses designed to avert or baffle the vigilance of the police, and other evidence than the plain admissions of the parties charged, is commonly found necessary for their conviction."

IV. The evidence on the part of the government had made out a *prima facie* case against the defendant—a sale by his servant of his liquors in his shop.

The defendant might go on the stand as a witness or not. By the constitution, he could not "be compelled to furnish or give evidence against himself." The privilege of exemption from criminative interrogation or cross-interrogation was guarantied to him. But this privilege may be waived. By R. S., c. 134, § 19, "in all criminal trials, the accused shall, at his own request, but not otherwise, be a competent witness." The defendant at his own request became a competent witness, and thereby waived his constitutional privilege. He then subjected himself to the peril consequent upon a cross-examination as to all matters pertinent to the issue. *State* v. *Ober*, 52 N. H., 459. *Com.* v. *Bonner*, 97 Mass., 587. *Com.* v. *Morgan*, 107 Mass., 199. *Connors* v. *The*

People, 50 N. Y., 240. Claiming to be a witness in his own behalf "at his own request" he cannot have the privilege of self-exonerative testimony without incurring the dangers incident to discreditive or criminative cross-interrogation.

V. The defendant going upon the stand as a "competent witness" was inquired about as to certain sales made by him prior to the one charged in the complaint to which he made answers admitting prior sales by himself. The witness interposed no objection to answering the question, because the answer might be self-criminative, but the objection was taken by the counsel for the defendant and by him alone.

Now, if there is anything well settled, it is that the privilege of exemption from answering interrogatories, which being answered truly would disclose the guilt of the person interrogated, is the privilege of the witness alone. It is granted because of crime and for its impunity, lest by means of and in consequence of the proof furnished by the answer, the witness may hereafter be subjected to the punishment which the law has affixed to his criminal misconduct. It is the privilege of crime. The interests of justice would be little promoted by its enlargement. "The privilege," observes Nelson, C. J., in *Cloyes* v. *Thayer*, 3 Hill, 564, "belongs exclusively to the witness, who may take advantage of it or not at his pleasure. . . The witness may waive it and testify, in spite of any objection coming from the party or his counsel." In *Ward* v. *The People*, 6 Hill, 144, the court held that the public prosecutor has no right in the trial of an indictment to object that a question put to one of the witnesses called for an answer tending to expose him to criminal punishment; this being an objection which the witness alone is authorized to make. So, in *State* v. *Foster*, 3 Foster, 348, it was to lay with the witness to claim the privilege or not as he may choose. It is obvious, that if the defendant is to be regarded, when testifying, only as a "competent witness," which is what the statute makes him, "at his own request and not otherwise," that the exemption from answering criminative cross-interrogation is personal and the witness alone can claim it. In *Brandon* v. *The People*, 42 N. Y., 265, this very question arose. The plaintiff in error, on her trial for grand larceny, was sworn

as a witness in her own behalf, and on her cross-examination was asked, "have you ever been arrested before for theft?" and the question was objected to by her counsel as an attack upon her character, which had not been put in issue. It was held the question was proper, she not having made any suggestion of privilege. In delivering the opinion of the court, which received the unanimous concurrence of all the members, Ingalls, J., says, "The question was one which the court in the exercise of its discretion had a right to allow to be put and answered. *La Beau* v. *The People*, 34 N. Y., 223. *G. W. T. Co.* v. *Loomis*, 32 Ib., 127. The witness did not claim that she was privileged from answering the question on the ground that it would disgrace her. Hence the case cited by the counsel for the plaintiff in error (*Lohman* v. *The People*, 1 N. Y., 380,) does not apply in this case. I perceive no ground for disturbing the decision of the general term." This opinion was re-affirmed in *Connors* v. *The People*, 50 N. Y., 240. It is well settled that neither party to a suit can raise the objection for and on behalf of the witness. It follows that a party who takes the stand as a witness cannot by his counsel interpose the objection that the inquiry, if truly answered, would lead to self-criminative answers, when the witness, whether regarded as party or witness, does not claim the privilege of exemption from answering. The privilege, it must be borne in mind, is purely personal.

The objection, therefore, that the questions would tend to criminate the defendant if truly answered, would, according to the authorities cited, seem not open to the defendant, as when testifying he did not claim his privilege.

Even if it was otherwise, it will be found that the inquiries proposed were strictly within the principles established in numerous and well considered cases.

VI. The objection is taken that the counsel for the state, in his inquiries of the defendant after at his own request he was a witness, transcended the limits of legitimate cross-examination.

The defendant was charged with having sold intoxicating liquors to one Charles T. Goodwin, on a day certain. It is immaterial, so far as regards his criminal liability, whether the sale was by him or his authorized agent. He was not obliged to testify. He

does testify upon "his own request." He goes on the stand and denies the sale or the authority to sell. He exonerates himself. He denies the commission of the offense charged. He is subject to cross-examination as the necessary result of his assuming the position of a witness. What are the limits which the law imposes on this cross-examination? It will hardly be contended that he can go on the stand and by a simple denial escape all discreditive or criminative cross-interrogation. In *Com.* v. *Morgan*, 107 Mass., 199, the question under consideration arose, and in delivering the opinion of the court, Colt, J., says, "his testimony on cross-examination was admissible, although it tended to criminate himself. By taking the stand as a witness he waived his constitutional privilege of refusing to furnish evidence against himself, and subjected himself to be treated as a witness. Stat. 1866, c. 260. *Com.* v. *Mullen*, 97 Mass., 545. *Com.* v. *Bonner*, 97 Mass., 587. Under our rule, the cross-examination of a witness is not confined to the matters inquired of in chief. *Moody* v. *Rowell*, 17 Pick., 490, 498." If a witness state a fact he is bound to state all he knows about it, though in so doing he may expose himself to a criminal charge. In *State* v. *K.*, 4 N. H., 562, the witness said he knew the defendant was innocent of the offense charged, but he could not state how he knew that without implicating himself. The court said, "if he chooses to testify to that fact, we shall permit the attorney general to inquire how the witness knows that fact, and compel him to answer the question." If he discloses part, he must disclose the whole in relation to the subject matter about which he has answered in part. *Coburn* v. *Odell*, 30 N. H., 562. *Foster* v. *Pierce*, 11 Cush., 437. Answering truly in part with answers exonerative, he cannot stop midway, but must proceed, though his further answers may be self-criminative. Answering falsely as to the subject matter, he is not to be exempt from cross-examination because his answers to such cross-examination would tend to show the falsity of those given on direct examination. If it were so, a preference would be accorded to falsehood rather than to truth. It was held in *Gill* v. *The People*, 5 N. Y. Sup. Ct. Rep., 309, that when the prisoner took the stand as a witness that he could be interrogated as fully as necessary to test the truth of his testimony.

Now what was the matter under investigation? A sale by the defendant or his servant in his shop. It matters not whether the sale or the authority to sell is denied. His answer is exonerative. The question is put, "did you have any bottles there filled with gin, whiskey, rum and brandy, pint, quart and half-pint bottles?" Shall the question be answered? The question is pertinent to the case. A sale is denied. Before selling, he must have liquors to sell. Selling implies having. It is important to prove having. Having, being admitted, for what purpose were they had? Were they like—

"broken teacups, wisely kept for show,"

or were they a standing notice to the incomer inviting him to partake of their contents? His direct examination related to sale made in his shop. It would be a strange restriction upon the right of cross-examination to refuse permission to the inquiry made. In *Com.* v. *Morgan*, 107 Mass., 199, the defendant was indicted for a libel. He denied having seen the libels until they were pointed out to him. On cross-examination he was asked if he was not the publisher of the paper in which they appeared. He, not his counsel, objected on the ground that his answer might criminate him; but the objection was overruled, and he answered that he, with another, published the paper, and upon exceptions to this ruling the propriety of the ruling was sustained.

The sale here was by the servant. These liquors were in the shop. The purpose for which they were, was material, whether for ornament or for use. The defendant was asked if he had any doubt that he sold to numerous persons within thirty days prior to the sale for which he was on trial. This inquiry he answered in the negative, not however interposing any personal objection to answering. Had the sale been by him, though denied, the question would have been proper. In *State* v. *Foster*, 23 N. H., 348, a witness having testified as to part of a transaction with one Jefferson was asked, if he sold any brandy, in the question, to which he objected to answer as criminating himself, but he was required to answer, and the ruling so requiring him was held correct. In *State* v. *Ober*, 52 N. H., 459, the defendant, on trial of an indictment for keeping liquors for sale, was asked as to sales by him a

year previous to the time mentioned in the indictment, to which he declined answering, because his answer might tend to criminate him. The court did not compel him to answer, but permitted counsel to comment upon his refusal to answer. Upon exceptions to this permission, its propriety was affirmed; the court held the inquiry proper and that he might have been compelled to answer the question propounded by the state's counsel. "It was material," observes Foster, J., "to the issue, if not directly involved in his own proffered testimony. At this point, for obvious reasons, he saw fit to close his lips, and the court allowed him to remain silent. Of this mistaken clemency he cannot now be heard to complain." In *State* v. *Bonney*, 39 N. H., 206, proof that the defendant who kept the hotel sold liquors was received as tending to show that the servant was authorized to make such sale. In *State* v. *Colston*, 53 N. H., 483, evidence that the defendant, the keeper of the Sherman House, kept liquors there at a certain date, has a tendency to prove that the defendant, still keeping the same house, kept liquors there at a subsequent date.

The inquiry made, and to which we have referred, and similar inquiries were proper on cross-examination. The subject matter of investigation was a sale claimed to be illegally made. The question of authority to sell was raised. True, the authority of the servant to sell was denied. But he was properly cross-examined to negative the truth of that denial. His own example would tend to show whether his denial was true or not, and whether there was authority to sell or not. This is fairly a part of the transaction disclosed in the direct testimony. His acts tending to negative the truth of his denial related to the subject matter of the sale, which he denied having authorized. He might have been asked if he did not authorize the sale. Equally he might be asked as to other acts of his, tending to prove authority. That the defendant kept the shop at which the liquors were sold; that they were his; that he was in the habit of selling them; that the servant who, it was asserted, has disobeyed his command, was retained in his employ to the time of trial, were facts proper for the consideration of the jury, upon the inquiry whether the command, given to the servant alleged to be disobedient, was given to

be obeyed or disobeyed; whether it was real or colorable; and whether the servant acted in accordance with the understood and actual wishes of his master, or was imperiling his property as well as his person, by action in direct disobedience to his commands.

The counsel refer us to *Tillson* v. *Bowley*, 8 Greenl., 163, and to *Low* v. *Mitchell*, 18 Maine, 374, as authorities against the correctness of the cross-examination of the respondent as conducted by the county attorney. These were bastardy cases, and the complainant was inquired of as to whether, about the time charged in the complaint, she had intercourse with any other man than the respondent, by whom the child might be begotten. The presiding justice ruled that she was not obliged to answer, and the ruling was sustained in the first case by Weston, J., who says, "the complainant could not be held to answer a question admitting or accusing herself of an offense which by our law may be criminally prosecuted."

The limits of the cross-examination of a witness, who, at the same time is a party, were not discussed by counsel, nor considered by the court. The general rule is well settled that a witness, while not obliged to criminate himself, may waive that privilege, and consenting to testify to a matter criminating himself, must testify in all respects relating to that matter as far as may be material to the issue. Now the issue in the cases cited, was the paternity of a child begotten by somebody upon the body of the complainant. It is obvious that the more unchaste the mother, and the more numerous her paramours, the greater the uncertainty of paternity. The defendant is charged with the paternity of the child to be born. That is the matter in issue about which the inquiry was made in the first instance, and about which the complainant has consented to testify. Cannot she be cross-examined to weaken or negative the force of her direct charge? Her knowledge of the paternity is the question, and cannot she be inquired of as to the possibility of her assured knowledge, as to who, among the recipients of her favors, is entitled to the doubtful honors of fatherhood?

In *Low* v. *Mitchell*, 18 Maine, 372, Shepley, J., while merely affirming the first decision, says, if the witness "consents to testify

to one matter tending to criminate himself, he must testify fully in all respects relative to that matter, so far as material to the issue." If the matter of paternity was the matter in issue, as it was, having voluntarily commenced testifying, the witness must testify fully thereto, so far as is material to the issue. Such is the logical result of the general doctrine of the opinion. Swift Ev., 81. *Norfolk* v. *Gaylord*, 28 Conn., 309.

A witness on cross-examination must answer as to all matters pertinent to the issue, whether inquired about in the direct examination or not, unless a personal privilege is invoked and the matters elicited would tend to criminate him; in which case, the cross-examination can be extended only to the subject matters of inquiry of the direct examination. In the case at bar, the subject matters of inquiry were a sale and whether it was authorized by the defendant—involving the double inquiry of a sale and its authorization—which being denied by the defendant, he was properly cross-examined as to his acts tending to show that whatever was done in his shop was done by his implied authority.

VII. By R. S., c. 27, § 55, it is enacted that "in any suit, complaint or indictment, or other proceeding against any person for a violation of any of the provisions of this chapter relating to spirituous liquors, other than for the first offense, it shall not be requisite to set forth particularly the record of a former conviction, but it shall be sufficient to allege briefly, that such person has been convicted of a violation of any particular provision or as a common seller, as the case may be, and such allegation in any criminal process, legally amendable in any stage of the proceedings, before final judgment, may be amended, without terms, and as a matter of right." By § 57, the form is specially prescribed and in the briefest terms.

The allegation in the complaint under consideration is "that the said Horace Wentworth has once been convicted of a single sale under section 28 of chapter twenty-seven of the Revised Statutes of Maine, in the county of York, to wit: on the twelfth day of October, A. D. 1874, in the municipal court of said city of Biddeford."

It is obvious that the legislature did not require technical ac-

curacy. The time when, the court before which, the chapter and section under which, the conviction was had, are briefly set forth. By § 28, single sales are punishable and the punishment in case of second conviction is increased. A conviction of a single sale under § 28, must be intended to mean a conviction of a sale prohibited by § 28, and of the sale of what is thereby prohibited to be sold.

The allegation is sufficiently certain without an amendment. Upon recurring to the record introduced to show a prior conviction, it appears that judgment was rendered upon the defendant's plea of guilty, so that the fact of such conviction is established by proof which he, at least, cannot very well controvert.

Exceptions overruled.
Judgment for the state.

WALTON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.
PETERS, J., concurred in the result.

MARY LITTLEFIELD, by guardian, *vs.* BOSTON & MAINE RAILROAD COMPANY.

York, 1875.—November 20, 1875.

County Commissioners. Amendment.

County Commissioners have no right to amend their record on a petition for land damages by inserting therein, as parties, names not embraced in the petition.

ON EXCEPTIONS.

DEBT on a judgment of the county commissioners awarding damages to plaintiff for land taken for defendants' railroad. After the commencement of the plaintiff's action, the county commissioners undertook to amend their record, which first awarded damages to the plaintiff alone for land of the homestead of the late Daniel Littlefield, jr., taken by the defendants, by inserting the names of Nancy A. York and of her husband George H. York who were the owners in fee after the life estate of the plaintiff expired, awarding to the three the same amount of damages first awarded

to the plaintiff alone, $350. At the trial at the January term, 1875, after the plaintiff had made out a *prima facie* case, the defendants offered a paper from the files of this court entitled the complaint of *Mary Littlefield* v. *Boston & Maine Railroad*, on an appeal from an award made by said commissioners at their April, 1874, session, and also a copy of the amended record which were admitted subject to the plaintiff's objection. The presiding justice ruled *pro forma* that the plaintiff was not entitled to maintain her suit and she excepted.

S. W. Luques, for the plaintiff.

G. C. Yeaton, for the defendants.

APPLETON, C. J. This is an action of debt on a judgment of the court of county commissioners of York county.

To sustain the action, the plaintiff offered in testimony a copy of a petition of the defendants for the assessment of damages on the land of the plaintiff and others, to the court of county commissioners for York county, and their judgment thereon rendered at the October term, 1873, in favor of the plaintiff, and a copy of the notice from said court of their award of damages duly served on her, December 9, 1873. The plaintiff upon this proof brings her case within R. S., c. 51, § 8.

To obviate the effect of the evidence introduced, the defendants offer a copy of the proceedings of the county commissioners which they claim to be an amendment of the record of their judgment rendered at their October term, 1873, these proceedings being after the commencement of this suit and after the right to appeal had ceased to exist by lapse of time.

By the record as claimed to be amended, the damages originally estimated as a just compensation for Mary Littlefield, are awarded to Mary Littlefield, George York and wife, as owners or heirs of all which the said railroad takes of the said Littlefield estate, the amount of damages being the same as in the estimate of October, 1873.

By R. S., c. 51, § 6, in certain cases where real estate has been taken by a railroad corporation, "the owners are entitled to dam-

ages, to be paid by the corporation and estimated by the county commissioners, on a written application of either party, made within three years after filing the location," &c.

In pursuance of this section the defendants made a written application to the county commissioners to estimate the damages done to various land owners, among whom is found the name of this plaintiff, but the names of George H. York and Nancy A. York, his wife, are not found in the application.

There must be a written application either by the land owners, whose land is damaged, or by the railroad corporation to the county commissioners, to give them jurisdiction. *Waldo* v. *Moore*, 33 Maine, 511. The written application of the defendants contains only the name of Mary Littlefield. It does not contain the names of George H. York and Nancy A. York. The record fails to show that they are parties to these proceedings, or that they have made written application to have their damages assessed. The defendants might have inserted their names by way of amendment, but they did not see fit to do it. *Grand Junction R. R. & Depot Co.* v. *Co. Commissioners*, 14 Gray, 553. The case fails to show any written application whatever, containing their names. It fails to show any jurisdiction of the court to estimate the damages they may have sustained.

The authority of the court to amend its records is unquestioned. *Inhabitants of Limerick*, petitioners, 18 Maine, 183. *Gloucester* v. *Co. Com'rs of Essex Co.*, 116 Mass., 579. But to amend, it must have jurisdiction. York and wife not being legally before the court, the court could not estimate their damages. The amended record, therefore, cannot be sustained.

The plaintiff has lost no right by her complaint joined with York and wife against the proceedings of the county commissioners at April term, 1874. The written application upon which their proceedings could be legitimately based, included only her name, and she could not with others appeal from proceedings in which such others were not parties. If the judgment is to be regarded as of October term, 1873, then the right to appeal had long before ceased to exist. *Exceptions sustained.*

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

EDWARD EASTMAN, administrator, *de bonis non*, *vs.* JACOB B. WADLEIGH and trustee.

York, 1875.—November 23, 1875.

Judgment.

Judgment in a suit against a non-resident of the state, upon whom no personal service has been made, but whose estate is returned as attached upon the writ, and notice is given by publication, under R. S., c. 81, § 12, is substantially but a judgment *in rem*, good only against the particular property attached, and of no effect as to the person of the defendant or as to other property.

Such a judgment cannot be made the basis of an action of debt, in order to obtain satisfaction of it out of other property than that returned as attached in the original suit.

ON EXCEPTIONS.

DEBT, brought by the plaintiff as administrator *de bonis non* of the goods and estate which were of late Elisha Wadleigh, deceased, by writ dated May 27, 1874, running against Jacob B. Wadleigh, of Texarcana, in the state of Texas, and Israel Banks, of Parsonsfield, in said county of York, as his trustee, declaring upon a judgment recovered at the May term, 1870, of this court for York county, by the plaintiff against this defendant, Jacob B. Wadleigh, then of the city and county of St. Louis, state of Missouri, for the sum of one hundred and eleven dollars and sixty-seven cents debt, and eighteen dollars and eighty cents, costs of suit, &c. The general issue was pleaded with a brief statement denying jurisdiction and averring the non-residence of the defendant, and that no service of the writ in the suit in which said judgment was recovered was ever made upon him. The cause was opened to the jury, and the fact that the defendant lived in St. Louis, and was not served with process in the original suit, was shown. It was further proved, that as heir of his then lately deceased father, he was the owner of an interest in a farm in Parsonsfield, in this county, his share being worth two hundred and fifty dollars; that this property was attached upon the writ in the original action; that a judgment such as is here declared upon was recovered, after notice given of the pendency of the suit by

publication in the "York County Independent," a newspaper published at Saco in said county, under R. S., c. 81, § 12, and in compliance with the order of court in the case. The defendant did not appear to answer to that action, but was defaulted. The execution issued upon this judgment was extended upon the land in question, but the levy was never recorded, the plaintiff consenting to a sale of the farm by all the heirs, with the intention upon his (the plaintiff's) part of bringing the present action. The writ in this case was properly served upon the trustee, who disclosed two hundred and fifty-two dollars and sixty-eight cents in his hands, and was personally served upon the principal defendant at his home in Texas. Upon this state of facts the presiding justice ruled that this action could not be maintained, and upon the defendant's motion ordered a nonsuit, to which the plaintiff excepted.

E. Eastman, pro se.

The statute, R. S., c. 81, § 12, says that "jurisdiction shall be sustained," when goods or estate are attached. Real estate proved to belong to the defendant was attached in the suit in which the judgment in question was obtained. Jurisdiction depends upon the facts existing at the time of the entry of the action. *Cassity* v. *Cota*, 54 Maine, 380. The judgment is one, then, rendered by a court having jurisdiction. The statute does not assume to permit a judgment *in rem*, but to authorize a general judgment, such as is entered in all personal actions. Section nineteen of the same chapter says that upon notice "he" (the absent defendant) "shall be held to answer to the suit;" and R. S. of 1857, c. 81, § 18, under which this judgment was recovered, added, "as in other cases." The judgment is that the plaintiff recover so much of the defendant, without any reference to any particular estate or fund from which it is to be obtained. Marshall, C. J., says "that a judgment *in rem* is where the process is served upon the thing itself and the decree is against it specifically, either with or without notice to parties supposed to be interested in it." Story, J., held that such judgments might be recognized by the domestic tribunal. *Picquet* v. *Swan*, 5 Mason, 43. From the statements in the report that the levy was abandoned, that the entire estate might be sold by the heirs, with the purpose upon the part of the plain-

tiff of bringing the present suit, it is evident that the funds now attached in the hands of the trustee are the proceeds of such sale, and that we are really therefore following the same property originally attached, although it has assumed a different form.

E. B. Smith, for the defendant.

This was at best, if valid anywhere, but a *quasi* judgment *in rem*, binding only the property originally attached and not enforcible against, or collectible out of, any other property. It would have not been heen held good against person or property anywhere outside of Maine, except as to that property attached; nor would a similar judgment, rendered in any other state, be held good here, except to that extent. It would be good everywhere to pass title to that property. Thus only can "the same effect" be given to this judgment throughout the Union. To hold it good against person or property would be to say that an insignificant article might be first attached and the judgment obtained levied upon property of great value; as Johnson, J., says, in *Mills* v. *Duryea*, 7 Cranch, 486, was the case in Pennsylvania where a cask of wine was attached and judgment rendered for a hundred and fifty thousand dollars. Though judgments upon constructive statute notice are not technically nor in form, *in rem*, they are so in substance and effect. *Boswell* v. *Otis*, 9 Howard, 348. *Lovejoy* v. *Albee*, 33 Maine, 414. *Picquet* v. *Swan*, 5 Mason, 43. Cooley's Const. Lim., 404. *Cooper* v. *Reynolds*, 10 Wallace, 308, 318, 319. *Galpin* v. *Paye*, 1 Central Law Jour., 491. *Oakley* v. *Aspinwall*, 4 Comst., 520. *Easterly* v. *Goodwin*, 35 Conn., 276, 278. *North Bank* v. *Brown*, 50 Maine, 215. *Swett* v. *Brackley*, 53 Maine, 347. *Bissell* v. *Briggs*, 9 Mass., 462. 1 Smith's Lead. Cas., 833, 834, note. *Downer* v. *Shaw*, 22 N. H., 277. Story, Confl. of Laws, § 549.

Appleton, C. J. The plaintiff commenced a suit against the defendant, a non-resident, on which an attachment was made of his real estate. The writ described him as a resident of St. Louis, Missouri. Notice was given of the pendency of the suit in conformity with R. S., c. 81, § 19, by publication in a newspaper in this county. Judgment was rendered in favor of the plaintiff at

the May term, 1870, of this court, and an execution issued thereon. A levy was commenced upon the real estate, but the proceedings were not recorded, nor does it appear that the plaintiff ever accepted seizin of any land upon which a levy had been commenced or made.

This is an action of debt upon the judgment thus obtained and the question arises, whether it is maintainable; in other words, whether the court had jurisdictional authority to do more than render a judgment against the property attached.

The state has undoubted jurisdiction over property within its territorial limits. It may subject it to taxation. It may render it liable to the payment of debts, though its owner may reside in another state.

By R. S., c. 81, § 12, "in all actions commenced in any court proper to try them, jurisdiction shall be sustained, if goods, estate, effects or credits of any defendant are found within this state and attached on the original writ; and service shall be made as provided in the nineteenth section hereof."

It has been settled by a uniform and unvarying series of decisions that a judgment obtained as was the one upon which this action is brought, while effective to bind the property of a non-resident, and to justify its appropriation to the payment of his debts, has no force and validity as against person or property outside the territory of the state in which it is rendered. The notice to be given by § 19, though given as required, will not give jurisdiction so that the judgment shall be binding elsewhere. *Ewer* v. *Coffin*, 1 Cush., 23. So a judgment similar in its character and with like incidents rendered in another state would have no force nor validity here. *Middlesex Bank* v. *Butman*, 29 Maine, 19.

The statute gives jurisdiction on certain conditions. What is the extent, what the limit, of the jurisdiction thus given?

The jurisdiction is to be sustained, if goods, estate, effects or credits of a defendant are found within the state, and being found are attached. Without property and its attachment, the court has no jurisdiction. Both must concur. The jurisdiction is acquired by attachment. To what extent? Not over the person of the defendant, for he is a non-resident. Not over other property; but

only over the property attached. In other words the state authorizes the seizure of the real or personal estate of non-residents found within its boundaries and its appropriation to the payment of their debts. The jurisdiction is only by attachment. It is co-extensive with and limited by the attachment, and ends with the disposition according to law of the estate so attached. Where there is no attachment, no valid judgment can be rendered. *Cassity* v. *Cota*, 54 Maine, 380.

The judgment recovered by the plaintiff was clearly not of validity so as to constitute the basis of a suit without the state. What is its validity here? It is not good against the person of the defendant, for he has never been within, nor submitted to, the jurisdiction of the court. It might have been levied upon the property attached, but no levy was perfected. What then is its effect?

It is simply a proceeding *in rem*. It is a statutory process, by which a creditor, following the provisions of the statute, is enabled to appropriate the property of an absent debtor to the payment of his debts. If the appropriation is made, it is protected. If not made, the judgment ceases to have any validity, so that it can constitute the basis of a new judgment.

The authorities entitled to the highest consideration concur in the views already expressed. In *Boswell's Lessee* v. *Otis*, 9 Howard, 336, McLean, J., says: "jurisdiction is acquired in one of two modes: first, as against the person of the defendant, by the service of process; or secondly, by a procedure against the property of the defendant, within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment, beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be, substantially, a proceeding *in rem*." The effect of a judgment against a non-resident debtor was again under the consideration of the supreme court of the United States in *Cooper* v. *Reynolds*, 10 Wallace, 308, and the court there held, that the only effect of a judgment against a non-resident was to subject the property attached to the payment of the demand which the court might find due to the plaintiff. "The

judgment of the court," observes Miller, J., "though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court or in any other, nor can it be used as evidence in any other proceeding not affecting the attached property, nor could the costs in that proceeding be collected of the defendant, out of any other property than that attached in the suit. The court, in such a suit, cannot proceed unless the officer finds some property of the defendant on which to levy the writ of attachment. A return, that none can be found, is the end of the case, and deprives the court of further jurisdiction."

In *Lovejoy* v. *Albee*, 33 Maine, 415, it was decided that when the property of a non-resident is found within the state, a judgment against him will be effectual only as a proceeding *in rem* and binding upon the property attached. In *Easterly* v. *Goodwin*, 35 Conn., 273, where the facts were similar to those in the case at bar, it was held, that a judgment rendered in an action upon which the property of a non-resident defendant had been attached, but in which no personal service had been obtained, was not a judgment *in personam*, and could not be the basis of an action of debt in the same court, and that its only effect was to authorize the appropriation of the property attached, to the payment or satisfaction of the judgment recovered in the suit in which the attachment had been made.

At the first glance, the case of *Granger* v. *Clark*, 22 Maine, 128, may perhaps be regarded as adverse to the views here expressed. But the decision there rendered rests upon the fact that a want of jurisdiction was not apparent of record. But in the case at bar, it appears from the record produced, that the defendant was a resident without the state; that there was no personal service upon, nor any appearance by him. If upon inspection of the record, it appears that judgment has been rendered without notice to the defendant, the judgment will be regarded as absolutely void. *Penobscot Railroad Company* v. *Weeks*, 52 Maine, 456.

The causes of action set forth in the suit, in which the judgment declared upon was rendered, were an account annexed against the defendant and his promissory note. An action of debt will lie on an account as held in *Norris* v. *Windsor*, 12 Maine, 293; and on a promissory note, as decided in *National Exchange Bank* v. *Abell*, 63 Maine, 346. Had the plaintiff moved to amend, there is no reason why leave should not have been granted on terms. It not having been done, the nonsuit must be confirmed. *Exceptions overruled.*

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

STATE *vs.* HUGH SMITH.

York, 1875.—February 26, 1876.

Indictment. Manslaughter. Trial.

Upon an indictment for manslaughter committed upon the prisoner's wife, a count which alleges the relation which the prisoner sustained to the deceased, his duty to provide for her necessities, her own incapacity and his ability to do it, and that he did "feloniously and willfully neglect and refuse to provide necessary clothing, shelter and protection from the cold and inclemency of the weather" for a certain number of days during winter, and the consequent sickness and death of the wife, and manslaughter by the defendant "in the manner and by the means aforesaid," is sufficient without other or more precise or formal allegations of evil or wrongful intent on the part of the defendant, or of his knowledge of the effect which his negligence was producing.

A count charging the defendant with manslaughter in the form prescribed in R. S., c. 134, § 7, is sufficient.

Upon a charge of manslaughter arising from a negligent omission of a known duty, it is not necessary to allege or prove a criminal intent on the part of the defendant.

A party cannot sustain exceptions to the judge's refusal to instruct the jury according to his requests, although such requests may contain abstract propositions which are legally correct, unless it appears that there was evidence in the case which made such instructions pertinent and appropriate, nor to the judge's refusal to adopt the form of stating a legal proposition desired by the party when he has given the law arising upon the evidence fully and correctly.

It is not in contravention of c. 212, Laws of 1874, to call the attention of the jury to important pieces of testimony nor to put questions to the jury suggested by the evidence, and which it is desirable that the jury should consider in coming to a conclusion upon the case committed to them.

On exceptions.

Indictment for manslaughter against the defendant for causing the death of his insane wife by negligently exposing her to the inclemency of the weather, insufficiently clad and in a room not sufficiently warmed, from January 18 to February 9, 1875.

The crime is set out in the indictment as follows:

First count. "The jurors for said state upon their oath present, that Hugh Smith, of Buxton, in the said county of York, laborer, on the nineteenth day of January, in the year of our Lord one thousand eight hundred and seventy-five; at Buxton, in said county of York, being then and there the husband of one Lucy A. Smith, his wife, and being then and there under the legal duty to provide for his said wife necessary clothing, shelter, and protection from the frost, cold and inclemency of the weather, and then and there having the means to provide the same, and she, said Lucy A. Smith, being then and there weak, feeble, destitute and infirm, and unable to go abroad, did then and there feloniously and willfully neglect and refuse to provide necessary clothing, shelter and protection from the frost, cold and inclemency of the weather for his said wife, whereby her health was greatly injured; and he the said Hugh Smith, afterward, to wit, on the next succeeding day and on every day between the said nineteenth day of January aforesaid and the ninth day of February then next ensuing, did there feloniously and willfully continue to neglect and refuse to provide her, the said Lucy A. Smith, with necessary clothing, shelter and protection from the frost, cold and inclemency of the weather, the said Hugh Smith being there on all said days and times her husband as aforesaid, and having the means to provide the same as aforesaid, and under the legal duty to provide the same as aforesaid, and she, the said Lucy A. Smith, having no means to provide the same as aforesaid, and being weak, feeble, destitute, infirm and unable to go abroad as aforesaid. By reason whereof the said Lucy A. Smith there on all the days and times before mentioned, until the fifth day of

May, in the year aforesaid, sickened and languished with a mortal sickness and feebleness of body so as aforesaid created and produced by the said Hugh Smith, until the fifth day of May now last past, on which said last mentioned day at said Buxton, she the said Lucy A. Smith, there of said mortal sickness and feebleness of body, died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said Hugh Smith, her, the said Lucy A. Smith, in manner and by the means aforesaid, feloniously did kill and slay, against the peace of said state and contrary to the form of the statute in such case made and provided."

[The second count, the verdict upon it being not guilty, is here omitted.]

THIRD COUNT. "And the jurors for said state upon their oath do further present, that Hugh Smith of Buxton, in said county of York, laborer, on the fifth day of May, in the year of our Lord one thousand eight hundred and seventy-five, at Buxton, in said county of York, one Lucy A. Smith, in the peace of the state then and there, being, feloniously did kill and slay against the peace of said state and contrary to the form of the statute in such case made and provided."

By order of the court the jury viewed the place where she was confined by the defendant.

The defendant contended that if his wife suffered from the causes alleged, it was without his knowledge, and that he never intended she should suffer from cold, and there was evidence from him which he claimed supported the defense; but in his evidence he admitted that he knew the condition of the room; that he passed through it every night but one from January 19th to February 9th, to fasten the doors, before going to bed, that he had warmed the room by a stove every winter before when she had been kept there, and intended to do so last winter, but not having the money on hand to buy one, had put it off from time to time, and that the only examination he made of the condition of his wife when in the room was to look and see if the canvas was over her.

Upon this point the defendant asked to have the jury instructed.

I. That "there are different degrees of negligence. Many acts

of blamable negligence, for which one would be liable to a civil action, will not support an indictment for injury (or death even) resulting from such negligence."

II. That "it is not every degree of carelessness or negligence, upon which death ensues, that will render the negligent person liable for manslaughter."

III. "Whether or not the accused is guilty of such acts and intent as to make him criminally liable to conviction of manslaughter therefor is purely a question for the jury."

These instructions were not given as requested, but the judge did say as follows:

"That if Lucy A. Smith was the lawful wife of the prisoner at the time alleged in the indictment, he was charged by law with the duty of rendering her proper support; that if, knowing that duty, he negligently omitted to perform it, having the ability to do so, said Lucy A. Smith being insane and unable to provide for herself, and she died, or her death was hastened or accelerated by reason of such omission, that he is guilty of the crime of manslaughter. This proposition I give you as covering the whole law applicable to the crime charged in the indictment. The first element is one of fact, whether the deceased was the lawful wife of the prisoner. The next is one of law; that is, if she was the lawful wife, the law charges him with the duty of rendering her support, proper support under all the circumstances of the case. The next is one of fact, the knowledge of the duty on his part.

The next element is one of fact, the omission of his duty in that respect, negligent omission.

And the next is one of fact, whether the deceased was in a condition to be incapable of providing for herself at the time of the omission.

The next element is one of fact, whether she died, or her death was hastened or accelerated by reason of the omission on the part of the prisoner.

Now, gentlemen, you will observe, if you have carefully listened to the elements of law I have given you, that the element of intent on the part of the prisoner is omitted. I charge you that to constitute the crime charged in this case, it is not essential to prove

criminal intent on the part of the prisoner. If the criminal intent was proved, the crime would not be manslaughter but murder, a higher grade of crime. So far as it was his duty to provide support, if you are satisfied in this case there was a negligent omission to perform his duty, a negligent omission, then the defendant is liable."

The defendant's counsel requested these instructions upon the question of intent, viz:

I. "The intent of the accused in the acts and omissions charged against him is an essential fact for the jury, to be proved (like any other fact) beyond a reasonable doubt."

II. "If the evidence can be reconciled with an innocent intent upon the part of the accused, he must be acquitted."

III. "There is only one criterion by which the guilt of men is to be tested. It is whether the mind is criminal."

IV. "The essence of an offense is the wrongful intent; without this it cannot exist."

V. "Let the result of an action or omission be what it may, a man can be held guilty only upon the ground of intention."

VI. "The allegation in the indictment that the offense charged was done 'willfully' is material, and to be proved beyond a reasonable doubt."

VII. "Willfully," in law, means "with a bad purpose."

VIII. "Before a conviction can be had, there must be a criminal intent, willful wrong done. There must be proof to the full satisfaction of the jury of a wrong intent."

The defendant also requested the following instructions:

"That there is a difference between the negligent doing of an act and the careless omission to perform one's duty; the negligence in the former case being greater in degree."

"That in order to justify the inference of legal guilt, the existence of the inculpatory facts must be absolutely incompatable with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt."

"That the jury must consider whether the circumstances proved necessarily involve the guilt of the prisoner, or only probably so; and when the evidence merely establishes some finite probability

in favor of one hypothesis rather than another, such evidence cannot amount to proof of guilt however great that probability may be." These instrictions the presiding justice declined to give.

The defendant also asked to have the jury told that mere carelessness is not necessarily criminal. Carelessness is not sufficient to convict without proof beyond reasonable doubt of intentional neglect.

Instead of giving this instruction the judge instructed the jury as hereinbefore stated. But he fully instructed the jury as to the burden of proof and the degree of proof necessary to establish every fact required to prove the guilt of the prisoner not excepted to by him.

The judge further instructed the jury "that if Mrs. Smith was the wife of the defendant the law charges him with the duty of rendering her proper support as long as he is able to do so, the husband being charged with the duty to support, if she was in such a condition of body or mind as to be incapable of caring for herself. If he had not himself means to render her support I instruct you, as matter of law, that it was his duty to apply to the proper authorities, whose duty it would be to render her support, to the overseers of the poor of the town charged with the duty to support his wife in a helpless condition; if he has not got the means to render that support he cannot be permitted to stand by and see her perish for want of proper support." "It would be a violation of his duty if he permitted her to be exposed in such a way as naturally and ordinarily would injure her health or endanger her life." (The evidence disclosing the fact that she had once to his knowledge been supported in the Insane Hospital by the town where he lived.)

The judge then stated that the care to be exercised by the person bound to furnish support depended on the condition and capacity of the person to be supported and upon the circumstances of each case; and further instructed the jury as to the duty of the defendant in this respect, not excepted to.

He further remarked, "the defendant comes upon the stand to exculpate himself from any imputation cast upon him of neglect of duty. You will consider the weather, taking his statement as

he gave it; consider the condition of his wife; the place where she was left; her liability to be naked at any time from her violent condition; whether he himself, from his own statement, has satisfied you that he was in the discharge of the duty which he owed her. Why gentlemen, what could have called the attention of that husband after passing through that room in the cold nights of January and February, from his wife, when he himself retired to his bed, knowing the bitter, biting cold in that room, the howling blast without, when that woman, to whom he stood in the dearest relation known to man, was in that room, situated as she was, what could have called his mind from her condition?"

Referring to the testimony of the defendant that he passed through this room night and morning, and looked to see if his wife was covered up, the judge had remarked that he did not remember that the prisoner said that he had ever looked to see what her condition was, or that he spoke to her during the twenty-two days from the 19th of January to the 9th of February, A. D. 1875. He now recurred to that, saying: "if he was attentive to her, caring for her, would not you expect, this is for you to consider, gentlemen, would you not expect that the husband, charged with the duty to render support to such a wife, would have seen to her, night and day, examined to see what condition she was in? Would you not expect him to know if she was freezing from exposure in that place; if properly cared for that some inmate of that house, the husband or the attendant would know that she was kept in a clean, healthy condition; would have known the condition of her feet and hips before the 9th of February, when that condition, so far as the evidence discloses, was first discovered?"

The defendant claims that the two paragraphs from the charge last above quoted was a comment upon the testimony, and in contravention of the Public Laws of 1874, c. 212.

The only reference made to the charge contained in the last count of the indictment was this: in his charge to the jury the judge said:

"The third count is a general count, setting out the crime gen-

erally, without any specification of the means by which it was committed. That count is drawn under the statute of this state which authorizes an indictment to be drawn in that manner.

The proof of the crime in any manner known to the law is sufficient to support a verdict under that count."

A verdict of guilty was rendered upon the first and third counts and of not guilty upon the second count, the verdicts being separately taken and rendered.

The defendant moved in arrest of judgment upon the verdicts on the first and third counts, because

I. The first count does not contain any allegation that the condition of the defendant's wife, her necessities, and the facts in said first count alleged were known to the defendant.

II. Because the said third count contains no allegations of negligence, nor of the manner and means by which the deceased came to her death, nor of any intent to commit an offense on the part of the accused, nor any facts, nor his knowledge of the facts, which were to be proved against him.

III. Because said third count does not state "the nature and cause of the accusation" against the accused, is insufficient to sustain the verdict, and any judgment thereon against the prisoner; and is not according to the requirements of the constitution; and any statute assuming to authorize such a count is unconstitutional.

To the foregoing rulings, instructions, refusals to instruct and remarks, and to the overruling of his motion in arrest of judgment, the defendant excepted.

E. B. Smith, for the defendant.

W. S. Lunt, county attorney, for the state.

BARROWS, J. Having been found guilty upon the first and third counts of an indictment in which he is charged with manslaughter the defendant moves in arrest of judgment, and excepts to the overruling of his motion, as well as to certain instructions given to the jury and certain refusals to instruct in conformity with his requests.

The crime was alleged to have been committed against the person of his wife, and the evidence for the state tended to show that his wife was insane and had been for some years, at times, so as

to tear all the clothing from her person, that she became a cripple, able to move herself by her hands only; that in this condition she was confined in a very cold open room in the ell part of the prisoner's house day and night without fire, with no garment on her, nothing to sleep on but husks and rags in a filthy condition, and no covering but a piece of canvas from the 18th of January to the 9th of February, 1875; that there was a broken pane of glass in one of the windows, permitted to remain open; that when found by the neighbors her feet and hips were badly frozen, swollen and discolored; that gangrene had already commenced, followed by mortification and death caused by freezing; that the prisoner had full knowledge of her condition and of the condition of the room and was able to support her in a proper manner. The medical men who examined her on the 10th and 11th of February, testified that in their opinion the freezing must have occurred three or four weeks previous.

Now, while the defendant contended that if his wife suffered from the causes alleged, it was without his knowledge and contrary to his intention and gave evidence which he claimed supported this position, he admitted upon the stand that he knew the condition of the room; that he passed through it every night but one, from January 19th to February 9th to fasten the doors; that every winter before, when she had been kept there, he had warmed the room by a stove and intended to do so last winter, but not having the money on hand, put it off, and the only examination which he made of the condition of his wife, when in the room, was to look and see if the canvas was over her.

We will consider first the questions raised as to the sufficiency of the indictment.

The defendant objects to the first count, because he says it contains no allegation that the condition of his wife, her necessities, and the facts alleged in that count as constituting the crime of manslaughter were known to him.

The count alleges the relation which he sustained to the deceased, his duty to provide for her necessities, her own incapacity and his ability to do it, and that he did "feloniously and willfully

neglect and refuse to provide necessary clothing, shelter and protection from the cold and inclemency of the weather" for her from the 19th day of January to the 9th day of February, the consequent sickness and death of the wife, and manslaughter by the defendant "in the manner and by the means aforesaid."

The objection is not sustained. The allegation of a willful and felonious neglect and refusal to perform the duties devolved upon him by law in the premises of itself imports an allegation that he knew the necessities of his wife and the essential facts alleged in the count.

A man cannot be said in any manner to neglect or refuse to perform a duty unless he has knowledge of the condition of things which requires performance at his hands.

The charge of neglect and refusal to furnish the necessary protection against the cold is tantamount to an averment that the defendant had all the knowledge of the facts which it was necessary that he should have, in order to inculpate him. It was not necessary to allege nor to prove that the defendant knew from day to day the effect which his brutal neglect was producing. If such knowledge could have been brought home to him he should have been charged not with manslaughter, but with murder; and it is not easy to see how he could have avoided the inference of malicious intent.

We hold the first count to be sufficient, even under the former practice requiring that the manner and means by which the crime was accomplished should be set forth in detail.

But such allegations are now unnecessary under the provisions of R. S., c. 134, § 7.

The defendant's objections to the third count are futile. Similar objections were made and overruled in *State* v. *Verrill*, 54 Maine, 408.

Nor do we see that the defendant has any good cause of complaint when we examine the instructions and the refusals to instruct as requested. One extended series of requests called for instructions upon the question of the prisoner's intent, maintaining that, "if the evidence can be reconciled with an innocent intent on the part of the prisoner he must be acquitted;" that a wrongful

intent was of the essence of the offense without which it could not exist; that, whatever the result of an action or omission, a man can be held guilty only upon the ground of evil intentions; that there must be proof to the satisfaction of the jury of a wrong intent, of a willful wrong done.

The presiding judge refused these requests and instructed the jury that it was not essential to prove criminal intent in order to constitute the crime charged in this case. This was clearly right.

A criminal intent on the part of a party who has carelessly caused the death of a human being need not be alleged nor proved in order to constitute manslaughter when such death was the result of the neglect of a known duty to the deceased.

Add to the matters charged in this indictment the element of an evil and wicked intent and you have the malice, express or implied, which would make the crime murder, either of the first or second degree according to the character of the intent.

It is settled beyond a question that the naked negligent omission of a known duty, when it causes or hastens the death of a human being, constitutes manslaughter. Hence, Maule, J., in *Regina* v. *Haines*, 2 C. & K., 368, charged the jury in these words: "If you are satisfied that it was the ordinary and plain duty of the prisoner to have caused an air-heading to be made in this mine, and that a man using reasonable diligence would have had it done, and that, by the omission, the death of the deceased occurred, you ought to find the prisoner guilty of manslaughter."

For further illustration of the doctrine that manslaughter may be committed by a negligent omission of duty see *Reg.* v. *Marriott*, 8 Car. & P., 425. *Reg.* v. *Edwards*, id., 611. *Reg.* v. *Lowe*, 4 Cox C. C., 449. *Reg.* v. *Plummer*, 1 Car. & K., 600. *Nixon* v. *People*, 2 Scammon, 269.

Another series of requested instructions embody certain general propositions as to degrees of negligence, among others that mere carelessness is not necessarily criminal; that carelessness is not sufficient to convict without proof beyond reasonable doubt of intentional neglect; that there is a difference between the negligent doing of an act and the careless omission to perform one's duty; the negligence in the former case being greater in degree;

that many acts of blamable negligence for which one would be liable in a civil action, will not support an indictment for injury or death resulting from such negligence; that it is not every degree of carelessness or negligence upon which death ensues, that will render the negligent person liable for manslaughter; that whether or not the accused is guilty of such acts and intent as to make him criminally liable to conviction of manslaughter, therefor, is purely a question for the jury.

The requested instructions were refused; but the jury were fully instructed as to the facts which it was necessary for them to find before they could pronounce the defendant guilty, and upon the law applicable to the facts.

One obvious reason for refusing the requests was that upon the defendant's own version of the facts the requests were not pertinent to the condition of things developed, and could only have tended to mystify it, and mislead the jury.

The negligence of the defendant was of the grossest and most culpable kind, regarding only the facts which he himself admitted to be true.

The defendant further requested the judge to instruct the jury "that in order to justify the inference of legal guilt, the existence of the inculpatory facts must be absolutely incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt; that the jury must consider whether the circumstances proved necessarily involve the guilt of the prisoner or only probably so; and when the evidence merely establishes some finite probability in favor of one hypothesis rather than another, such evidence cannot amount to proof of guilt however great that probability may be."

The judge did not give these instructions in this form; but the exceptions state that he did "fully instruct the jury as to the burden of proof and the degree of proof necessary to establish every fact required to prove the guilt of the prisoner," in a manner to which no exception is taken.

The reason last mentioned for the refusal of other instructions applies also to these. There was no occasion for them. It is quite possible to conceive of cases where they might be pertinent

and proper; but there was nothing in the questions upon which the jury had to pass in this case that made them so here.

There is another reason. When a judge has once given the law arising upon the evidence fully and correctly, he is under no obligation to repeat the propositions at the request of a party in such form as the whim or shrewdness of counsel may suggest as likely to produce an impression favorable to his side of the case. A refusal to do this is matter of discretion, and not exceptionable. *State* v. *McDonald*, 65 Maine. *State* v. *Pike*, 65 Maine, 111, and cases there cited.

We find recited in the exceptions two paragraphs of the judge's charge, of which the defendant complains as being in contravention of c. 212, Laws of 1874. We do not think they can be so regarded. These paragraphs seem to have been selected as most obnoxious to the charge of being expressions of opinion upon questions of fact arising in the case, of all the utterances of the presiding judge during the progress of the trial. They call the attention of the jury to testimony coming partly from the defendant himself, having an important bearing upon the questions upon which the jury were to pass, and consist mainly of interrogatories addressed to the jury, which it behooved them to consider and answer in coming to a conclusion upon the main question.

Considering the cold blooded and cruel recklessness of which the defendant upon his own showing was guilty, we think the judge must have refrained with praiseworthy precision from saying anything that could be deemed incompatible with the statute referred to. *Exceptions overruled.*

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

STATE *vs.* CHARLES E. GORHAM.

York, 1875.—March 1, 1876.

Indictment. Intoxicating liquors. Evidence.

The book containing a record of the names of persons paying special taxes, kept at the office of the collector of internal revenue by virtue of a requirement of the statutes of the United States, is *prima facie* evidence of the facts properly contained in it; and either the original or a copy duly certified may be received in evidence.

An allegation in the indictment that the defendant has been once before convicted of the offense charged against him, (whether as common seller or as keeper of a drinking house and tippling shop,) stated in general terms as prescribed in the statute, is sufficient to sustain a conviction against him for a second offense.

ON EXCEPTIONS.

INDICTMENT for being a common seller of intoxicating liquors, from April first, 1874, till the finding of the indictment at the September term following; also an indictment for keeping a drinking house and tippling shop; two cases covering the same time considered together.

Each indictment charged a former conviction and each was supported by similar evidence. The averment of former conviction was in the form following:

"And the jurors aforesaid, upon their oath aforesaid, do further present that the said Charles E. Gorham has been once before convicted as a common seller of intoxicating liquors, under section twenty-nine of chapter twenty-seven of the Revised Statutes of said state, in said county of York."

The averment in the second indictment was of the same general form, differing only in the substitution of the words "for keeping a drinking house and tippling shop" in place of the words "as a common seller of intoxicating liquors."

A witness on the part of the government testified that he was acting in the capacity of deputy collector of internal revenue for the first district of Maine, that he had in his hand an alphabetical list of persons who had paid special taxes for the year ending 1875, that it was the original record kept by him for that purpose

in the office of internal revenue, that it was his duty to keep it and that the name of Charles E. Gorham appeared upon it. The witness then read in answer to a question by the prosecuting officer, by leave of court and against the defendant's objection, as follows:

"Charles E. Gorham, retail liquor dealer, Saco, May 13th, $25. Old Orchard House." The heading is:—"Record of Special Taxes, First District of Maine, from May, 1874, to April 30, 1875."

To sustain the allegation concerning a former conviction, the government officer offered in evidence a copy of a record, to the introduction of which the counsel objected and contended among other things that the count under which it was introduced was so general and informal, that no evidence could be legitimately introduced under it; that it did not allege time or place or court at which such conviction was had, and that no legal conviction could be had under the sectio ntherein referred to; that there was nothing to indicate that the conviction, evidenced by the record offered, was the same referred to in the count; that the count gave the party no notice of the particular offense and conviction therein referred to, and was neither sufficient at common law nor under the chapter referred to. The presiding justice overruled the objection and admitted the record, and in his charge to the jury instructed them that it was sufficient evidence to sustain the allegation in the indictment concerning the prior conviction.

The defendant filed a motion in arrest of judgment because of the insufficiency of the count alleging former conviction, which was overruled by the court.

To all of which rulings the defendant, the verdict being guilty, excepted.

R. P. Tapley, for the defendant.

W. F. Lunt, county attorney, for the state.

PETERS, J. The book, admitted in evidence in these cases, was a record of the payments of special licenses. It was not a book of assessments. It is kept by the collector of internal revenue, under the requirements of the revenue act of December 24, 1872, (incorporated into the Revised Statutes of the United States, in

section 3240,) which provides, "that each collector of internal revenue shall, under regulations of the commissioner of internal revenue, place and keep conspicuously in his office, for public inspection, an alphabetical list of the names of all persons who shall have paid special taxes within his district, and shall state thereon the time, place and business for which such special taxes have been paid." The book was introduced to show that the respondent had paid for a license as a retail liquor dealer, for a period of time covered by the indictment; and it was clearly admissible as *prima facie* evidence of that fact. It is an official record, kept by a sworn officer, and authorized by law. 1 Greenl. on Ev., §§ 483, 484, 485. In *Gurney* v. *Howe*, 9 Gray, 404, it was held that a post office record of registered letters received was competent evidence of the facts contained in it; and in *Sumner* v. *Sebec*, 3 Maine, 223, that a book found in the hands of a town clerk, purporting to be a record of births and marriages in the town, was *prima facie* evidence of the facts contained in it, though it had no title or certificate or other attestation of its character; in *Merriam* v. *Mitchell*, 13 Maine, 439, that a post office record of mails received and sent away was admissible in evidence; in *Hodgdon* v. *Wight*, 36 Maine, 326, that the books of the state treasurer may be received in evidence to show that taxes upon wild lands had been paid; in *Wayland* v. *Ware*, 104 Mass., 46, that the record kept by a town clerk of the soldiers who composed his town's quota of the troops furnished by the commonwealth of Massachusetts to the United States during the civil war, was competent, though not conclusive, evidence of facts it was required by statute to contain; and there are among the cases many other similar instances where such evidence has been received. The same authorities (with others) decide that either the original or a certified copy may be received in evidence. *Parker* v. *Currier*, 24 Maine, 168. *Sawyer* v. *Garcelon*, 63 Maine, 25. And the original is admissible, whether it is or not improperly taken from the office, where the law requires (as in this case) that it shall be constantly kept. *Brooks* v. *Daniels*, 22 Pick., 498. Nor was it necessary for the acting deputy collector to produce any proof more than his own oath, that he had the official possession of the

records, until some facts were put in evidence, having a tendency to show the contrary. *Com.* v. *Connell*, 9 Allen, 488. Nor did it prejudice the respondent that the book, by a slip of expression by the court, was styled a book of "assessments" instead of "collections;" for he would in fact be benefited thereby. The remark rather limited than extended the value and force of the evidence. By the law, a person could not pay for a license until he was assessed; nor can he be assessed until he has made an application to be assessed.

The objections to the indictment cannot be sustained. The points involved have been mostly determined in the case of *State* v. *Wentworth*, 65 Maine, 234. Our attention is called to the fact that the word "spirituous," instead of the word "intoxicating," is used in that part of c. 27, § 55, which relates to the allegation of prior convictions. Undoubtedly the word "intoxicating" would be the more appropriate word in that connection. But taken with § 57, in all its parts, including the forms prescribed, the interpretation is plain enough. The words "spirituous liquors" in § 55 are not a necessary portion of the section at all. Besure, the common law technicalities of pleading are very considerably abrogated under this statute. But we do not see how any practical wrongs can g row out of it. *Com.* v. *Miller*, 8 Gray, 484.

Exceptions in both cases overruled.

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

EBEN M. JONES *vs.* JAMES ROBERTS.

York, 1875.—March 1, 1876.

Where a judge at *nisi prius* decides the attesting witnesses to a deed to be out of the state and on that account admits secondary evidence of the execution of the instrument, his decision of fact is not reviewable by the law court.

Where the testimony of neither of the subscribing witnesses to a deed can be obtained, proof of the handwriting of the grantor is admissible, without first proving the handwriting of the witnesses.

Where a deed is first delivered to the grantee named therein after it has been

recorded by the grantor, the grantee takes the deed and its registration with the same effect thenceforward as if recorded by him at the date of its delivery.

A conveyance by a father as a gift to his son, executed for the purpose of depriving the father's future wife to whom he was then engaged of dower in the premises conveyed, is not a fraudulent and void conveyance as against the future creditors of the grantor.

On exceptions.

Writ of entry.

The plaintiff claimed title through deed of his father, Eben Jones, to himself and two brothers, and through deeds of his brothers to him. The defendant claimed through a levy as judgment creditor against Eben Jones and one Hanscom, the judgment being founded on a note wherein Eben was an accommodation signer for Hanscom. The plaintiff had the apparent prior record title through a deed which the defendant sought to impeach as a fraud against his future wife when given and as a continuing fraud against subsequent creditors. It appeared by the deposition of Eben, introduced by the defendant, that his deed to his sons made in 1839 was then placed in the hands of one James Jones with directions to keep it till the grantees became of age and then to deliver to them, that he was then owing nothing, that his reason for making the deed was that the mother of the grantees had died and he thought of marrying again and was afraid that his wife outliving him would take the property from the boys.

At the trial, the plaintiff, after introducing the deed from his father to himself, offered a deed from his brother John A. Jones, then and at the time of its execution living in Wisconsin; and the witness to whom it was returned testified that he did not know the whereabouts of the subscribing witnesses or that they were within this state. Thereupon the presiding justice, against the defendant's objection, ordered the deed to be read on proof of the handwriting of the grantor.

The dates of the material transactions are as follows: the deed of 1839 was recorded January 28, 1865; the deed of John A. Jones to plaintiff of January 13, 1865, was recorded September 22, 1874. The note was dated October 5, 1858; judgment rendered upon it in favor of plaintiff, May term, 1868. An action

of debt on the judgment was brought in August, 1873, and a new judgment recovered September term, 1873, upon which execution issued, and a levy was completed upon the *locus* January 3, 1874, after which plaintiff brought suit. The defendant, the verdict being for the plaintiff, alleged exceptions.

W. J. Copeland, for the defendant, contended in support of his exceptions that the deed from John A. Jones to the plaintiff was improperly received without the production of the subscribing witnesses or proof of their handwriting and without evidence that they were not living and residing within the jurisdiction of the court; that their handwriting should at least have been proved; that the instructions of the judge, "that if the purpose of Eben Jones in executing the deed of 1839 was to prevent his future wife to whom he was then engaged from having dower in the estate it would not authorize subsequent creditors to impeach the deed" was erroneous. By the statute of 13 Eliz., conveyances made to defraud creditors and others were void. The person to whom Eben Jones was engaged had a right of action against him if he declined to marry her. If he married her, he and his estate were bound for her support, and she had the right of dower and other equitable interest in the estate. The conveyance was voluntary and fraudulent as to the future wife of Eben Jones; if not strictly a creditor she was of the "others" protected by the statute of 13 Eliz. *Livermore* v. *Boutelle*, 11 Gray, 217. The conveyance, being both fraudulent and voluntary, was a continuing fraud and void both as to existing and subsequent creditors. There was a secret trust which rendered it void as to subsequent creditors. *Hall* v. *Sands*, 52 Maine, 355. The deed being voluntary and not being delivered or recorded until after the debt to the defendant was incurred, credit being given upon the possession and apparent ownership and record title, it had, as against the defendant, no effect until delivery and registration; the defendant is to be treated as a prior creditor. *Smith* v. *Lowell*, 6 N. H., 67. *Paul* v. *Crooker*, 8 N. H., 288.

W. Emery, for the plaintiff.

PETERS, J. The deed of John A. Jones to the plaintiff was properly received in evidence. The deed was executed out of the state. The person receiving it and recording it here testified that he did not know the whereabouts of the subscribing witnesses, or that they were within this state. Thereupon the court allowed the deed to be read, upon proof of the handwriting of the grantor. This amounted to a decision of the judge at *nisi prius*, that as a matter of fact the subscribing witnesses were not, at the time of the trial, within the jurisdiction of the court, and to this decision of fact exceptions do not ordinarily lie. The secondary evidence was therefore admissible. *Woodman* v. *Segar*, 25 Maine, 90.

The defendant objects to the validity of one of the deeds under which the plaintiff claims, that it was recorded before it was delivered, and was not recorded afterwards. This objection is of no avail. When a grantee named in a deed, already registered, takes a delivery of such deed, he accepts it and its registration with the same effect thenceforward as if recorded by him at the date of its delivery. *Parker* v. *Hill*, 8 Metc., 447.

Another point is taken. As to one of the deeds under which the plaintiff claims title to the *locus*, the jury were substantially instructed, *inter alia*, that if the only purpose of the plaintiff's grantor in executing the deed was to deprive his future wife, to whom he was then engaged, of her dower in the premises, that fact would not give to the conveyance such a character as would authorize subsequent creditors to impeach it on the ground of fraud, although a voluntary conveyance without any pecuniary consideration therefor. In this connection, it must be borne in mind that the judge had already fully and favorably to the defendant instructed the jury as to the effect of the conveyance, provided the jury should find that there was a secret trust intended by the parties to the deed. No fault can be found with this instruction. The grantee receives the deed as a gift. No secret trust is intended or established. The title is never reclaimed by the grantor, nor attempted to be. We do not understand that the future creditors of the grantor have any reserved rights in this estate, because the grantor preferred to give it to a son rather than that dower in it should enure to a person who was not then his wife. The case

of *Livermore* v. *Boutelle*, 11 Gray, 217, cited, (see similar case of *Bailey* v. *Bailey*, 61 Maine, 361,) does not apply to these facts. The wife is not a party here. If a fraud was meditated against her, it was not against anybody else. But the cases of *Baker* v. *Chase*, 6 Hill, 482, and *Rowland* v. *Rowland*, 2 Sneed, Tenn., 543, do apply exactly, and are in accordance with our decision here. *Exceptions overruled.*

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

JOHN H. FERGUSON *et al. vs.* JULIA A. SPEAR.

York, 1875.—March 5, 1876.

Husband and wife. Trial.

The law will not imply a promise on the part of a married woman to pay for materials bought by her husband and used in the erection of buildings upon her land from the mere fact of the contemporaneous knowledge of such purchase and of the use to which the materials were put.

It was a question for the jury whether the husband was or was not acting as the agent of the wife in making such purchase and whether he had authority to purchase upon her credit; and their finding that the contract was not hers but his, is not so manifestly against the evidence as to justify the law court in setting it aside.

When the husband is justly indebted to the wife he may without fraud prefer her to his other creditors and may make a valid appropriation of his property to pay her claim even though he is thereby deprived of the means to pay other debts.

ON MOTION to have the verdict set aside as against law and evidence.

ASSUMPSIT on account annexed of $250 for materials and labor furnished in the building of a house on the defendant's land in Kennebunk in 1872, claiming a lien.

It was admitted that the items were furnished by the plaintiffs and that the prices were reasonable. The defense was that they were furnished on the credit and promise of the defendant's husband. The plaintiffs admitted that the husband was originally debited with the items, but claimed that in fact he was acting for

her as her agent. There was evidence tending to show that the husband was owing his wife to the amount of the items sued for and that they were allowed by the wife in payment of his indebtness to her. The verdict was for the defendant which the plaintiffs moved to have set aside as against law and evidence.

The facts and the positions of counsel appear more fully in the opinion.

E. E. Bourne, for the plaintiffs.

E. B. Smith, for the defendant.

Barrows, J. The plaintiffs sold and charged to the husband the building materials for the price of which they here sue the wife, claiming a lien upon a certain house and barn and the lot on which they stand, belonging to her, upon the ground that the materials were furnished by virtue of a contract with her and were used in the erection of the buildings.

The case comes before us upon a motion to set aside the verdict for the defendant as against law and evidence.

The plaintiffs insist that the buildings, being erected upon and attached to the wife's land, became her property as they were erected, and that the husband in purchasing materials for their erection must be regarded as her agent, that a promise from her to pay the plaintiffs is implied from the fact that she knew her husband was getting materials from them, that she ratified the purchase of the materials by mortgaging the land and buildings to the savings bank, professedly to get money to pay the bills which accrued in building, that having sold the materials in the belief that the husband was the principal and since discovered that he was merely the agent of the wife, they may recover against her as the undisclosed principal notwithstanding they at first debited the husband.

The plaintiffs had no communication whatever with the wife until after they had presented their bill to the husband and failed to get payment. The foundation of their claim is the allegation that the husband was in fact the agent of the wife in making the purchase.

This the defendant and her husband both denied, and the

defendant produced evidence tending to show that the husband made the contracts for the work and materials that went into the buildings on his own account, made payments on account of them out of his own money, and a verbal transfer and release of all his interest in the buildings to her upon her surrendering claims which she held against him for money of her own which she had lent him for various purposes.

It is with the legal and not the moral aspect of the case that we have to deal. We are unable to say that the finding of the jury that the wife made no such contract as the plaintiffs alleged, and that the husband was acting not for her but for himself in his purchase from the plaintiffs, is wrong as matter of law, or so manifestly against the weight of the evidence as to justify us in setting it aside.

Whatever we might suspect as to the intentions of the husband and the expectations of the wife, it cannot be said to be conclusively proved that they conspired together to defraud the plaintiffs, or that the wife gave the husband any authority to contract debts on her account in order to put up the buildings on her land.

And this was what the plaintiffs alleged and undertook to prove. If the jury believed the defendant's testimony (and the question of its credibility was for them) it was competent for them to say as they have done by their verdict that the husband purchased in fact, as well as in appearance, upon his own account. If so, the plaintiffs' suit could not be maintained although the property came ultimately into the hands of the wife. No promise from her to the plaintiffs would be implied.

It seems to have been both conceded and proved that the wife had money of her own which had gone into the hands of the husband. He had the legal right to prefer her to his other creditors and to appropriate his property to pay her claim, and such preference is not necessarily and of itself a fraud at common law, though both debtor and creditor knew at the time that the effect of such appropriation would be payment and satisfaction of her demand to the exclusion of all others to whom he was justly indebted. *Motley* v. *Sawyer*, 38 Maine, 68. *French* v. *Motley*, 63 Maine, 326. *Giddings* v. *Sears*, 115 Mass., 505.

Nor would the buildings erected by the husband upon the land of the wife with her knowledge and consent necessarily become hers because attached to her land. If, under existing laws respecting the rights of married women to hold, manage and dispose of property, too great facilities for fraudulent connivance between husband and wife respecting contracts of this kind are afforded, it may be that the legislature can furnish a remedy by providing a more stringent lien in such cases.

At present the remedy must be found in the greater vigilance of material men as to the responsibility of the parties with whom they contract.

The jury have said that this contract was made with the husband and not with the wife, and the plaintiffs must abide the result. *Motion overruled.*

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

IVORY GOODWIN *vs.* CALEB B. CLARK *et al.*

York, 1875.—March 9, 1876.

Contract. Intoxicating liquors. Words—"dealer" defined.

Where a plaintiff sues upon an account annexed containing items of a legal and items of an illegal character, each class of which would sustain an action by itself, but for the illegality, he cannot be debarred from recovering for such items as are legal, merely because the two classes of items are embraced in the same account and sued for in the same suit.

A single sale of all the merchandise which a person has on hand, who is going out of a business formerly carried on by him, does not constitute the seller a "dealer" within the meaning of the revenue laws of the United States which require a license for making sales.

A plaintiff cannot recover for his personal services, portions of which were rendered in an employment of selling liquors unlawfully, the contract of service being an entirety; but he is not to be prevented from recovering for his services contracted to be rendered in a lawful employment, merely because, during the term of his employment, he occasionally assisted his employer in such unlawful business gratuitously, not expecting or seeking any compensation therefor.

On exceptions and motion.

Assumpsit on account annexed, dated June 25, 1872, for $433.-89 in items which may be generalized thus: tobacco and cigars, $61.02; champagne itemized as cash, $10.00; other items of merchandise specified, $84.67; two months and twenty-nine days' labor, $272.50; interest, $5.70.

The defense was illegality of consideration, also payment for the labor.

The plaintiff testified that he held a United States license for the sale of tobacco and cigars which expired with April, 1872; that he carried on business under it at Biddeford where he was burned out; that the items of merchandise charged in the account were saved from the fire; that the item of $10 charged as cash was for champagne which was a part of his Biddeford stock; that the item for labor was for services at the Bay View house under a contract that he should have the same as the caterer got at the Ocean house; that the caterer there got $125 per month, but that he asked the defendants only $100 per month, for the first two months, and $75 per month for the last twenty-nine days; that during the time he was there he gave orders for buying everything that was used in the house, saw that the cooking was properly done, did the carving, made out bills of fare, saw that the help were in their proper places and did their work satisfactorily, and that he tended the bowling alley. To the question whether he sold the liquors there, he declined to make answer, on the ground that it would tend to criminate him. He further testified that he had been paid nothing on the account.

The defendant, Moulton, testified that he hired the plaintiff to tend the bowling alley and bar, to do whatever was required about the house, to be there when he was away, to make up the lists for food, get the meals ready, etc.; that the plaintiff sold in the bar all kinds of intoxicating liquors; that he agreed to pay him what he could hire others for, to do the same business; that he paid him $150 at the time he left, which was $50 per month and the same price at which he had hired a man before.

The defendants requested to have the jury instructed, "that if,

at the time of the sale of the tobacco and cigars, the plaintiff had no license from the United States as a dealer in those articles, he cannot recover." The presiding justice declined to give this instruction, but said to the jury that if Mr. Goodwin "had been a dealer and was licensed as such, and, just before his license expired, was burned out or his property principally destroyed and he had these as a relic, he might sell them, lump them out and sell them out, but not as a dealer in cigars; that he might get rid of the property on his hands without taking out a new license. If that was the state of facts as you shall find in this case, I instruct you that the license was not necessary, and he could recover for these cigars, so far as that is concerned."

The defendants requested to have the jury instructed that, "if by agreement of the parties, part of the plaintiff's services to the defendants was the illegal sale of intoxicating liquors, then the plaintiff cannot recover for any of his services." "If part of the plaintiff's labor, duties and services rendered to and performed for the defendants was the attendance upon the defendants' bar, and the illegal sale of intoxicating liquors at such bar, the plaintiff cannot recover for the services claimed in his account."

Upon this point the judge did not give the requested instructions, but told the jury this: "the plaintiff says the contract was that he was to perform the services of a caterer at the Bay View house, kept by these defendants. That, the defendants deny, and say that he was to tend bar and bowling alley. Now, if that was to be his business, to tend the bar and sell liquors contrary to law, whatever you may think of the defense set up, it is a lawful one. . . . . I instruct you that if the plaintiff was to go down there and have the chief control of that house, (as he says,) decide what should be put upon the table from day to day, and have general charge of that house, and that was the contract service which he was to render, then he would be entitled to recover the contract price, if there was any; or if no contract price, what his services were reasonably worth; and if he did sell liquor there contrary to law, as servant of these defendants, but his services were not contracted for that purpose, but for a general supervision of the whole establishment, that is no defense. On the other hand, if the

services were for the purpose of selling liquors, he cannot recover anything, however valuable his service may have been."

The defendants excepted.

E. B. Smith, for the defendants.

I. T. Drew, for the plaintiff.

PETERS, J. The suit is upon an account annexed, containing two different claims, one for personal services rendered, and the other for merchandise sold. The plaintiff charged $272 as wages for his services, and that sum with interest would just equal the amount of the verdict returned. Taking the testimony of the plaintiff to be true and discarding that of the defendant who testified, which the jury might do, and the verdict can stand. There was enough in the case to authorize the jury to find that the plaintiff did not sell liquors as any part of the business for which he was employed. But the defendants contend that the plaintiff is debarred from recovering at all, because one of the items in the account sued, charged under the head of cash, was really not cash, but was intended to represent a quantity of liquors illegally sold to them by the plaintiff. But the plaintiff is not to fail upon his claims altogether, merely because he sues in the same action for items legal and items illegal, each class of which would support a separate action of itself, (but for the illegality,) and having no other connection than that they are embraced in the same account annexed in a single suit. Nor has it in this state ever been so decided. In *Towle* v. *Blake*, 38 Maine, 528, it was held that where the objectionable items were struck out by an amendment, no objection was left. *Boyd* v. *Eaton*, 44 Maine, 51, is to the same effect. See also *Plummer* v. *Erskine*, 58 Maine, 59. Besure, the statute inhibits the maintenance of any action upon any claim or demand contracted or given for intoxicating liquors. But this action is upon several distinct and independent demands. The claims sued are not an entirety. The plaintiff can sustain his item for labor without any necessity for evidence upon any other items by him claimed. In *Badger* v. *Titcomb*, 15 Pick., 409, Wilde, J., remarks for the court: "We think it cannot be maintained, that a running account for goods sold and delivered, money loaned,

or money had and received, at different times, will constitute an entire demand, unless there is some agreement to that effect, or some usage or course of dealing, from which such an agreement or understanding may be inferred." In *Robinson* v. *Green*, 3 Metc., 159, the plaintiff, who sued for claims both legal and illegal, upon *quantum meruit*, was allowed to recover for the legal claim which was severable from the other. Other cases are to the same effect. *Rundlett* v. *Weeber*, 3 Gray, 263. *Holt* v. *O'Brien*, 15 Gray, 311. *Bligh* v. *James*, 6 Allen, 570. *Warren* v. *Chapman*, 105 Mass., 187. *Dunbar* v. *Johnson*, 108 Mass., 519. *Hall* v. *Costello*, 48 N. H., 176.

We find no error in the charge to the jury. The "business" of selling tobacco without a license, is prohibited by law. But one sale (like this) would not constitute the vender a "dealer." A plurality of sales would, under ordinary circumstances. A single sale might, if accompanied by evidence of a preparation and readiness by the vender to make other sales. In the case of *Harding* v. *Hagar*, 60 Maine, 340, and S. C., 63 Maine, 515, no question was made that the plaintiff was not "a broker;" and that case differs from this. Here goods on hand and belonging to the plaintiff were sold. There the plaintiff claimed to recover, upon the ground that he had rendered services as a broker.

The last instruction requested by the defendants was substantially given in terms adapted to the facts of the case. The proposition of the defendants is a correct one. A person cannot recover for his personal services, portions of which are rendered in an unlawful employment, the contract being an entirety. If the plaintiff contracted with the defendants for his personal services in their employment, a part of which employment was to be in selling liquors unlawfully, he can recover nothing upon such a contract or for services rendered in pursuance of it. But if his contract was to render services only in a legal employment, and he seeks to recover for no other, he is not to be debarred therefrom merely because, during the season of his employment, he occasionally assisted in the sale of liquors as a gratuitous service to his employers, and not as a part of his contracted services for which he seeks compensation. The two things are independent

of each other. The judge gave the instruction in a way to allow the jury to comprehend and appreciate this distinction, and it was his duty to do so. The request, as worded, was not of itself sufficient to cover the whole case.

Motion and exceptions overruled.

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

ALICE M. WEEKS *vs.* INHABITANTS OF PARSONSFIELD.

York, 1875.—March 13, 1876.

Way. New Trial.

What obstructions or other inconveniences will render a highway defective, so as to make the town liable if an injury is thereby occasioned, is, to a considerable extent, a matter of opinion or judgment and one in relation to which persons of ordinarily good judgment are liable to differ. The same is true as to what constitutes due care. The court will not therefore assume that the jury have acted dishonestly or perversely, simply because they have come to a conclusion different from that to which the court would have come upon the same evidence.

To justify setting aside the verdict of a jury the court must feel that it is clearly, manifestly wrong.

ON MOTION.

CASE for injuries received from defective highway, August 31, 1873.

While the plaintiff was in the day time, in an open wagon attached to a single horse, driven by her daughter fifteen years of age, one of the wheels in descending a hill struck the point of a ledge projecting into the traveled highway. The plaintiff was thereby thrown from the wagon and her arm broken. There was evidence tending to show that there was sufficient room within the traveled way to have avoided the projecting rock. There was also evidence that the rock had been worn by the wheels of passing carriages.

The verdict was for the plaintiff for $500, which the defendants moved to have set aside as against law and evidence.

G. C. Yeaton, for the defendants.

"The town has done its duty when it has prepared a pathway of suitable width in such a manner that it can be conveniently and safely traveled with teams and carriages," but travelers may pass over remaining width of way "without being subjected to other or greater dangers than may be presented by natural obstacles." *Johnson* v. *Whitefield*, 18 Maine, 286, approved in *Savage* v. *Bangor*, 40 Maine, 176. *Dickey* v. *Maine Tel. Co.*, 46 Maine, 483. *Macowber* v. *Taunton*, 100 Mass, 255.

Was not this such a way? If not, can it be believed that this way was so dangerous, that ordinary care, in daylight, would not have proved a sufficient guaranty against injury to a traveler?

Such being the character of the alleged defect the burden of proving ordinary care on the part of plaintiff, which plaintiff must always bear, (*Butterfield* v. *Western Railroad*, 10 Allen, 532, *Gleason* v. *Bremen*, 50 Maine, 224,) is thereby largely increased; and if the "evidence is equally consistent with either care or negligence" she cannot recover. *Crafts* v. *Boston*, 109 Mass., 519.

L. S. Moore, *C. R. Ayer*, and *G. F. Clifford*, for the plaintiff.

WALTON, J. What obstructions or other inconveniences, will render a highway defective, so as to make the town liable, if an injury is thereby occasioned, is to a considerable extent a matter of opinion or judgment. And it is one in relation to which persons of ordinarily good judgment are liable to differ. The same is true as to what constitutes due care. The court must not therefore assume that the jury have acted dishonestly, or perversely, simply because they have come to a conclusion different from that to which the court would have come upon the same evidence. To justify setting aside the verdict of a jury, the court must feel that it is clearly, manifestly wrong. In this case our conclusion is, that the verdict is not so clearly, so manifestly wrong, either with respect to the alleged defect in the road, or the exercise of due care on the part of the plaintiff, as to justify us in setting it aside.

Motion overruled.

Judgment on the verdict.

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

ALLISON B. HUFF, in equity, *vs.* WILLIAM CURTIS.

York, 1874.—March 20, 1876.

Equity. Trial. Evidence.

In suits in equity, in order to let in parol evidence of the contents of a writing, upon the ground that the writing is lost, it is immaterial at what stage of the proceedings the loss is shown.

Thus, where at the time of taking evidence to prove the contents of a lost writing, its loss had not been shown, and the evidence was then objected to upon that ground, still, if it was afterwards shown, by one of the objecting party's witnesses, that the writing came into his possession, and that he had made diligent search for it and could not find it, the objection will be obviated and the parol evidence regarded as legally in the case.

BILL IN EQUITY to redeem real estate under mortgage.

In defense it was claimed that the plaintiff was not the owner of the right to redeem. It appeared in evidence that the wife of Aaron M. Mellen was once the owner of the equity and that when upon her death-bed she signed a writing relating to her interest in the land. The plaintiff claimed that it was a deed to her husband of the equity of redemption, which interest was afterwards sold on an execution against him, and assigned by the purchaser to the plaintiff. The defendant contended that the writing in question was not a deed to her husband, but a will to her children. To show the character of the writing, the plaintiff took the testimony of the scrivener, which was objected to on the ground that the loss of the writing was not first proved. The defendant afterwards examined the husband, who, on cross-examination, testified that the paper signed by his wife was left in her sick-room, that he supposed it was a will, that it was not delivered to him, that he made search for it some months after his wife's death, but was unable to find it.

J. Dane & E. E. Bourne, for the plaintiff.

J. M. Goodwin & W. F. Lunt, for the defendant.

BARROWS, J. The lot of land which the complainant seeks by this bill to be allowed to redeem was conveyed in 1852 by Jedediah

Towne to Lavinia, wife of Aaron M. Mellen; and was mortgaged in 1857 by said Aaron and Lavinia, in her right, to said Towne to secure a debt of said Aaron's.

The complainant is the grantee of the purchaser at a sheriff's sale upon execution of all the right in equity of redemption which the said Aaron had therein on the 14th of November, 1866. The respondent holds the mortgage by assignment from said Towne, made in November, 1872. Towne published a notice of foreclosure in December, 1869. But before the three years had expired, and after the assignment to the respondent, the complainant made a demand upon him for an account under R. S., c. 90, § 13, with which the respondent did not comply; and he denies in his answer that Aaron M. Mellen had the right of redemption when it was attached and sold as his, or that it was ever conveyed by said Lavinia to said Aaron as the complainant alleges. All other material allegations in the bill are substantially admitted.

It is upon proof of the making of the alleged conveyance by Lavinia Mellen to her husband prior to November 14, 1866, that the complainant's rights depend. She died May 14, 1866. The respondent contends that no such deed of her right of redemption in the premises was ever executed or delivered by her, or accepted by her husband; that it would defeat her intention, often expressed, that her children should have her property; that if she executed such a conveyance she was not of sound mind; and finally that, in any event, if Mellen took such a conveyance from her, it was subject to a trust in favor of the children, whose right to redeem the defendant concedes, in argument.

That William F. Moody, of Kennebunkport, a justice and notary, accustomed more or less to act as a scrivener in the making of both wills and deeds, was sent for by the husband a few days before the wife's death, to make some kind of a writing for Mrs. Mellen to execute; that he came and that she executed the writing he made, is testified to by the witnesses called by the defendant, as well as by those of the plaintiff.

The character and contents of the instrument are the matters here controverted, the defendant insisting that it was a will in favor of the children, the plaintiff, that it was a deed to her hus-

band. Neither the instrument nor anything purporting to be a copy is produced. If secondary evidence of its contents is admissible, we think there is so decided a preponderance in favor of the hypothesis that the instrument was a deed of the wife's right in this piece of real estate to the husband that we ought to say we are reasonably satisfied that such was the fact. It is also, in our opinion, fully established that Lavinia Mellen, though fatally ill and very feeble at the time of executing the instrument, had legal capacity to make a conveyance of her property, according to the definition of that capacity given in *Hovey* v. *Chase*, 52 Maine, 304; *Hovey* v. *Hobson*, 55 Maine, 256; and *Darby* v. *Hayford*, 56 Maine, 246. We are equally well satisfied that the deed was duly delivered and accepted, and went into the possession of Aaron M. Mellen; nor do we see any cause to believe that the conveyance was subject to any trust whatever.

Some questions are raised as to the admissibility of testimony respecting the mental condition of Mrs. Mellen. But they have been so often passed upon in this state, that we deem any special reference to them here unnecessary. Our conclusion upon this point is based upon the testimony as to the acts and language of Mrs. Mellen, and the various facts and circumstances proved, indicating her mental condition, and not upon the mere expressions of opinion of the various witnesses in regard to it

The defendant's objection to the vitally important testimony of Mr. Moody as to the character and contents of the deed, merits consideration. It cannot be said that the plaintiff had affirmatively shown that he had exhausted all the sources of information in the effort to produce the instrument itself, when he offered the secondary evidence, or that he had established its existence and loss when he propounded to Mr. Moody an interrogatory calling for all his knowledge respecting the conveyance and its execution, which was "objected to by defendant's solicitor as leading and as inadmissible, and not competent to prove the execution of a deed assumed to have been made." The deponent's answer was also "seasonably objected to as not being the best evidence to prove the allegations in the bill, also as incompetent and inadmissible and irrelevant, it not having been previously shown that such a

deed was in existence or was lost, or that any effort had been made to procure it, or any notice given to any one to produce it."

The objection is insisted on in argument, and it is claimed that it should be considered in view only of the proceedings which had been had, and of the testimony which had been produced in the case when Moody's deposition was taken. But we think the objection is to be passed upon in view of the case and evidence as they stand at the time of the publication of the testimony; and if, upon the proceedings had and the whole evidence offered, it then appears that the secondary evidence is admissible to prove the contents of the writing, the objection to it ought not to be sustained for want of the production of the requisite proof before or at the time of the taking of the deposition. How much diligence and effort must be used to secure the production of a lost deed before parol evidence of its contents can be deemed admissible depends of course very much upon the ever varying circumstances of the cases in which it is offered. It must always be enough to repel conclusively the suspicion that the party resorts to secondary evidence because the best evidence would not be found favorable to his position.

It is material then to ascertain to whose hands the document is last traced, and which party, if either, is most likely to know what has become of it, or to be able to procure it, if it is still in existence. Upon that point in the present case we are not left in doubt. Aaron M. Mellen, at whose request the instrument was drawn, and into whose possession we think it went immediately after its execution, is produced as a witness by the defendant, and gives testimony from which the defendant's counsel argues that the instrument was not a deed but a will; and, touching the whereabouts of the document in question, he swears to that which, whether it commands belief or not, fully accounts for the absence of the writing, and demonstrates the futility of any effort on the part of the plaintiff to produce it. The plaintiff puts in the testimony of all those who could be supposed to know what was done with the instrument after it was executed, except Aaron M. Mellen and his daughter, at that time a young girl, and they are both called as witnesses by the defendant. The former says that he

never accepted or had in his possession the paper which he was so eager to have drawn; that the last he saw of it was in his wife's sick-room; that he took no pains at first to ascertain what became of it, but made thorough search the next fall, and has been unable to find it.

As above remarked, the testimony produced by the plaintiff satisfies us that the instrument went into the possession of this witness. Subsequent events have made it for the interest of himself and his family to suppress it. Whether it is now in existence or not, it is obvious from the testimony which he gives, that the plaintiff would call in vain for its production. Without the testimony of this witness the plaintiff had not laid the proper foundation for the introduction of parol evidence of the contents of the instrument. With it, (and so long as it is in the case it is immaterial by which party it is produced,) we think it sufficiently appears that a writing of vital importance in the determination of the rights of these parties was once in existence and cannot be procured by the plaintiff to be used as evidence; and hence that he might properly offer secondary evidence of its contents.

Upon the whole we find it proved to our reasonable satisfaction that his wife's right of redemption was conveyed to Aaron M. Mellen previous to November 14, 1866, when it was attached as his; and that it had been regularly transferred to the plaintiff, who is in consequence entitled to redeem.

Decree accordingly.
Master to be appointed.

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

PORTLAND, SACO & PORTSMOUTH RAILROAD COMPANY, petitioners, *vs.* COUNTY COMMISSIONERS OF YORK COUNTY.

York, 1874.—May 3, 1876.

Certiorari. Records. County Commissioners.

If the adjudication of the county commissioners does not contain a description of the road, so that it may be ascertained from the record, a writ of certiorari will be granted.

Where the record contained no description of the portion of the old way attempted to be discontinued, or of the new one to be established, except by reference to a plan, and the plan did not state distances, and was in other respects unintelligible, the writ of certiorari was granted.

ON EXCEPTIONS.

PETITION for writ of certiorari.

The petition set out that on December 29, 1871, the county commissioners of York county upon the application of the Boston & Maine Railroad adjudged and determined the conditions and manner of the crossings in, upon, and over, certain ways in the town of North Berwick, alleged illegalities, and prayed that a writ of certiorari might be issued and the records and proceedings quashed.

The record, among other things, stated the adjudication of the commissioners to be that the crossing shall be on the road leading from North Berwick to Wells village, near the house of Abraham Junkins and the old road near the same point, "the courses of both roads to be changed so as to pass over the railroad by one bridge in the manner indicated on the plan marked F," &c.

The presiding justice *pro forma* denied the prayer of the petitioners and they alleged exceptions.

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

J. Drummond, for the respondents.

WALTON, J. If in this case it were desirable to sustain the doings of the county commissioners, it would be establishing a dangerous precedent to do so. Their record contains no description whatever of that portion of the old way which is discontinued,

or of the new way which is attempted to be established, except by reference to a plan. The plan is unintelligible unless aided by parol evidence. It does not state distances. To ascertain the length of the old way which is discontinued, or of the new one attempted to be established, recourse must be had to the scale, which is one hundred feet to an inch. It does not give the place of beginning or the place of ending of the new way, nor its angles. These important facts, if ascertainable at all, can only be ascertained by the use of the scale, and the aid of persons familiar with the buildings and other objects very imperfectly laid down on the plan. Results thus obtained are altogether too unreliable. To sustain proceedings so defective and unprecedented would establish a dangerous precedent. Nor is it desirable to sustain these proceedings. The alteration was made to accommodate the Boston & Maine railroad company. They have since changed the location of their track, and the alteration is no longer needed for the purpose for which it was made. It is therefore better that the old way should be reinstated and the new one discontinued. *Writ granted as prayed for.*

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

STATE *vs.* FRANK PIERRE, appellant.

York, 1874.—June 6, 1876.

Trial justice. Jurisdiction.

Trial justices do not have jurisdiction of the offenses described in R. S., c. 17, § 1, which declares that all places used as houses of ill-fame, resorted to for lewdness or gambling, for the illegal sale or keeping of intoxicating liquors, are common nuisances. They may cause such offenders to be arrested and require them to recognize for their appearance at a higher court; but they cannot pass sentence upon them.

ON EXCEPTIONS.

COMPLAINT for keeping a common nuisance by selling intoxicating liquors illegally.

The trial justice took jurisdiction and imposed a fine of ten dollars and costs, from which sentence the defendant appealed to this court and moved to quash for want of jurisdiction in the trial justice. The court ruled as matter of law, if presented in any form of pleading, that the trial justice had jurisdiction, and declined therefore to allow the motion. The defendant excepted.

G. C. Yeaton, for the defendant.

This complaint is not under R. S., c. 27, but R. S., c. 17. *Commonwealth* v. *Bubser*, 14 Gray, 83. *Commonwealth* v. *Cutler*, 9 Allen, 486.

The trial justice had no jurisdiction ; for :

I. There being no presumption in favor of it, it cannot exist without some statute "specially conferring it." *State* v. *Hartwell*, 35 Maine, 129. Hersom's case, 39 Maine, 476. *State* v. *Hall*, 49 Maine, 412. Bouv. Law Dic., Tit. "Jurisdiction."

II. Criminal jurisdiction of trial justices is conferred by R. S., c. 132, §§ 2–7, and some other special sections. If claimed at all under this chapter, it must be under § 4. This cannot confer it, for the penalty imposed in c. 17, § 2, "not exceeding one thousand dollars" and "not more than one year," stamps the crime with legislative determination that the offense is "of a high and aggravated nature." And this section includes only three classes of crimes.

III. Trial justices cannot have jurisdiction here, for jurisdiction *ex vi termini* imports power to pass sentence for the full penalty possible for the offense charged. Hersom's case (supr.) *Hopkins* v. *Commonwealth*, 3 Metc., 460. *Commonwealth* v. *Woolford* and wife, 108 Mass., 483. *Barnes* v. *Green*, 1 Scam., 42. *Commonwealth* v. *Curtis et als.* Thach. Crim. Cases, 202. Bouv. Law Dic., Tit. "Jurisdiction." Davis Crim. Jus. (3d ed.) Tit. "Nuisance."

H. M. Plaisted, attorney general, and *W. F. Lunt*, county attorney, for the state.

A trial justice has jurisdiction of violations of any statute, where the offense is not of a high and aggravated nature, and may fine to the extent of ten dollars. R. S., c. 132, § 4.

At common law the matter of complaint did not constitute a crime or misdemeanor, but it is an offense created entirely by statute.

The fine is fixed in the discretion of the court, not exceeding one thousand dollars, and the offense itself is not necessarily of a high and aggravated nature.

The law necessarily confers a certain discretion upon magistrates to determine the grade of crime alleged to have been committed.

R. S., c. 17, § 13, contemplates that justices shall have jurisdiction in cases of this nature.

The conviction before the justice if it had not been vacated by appeal would be a bar to any proceedings upon an indictment for the same offense, if properly pleaded. 13 Mass., 245 and 455.

Error in the sentence of a justice of the peace is no ground for dismissing the complaint in the appellate court. *Com.* v. *Tinkham*, 14 Gray, 12.

The appeal opens to respondent the whole case, as to the law, the facts and the judgment, *Com.* v. *O'Neil*, 6 Gray, 343, and he cannot on this appeal contest the jurisdiction of the justice. Ibid. *Com.* v. *Calhane*, 108 Mass. 431.

By the ruling of the court, the respondent is not aggrieved on this appeal, whether or not the justice had jurisdiction to sentence him. The exceptions should therefore be overruled and the respondent be required to appear for sentence upon his plea of guilty.

WALTON, J. All places used as houses of ill fame, resorted to for lewdness or gambling, for the illegal sale or keeping of intoxicating liquors, are declared to be common nuisances; and the keepers may be punished by a fine of one thousand dollars, or a year's imprisonment. R. S., c. 17, §§ 1, 2. The question is whether trial justices have jurisdiction in these offenses. We think they do not. Jurisdiction is not expressly conferred upon them; and as the punishments which may be inflicted are far greater than they are authorized to impose, we think it cannot be conferred upon them by implication. They may cause such offenders to be arrested, and require them to recognize for their

appearance at a higher court, but they cannot pass sentence upon them.

Exceptions sustained.
Case to be dismissed.

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

ELIAS THOMAS *vs.* LEWIS CLARK and ARTHUR BOOTHBY, alleged trustee.

York, 1874.—June 13, 1876.

Trustee process. Assignment.

The true consideration of an assignment of the property of a debtor for the benefit of his creditors is the agreement of the assignee to perform the trusts imposed upon him by the assignment; and that, in contemplation of law, constitutes a full and complete consideration.

The statute, R. S., c. 70, § 2, which declares that the assignor shall make oath to the truth of the assignment, does not prescribe any particular form of oath. *Held*, that an oath and certificate in the form following were sufficient: "I, L. C., do solemnly swear that I have placed and assigned all my property of every description in the hands of said A. B., to be divided among all my creditors who shall become parties to said assignment within three months from the date thereof, in proportion to their respective claims. (Signed) L. C. YORK, ss. (date.) Personally appeared L. C. and made oath that the above affidavit by him subscribed is true. Before me, W. M., justice of the peace."

The statute, R. S., c. 70, § 3, requiring the account of the assignee to be *rendered* to the judge of probate within six months, does not require it to be *allowed* within that time. Thus, where the assignment was dated October 16, 1872, and the assignee rendered his account to the judge of probate on the first day of the following April; *held*, that the fact that the account was not allowed till the May term of his court, was unimportant.

Under the statute, R. S., c. 70, § 7, which provides that the assignee may be trusteed after the lapse of eighteen months from the assignment, or two years, if the probate court extend the time so long, in favor of a creditor who has not become a party to the assignment, the assignee will not be holden as trustee for more than the excess of the estate in his hands after the payment of the debts of the creditors who have become parties to the assignment, and the lawful expenses.

The clause in an assignment for the benefit of creditors, "being responsible only for his actual receipts or willful defaults," annexed to the agreement of the assignee accepting the trust, will not vitiate the assignment. It does not release the assignee from the use of due diligence to collect the debts due to the assignor.

On exceptions.

Assumpsit upon promissory notes to which no defense was made.

The contention was as to the liability of the alleged trustee, who disclosed at the September term, 1873, that at the time of the service upon him, May 27, 1873, he had no "goods, effects or credits" of Clark in his hands. He also disclosed a written assignment of Clark to himself of the following tenor: "Know all men by these presents, that I, Lewis Clark, of Limington, in the county of York and state of Maine, in consideration of one dollar to me paid by Arthur Boothby, of Limington aforesaid, and of all the trusts herein expressed, do grant and assign to said Arthur Boothby all my property, estate, rights and credits of every description, (a schedule thereof is hereto annexed,) to have and to hold the same, to said Arthur Boothby and his heirs, in trust, to sell and dispose of the said property to the best advantage, and to collect and convert into money the said debts and demands, and after deducting from the proceeds of said property the expenses incurred by said Arthur Boothby in transacting the business, and a reasonable compensation for his services, to divide and pay the said proceeds among all the creditors of said Lewis Clark, who shall become parties to this agreement within three months from the date hereof, in equal proportion of their respective claims. Arthur Boothby aforesaid agrees to execute said trust, being responsible only for his actual receipts or willful defaults. The creditors whose names are subscribed, agree to said assignment, and that this instrument shall be a release in full of all their claims whenever their just proportion of all the proceeds of said property shall be paid. Witness our hands and seals this sixteenth day of October, A. D. 1872. Signed, Lewis Clark. [Seal.] Arthur Boothby. [Seal.] Signed, sealed and delivered in presence of Wm. M. McArthur.

I, Lewis Clark, do solemnly swear that I have placed and assigned all my property of every description in the hands of said Arthur Boothby, to be divided among all my creditors who shall become parties to said assignment within three months from the date thereof, in proportion to their respective claims. (Signed,)

Lewis Clark. YORK, ss., October 16, 1872. Personally appeared Lewis Clark and made oath that the above affidavit by him subscribed is true. Before me, Wm. M. McArthur, justice of the peace."

The alleged trustee also put into the case the petition to the probate court for an extension of time to two years within which to close the administration of the estate, which extension at the March term of the probate court, 1874, was granted as prayed for.

At the same September term, the plaintiff's counsel filed allegations, and claimed that Boothby should be holden as trustee on the several grounds hereinafter stated in the opinion of the court, and also that R. S., c. 70, was superseded by the bankrupt act. The presiding justice ruled that the trustee be discharged, and to that ruling allowed the plaintiff his exceptions.

T. H. Haskell, for the plaintiff, in his argument in support of the exceptions, took the positions stated in the opinion of the court, some of which appear in the following brief.

The assignment under which the trustee claims is in fraud of creditors and void.

I. Because it is without adequate consideration and does not provide for a distribution of all of the defendant's property among all his creditors, but limits the distribution to those who became parties to the assignment, and stipulates that the trustee shall be responsible only for actual receipts and willful defaults, thus reserving a secret interest to the debtor. *Berry* v. *Cutts*, 42 Maine, 445. *Brown* v. *Warren*, 43 N. H., 430. *Spinney* v. *Portsmouth Co.*, 25 N. H., 9.

II. Because it does not comply with R. S., c. 70. *Simmons* v. *Curtis*, 41 Maine, 373. *Pearson* v. *Crosby*, 23 Maine, 261.

III. Because R. S., c. 70, § 7, protects property in the hands of the assignee from attachment and trustee process for six months only, and because the assignee did not account to the judge of probate within six months.

IV. Because R. S., c. 70, is inoperative by reason of the existence of the bankrupt act, in that it acts upon the same subject matter in distributing the property of the debtor among his creditors, and for the same reason an assignment is void, whether other-

wise good at common law only or by force of the state statute, which does not provide for a proportional distribution of the debtor's property among all his creditors, but limits it to those who become parties to the assignment. *Ex parte Eames*, 2 Story, 323. *Sturgis* v. *Crowninshield*, 4 Wheat., 122. *Ogden* v. *Saunders*, 12 Wheat., 213. *In re Reynolds*, 9 B. R., 50. *Carter* v. *Sibley*, 4 Metc., 298. *Griswold* v. *Pratt*, 9 Metc., 16. *Com.* v. *O'Hara*, 6 Law Reg., 765. *Wyles* v. *Beals*, 1 Gray, 233. *Edwards* v. *Mitchell*, 1 Gray, 239.

E. B. Smith, for the alleged trustee.

WALTON, J. The only question is whether the trustee shall be charged or discharged. He is the assignee of the principal defendant under an assignment for the benefit of his creditors.

No reason is perceived why the assignment should not be sustained and the trustee discharged.

I. The first point made by the learned counsel for the plaintiff, that the assignment was made for the purpose of hindering and delaying creditors, and is therefore fraudulent, is not sustained by proof. There is nothing to indicate that the assignment was not made in good faith, and for the purpose of securing to all his creditors the payment of their debts as far as the debtor's means would go.

II. The point that the consideration for the assignment is inadequate is not well taken. True, the pecuniary consideration named is only one dollar; but the true consideration is the agreement of the assignee to perform the trusts imposed upon him by the assignment; and that, in contemplation of law, constitutes a full and complete consideration.

III. Nor is the point that the assignment does not provide for a proportional distribution among all the creditors becoming parties thereto, well taken. The assignment does provide for such a distribution.

IV. Nor is the point that the assignment was not properly sworn to, well taken. The statute does not prescribe any particular form of oath. It simply declares that the assignor shall make oath to the truth of the assignment. R. S., c. 70, § 2. This the

assignor did, and we think the form of the oath, and also the magistrate's certificate, are sufficient in form and in substance.

V. Nor is the point that the assignee did not render a true account of his doings to the judge of probate within six months, well taken. The assignment is dated October 16, 1872. The trustee, in his disclosure, says he rendered his account to the judge of probate on the first day of the following April, and that it was sworn to. That was within six months. The fact that the account was not allowed by the judge of probate till the May term of his court, is unimportant. The statute only requires the account to be rendered within the six months; it does not require it to be allowed within that time. Besides, the delay was necessary, in order that notice might in the mean time be given.

VI. Nor is the point that after six months from the publication of notice of the assignment, or after eighteen months, or two years, if the judge of probate shall so long extend the time for the settlement of the estate, the assignee may be held as trustee in favor of a creditor who has not become a party to the assignment, well taken. At no time can the trustee be charged for more than the excess of such estate remaining in his hands after the payment of the debts of the creditors who have become parties to the assignment and the lawful expenses. Such is the true intent and meaning of the statute referred to. R. S., c. 70, § 7. In this case there is no such excess. The debts are over $12,000, and the assets less than $4000.

VII. Nor does the clause, "being responsible only for his actual receipts or willful defaults," annexed to the agreement of the assignee accepting the trust, vitiate the assignment. The argument that this clause releases the assignee from the use of due diligence to collect the debts due to the assignor, is not, in our judgment, well founded. The law requires the assignee to use due diligence in the discharge of all his duties, and the above clause will not release him from such a discharge of his duties. An omission to use due diligence would, in contemplation of law, be a willful default.

We believe we have now considered all the points raised by the

learned counsel for the plaintiff. None of them, in our judgment, are tenable. *Exceptions overruled.*
Trustee discharged.

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

SYLVESTER CUMMINGS *vs.* DARLING H. GARVIN and NATHAN DANE, trustee.

York, 1875.—June 13, 1876.

Trustee process. Words.

The words "effects and credits" as used in our trustee writs are sufficient to authorize the attachment of a legacy in the hands of an executor or administrator. R. S. c., 86, § 36, construed.

ON EXCEPTIONS.

ASSUMPSIT upon an account annexed to which no defense was made.

The contention was as to the liability of the alleged trustee. The writ was in the common form summoning the alleged trustee to appear and show cause why execution should not issue against his (the principal defendant's) goods, effects or credits in the hands and possession of him the said trustee. At the May term, 1875, the trustee disclosed that he was executor of the will of Eliza Marshall, in which was a legacy to Garvin, the principal defendant, of one hundred dollars, and that assets sufficient to meet the legacy had been reduced into money. The presiding justice adjudged him trustee, to which ruling the trustee excepted.

J. Dane, for the trustee.

A. Low, for the plaintiff.

WALTON, J. It was decided in *Barnes* v. *Treat*, 7 Mass., 271, that an executor could not be charged as the trustee of one to whom a pecuniary legacy was bequeathed by the will of the testator. But the law has since been changed, and a legacy due from

an executor or administrator may now be attached by trustee process. R. S., c. 86, § 36. And the only question to be decided in this case is whether it can be done under the old form of writ, which avers that the supposed trustee has in his hands "goods, effects, and credits" of the principal defendant, but makes no mention of the legacy as such. We think it can. It is true that in the case above cited the court expressed the opinion that legacies could not be regarded as goods, effects, or credits. But when the legislature afterwards declared that legacies might be attached by trustee process, and yet made no mention of any change in the form of the writ, we think it was equivalent to a legislative declaration that legacies should be regarded as included in one of those terms. And certainly it would be no very great stretch of the meaning of the word "effects" to hold that it includes a pecuniary legacy. It is certain that in many of the sections of the chapter on trustee process, the word "effects," or the word "credits,' must be construed as including legacies, or an executor, or administrator, when summoned as a trustee, will be deprived of very important rights to which others are entitled. So will the plaintiff in the suit. See §§ 23, 46, 64, 67, 73, 76. And we think the words "effects and credits," as used in our trustee writs, are sufficient, under our statute, to authorize the attachment of a legacy in the hands of the trustee. *Exceptions overruled.*

Trustee charged.

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

ALONZO HEARNE *vs.* OWEN B. CHADBOURNE, appellant.

York, 1875.—September 8, 1876.

Statute of frauds. Evidence.

Where a verbal contract for service to be rendered for a certain number of weeks or months is silent as to the time when the service is to commence, while the presumption is that it is to commence forthwith, this is no such conclusive presumption of law as to exclude evidence from the acts of the parties to show that in fact the understanding between them was that such service should commence, not immediately, but at a future day.

Where a verbal contract was made Friday that the plaintiff who was then in the employment of the defendant, should work a year for him at an increase of wages, and was silent as to the time when the year was to commence, *held*, that the fact that the defendant credited the plaintiff with wages at the increased rate, from the subsequent Monday only, and that partial settlements were made by the parties on that basis was admissible in evidence, and sufficient to warrant the inference that the understanding was that the year was to commence on Monday and not on Friday, and that the contract, therefore, being one not to be performed within a year from the making thereof, was within the statute of frauds.

On exceptions.

Assumpsit for wages.

The action was referred in this court to a referee to be determined upon legal principles, who at the September term thereof, 1874, made report "that upon Friday, March 7, 1873, the parties agreed that Hearne should work for Chadbourne one year at the rate of nine dollars a week; that the plaintiff had previously worked for the defendant at eight dollars a week without any agreement to remain any definite time; that for the week's work, ending with Saturday, March 8, 1873, the parties settled at the old rate of eight dollars per week, and for the succeeding weeks they settled at nine dollars per week (so far as any settlement was had), commencing to credit Hearne for his work at this rate on and after Monday, March 10, 1873. Hearne continued to work for Chadbourne till May 19, 1873, when he left. If the agreement to work for one year was legally binding, or if the effect and construction to be given that contract is that the year commenced with Friday March 7, 1873, then I find that nothing is due the plaintiff, because I find that he broke that contract, and thereby the defendant suffered much greater damage than all the labor rendered by the plaintiff was worth; but if the true interpretation of the language and acts of the parties is, that the year was not to commence till Monday, March 10, 1873, and the contract was therefore invalid under the statute of frauds, then I find that the plaintiff is entitled to have and recover of the defendant the sum of twenty-eight dollars and sixty cents and the costs of this reference taxed at five dollars, together with the costs of court to be taxed by the court and the costs awarded in the Biddeford municipal court; but as the parties have desired the

cause to be determined upon legal principles I refer to the court the question of the true construction and legal effect of the transaction between the parties."

Upon the report, the presiding justice ordered judgment for the plaintiff, and the defendant excepted.

R. P. Tapley, for the defendant.

The plaintiff seeks to avoid his contract under the provisions of the statute of frauds which provides that "no action shall be maintained . . . upon any agreement that is not to be performed within one year from the making thereof . . . . unless the promise, contract or agreement on which such action is brought or some memorandum or note thereof is in writing and signed by the party to be charged therewith." R. S., c. 111, § 1, cl. 5.

I. To bring the case within the statute it must affirmatively appear that the contract was "not to be performed within one year from the making thereof." It is not enough that it may or may not be performed within the year; if it is susceptible of performance within the year the statute does not attach. Brown on Statute of Frauds, c. 13, §§ 273, 278 A, 279.

Our own courts say: "This clause of the statute has been limited to cases where, by the express terms of the agreement, the contract was not to be performed within a year."

The supreme court of errors in Connecticut say that unless it appears that the agreement is not to be performed until after the expiration of a year it need not be in writing. *Russell* v. *Slade*, 12 Conn., 445. *Clark* v. *Pendleton*, 20 Conn., 495.

II. It must affirmatively appear, from the agreement itself, that it was not to be performed within a year.

Subsequent modifications will not relate back. If the contract does not provide that it is not to be performed in a year, it is not within the statute whatever may have been the expectation of the parties. *Russell* v. *Slade*, *ubi supra*. *Moore* v. *Fox*, 10 Johns., 244, where the court cite *Lower* v. *Winter*, 7 Cow., 263; and *McLees* v. *Hale*, 10 Wend., 426; and remark that *Boydell* v. *Drummond*, 11 East., 142, does not conflict with these authorities but proceeds upon the same principle.

In *Peters* v. *Westborough*, 19 Pick., 364, the court say: "But

this clause of the statute extends only to such agreements as, by the express appointment of the parties, are not to be performed within a year. If an agreement be capable of being performed within a year from the making thereof, it is not within the statute, although it be not actually performed till after that period."

In *Lyon* v. *King*, 11 Metc., 411, a construction of the statute was sought and the previous decisions of the court were referred to as presenting the views of the court including the case of *Peters* v. *Westborough*, which was *eo nomine* sustained and the case under consideration sustained upon it.

The case of *Doyle* v. *Dixon*, 97 Mass., 208, recognizes *Peters* v. *Westborough* as authority, thus bringing the construction found in that case down to a very late period of time.

In the case of *Linscott* v. *McIntire*, 15 Maine, 201, it is said by our court: "This clause of the statute has been limited to cases where, by the express terms of the agreement, the contract was not to be performed within the space of a year."

In *Herrin* v. *Butters*, 20 Maine, 119, the court say: "We must look to the contract itself and see what he was bound to do; and what, according to the terms of the contract, it was the understanding that he should do."

III. An agreement to labor for a year is not within the statute. This is expressly decided in *Russell* v. *Slade*, before cited.

"In *Williams* v. *Jones*, 5 Barn. & Cress., 108, an attorney had entered into a written contract, whereby he agreed to take into partnership in the business of an attorney a person who had not at that time been admitted. No time was expressly fixed for the commencement of the partnership. And it was held, that no time being expressly appointed the partnership commenced from the date of the agreement." Holroyd, J., in that case said: "Whatever may have been the intent of the parties which I collect to have been that the instrument should take effect immediately, at all events, the law gives it that effect, no time for its commencement being mentioned in the instrument."

It was also held in this case "that parol evidence could not be received to prove that the agreement was not to take effect until the person had been duly admitted."

In the light of these authorities the counsel gave a minute and exhaustive examination of the referee's report.

J. M. Goodwin & W. F. Lunt, for the plaintiff.

BARROWS, J. ASSUMPSIT for labor and services rendered.

The question is whether judgment was rightly ordered for the plaintiff upon an alternative report of a referee, who found that while the plaintiff was at work for the defendant at $8 a week he made a verbal agreement during the progress of a week's service to work for him a year at $9 a week, that the parties settled for that week's work at the old rate of $8 per week, and for succeeding weeks so far as any settlement was had at $9 a week, the defendant commencing to credit the plaintiff for his work at the latter rate on and after March 10th, the contract for the year's service having been made on the 7th.

This contract the referee finds the plaintiff broke, and if it is legally binding, nothing is due him; "but if the true interpretation of the language and acts of the parties is that the year was not to commence till Monday, March 10, 1873, and the contract was therefore invalid under the statute of frauds," he finds a certain amount due the plaintiff.

We think that "the true interpretation of the language and acts of the parties" as reported by the referee is that it was understood by them both that the contract for the year's service at $9 a week was not to go into effect until the following week, and so was "not to be performed within one year from the making thereof."

It is true that in the absence of any words or acts of the parties indicating the contrary, an agreement to work for a year means, to work for that length of time commencing forthwith.

The referee reports no express stipulation in the contract to overcome this presumption; but he sets out the acts of the parties showing the contemporary interpretation which both put upon it, and this places the case directly within the doctrine laid down in *Herrin* v. *Butters*, 20 Maine, 119; *Peters* v. *Westborough*, 19 Pick., 364; and *Boydell* v. *Drummond*, 11 East., 142; where the old idea that it must be expressly and specifically agreed that the contract is not to be performed within the year, as expressed in

Moore v. *Fox*, 10 Johns., 244, and *Fenton* v. *Embler*, 3 Burr., 1278, is so far modified as to include cases where such appears to have been the understanding of the parties.

The defendant's counsel earnestly contends that it should appear in the statement of the contract itself that it was not to be performed within the year or it would not be invalidated, and cites *Williams* v. *Jones*, 5 Barn. & Cress., 108, to show that parol evidence is not admissible to prove that the understanding was that the term of service was not to commence immediately. But that was a case of a written contract, and it was held in accordance with familiar principles, that it was not competent to vary its effect by parol and to show that while apparently absolute it was really conditional, nor to add by parol to an agreement which could not be valid unless in writing. When a verbal contract for service to be rendered for a certain number of weeks or months is silent as to the time when that service is to commence, while the presumption is that it is to commence forthwith, it is no such conclusive presumption of law as to exclude evidence from the acts of the parties to show that in fact the understanding between them was that such service should commence, not immediately, but at a future day.

The case presented by the report of the referee is this. Hearne has done work for the defendant for which he is entitled to recover pay unless the defendant has shown that he has forfeited his right to it by breaking a contract which was legally binding.

The facts reported by the referee show a verbal contract, made on the 7th, for a year's service to commence on the 10th and so not legally binding. *Snelling* v. *Lord Huntingfield*, 1 Cromp., M. & K., 20. *Bracegirdle* v. *Heald*, 1 B. & A., 722.

Exceptions overruled.

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

ALEX. H. HOWARD *vs.* JULIA KIMBALL, executrix.

Kennebec, 1874.—January 8, 1876.

Amendment. Trial. Exceptions. Evidence. Auditor. Judgment.

Where the plaintiff has in his writ a count for money had and received with specification, *inter alia*, of "the amount of money which the said K. (the defendant's testator) was owing one P., the same having been transferred by the said P. to the plaintiff, and for which the said K. agreed to account to the plaintiff as creditor to said P," the introduction by way of amendment of counts upon an order drawn by P. upon K. for "any balance there may be in your hands on settlement of my account with you," in favor of the plaintiff, and accepted by K., is not objectionable as introducing a new cause of action. It is but a more particular and circumstantial setting out of a cause originally alleged.

When such order was made payable "to the order of A. H. H., cashier," and indorsed by A. H. H., cashier, to himself, and sued in his own name to be recovered to his own use, and it was proved that he was at the time cashier of the A. bank; yet inasmuch as the evidence negatived the idea that the A. bank ever had any interest in the order, and showed that it was originally made and delivered to the plaintiff to secure P.'s indebtedness to him personally, and the jury would not have been authorized to come to any other conclusion on the evidence before them; *held,* that instructions "that the order" might "be regarded as negotiable, and the word 'cashier' as *descriptio personæ*, and the indorsement as sufficient, with K.'s acceptance and assent to transfer to the plaintiff P.'s interest in the accounts without proof of special authority from the bank to the plaintiff to make the indorsement," whether technically correct or not, did no wrong to the defendant, and that exceptions to the admission of the order as evidence, and to these instructions respecting its character and effect could not be sustained; *held,* further, that the testimony given by the president and one of the receivers of the A. bank, was competent upon the question whether the bank ever had any interest in the order.

The case had been before an auditor, who returned his minutes of the testimony taken before him as part of his report. The plaintiff offered the report in evidence. The defendant objected on the ground that it was irregular to make the evidence of the witnesses before the auditor a part of the report. The presiding judge admitted the report, except that portion which contained the documents and evidence laid before the auditor. *Held,* that the defendant had no ground of exception to such admission, nor to instructions that "the auditor's report was *prima facie* evidence of the amount which the plaintiff was entitled to recover, that it was competent for the defendant to disprove it, but it must stand unless he had impeached it."

A former judgment will not be a bar to further litigation unless the same vital point was put directly in issue and determined. That was not the case in the equity suit between these parties. The question there settled was as to

the plaintiff's right to redeem the half of the ship and to an account of her earnings. *Held*, that the decision was not conclusive against his rights to the sum due from Kimball to Page, under the assignment and acceptance. The defendant's motion to stay proceedings until payment of costs in the equity suit was rightly overruled. The case is not within the provisions of R. S., c. 82, § 111.

On exceptions and motion, argued May term, 1871, and re-argued May term, 1874.

Assumpsit, to recover the amount formerly due from Nathaniel Kimball, the defendant's testator, to Rufus K. Page and by Page assigned to the plaintiff.

Prior to July, 1856, Page had extensive dealings with Kimball, arising from owning shipping together, Kimball being the managing owner and keeping the accounts. In December, 1855, their accounts being unsettled, Page, to raise money for his business as a merchant, obtained notes from Kimball of some $15,000, and transferred to Kimball, by a bill of sale, absolute in form, one-half of the ship "Ocean Steed," which they had hitherto owned in common.

Page afterwards transferred the balance due him from Kimball, to the plaintiff Howard by an order in writing of the tenor following:

Hallowell, July 23, 1856.

Value received, pay to the order of A. H. Howard, cashier, any balance there may be in your hands on settlement of my account with you, and oblige your ob't serv't,

(Signed,) Rufus K. Page.

To Capt. Nath'l Kimball, Boston, Mass. (Indorsed.) Pay A. H. Howard or order. A. H. Howard, cashier. Accepted, Nathaniel Kimball."

October 5, 1857, Page, having failed in business, assigned a scheduled list of his property and "any and all other demands, claims or property in which" the said Page had "any interest, whether herein specially named or not," to Charles Danforth and Calvin Spaulding, for the benefit of creditors.

In October, 1862, Kimball died, leaving his account with Page unsettled. This plaintiff failed to procure an adjustment with the defendant executrix, and uncertain what the nature of the deal-

ings in the transfer of the "Ocean Steed" was, commenced two suits, one in equity against her, joining Page as a party defendant, and the other, this suit, at law against her alone.

The equity suit, in which the plaintiff claimed that the "Ocean Steed" was transferred to Kimball as collateral security and in trust, and prayed for an account, was dismissed with costs for the defendant.

The writ in this case, the suit at law, is dated July 23, 1863. It contained when made three counts.

The first count, on an account annexed, the last item in which is for the amount of the indebtedness of the defendant's testator to R. K. Page, transferred to the plaintiff, and which Kimball, the testator, agreed to account with the plaintiff for, is for $10,000.

The second count is for the price or value of one-half of the ship "Ocean Steed," alleged to have been sold by plaintiff to the testator, $10,000.

The third count is for $32,000, money alleged to have been had and received by the testator in his life-time, to wit, on the first of November, 1862.

Under this count is a specification of the claims relied on; the last of which is the amount of money which the said Nathaniel Kimball was owing one Rufus K. Page; the same having been transferred by the said Page to the plaintiff, and for which the said Nathaniel Kimball agreed to account to the plaintiff as creditor of the said Page.

At the August term, 1866, the plaintiff had leave to amend by adding the fourth and fifth counts.

The fourth count alleges that said Page, on the 23d of July, 1856, drew his order on said Kimball, requesting him to pay to the order of said Howard, "cashier," any balance that might be in his (Kimball's) hands, on settlement of his (the said Kimball's) accounts with him, for value received; that the order was indorsed by Howard, cashier, to the plaintiff and accepted by Kimball; and that the balance due was $15,000.

The fifth count is similar to the fourth count, excepting it is described as an order made payable to the order of the plaintiff, and there is no allegation of its having been indorsed.

At the time when the amendment was allowed, exceptions were filed; and at the trial, March term, 1871, the defendant's counsel again objected to the third and fourth counts and to the introduction of the order under them, as introducing a new cause of action; but his objection was overruled.

The defendant pleaded the general issue; and also by brief statement the statute of limitations (afterwards waived); and also the suit in equity and the proceedings and judgment thereon.

The general issue was joined by the plaintiff, and by counter-brief statement he made answer to the defendant's brief statement.

At the trial the plaintiff offered in evidence the report of the auditor, which found a balance due from Kimball to Page as of July 3, 1856, $9776.79, made up of the following items:

1. Accountable receipt of July 12, 1855, as per exhibit marked (C.),	$4290.00
Interest from March 8, 1855,	353.92
2. Proceeds of sale of one-sixteenth of ship "Lion" to Capt. Ryan, August 10, 1855,	2484.69
Interest from August 10, 1855,	153.22
3. Three-sixteenths bark "Savannah," July 22, 1856,	1500.00
Interest,	.25
4. Note given by Kimball to Page, given up by Page, and interest,	994.71
	$9776.79

The report further found:

5. Seven-sixteenths primage on $656.25 is also allowed, and interest thereon, on Ryan's deposition, (exhibit D., now lost,) letter of Kimball to Howard, inclosing account, in which Kimball credits Howard therewith; also exhibits 7 and 8, and private account between Ryan and Kimball, in which this item is not charged as paid over to Ryan. Interest on same, $235.46,	891.71
	$10,668.50

The report, after tabulating the several items allowed and disallowed in the plaintiff's bill of particulars, closed as follows: "I herewith submit the paper evidence and exhibits and minutes of testimony taken before me, as part of my report. (Signed,) Samuel Titcomb, auditor."

The admission of the auditor's report was objected to by the defendant; but it was admitted by the court, except that portion which makes the accompanying document and evidence a part of the report.

The defendant's counsel objected to the document and evidence accompanying the report; and that objection having been sustained, he objected to the remainder—the report itself,—on the ground that it could not be received without the accompanying evidence, as that was attached to the report; and because the auditor had no power to report the evidence.

The plaintiff offered in evidence the order of July 23, 1856, signed by N. Kimball, which was objected to under the fourth count on the ground that it was not negotiable, but if it was negotiable, then Howard, as cashier of the bank, had no authority to indorse and negotiate it to himself in his private capacity without being authorized so to do by the bank. The court ruled for the purpose of the trial that the order was negotiable, and that Howard had authority to indorse and negotiate it, and admitted it, the word "cashier" being *descriptio personæ.*

The plaintiff objected to the deposition of Page on the ground that it was not competent by parol to explain or affect the order.

The plaintiff called H. K. Baker, one of the receivers of the American Bank, who testified that the books of the bank came into the hands of the receivers in the last of September, 1865. He produced the journal and ledger, and exhibited certain entries thereon of transactions with Page, and testified, subject to the defendant's objection, that no notes signed by R. K. Page had come into his hands dated anterior to July 23, 1856; and that he found no entry on the books of any other note than the one he had stated, given by said Page.

Calvin Spaulding, plaintiff's witness, testified that he was the president of the American Bank in 1856; was not familiar with the books; that A. H. Howard kept them; that they ought to show the indebtedness of parties to the bank; and further testified, subject to defendant's objection, that he was not aware of any indebtedness of any description from Page to the bank that had not been paid.

The defendant's counsel contended that the judgment in the bill in equity, *Howard* v. *Kimball,* aforesaid, was a bar to all of plaintiff's claims in this action, except the first and second items in the auditor's account. But if not so, then plaintiff was not entitled

to recover, because the order of July 23, 1856, aforesaid, was not negotiable; that the order when first given was given to the American Bank, or to Howard as cashier, as security for Page's liabilities to the bank, and held by the bank for that purpose; that Howard, as such cashier, had no authority to indorse and to negotiate the order to himself; that, if the liabilities of Page to the bank were paid after the order was given, the bank no longer had any authority to hold it, or to negotiate it to Howard; that there was nothing due from Kimball to Page on the 23d of July, 1856; that when Kimball loaned Page the $15,000 in notes on which to raise money, it was specially agreed that they should be payment of and offset against the balance then due from Kimball to Page, at the time the notes were given, April 17, 1856, and that all the bank or Howard could take by the order would be the balance, if any, after allowing Kimball the $15,000 for his notes, and that, settling their accounts in that way, the balance was in Kimball's favor at the time the order was given.

He also contended that the auditor's report was only evidence for the consideration of the jury, to be considered the same as other evidence; that it was evidence only in regard to the items of account on which the auditor passed, as appeared by his report; that it was not evidence on the point of the agreement to offset the $15,000 in payment of Kimball's indebtedness to Page.

On these points the presiding judge instructed the jury that the plaintiff must recover, if he was entitled to recover at all, by virtue of the order of July 23, 1856, except as to the first and second items; that the judgment in the equity suit was no bar to this suit or any portion of it covered by the order; that the plaintiff Howard had authority to negotiate and indorse the order to himself, and, for the purpose of this trial, was to be regarded as the lawful holder of it.

The court was requested to, and did instruct the jury, if they are satisfied from the evidence that Mr. Kimball loaned his notes for $15,000 to Rufus K. Page, December 17, 1855, or April 17, 1856, and Kimball was to pay the notes, with an agreement that the amount due from Kimball to Page should be offset

against the $15,000, and Page should be the debtor of Kimball for the balance, for which Kimball should hold half of the "Ocean Steed," then this order of July 23, 1856, would not assign anything to the plaintiff, unless the balance of the account due from Kimball to Page at the time the notes were given exceeded the amount of said notes. He also instructed them that, if Mr. Howard first became the holder, in his individual capacity, of the order dated July 23, 1856, on or about November 1, 1859, then the whole interest in the balance of account due from Kimball to Page at the date of that order, passed to Danforth and Spaulding under the assignment of Mr. Page, dated October 5, 1857, and the plaintiff took nothing by the order and cannot maintain this action; that the auditor's report was *prima facie* evidence of the amount which the plaintiff was entitled to recover; that it was competent for the defendant to disprove it, but it must stand unless he had impeached it.

Appropriate instructions were given as to the rule in regard to interest; that interest should be computed from the date of the writ only and not as allowed by the auditor.

To the foregoing rulings and instructions to the jury, except the instructions requested, the defendant excepted, and also moved to have the verdict, which was for the plaintiff for $14,466.63, set aside as against law and evidence.

A. Libbey, for the defendant, at the July term, 1871.

I. The amendment by adding the fourth and fifth counts introduced a new cause of action. The ruling of the presiding justice in his charge, that if the plaintiff could recover at all, it must be by virtue of the order, illustrates it. *Newall* v. *Hussey*, 18 Maine, 249. *Vancleef* v. *Therasson*, 3 Pick., 12, and cases cited in note to 3d edition by Perkins.

II. The order was not admissible under the fourth count because of variance. That count describes the order drawn in favor of Howard, and not as cashier. It was not admissible without some evidence that Howard as cashier was authorized by the bank to indorse it to himself. Page was indebted to the bank on his own paper and that of Reed & Page. The "Ocean Steed" notes were

pledged to the bank as collateral to his indebtedness about the time the order was given. Howard treated it as given to him as cashier of the bank by indorsing it in that capacity. The presiding judge erred in ruling as matter of law that the order was given to Howard in his private capacity, the title "cashier" being mere *descriptio personæ.*

The most favorable ruling for the plaintiff which the law would authorize, was to submit the question to the jury to find as a matter of fact whether the order was given to plaintiff or the bank. *Bank of Newbury* v. *Baldwin*, 1 Clifford, 519. *Mechanics' Bank* v. *Bank of Columbia*, 5 Wheat., 326. *Commercial Bank* v. *French*, 21 Pick., 486. *Baldwin*, in error, v. *Bank of Newbury*, 1 Wallace, 234.

If the order was originally given to the bank, then the cashier could not, without special authority, indorse it and transfer the title to himself.

But if so, the order is not a negotiable order. It is not for a sum certain, nor is it payable on a fixed period of time. Story on Prom. Notes, 22, 20. *Dodge* v. *Emerson et al.*, 34 Maine, 96.

III. The auditor's report should not have been admitted. All the evidence put in by plaintiff before the auditor, including the evidence of the witnesses, was made a part of his report. Such a report is irregular, and is not evidence under the statute. But if admitted at all, it should have been admitted as submitted by the auditor. The court had no power to admit a part and reject a part; and if admitted at all, the evidence reported should have been admitted with it, as we had a right to impeach the report by showing that the conclusions of the auditor were not warranted by the evidence before him.

But if admissible the presiding judge erred in his instruction to the jury as to its legal effect as evidence. The duty of the auditor is to state the accounts between the parties and report such items as he finds properly vouched. It is no part of his duty to determine whether any item or items are a legal offset, nor to determine an issue of fact controverted by the parties, or what the contract between them really was. One issue of fact raised in this case was whether the $15,000 in notes loaned Page by

Kimball was to be offset against and go as payment of the balance, if any due, from Kimball to Page. Another issue of fact presented was whether the order was held by Howard prior to Page's assignment, October 5, 1857.

The instruction of the court to the jury as to the legal effect of the report made it evidence against the defendant on both of these issues, and conclusive unless the defendant impeached it. The jury must have so understood it, and regarded it as conclusive, because the evidence from Page, and Howard in his bill and supplemental bill in the equity suit, is full and explicit on the first question. The instruction had the effect to change the burden of proof from the plaintiff to the defendant, when the statute makes the report evidence only, without changing the burden of proof, so that if the defendant's evidence is sufficient to balance the force of the report, the plaintiff would fail.

IV. The questions put to H. K. Baker, "have any notes signed by R. K. Page come into your hands, dated anterior to July 23, 1856?" and "have you found an entry on the books of any other note than the one you have stated, given by said Page?" were inadmissible. The answers were calculated to mislead the jury. The question recited in the exception, put to Spaulding, and the answer, were not legally admissible.

V. The judgment in the bill in equity, *Howard* v. *Kimball*, ex'rx, is a bar to all of this suit embraced in the account *Page* v. *Kimball*, as it stood at the time of the loan of the $15,000 in notes, and the conveyance of the "Ocean Steed" as collateral. After that transaction all the balance of account due from Kimball to Page, except the excess over and above the $15,000, if any, entered into the "Ocean Steed" transaction, and was afterwards to be applied towards the payment of the debt for which the "Ocean Steed" was pledged and for the redemption of the ship. Whoever took a conveyance from Page of his equitable interest in the ship, had a right to have the balance of account applied that way, and for the redemption of the ship. Danforth and Spaulding have a right to settle the affairs of the "Ocean Steed" on that basis, and the case finds that they claim that right. The order in suit was filed as evidence in that suit. This court having jurisdiction of the orig-

inal bill, as a bill for an account, and for the redemption of the "Ocean Steed," held in trust and pledge by Kimball ; after the loss of the ship the court still had jurisdiction under the supplemental bill to decree an account and payment of the balance due from Kimball's estate, if any, in money. The whole subject matter was before the court on the merits, and that judgment is a bar to a suit at law for the same cause. It clearly is a bar unless the balance of account at time the notes were given exceeded the amount of the notes, and that is not pretended. *Smith* v. *Kernochan*, 7 Howard, 198. *Hopkins* v. *Lee*, 6 Wheat., 109.

J. S. Abbot, for the plaintiff, at the July term, 1874.

I. The defendant's counsel claimed in his brief in 1871, that "the court had no power to admit a part and reject a part; that if admitted at all the evidence reported should have been admitted with it, as we had the right to impeach the report by showing that the conclusions of the auditor were not warranted by the evidence before him."

This right was never opposed by plaintiff's counsel, or ruled against by the court. The ruling of the court was that the plaintiff could not introduce the auditor's report of the evidence before him in support of his report, against the objection of defendant's counsel.

This ruling of the presiding judge was correct on principle and on authority. *Jones* v. *Stevens*, 5 Metc., 373.

II. The instruction given by the presiding judge as to the effect to be given to the auditor's report, is correct. *Allen* v. *Hawks*, 11 Pick., 359. *Lazarus* v. *Commonwealth Ins. Co.*, 19 Pick., 81. *Clark*, adm'x, v. *Fletcher*, 1 Allen, 53. *Kendall* v. *Weaver*, 1 Allen, 277. *Gould* v. *Norfolk Lead Co.*, 9 Cush., 338.

III. The defendant objected to the introduction of the order of July 23, 1856, signed by N. Kimball, and to the ruling of the judge in regard to it.

It is claimed that the instructions were legally correct; but if not strictly and verbally accurate, the verdict should not be set aside, provided the same results would certainly follow if the instructions had been strictly and verbally correct.

In this branch of the case the question is whether the balance

due from Kimball to Page was so transferred that it can be legally collected by the plaintiff. Page drew his order on Kimball, requesting him to pay such balance "to the order of A. H. Howard, cashier." This order was accepted by Kimball, and was indorsed on the back, "Pay A. H. Howard or order. A. H. Howard, cashier."

It is of no importance whether the order is negotiable or not; and of no importance whether the word "cashier" is *descriptio personæ* or not. Kimball, by his acceptance of the order, promised to pay that balance to the order of "A. H. Howard, cashier." A promise to pay to the order of A. B. is in legal effect the same as a promise to pay A. B. or order; and upon such promise an action is maintainable in the name of A. B. without any prior indorsement by A. B.

There was no necessity for the indorsement by Howard. Under the fifth count, or even under the first or third count, this action can be maintained without such indorsement, and the money collected will belong to Howard, if the word "cashier" is descriptive only. But if the word "cashier" is not descriptive, still the action is maintainable and the plaintiff in such case would hold the funds in trust for the bank. *Fairfield* v. *Adams*, 16 Pick., 381. *Gould* v. *Norfolk Lead Co.*, *supra*, p. 345. *Lovell* v. *Evertson*, 11 Johns., 52. *Hartford Bank* v. *Barry*, 17 Mass., 94.

It should also be noticed that the case shows that Page was not indebted to the bank, and that the bank never had any interest in this order.

The bank failed. All its effects were assigned to receivers, against whose intelligence, vigilance and integrity nothing can be urged. After a careful investigation, the receivers were satisfied that the bank never had any interest in the subject matter of this suit; and at the March term, 1869, they entered upon the docket of this court their disclaimer of any such interest. It thus appears that the word "cashier" is merely descriptive; and that the rulings were literally as well as substantially correct.

The indorsement was not made to transfer any funds of the bank. It was an unnecessary act, done under the opinion often but erroneously held, that if a promissory note is made payable to

the order of A. B., it must be indorsed by A. B. to himself, to enable him to maintain an action.

IV. The only objection made to the admissibility of the deposition of R. K. Page and the exhibits therein referred to, was "that it was not competent thus by parol to explain or affect the order."

The answer is that it was not offered for any such purpose, and it did not tend to any such result, further than to show that the word "cashier" was descriptive of the person only. And it was admissible for this and for other purposes.

V. Certain questions propounded to H. K. Baker were objected to.

Mr. Baker was one of the receivers of the American Bank. He produced the journal and ledger of the bank. He had the means of ascertaining whether said Page was indebted to the bank at the date of the order, July 23, 1856. He stated his means of knowledge; and, in substance, that he found no such indebtedness.

This testimony was pertinent to the inquiry whether the amount transferred by the order was the property of the bank. *Fairfield* v. *Adams*, 16 Pick., 381.

VI. The objections to the testimony of Calvin Spaulding cannot be sustained, for the reasons just given above.

VII. As there was no evidence showing that the bank ever had any interest in the order, but, on the contrary, that it had not, the ruling that the word "cashier" should be regarded as descriptive of the person, was correct. But whether strictly correct or not, the verdict should not be set aside, for reasons already given.

VIII. The plaintiff was under no obligation to pay the costs in the equity suit before proceeding in this. The equity suit was not for the same cause, nor between the same parties, nor was it commenced until after the suit at law.

IX. The instructions in regard to the notes alleged to have been loaned by Kimball to Page, and in regard to the assignment of Page to Danforth and Spaulding, are correct.

X. By the plea in bar, in form of a brief statement, the defendant admits the claim as made. 2 Doug., 575. 6 Ves., jr., 594.

Bars are not favored, and they must be made out strictly. *New England Bank* v. *Lewis*, 8 Pick., 113. Greenl. on Ev., §§ 530—534. *Lord* v. *Chadbourne*, 42 Maine, 429, p. 443.

The bill in equity and the proceedings under it are not a bar to this suit. The parties are not the same, nor is the issue the same. In the equity suit the only question was, whether there was a trust which Howard could enforce—whether the bill of sale was absolute or conditional.

The dismissal of a bill where a trust is alleged and an account is asked, cannot operate as a bar to such an action as this. *Bridge* v. *Sumner*, 1 Pick., 371.

J. Baker, for the plaintiff, as to the extent of the powers of an auditor, and of the court over his report, cited *Locke* v. *Bennett*, 7 Cush., 445. *Quimby* v. *Cook*, 10 Allen, 32. *Clark* v. *Fletcher*, 1 Allen, 53.

The jury took the items of principal found by the auditor as follows:

1. Accountable receipt of July 12, 1855,	$4,290.00
2. Proceeds of sale of one-sixteenth of ship "Lion," to Capt. Ryan,	2,484.69
3. Three-sixteenths bark "Savannah,"	1,500.00
4. Note given to Kimball by Page, given up by Page,	994.71
5. Seven-sixteenths primage paid by Howard for Capt. Ryan, and not paid over by Kimball to Ryan,	656.25
	$9,925.65
Add interest from date of the writ, July 23, 1863, to March 8, 1871,—7 years and 7½ months,	4,540.98
	$14,466.63

This verdict, therefore, cannot be against the evidence in the case.

Barrows, J. The first exception urged by the defendant is to the allowance of the amendment by the introduction of the fourth and fifth counts describing the order drawn by Rufus K. Page, July 23, 1856, and accepted by Nathaniel Kimball the defendant's testator, on the ground that this constitutes a new cause of action. We cannot so view it. As it stood previous to the amendment, the plaintiff's writ showed that the greater part of his claim consisted of sums alleged to have been due from Kimball originally to Page and to have been so transferred by Page to the plaintiff with Kimball's assent as to enable the plaintiff to sue therefor in his own name. This appears not only by the

account annexed but by the money count and the concluding part of the specifications under it. Such an assignment will enable the assignee to maintain an action for money had and received in his own name when the debtor has consented thereto and promised payment to him. *Lang* v. *Fiske et al.*, 11 Maine, 385.

The new counts are simply descriptive of the instrument by which the plaintiff undertakes to make out his title to the amount due Page, and Kimball's promise to pay it to him as Page's assignee.

They serve to make known more particularly the origin and character of the plaintiff's claim which had been previously stated in general terms, without introducing any substantially new cause of action.

The amendment was allowable under the statute (c. 82, § 9,) and numerous decided cases to which it is unnecessary to refer.

II. Page's order of July 23, 1856, directed to Kimball and accepted by him ran thus: "Value received, pay to the order of A. H. Howard, cashier, any balance there may be in your hands on settlement of my account with you," &c., and was indorsed, "Pay A. H. Howard, or order. A. H. Howard, cashier." The exceptions show that the defendant objected to the admission of the order in evidence under either of the amended counts,—under the fourth on the ground that it was not negotiable, not being for a sum certain, and if it were, then the plaintiff as cashier of the American Bank could not negotiate it to himself, without special authority from the bank; and under the fifth on the ground of a variance.

Upon the objections to its admissibility in support of the fourth count the exceptions state that the presiding judge made a *pro forma* ruling that the order was negotiable and that the plaintiff had authority to indorse and negotiate it to himself as he did on the ground that the word cashier was but *descriptio personæ*, and the order was admitted in evidence.

It is obvious that, whether technically correct or not, this ruling cannot have done the defendant any injustice if it can be made certain that the order was admissible under any one of the counts in the writ and operated as a legal transfer to the plaintiff of the balance due from Kimball to Page, July 23, 1856, so as to enable

the plaintiff to sue for it in his own name. To ascertain this, a review of the facts proved and the positions taken by the parties under their pleadings is necessary.

To the writ as amended the defendant pleaded the general issue with a brief statement that the plaintiff's suit was barred by the statute of limitations, and by the judgment of this court in defendant's favor upon a suit in equity brought by the plaintiff, which suit (the defendant alleges) involved the same causes of action set forth in this writ.

It is conceded that the action is not barred by the statute of limitations. The remaining questions then were: did the plaintiff ever have any cause of action, and if so, for how much; is it barred by the judgment in the equity suit. Among the facts not controverted it appears that prior to July 23, 1856, Kimball and Page had large business transactions together, growing mainly out of their ownership of parts of the same vessels, for which Kimball acted as ships' husband; that aside from the transaction between them respecting Page's half of the ship Ocean Steed (the character and effect of which are presently to be considered), Kimball was indebted to Page in a considerable amount on account of transactions respecting other vessels; that Page was largely indebted to the plaintiff by reason of the plaintiff's indorsements on his paper, and was desirous to secure him for his liabilities; that Page had conveyed by an absolute bill of sale his half of the Ocean Steed to Kimball, and received therefor Kimball's three negotiable promissory notes for $5000 each, two of which, if not all three, were deposited at the American Bank as security for the liabilities of Page, and Reed & Page to the bank, amounting to about $8000; that all three of the notes were subsequently paid and taken up by Kimball, one of them being offset against a note of Page held by Kimball and an order on Kimball from Page in favor of one Cox, and Kimball's disbursements on Page's part of ship Lion at St. Johns; that on the 23d of July, 1856, after the giving of these notes and the conveyance of Page's half of the Ocean Steed about the time of his failure in business in the preceding April, Page made and Kimball accepted the order in question, and it was delivered to the plaintiff. Thus far no controversy as to the facts.

But hereupon the defendant contended that the order was given first to the American Bank or to the plaintiff as cashier thereof to secure Page's liabilities to the bank; that if the order could be deemed negotiable the plaintiff as cashier had no authority to negotiate it to himself; that if Page's liabilities to the bank were paid after the order was given, the bank could no longer hold it nor transfer it to the plaintiff; that the conveyance of Page's half of the Ocean Steed to Kimball was intended only as security for the loan of the three $5000 notes to raise money upon; that it was specially agreed when those notes were given, April 17, 1856, that they should be payment of and offset against the balance then due from Kimball to Page and that all that the bank or the plaintiff could take by the order would be the balance if any after allowing Kimball the $15,000 for his notes, which would make a balance the other way and nothing due from Kimball to Page, July 23, 1856, upon which the order could take effect. As to this last position, which relates rather to the effect than to the admissibility of the order, the jury were duly instructed at defendant's request that if they were satisfied that Kimball loaned the notes for $15,000, and was to pay the notes, with an agreement that the amount due from him to Page, should be offset against the $15,000, and Page should be the debtor of Kimball for the balance, for which Kimball should hold half of the Ocean Steed, then the order would not assign anything to the plaintiff unless the balance of the account due from Kimball to Page at the time the notes were given exceeded the amount of the notes, which was not pretended.

Why three experienced business men should perform an act so completely nugatory as the making, acceptance and delivery of this order must be, if this hypothesis of the defendant's were to be accepted, it is not easy to see. Certainly they must have intended thereby to transfer an interest in the amount due from Kimball to Page either to the bank or to the plaintiff. If to the plaintiff, then it matters not whether the order was or was not technically speaking negotiable, nor whether the plaintiff had any authority to indorse it to himself, because it would follow that the interest passed at once to the plaintiff; the word cashier must be regarded

merely as *descriptio personæ* and no indorsement was necessary, because paper made payable to the order of a party is the same in legal effect as if made payable to him or his order.

The defendant's counsel argues that the most favorable ruling for the plaintiff which the law would authorize was to submit it to the jury to determine as a question of fact whether it was given to the plaintiff or the bank.

Had there been any evidence which would have authorized the jury to conclude that the bank ever had any interest in the order this would seem inevitable. But looking at the whole evidence we think this idea is conclusively negatived. The testimony must be regarded as establishing the fact that the bank was abundantly secured for the indebtedness of Page and Reed, and Page, by the Ocean Steed notes. So far as appears neither the president, directors nor receivers of the bank ever recognized the order as a matter in which the bank ever had any interest. As long ago as 1869, the receivers disclaimed such interest upon the docket in this suit. In fact no such interest appears ever to have been asserted, and there is nothing in the case to afford the slightest indication of its existence except the description of the plaintiff as cashier. In view of the other facts proved, we think the only reasonable conclusion was the one expressed in the ruling of the judge that this was only *descriptio personæ.*

If so it did not change the legal effect of the order any more than the addition of esq. to the name of the payee would do. It would follow that the order was admissible under the third count and sufficient to show title in the plaintiff to the amount due from Kimball to Page, July 23, 1856, whether the order was negotiable or not, and without proof of authority from the bank to indorse it.

The trial took place before the passage of the statute, c. 212, laws of 1874, and prior to that time it was the doctrine of this court that when the whole testimony, if believed, will not in law establish a fact, the presiding judge may express the legal effect of the testimony as matter of law. *Gilbert* v. *Woodbury*, 22 Maine, 246.

Whether the ruling that the word cashier was merely *descriptio*

personæ be regarded as the expression of an opinion upon the facts and testimony, or as a ruling in matter of law, it did the defendant no wrong, and the exception to it cannot be sustained. *McDonald* v. *Trafton*, 15 Maine, 225.

It is obvious as we have already seen that if this be so, the rulings in respect to the negotiability of the order or the authority from the bank to indorse it were purely immaterial. We remark in passing, that we see no propriety in extending the doctrine of *Fairfield* v. *Adams*, 16 Pick., 381, to any other than strictly negotiable securities, nor to cases where the holder claims distinctly to recover to his own use and not in any fiduciary capacity; nor do we perceive how it would be possible for the plaintiff to maintain this suit for the benefit of the bank which confessedly has no interest therein.

III. In connection with the ruling above discussed, we observe that none of the objections to the testimony admitted on behalf of the plaintiff seem tenable. The first, against the deposition of R. K. Page on the ground that it was not competent thus by parol to explain or affect the order, is not insisted on in argument here, and the answer is obvious that it was not offered for that purpose and does not tend to vary or contradict the written instrument but only to apply it and show the mode and purpose of its delivery, and like the testimony given by the receiver and president of the bank it is relevant and admissible for the purpose of showing that the bank had no interest in the order and claimed none. It is only by the admission of parol evidence to show that the plaintiff was, at the time of the making and delivery of the order, cashier of the American Bank that the defendant obtains an opportunity to argue that the bank may have had an interest therein, and the same kind of evidence is admissible to rebut the presumption which was required to raise it. It is no violation of the wholesome rule which prohibits the introduction of parol evidence to contradict, vary or control the terms of a written instrument.

It is true that the questions to the receiver and president of the bank serve only incidentally and indirectly to confirm the plaintiff's position that the order was made to secure him and not the bank

and not directly to establish it; but we do not see how the jury could have been misled thereby. If there was danger of it the defendant's counsel should have requested an instruction as to its application and effect. In fact the jury were instructed in substance that if the plaintiff did not become the holder of the order in his individual capacity until after Page's assignment to Danforth & Spaulding in October, 1857, he could not maintain the action.

IV. Before the case came on for trial it had been submitted to a competent and faithful auditor upon whose report the plaintiff relied. We are now to consider the exceptions taken to the admission of his report and the rulings respecting it. The exceptions state that the report of the auditor was offered in evidence by the plaintiff and was seasonably and duly objected to, but admitted by the court except that portion which makes the accompanying documents and evidence a part of the report. What the objection made at the trial was does not appear. In strictness the exception to the admission is liable to be overruled for this cause alone. *Emery* v. *Vinal*, 26 Maine, 295. *Comstock* v. *Smith*, 23 Maine, 202. *White* v. *Chadbourne*, 41 Maine, 149. But if we allow ourselves to infer that the objection alleged was the somewhat inconsistent one now urged in argument, that the evidence before the auditor was irregularly made part of the report and also that that evidence was not allowed to go to the jury so that the defendant might impeach the report by showing that its conclusions were not warranted by the evidence, we do not think it can be sustained. If the defendant desired to use that evidence to impeach the report, doubtless he might have had the opportunity by waiving his objection to the return of it as part of the report. His objection to its introduction by the plaintiff as part of the report was rightly sustained. We are clear that it is competent for the judge presiding at the trial, when an auditor's report is offered in evidence to reject such portions of it as are not proper to go to the jury and receive the remainder, ruling upon the introduction of those parts which are objected to as he would in the case of a deposition. *Jones* v. *Stevens*, 5 Metc., 373. The defendant was at liberty to put in

the same evidence which was before the auditor or such other evidence pertinent to the case before the jury as he desired and this right does not seem to have been abridged. Either party has that right and will commonly find it necessary to avail himself of it, as to disputed items, whether the object be to impeach or to support the auditor's report.

But the defendant complains also of the ruling with regard to the force and effect of the auditor's report. As stated in the exceptions it was that "the auditor's report was *prima facie* evidence of the amount which the plaintiff was entitled to recover, that it was competent for the defendant to disprove it, but it must stand unless he had impeached it." It is argued that this instruction had the effect to change the burden of proof from the plaintiff to the defendant; when on the contrary if the defendant's evidence balanced the force of the report the plaintiff ought to fail. The language of the statute is, the "report may be used as evidence by either party, and it may be disproved by other evidence." What does this imply?

Referring to the former statutes respecting auditors and their functions we find that by the law of 1821, c. 59, (after regulating in §§ 23 and 24, the course of proceeding in the now somewhat disused action of account), in § 25, provision is made that "in any action when it shall appear to the court that an investigation of accounts, or an examination of vouchers is necessary for the purposes of justice between the parties," auditors may be appointed by the court to state the accounts between the parties and to make report thereof to the court, which report "shall under the direction of the court be given in evidence to the jury; subject, however, to be impeached by evidence from either party." By the Laws of 1826, c. 347, this § 25 is repealed, the power of the court to appoint on motion of either party is limited to the first four days of the term when the action is entered, though an appointment may be subsequently made with the consent of both parties; "and the duty of auditors so appointed shall be to arrange the items of the accounts depending, consider the principles on which they depend and examine the vouchers offered in their support, and as far as convenient note the same in their statement;"

and make report to the court; "and if the parties agree that the auditor shall have power to examine witnesses and depositions according to the principles of law, such power shall be expressed in the rule certifying their appointment; and in that case their report shall be submitted to the jury to be by them considered in connection with all other evidence adduced."

Under the revision of 1841, c. 115, §§ 49, *et seq.*, the appointment was to be made by consent of parties; witnesses might be summoned and compelled to attend "as before referees;" the report might be "used by either party as evidence on the trial of the cause before the jury; but shall be open to be impeached or disproved by other evidence."

In the revision and condensation of 1857, c. 82, §§ 59, *et seq.*, (of which the present law found in R. S. of 1871, c. 82, §§ 62, *et seq.*, is an exact transcript,) there came full power to the court at any proper stage of the cause in the class of cases requiring it, with or without the consent of the parties, to appoint auditors "to hear the parties and their testimony, state the accounts, and make a report to the court." They are invested with the more important incidental powers of a subordinate tribunal and charged with the performance of its duties. "Their report may be used as evidence by either party, and it may be disproved by other evidence." The power to compel the attendance of witnesses and to hear the parties and their testimony would be nugatory unless accompanied with a power to pass upon the facts in controversy. Evidently we think there is implied here a power to settle such controverted facts as may be necessary to ascertain whether the debit or credit claimed ought to be allowed.

The results reached by the auditor are not conclusive upon the parties, but his report when offered in evidence is subject to be impeached, rebutted, controlled or disproved by competent evidence to be laid before the jury. But it amounts to *prima facie* evidence sufficient to warrant a verdict unless thus impeached or disproved. This is the view of its effect taken by the court in Massachusetts in a series of decisions under statutes substantially similar. *Allen* v. *Hawks*, 11 Pick., 359. *Lazarus* v. *Commonwealth Ins. Co.*, 19 Pick., 81, p. 97. *Taunton Iron Co.* v.

Richmond, 8 Metc., 434. *Kendall* v. *Weaver*, 1 Allen, 277. *Morgan* v. *Morse*, 13 Gray, 150.

Some of these cases go further and sustain the doctrine that the burden of proof is thereby changed.

But in the discriminating opinion in *Morgan* v. *Morse*, 13 Gray, 150, while attention is called to the loose and inaccurate mode of using the phrase, (the presiding judge having instructed the jury that the burden of proof was upon the defendant to overturn or control the auditor's report,) it was held not likely to mislead the jury and that the defendant was not aggrieved, and the general doctrine above stated is approved.

Bigelow, J., remarks that "it would have been more correct for the court to have instructed the jury that the report of the auditor in favor of the plaintiff was *prima facie* evidence, and sufficient to entitle him to a verdict unless it was impeached and controlled by the evidence offered by the defendant." The instruction thus commended is substantially the same as the one of which the defendant here complains. We think it unexceptionable. If the defendant had desired a more elaborate dissertation upon the burden of proof he should have made specific requests for instructions respecting it.

V. This writ was sued out July 23, 1863. Almost simultaneously, by a bill in equity brought against this defendant and Rufus K. Page and filed July 24, 1863, the plaintiff claimed that the conveyance of Page's half of the Ocean Steed to Kimball though absolute in form was intended only as security for the $15,000 in notes advanced by Kimball to Page to raise money upon, and that the conveyance and notes were to be subject to a settlement of the mutual and open accounts then subsisting between them and to such agreement as upon such settlement might be made between them; that upon an examination and adjustment upon this basis, in November, 1859, it was ascertained that Kimball was owing Page about $10,000 on the accounts, and reckoning in the notes which had been paid by Kimball, there was due Kimball, $5000, for which he held Page's half of the ship as security and in trust; and that it was then and there agreed between Page,

Kimball and the plaintiff, that Kimball should hold the same, after repayment out of the earnings, in trust for the plaintiff to whom Page was then and ever since largely indebted; that the net earnings of Page's half of the ship received by Kimball were more than sufficient to pay the balance of the loan; wherefore he claimed a decree that this defendant as the executrix of Kimball should convey the half of the ship so held and pay over the excess of the earnings, if any, to him.

The defendant in her answer, upon information obtained from said Kimball, denied the trust, insisted that the sale of Page's half of the ship to Kimball was absolute in reality as well as in form, "and not intended to have any connection with or bearing upon any settlement of any accounts subsisting between them," and that Page had no equitable interest in the ship which he could make over to the plaintiff. The case proceeded to a hearing upon bill, answer and proof. As it appeared that Page had made an assignment under the statute for the benefit of all his creditors, October 5, 1857, it was held that whatever the character of the conveyance any interest remaining in Page passed to his assignees before the alleged agreement of November, 1859, and so the plaintiff had no title.

The bill was dismissed with costs; and the defendant now claims that the judgment in that suit is a bar to this.

We cannot so view it. The question whether the plaintiff took anything by the attempted adjustment of the accounts and transfer of Page's supposed right of redemption in the Ocean Steed to him in November, 1859, is not identical with the question whether he acquired Page's interest in those accounts by virtue of Kimball's acceptance of an order in his favor, July 23, 1856. This latter question was not even incidentally decided in the equity suit.

To ascertain whether a former judgment is a bar to present litigation the true criterion is found in the answer to the question: was the same vital point put directly in issue and determined. 8 Am. Jur., 330–335. *Outram* v. *Morewood*, 3 East., 346. Greenl. on Ev., part III., vol. 1, §§ 528, 529, 530. *Lord* v. *Chadbourne*, 42 Maine, 429, p. 443.

Upon the assignment of the accounts and Kimball's assent thereto, the plaintiff had a plain and adequate remedy at law which he is now pursuing; not so as to the supposed right of redemption which was the matter in issue in the bill in equity.

VI. The point that the plaintiff should have been prohibited from prosecuting this suit until he had paid the judgment against him for costs in the equity suit is not pressed in argument. Clearly the case is not within the provisions of R. S., c. 82, § 111, and the defendant's motion was rightly overruled.

VII. The defendant contends that the verdict should be set aside as against the evidence.

This claim is founded upon the position that the proceedings in the plaintiff's equity suit and the testimony therein taken, (which seems to have been admitted here by consent of both parties,) conclusively prove that the character of the transaction between Page and Kimball was as therein asserted a loan of the notes, a reception of the conveyance of Page's half of the ship as security and in trust merely, coupled with an agreement that the balance of account due from Kimball to Page should go to offset or pay the notes loaned, Kimball to hold the ship as security for the difference only, and that Page's right of redemption passed to Messrs. Danforth & Spaulding his assignees.

The jury found otherwise, at all events so far as regards the agreement to offset the accounts against the notes given for the Ocean Steed. But this finding, though adverse to the testimony produced by the plaintiff in the equity suit, is in accordance as we have already seen, with the position then taken by this defendant that the sale was absolute and had no connection with the settlement of the accounts; and this receives confirmation from the fact of the making of the order (which would otherwise be an idle ceremony) and from the use which was agreed to be made and was made of the notes given by Kimball, whereby such an offset was precluded. The subsequent attempt by Page, Kimball and the plaintiff to arrange for a redemption, being abortive, ought not to be allowed to affect the rights of the plaintiff originally acquired by the assignment of the account and Kimball's acceptance.

The existence of any right of redemption in Page in the outset

has been steadily ignored by the defendant and we do not think it is demonstrated. It seems to have been an afterthought of Page, Kimball and the plaintiff which never ripened into a valid and binding act. If it ever existed it passed to Page's assignees in October, 1857. Their intelligence and fidelity to their trust cannot be questioned. It does not appear that they have ever taken any steps to enforce such supposed right; one of them, Spaulding, was a witness for the plaintiff at the trial of this cause without asserting any such right. Kimball's estate holds the ship and her earnings, as if the sale were absolute by a title which now appears to be unquestioned. We see no propriety in the use which the executrix attempts to make of the proceedings in the equity suit to defeat this action.

The plaintiff would seem to have been sufficiently punished for the assertion of an unfounded claim to redeem, by his subjection to costs in that suit, and the difficulty and delay thereby inevitably caused in the enforcement of what are apparently his just rights in this. *Motion and exceptions overruled.*

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

AMOS WILDER *vs.* MAINE CENTRAL RAILROAD COMPANY.

August, 1874.—February 14, 1876.

Railroad. Negligence. Fence.

The statute requiring railroad corporations to inclose the land taken for their road with fences is a police regulation, designed to secure the safety of the public travel and transportation, and is obligatory, as such, upon all railroad corporations, whether chartered before or after its passage.

A parol agreement between a railroad company and an adjoining owner, for the removal and discontinuance of a fence on the line of the railroad, does not run with the land, and cannot therefore bind his grantee.

Where a horse escaped from his owner's land on to an adjoining railroad and was killed by the railroad company's locomotive, *held*, that the mere fact of his turning his horse upon his land where there was no fence between it and the railroad, when it was the legal duty of the railroad company to build it, was not proof of contributive negligence on his part.

On exceptions and motion.

Case for killing the plaintiff's horse at Hallowell, in June, 1871, by running upon him with an engine.

At the trial, March term, 1874, the verdict was for the plaintiff, with damages assessed at $1000. The defendants moved to have the verdict set aside as against law and evidence, and filed exceptions.

The plaintiff was a third owner in common of the oil cloth factory, and the lot connected therewith which extended on both sides of the railroad. The plaintiff's horse escaped from this lot, then unfenced, on to the track at the time of the killing.

There was evidence tending to show that the defendant company originally fenced their track from the oil cloth lot, and that the fence was removed many years previously at the request of Stickney, a member of the firm of Stickney & Page, owner of the *locus*. The firm afterwards took in Towle as a partner; Stickney died, and the plaintiff purchased his interest in the real estate and mills which were all included in the partnership business.

The defendants contended that they were not bound to fence their road under the general statutes of the state, because their charter and the location of their road were prior to the statute; that they were not bound to fence their road through the plaintiff's lot, because the same was not inclosed or improved land within the meaning of the statute, and because the owners and occupants had agreed with the defendant that they should not fence the same; and that they were not liable because the negligence of the plaintiff caused or contributed to the loss of his horse; and they excepted to such parts of the charge as were adverse to these positions.

The presiding justice, among other things, instructed the jury as follows:

"The first point, made then, in regard to this, is, that the railroad is under no circumstances bound to make a fence, because it is said that the charter of this road was granted previous to the law passed by the legislature, requiring railroads to build fences. I reserve this question for future consideration, for the full court, where it can be more carefully examined than it can be here, and

hold that this road would be bound by the statute which has been referred to, as having been first passed in 1842. Then under that statute this road and others in the state are bound to build fences along the line of their road on each side, provided they pass through inclosed or improved lands.

I understand land to be improved, when it is occupied for the purpose of obtaining a profit from the produce which may grow upon it, pasturing, and mowing, or tillage, or anything of that kind. I understand that to be the sense in which the word is used in the law which has been read in your hearing. If it is not improved land, in the sense to which I have called your attention, the road would not be under obligation to build a fence. If it was improved land at that time, in the sense which I have defined to you, then the road would be under obligation, so far as that is concerned.

I instruct you for the purpose of this trial that the agreement, whatever it was, made with Stickney as a member of that firm, would be binding upon the firm. He had a right, so far as he himself was concerned and so far as the firm then existing was concerned, to release this railroad company from building a fence. He had no such right, to be sure, so far as the public was concerned, and if any passenger had been injured or any property of any person being carried over the road had been injured or destroyed, for the reason that any animal escaped from that and got upon the road, the railroad still might have been liable notwithstanding the agreement.

The agreement, then, goes no further than to those persons who are parties to it, and who are bound by it; and the party owning the land, may assume the obligation, if he chooses, to keep up the fence; and if he does, so far, and so long as that obligation continued, he could have no claim himself upon the railroad for any of his animals that might escape through that fence, or for the want of a fence upon the track.

So I hold for the purpose of this trial, that a member of the partnership business, in relation to that which pertained to the partnership, would have authority to bind the partnership. If they were then occupying this land, and used it for partnership

purposes in carrying on their partnership business, one of the members of the firm would have a legal right, so far as that firm was concerned, to release the company from building the fence. That agreement would continue in force and be binding upon that partnership. It would not be binding, as has been held in our court, upon any successor or any grantees. Now when a partnership is existing, and one partner goes out and another comes in, that is a regular dissolution of that partnership. And a new one being formed, they would be the successors of the others, and, therefore, I instruct you in this case that whatever that contract might have been between Stickney, (as representing that partnership,) and the railroad company, that would not be binding upon his successors. When the partnership became changed the contract would be no longer in force.

I instruct you for the purpose of this trial that the mere fact of there being no fence is not proof that he was negligent in turning his horse out there. That is to say, he had a right to use his own land in the ordinary way, and the railroad company could not screen themselves simply upon the ground that they had neglected to perform the duty which was incumbent upon them. But this principle of law is subject of course to qualifications. In one instance it may not have been a negligent act and in another instance it may have been a negligent act. Here is a question of fact for the jury to settle. You will take into question the nature of the road, the manner in which it was built, the dump which extended from near the crossing to the bridge, the nature and character of the horse, and all the circumstances bearing upon that, and decide for yourselves whether the plaintiff was guilty of negligence in turning his horse out there under the circumstances in which he did. It is not to be taken as a matter of law that he was negligent, neither are you to consider the simple fact that he turned his horse in, knowing that there was no fence; but you are to take all these circumstances into consideration; you take that of course, so far as it is a fact, that there was no fence there, (because if there had been a fence this question would not have arisen,) but not as bearing upon the question of negligence;

but taking all these circumstances into consideration—was it an act of negligence on his part to turn his horse in?

If the company was under obligation to build the fence at that time and maintain it and the plaintiff was not negligent in turning his horse in at that time, the company would be liable. Otherwise, upon this branch of the case, they would not be."

J. W. Bradbury, jr., for the defendants.

The defendants were not required to fence the *locus in quo.*

I. Their charter, granted in 1836, specially exempts the corporation from the provisions of the act of March 17th, 1831. It is not therefore subject to the future action of the legislature, except in the manner provided in the charter itself; and that does not authorize any action in regard to fencing.

The act requiring railroads to fence was passed in 1842, and the act subjecting them to damages, caused by the neglect, in 1853.

These acts cannot affect the existing relations between this corporation and the land owner.

As the terms of these relations were established by the charter, they are not to be interfered with by any subsequent legislation.

The legislature, by its own act, had surrendered the power to interfere and had stipulated that it would not.

It was under this condition that the relations between the land owner and the corporation had become fixed, and the damages for taking the land appraised and paid.

It was not competent, therefore, for a subsequent legislature to change the conditions or add to the burdens of either party. Any act attempting it would be clearly retroactive and unconstitutional. And the instructions given on this point were therefore erroneous. *Baxter* v. *Boston & Worcester R. R.*, 102 Mass., 383.

II. Again, under the act of 1842, the relations between the parties were not changed. That act, if constitutional, would only subject the defendants to the penalty for neglect to fence, but it would not authorize the plaintiff to recover in this action, if he could not, independent of its passage.

III. The *locus* was a mill yard, and not inclosed or improved land, such as railroads are required by the statute to fence.

The burden is upon the plaintiff to establish the fact that the defendants were bound to fence. 102 Mass., above cited.

IV. The fence having been removed at the request of, and under an arrangement made with, the managing owner, Mr. Stickney, under whom the plaintiff holds, and whose interest he has, he cannot repudiate that agreement; in fact, he had never done so, and had never intimated to the defendants any desire to have the fence rebuilt. It was an agreement acted upon by the defendants, and it is not competent for the plaintiff to repudiate it without notice. It was competent for Stickney to make such an agreement. *Tombs* v. *Rochester & Syracuse Railroad*, 18 Barb., 583. *Talmadge* v. *Rensselaer & Saratoga Railroad*, 13 Barb., 493.

O. D. Baker, with whom was *J. Baker*, for the plaintiff, contended that R. S., c. 51, § 20, applies as well to railroads chartered and located before, as after the passage of the statute in 1842, c. 9, § 6. The statute of 1842 does not conflict with the defendants' charter, or the constitution of the state; for its enactment was in the exercise of a police power, vital to the safety of the public, which the sovereign cannot alienate.

The agreement of the defendants with Mr. Stickney, one of three prior owners, and grantor of the plaintiff, was not binding on the plaintiff.

The agreement was by parol. It was made with only one of three partners, and was never even known to the other two.

I. It has been settled ever since the time of Lord Kenyon, that one partner cannot bind the partnership land even by deed without a special authority, of which there is no pretense here. *Harrison* v. *Jackson*, 7 T. R., 203.

But if one partner cannot bind partnership land by deed, much less can he by parol. And if he cannot bind the land, how can his agreement run with the land? And if he cannot bind an existing partnership of which he is a member, how can he bind a future partnership of which he is not a member?

II. But whatever the power of partners between each other, a parol contract can never run with the land or affect even the

grantees of the person contracting. 1 Smith Lead. Cas., 22. Notes to *Spencer's case*. *Bickford* v. *Parsons*, 5 C. B., 920.

III. In any view, "an agreement like this for the nullification of a statute of this state cannot be regarded as having any effect upon the rights of any one who is not a party to it nor shown to be cognizant of or assenting to it." It amounts at best only to a personal estoppel. *Gilman* v. *Eur. & N. A. R. R.*, 60 Maine, 235. *Shepard* v. *Buffalo, &c., R. R.*, 35 N. Y., 641. *St. Louis R. R.*, v. *Todd*, 36 Ill., 409.

IV. Every person has a right to "use his own land in a natural and ordinary way for the purposes for which it is fit," and to do so is not negligence; and the mere fact that the plaintiff turned his horse on his own land, knowing it to be unfenced, is not evidence of negligence. Shear. & Red. on Neg., § 471. *Shepard* v. *Buffalo R. R.*, 35 N. Y., 641, (overrules the cases in Barb.) *Rogers* v. *Newburyport R. R.*, 1 Allen, 16. *Gardner* v. *Smith*, 7 Mich., 410, 420. *McCoy* v. *Cal. Pac. R. R.*, 40 Cal., 532. 6 Amr. R., 623. *St. Louis R. R.* v. *Todd*, 36 Ill., 409.

A. Libbey, in reply.

On the point of contributive negligence, he contended that the instructions of the presiding justice did not present the correct rule of law applicable to the case. There was no controversy as to the facts, as to the condition of the road, its situation and manner of construction, the situation of the lot and mill yard, the number of trains and the times they passed the mill, the want of a fence, and the acts of the plaintiff in turning his horse loose. The presiding judge should have held as matter of law, that the facts not disputed did not prove due care on the part of the plaintiff. *Lewis* v. *B. & O. R. R. Company*, in court of appeals. W. D., reported in Am. L. Reg. Mag., 1874, p. 284, and cases cited in note by F. R. *Eames* v. *Salem & L. R. R. Co.*, 98 Mass., 560. *Gilman* v. *Deerfield*, 15 Gray, 577.

DICKERSON, J. The statute requiring railroad corporations to inclose the land taken for their road with fences, is a police regulation, designed to secure the safety of the public travel and transportation, and is obligatory, as such, upon all railroad corporations

whether chartered before or after its passage. *State* v. *Noyes*, 47 Maine, 189. *Ind., &c., Railway* v. *Townsend*, 10 Ind., 38. 1 Red. on Railways, 493 and 494. 2 same, 428.

The counsel for the defendants contend that the land of the plaintiff adjoining the defendants' road, was not "inclosed" or "improved," and was not, therefore, required to be fenced against by the defendants. We think otherwise. Though the land was used partly as a mill yard, it was also mowed, and occasionally used by animals for grazing. The cases cited by the counsel are distinguishable from this case. It appears from them that a railroad company is relieved from the obligation to fence against adjoining lands, when such fence would be a public nuisance, or prevent access to a mill through whose yard the railroad passes, or at points where its engine house, machine shop, car house, wood house, wood shop and depot are so situated as to render a fence unnecessary. These are exceptional cases and do not include the one under consideration.

It is well settled, upon both principle and authority, that a parol agreement for the removal and discontinuance of a fence on the line of a railroad, between the owner of the land and the railroad company, does not run with the land, and cannot, therefore, bind his grantee. *Gilman* v. *Eur. & N. A. R. R. Co.*, 60 Maine, 235. *St. L. & A. R. R. Co.* v. *Todd*, 36 Ill., 409.

There can be no question, therefore, but the defendants were guilty of negligence in not building a fence upon the line of their road adjoining the plaintiff's land; and the remaining question to be determined is, whether the plaintiff is guilty of contributory negligence in turning his horse out upon his land, knowing that it was not fenced. The owner of land has a right to use it in a natural and ordinary way for the purposes for which it is fit. This right does not depend upon the performance or non-performance of any duty or obligation enjoined by law upon another in respect to his land. He has a right to expect that the requirements of law will be complied with, and to act accordingly; nor does his knowledge that they have not been, affect his right of use one way or the other. If it did, the neglect of another to obey the law might operate to prevent him from the lawful use

of his own property. The common law made it the duty of the owner of land to guard against the escape of his cattle therefrom, but the statute devolves this duty upon the railroad company in the case under consideration, and the rights of the parties must be determined in accordance with this change. To hold the land owner to the same care of his cattle, as the common law required, would be to disregard the statute, and render it inoperative. It was for the defendants to use the necessary care to prevent the escape of the plaintiff's horse on account of their neglect to build the fence. Shear. & Red. on Neg., § 471.

In *Rogers* v. *Newburyport R. R. Co.*, 1 Allen, p. 17, which was tort for the loss of a colt run over by the defendants' cars, the court say, "the plaintiff had a right to place his colt in his pasture to feed, and was under no obligation to the defendants to use any care to prevent escape by reason of their neglect to maintain the fence. It was for them to use the necessary care to prevent such an escape." *Gardner* v. *Smith*, 7 Mich., 410.

In *McCoy* v. *Cal. & Pac. R. R. Co.*, 40 Cal., 532, the line of the road was not fenced where it passed through the field occupied by the plaintiff, and the live stock of the plaintiff running in this field strayed on to the road and were killed by the defendants' train; and the court held that these facts made out a *prima facie* case against the defendants, and also, that the plaintiff was not guilty of contributory negligence, from the fact that he knew that the road was not fenced, when he turned his cattle into the field. *Kellogg* v. *Ch. & N. W. R. R. Co.*, 26 Wis., 223.

The presiding justice stated the rule of law correctly when he instructed the jury that the plaintiff had a right to use his land in the ordinary way, and that the mere fact that the railroad adjoining his land, was not fenced, was not proof that he was negligent in turning his horse out there. The question of fact, whether, under all the circumstances of the case, it was negligence in the plaintiff to turn his horse out as he did, was submitted to the jury under appropriate instructions. It was the exclusive province of the jury to determine this question, and they found it in favor of the plaintiff. The jury were aided in their investigation by a plan of the premises, verified and explained by the engineer who drew

it. They also saw the witnesses and could judge of their credibility from their appearance on the stand. It is next to impossible for the court in this class of cases to put itself in the situation of the jury so as to be able to say whether or not its decision would have accorded with theirs if it had occupied their place at the trial. Hence the wisdom of the rule that the court will not set aside a verdict as against evidence or the weight of evidence unless it is so manifestly so, as to render it apparent that the jury have mistaken or disregarded the evidence. In reviewing the testimony in this case, we do not find such ground for setting aside the verdict. *Motion and exceptions overruled.*

Judgment on the verdict.

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

IVORY WAKEFIELD, in equity, *vs.* JOSIAH F. MARR, guardian of Edward Wakefield.

Kennebec, 1875.—February 19, 1876.

Equity. Infancy.

Where a bill in equity is brought to enforce a trust, the trustee, though a minor, must be made a party.

It cannot be maintained against the guardian of such minor alone.

BILL IN EQUITY asking the court to order one Josiah F. Marr, guardian of Edward Wakefield, a minor, to release and quitclaim to the plaintiff the title to certain real estate held by said minor, which the plaintiff claimed in equity and good conscience belonged to him, he having paid the full consideration therefor. The suit was against the guardian alone, and the only service of the bill was an acknowledgment of the guardian that it had been legally served upon him. The defendant demurred to the bill.

W. Benjamin, for the plaintiff.

No counsel appeared for the defendant.

APPLETON, C. J. This is a bill in equity against the respondent as guardian of Edward Wakefield, a minor. It seeks the enforcement of a trust arising by implication of law, and not evidenced by any writing, and to compel the conveyance to the plaintiff of real estate the legal title to which was in the minor by descent, though the purchase money had been wholly paid by the complainant.

The minor is not made a party to the bill. We think he should be. The title to the land is in him, and the conveyance should come from him. The court appoint a guardian *ad litem* to see that his rights are properly defended. An infant institutes a suit in equity by his next friend, and defends by his guardian. The decree when made is against the infant. Story Eq. Pl., § 70. *Walsh* v. *Walsh*, 116 Mass., 377. *Tucker* v. *Bean*, *post*, 352.

The infant not being made a party, the bill must be dismissed.

Bill dismissed.

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

ANN BESSEY *vs.* INHABITANTS OF UNITY PLANTATION.

Kennebec, 1874.—March 16, 1876.

Town. Plantation.

To show money had and received to the use of the plaintiff by a town or plantation, it will not suffice merely to show money lent by the plaintiff upon the representations of its officers that it was required for legitimate expenditures, without showing the appropriation of the money to the legitimate expenses of the town or plantation.

An order, drawn by the assessors of a plantation, (who have in general the same powers as selectmen of towns,) upon their treasurer, and delivered by him to the plaintiff, when the plaintiff let him have the money, would constitute an "obligation" binding upon the inhabitants of the plantation to repay the money, provided the vote of the plantation conferred upon the treasurer legal authority to hire it.

A plantation, whether originally organized for election purposes only or otherwise, which during the late rebellion had its quota of soldiers under the several calls for troops regularly assigned to it, is within the purview of the various legislative enactments making valid the acts and doings of cities,

towns and plantations in agreeing to pay bounties to volunteers, drafted men and substitutes and in providing the means to pay such bounties by loan or otherwise; and notes and orders signed by their assessors, when delivered, by their lawfully authorized agents in pursuance of a vote passed at a legal meeting of their inhabitants empowering such agents to hire money for that purpose, to the party who loans the money, are thereby made valid and binding; and payment thereof cannot be successfully resisted upon the ground that such plantation had no such organization as made it capable of contracting for that or any other purpose.

To enable a party to recover against the plantation for money lent in pursuance of such a vote, it must appear that the sum was within the amount which the agent was empowered to hire; and if this depends upon the number of men required to fill the quota of the plantation, the plaintiff must show how many were required.

It must appear also that such vote was passed at a meeting of the plantation legally called and holden, and under articles sufficiently describing the character of the business upon which the voters were called to act. The certificate of the assessors of the plantation indorsed upon the warrant for the meeting, that they "have notified the within named inhabitants by posting up a written notice seven days, as the law directs, of the time and place, and the intention of said meeting," does not afford legal evidence that the meeting was regularly called, notified and holden.

On exceptions.

Assumpsit for money had and received, evidenced by an order for $371, on the treasurer of Unity plantation, dated March 22, 1865, signed "Edwin E. Hall," and "Gilbert Libbey, assessors of Unity plantation." The money in exchange for the order was delivered to Francis B. Lane, acting treasurer of the plantation, also their special agent, by vote passed February 4, 1865, to fill the quota under the call of December 19, 1864.

Under the several calls of the president for troops from July 2, 1862, to December 19, 1864, the quotas for Unity plantation, required in all ten men. Its quota under the last named call was two; there was also then a deficit of one man under previous calls.

The defendants' treasurer paid the plaintiff interest on the order in May, 1869.

After the evidence was out, the justice presiding instructed the jury as follows: "If the parties hiring this money of the plaintiff had authority to do it, she would be entitled to recover; if they had not authority as I view the testimony in the case, she would not have a right to recover. If the plaintiff can recover at all she can recover upon the order; and it is purely a question of

law, whether they had authority or not, and depends upon an examination of the records. An order is produced here, signed by men who were acting as assessors of that plantation. The money was obtained by the agent who seemed to have some color of election, as a special agent of the plantation, and so far as it appears, the money was loaned in good faith by the plaintiff, and I do not think it makes any difference under those circumstances what the assessors did with it afterward. If they had authority, the plantation would be liable, and I feel bound to give an instruction, rather *pro forma* than otherwise, (for I have not had an opportunity to examine,) that the plaintiff would be entitled to recover, and the clerk will make up the verdict, and your foreman can sign it without leaving your seats."

The defendants, the verdict being for the plaintiff, excepted.

J. Baker, for the defendants.

I. The plantation was organized under the statute of October 2, 1840, for election purposes only.

II. This plantation had no power in 1865, to raise money by taxation or loan for any purposes. Public Laws 1840, c. 89, § 1. Plantations organized under this act had power only to choose a moderator, clerk and three assessors, and to perpetuate their organization by annual meetings for voting purposes only.

By intervening acts between that act and the revision of 1857, their powers were increased so that they could elect assessors, clerk, surveyors of lumber, fence viewers and constables, and that was all. There was no power to raise money, or assess or collect taxes, granted to them by any of these acts. Between 1857 and 1865, no new powers were conferred on this class of plantations. So that when the meeting of February 4, 1865, was called and held, this plantation had the powers contained in R. S. 1857, c. 3, §§ 70 to 75 inclusive, and no more. There was no power to raise money, or to assess, or to elect a treasurer or collector. There was no treasury.

So the counsel contended, that if all the proceedings in relation to the order in suit were legal in form, they were still void, and conferred no authority on any officer or agent of the defendants to bind them. He also contended that the proceedings were not

regular in form, and that they were not cured by the ratification acts of 1865, c. 298, and of 1866, c. 59; and further, that the plaintiff could not recover on the money count, for the reason, among others, that it was not proved that any man was actually put into the service, and credited to their quota. *Bank* v. *Lowell*, 109 Mass., 214.

A. Libbey, for the plaintiff.

I. The state tax acts are public acts, and show that the plantation has for many years been taxed the same as towns.

The records put in show that the defendants were acting as an organized plantation.

For all purposes within the powers of plantations the assessors have the same powers as the selectmen of towns.

II. A quota having been assigned to this plantation in the same manner as to towns, it was subject to the same duties in regard to filling it, and had the power to raise money by taxation, or to borrow money for that purpose. Act of 1864, c. 227, §§ 5 and 6.

III. The money having been borrowed by the agent held out as authorized by the action of the defendants, for a purpose authorized by law, they are estopped from saying now that their action was technically irregular, and that they are not bound.

Selectmen of towns and assessors of plantations have power to borrow money for lawful purposes, to meet the obligations of the town or plantation without special authority. *Andover* v. *Grafton*, 7 N. H., 298. *Pike* v. *Middleton*, 12 N. H., 278. Dillon on Municipal Corporations, § 384. *Argenti* v. *San Francisco*, 16 Cal., 255.

Such has been the practice of New England towns for many years.

The action of the officers *de facto* bound the defendants. *Cushing* v. *Frankfort*, 57 Maine, 541.

Having received and retained the money, they are liable under the money count. *Smart* v. *Blanchard*, 5 Chand., N. H., 137. *Alleghany City* v. *McClurkan*, 14 Penn., 81. *Atlantic Bank* v. *Merchants' Bank*, 10 Gray, 532.

IV. The defendants have ratified the loan by paying interest

through Hall, their treasurer; a stronger case on this point than *Belfast & M. H. L. R. R. Co.* v. *Brooks*, 60 Maine, 568.

BARROWS, J. The money which the plaintiff here claims to recover, as had and received by the inhabitants of Unity plantation to her use, was delivered by her, March 22, 1865, to one Lane, acting treasurer of the plantation, upon the faith of an order signed by two of the assessors, and addressed to the treasurer or his successor, and commanding him to pay the plaintiff the sum therein named, in one year with interest, "it being for money lent." It appears, and is not questioned, that the officers of the plantation, when they got the money of the plaintiff, informed her and her father, under whose advice she was acting, that they wanted the money to pay for soldiers to fill the quota of the plantation. Whether it was in fact so applied, is a matter not placed beyond controversy by the testimony reported; but may depend upon the opinion entertained by the jury of the truthfulness of the assessor and treasurer, and the accuracy of their recollection. No occasion for the hiring of money by the plantation for any other purpose appears to have existed.

One of the grounds upon which the defendants resist payment is, that their plantation was organized for election purposes only and was therefore incapable of contracting or of raising money by taxation or loan.

The records offered in evidence show that whatever the original purpose and form of the organization might have been, this plantation, for a series of years prior to this transaction, had been exercising most if not all of the functions belonging to the other class of plantations. It is probable that some of the plantations, originally organized for election purposes only under the act of October 2, 1840, passed into the other class under the provisions of R. S. of 1841, c. 14, §§ 40–49, upon being ordered by the legislature, from time to time, to pay their proportion of the public taxes, with very imperfect records of the proceedings which completed their organization.

But whether that was the case with Unity plantation or not, the single fact, (which appears in the records of the adjutant general's office,) that during the war it had its quota of soldiers under

the different calls for troops regularly assigned to it, makes it certain that it comes within the purview of the various legislative acts affecting the powers and duties of towns and plantations in relation to the procurement of soldiers, the business of state aid, and kindred topics. Whenever a duty is imposed all the power necessary for its proper performance is given, if not expressly, then by inevitable implication. We cannot doubt that, whatever the form of its original organization, any plantation, which had a quota of soldiers assigned to it, received sufficient legislative recognition as duly organized, in the successive acts, "to make valid the acts and doings of cities, towns and plantations in voting and making provision for the payment of bounties to volunteers" &c., to be bound by those acts so far as they are found applicable to its votes, and the contracts made by those who were its acting officers or its lawfully authorized agents.

The inhabitants of this plantation cannot rid themselves of the liability to pay this money upon the plea that they had no such corporate organization or existence as enabled them to make the promise which the plaintiff alleges and they deny.

But all these acts and contracts, whether of towns or plantations, were, when initiated, plainly *ultra vires*, if we look only at the ordinary powers and duties of such corporations; and they can be held valid only as they may have been authorized or ratified by certain legislative enactments dictated by the supposed exigencies of the country and the times.

It may be true, as argued by the plaintiff's counsel and as held in the cases which he cites, that selectmen of towns and assessors of plantations, (who, under our statutes, have substantially the same powers as selectmen,) have, by virtue of their office, power to borrow money for lawful purposes to meet the obligations of the town or plantation, without being specially authorized. But where the lender proceeds against the town or plantation upon this ground we think he is bound, in order to recover, to show the appropriation of the money to legitimate expenses of the town or plantation. There can be no such thing as a general and unlimited authority in municipal officers to borrow money on the credit of the town or plantation by which they are elected, with-

out regard to the purposes to which it is devoted. To show money had and received to the use of the plaintiff by a town or plantation, it will not suffice merely to show money lent by the plaintiff upon the representations of its officers, that it was required for legitimate expenditures.

But it is needless now to discuss further the possible liability of the defendants upon this ground, or what it is incumbent upon the plaintiff to prove in order to establish it; because the case was not committed to the jury with directions to ascertain the facts upon which it must depend.

On the contrary, the verdict was returned upon a distinct *pro forma* instruction that the plaintiff could recover only by proving the authority of the parties who received the money from her to borrow it on the credit of the plantation, and that the question of the existence of such authority was purely one of law, depending upon an examination of the records and, finally, that the record evidence entitled her to a verdict.

It is in vain for us here and now to discuss or consider the question whether a corporation of this description may not be held liable upon notes or orders issued by its officers without express authority, upon the ground that it has received the benefit of the money thereby obtained, or that it has ratified their acts by a subsequent recognition of them as valid and binding, or by claiming and receiving reimbursements on account of them, or on the ground of an equitable estoppel by matters *en pais*. The facts upon which such liability must rest, have not been ascertained by the verdict, and are apparently more or less in controversy.

The question presented is, whether the records show sufficient authority in the parties procuring this money of the plaintiff to bind the plantation for its repayment.

The plaintiff relies upon a record of a meeting held February 4, 1865, at which it appears that the plantation chose F. B. Lane special agent to fill the quota under the call of December 19, 1864 and voted to raise "not to exceed three hundred and fifty dollars per man, the same paid drafted men," and to "empower agent to hire money to furnish men to fill said quota, and authorize him to hire money to amount voted to each man so furnished

on the credit of the plantation, and give obligation binding the inhabitants of said plantation paying tax thereon."

Among the objections urged by the defendant against a recovery upon the order is this that it is signed by the assessors, while the power to hire the money, if any was conferred, was given not to them but to Lane as special agent. But the uncontradicted testimony shows that the plaintiff received the order from Lane to whom it was delivered by the assessors signed in blank, to serve as evidence of the loan with whomsoever he might negotiate it. It became operative only upon its delivery by Lane to the plaintiff when she let the money go into his hands on the strength of it.

The negotiation was conducted by Lane who was the special agent under the vote and had also been elected treasurer of the plantation as appears by the record of the March meeting, 1865. The vote prescribed no particular form in which Lane was to "give obligation binding the inhabitants of the plantation" for the money which the vote in express terms authorized him to hire on their credit; and we see no substantial force in this objection to the mode in which he executed the power.

The order drawn by the assessors, (who have in general the same powers as selectmen of towns,) upon Lane as treasurer and delivered by him to the plaintiff when she let him have the money, would constitute an "obligation" binding upon the inhabitants of the plantation to repay the money, provided the vote conferred upon Lane legal authority to hire it.

More formidable obstacles to the plaintiff's recovery appear, when we inquire as to the validity of Lane's authority. The plaintiff claims that the plantation might lawfully pass the vote in question by virtue of § 6, c. 227, Laws of 1864, whereby any city, town or plantation, was authorized to make temporary provision for, and pay to its recruits, a bounty of $300 under certain conditions. But the vote contemplates the payment of a larger bounty than was warranted by the act. The action of the plantation was not within the scope of the authority granted. The plaintiff must find other support for it, or it will not avail her.

By § 1, c. 298, of the Laws of 1865, approved February 17, 1865, the past acts and doings of cities, towns and plantations in

offering, paying, agreeing to pay, and in raising and providing the means to pay, bounties to volunteers, drafted men, or substitutes of drafted or enrolled men, who have been or shall hereafter be actually mustered into the military or naval service of the United States, were made valid. The vote we are considering was passed at a meeting of the plantation held February 4, 1865, and if the meeting was regularly called and held, it comes within the purview of this act.

The plaintiff did not lend the money nor receive the order until March following; and the provisions in the act of February 17, making valid all notes and town orders given by the municipal officers of any city, town or plantation, in pursuance of a previous vote for the benefit of volunteers, &c., and also "all contracts made by said officers, or their duly authorized agents with third persons . . . for the purpose of raising means to pay such bounties so voted," cannot aid her; for they apply only to notes, town orders and contracts, in existence at the time of the passage of the act.

The defendants contend that the somewhat similar provision in § 2, c. 59, Laws of 1866, though subsequently enacted, is without effect in this case on the ground that the contract for the purpose of providing the means to pay bounties here was not made by the municipal officers of the plantation or any authorized agent of those officers.

This is too narrow a construction of a remedial act, which was doubtless intended to ratify and make valid all securities given by the municipal officers of a city, town or plantation, for the purpose designated, under due authority from the corporation itself, whether the negotiation, contract or actual manual tradition of the securities was made by those officers personally or by some one else lawfully authorized either by them or the corporation which they represented.

If Lane was duly authorized to "give obligation binding the inhabitants of the plantation" and was intrusted with the order, signed in blank by the assessors, to be filled up and delivered to the person from whom he should procure the means to pay the bounties; such order, when delivered to the party lending the

money for that purpose, comes fairly within the description of the contracts which are made valid and binding by the statute. But it is obvious that to complete her proof here it was necessary for the plaintiff to show how many men were needed to fill the quota; otherwise it could not be known whether the sum loaned was or was not in excess of the sum which Lane was authorized to hire. This was a controverted question of fact, and the jury did not pass upon it, nor did the instructions they received require them to do so.

Moreover, the purpose, for which the money was borrowed, was made known to the plaintiff, and she was bound to know that, without some extraordinary legislative grant of authority, towns and plantations had no power to raise or borrow money to be thus expended. It is incumbent upon her, then, to bring her case within the ratifying act. It was decided in *Sanborn* v. *Machiasport*, 53 Maine, 82, that only the doings at meetings legally notified and held, were made valid by the ratification acts.

The records before us show a notice of the meeting of February 4, 1865, made January 25, under the hands of George D. Bacon and Aaron P. Perkins, assessors, containing articles upon which such action, as the meeting afterwards took, might properly be based.

But proof of the making and signing of such a notice by the assessors will not suffice to show a legal meeting in the absence of proof that it was issued and posted according to the requirements of law. There is no legal evidence that this was done. All that is offered in this behalf is the following certificate signed by the assessors, and apparently indorsed without date upon their warrant for the meeting: "We hereby certify that we have notified the within named inhabitants by posting up a written notice, seven days as the law directs, of the time and place and the intention of said meeting."

This certificate can in no sense be regarded as legal evidence that the proper notice was given. The assessors are not certifying officers. It does not appear when or where their notice was posted, nor whether it was a copy of their warrant.

We cannot accept their opinion, that notice was given "as the law directs," in lieu of the facts.

That any of the requirements of §§ 5, 6, and 7, of c. 3, R. S. of 1857, were observed or that the meeting of February 4, 1865, was in any manner legally called and holden, does not appear.

Until this defect is supplied, it cannot be said that the authority of the parties hiring this money of the plaintiff to bind the inhabitants of the plantation for its repayment, is established.

The *pro forma* ruling was erroneous.

Exceptions sustained.

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

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

ISAAC TUCKER, in equity, *vs.* SALOME M. BEAN, executrix, and JOSEPH E. BEAN, guardian of Vesta Cram.

Kennebec, 1875.—April 14, 1876.

Equity. Infant.

A bill in equity should never be taken *pro confesso* against an infant defendant.

A decree upon the answer of *non sum informatus* by a guardian *ad litem* will not bind the infant.

Infants must be made parties to bills in equity, affecting their title to real estate; making their guardians parties is not sufficient; for, while it is true that an infant can answer only by guardian, still, the suit must be directly against the infant.

IN EQUITY.

The bill alleges, in substance, that one Harvey Cram, in 1854, bought for plaintiff, with plaintiff's money, a lot of land, taking the deed in his own name, and recently died testate, never having parted with the legal title, leaving a widow his executrix, who has since married, and an infant daughter, and that the possession of the land has ever remained in the plaintiff. The executrix and her present husband, as guardian of her infant daughter, (but not the infant herself,) are made parties to this bill, which prays, among other things, that Joseph E. Bean, in his capacity as guardian, may be required to execute the resulting trust in favor of the plaintiff, and convey to him by deed of quitclaim the right, title

and interest which Harvey Cram acquired and which the infant daughter has as his heir.

S. & L. Titcomb, for the plaintiff.

A trust results by implication of law in favor of one who has furnished his agent with money to purchase for him real estate, if the agent takes the conveyance to himself; and on the death of the agent his heirs may be compelled to release to the equitable owner. *Brown* v. *Dwelley*, 45 Maine, 52.

Such a trust is not within the statute of frauds, and need not be declared in writing.

No counsel appeared for the minor.

WALTON, J. A bill in equity should never be taken *pro confesso* against an infant defendant. No *laches* can be imputed to an infant, nor can the guardian *ad litem*, by any consent, bind his rights. No valid decree, says Chancellor Kent, can be awarded against him merely by default, or upon such consent. The plaintiff in every such case ought to prove his demand, either in court or before a master. *Mills* v. *Dennis*, 3 Johns. C. R., 367.

In equity suits the usual answer of a guardian *ad litem* of an infant is that, the infant knows nothing of the matter, leaving the plaintiff to prove his case if he can, and throwing the infant upon the protection of the court. Such is the answer of the guardian in this case. But such an answer was pointedly condemned in *Lane* v. *Hardwicke*, 9 Beavan, 148; and Chancellor Kent held in the case of *Mills* v. *Dennis*, above cited, that a decree upon such an answer would not bind the infant; that the plaintiff should prove his case.

And again: This court has recently decided in a case not yet reported, that infants must be made parties to bills in equity affecting their title to real estate; that making their guardian a party is not sufficient; that while it is true that the infant can only answer by guardian, still, the suit must be directly against the infant. *Wakefield* v. *Marr*, 65 Maine, 341.

In this case there is no proof in support of the plaintiff's claim other than the bill itself. Nor is the infant defendant made a party to the suit. It seems to have been supposed that making

her guardian a party was sufficient. No counsel appears in defense of the suit. Nor is there any other answer by the guardian than *non sum informatus.* The court cannot consent to make a decree barring the infant of her rights in her father's estate upon such a presentation of the case. *Bill dismissed without cost.*

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

EDMUND H. WALKER *vs.* FRANCES O. BAILEY, administratrix.

Kennebec, 1875.—April 26, 1876.

Trial.

The judge at *nisi prius* has the right to inquire of the jury, when they return their verdict, upon which of several grounds taken by the prevailing party the verdict is based.

This power should be exercised sparingly and cautiously; and the best course is to put written interrogatories to the jury when the case is committed. to them, and require written answers which may be affirmed as a special verdict.

Whether a statement as to the ground of the verdict made by the foreman only and not affirmed by the jury will be regarded in the consideration of a motion for a new trial, *quære.*

In this case there was a conflict of testimony upon both grounds taken in defense. *Held,* that the verdict of the jury based upon either ground must be regarded as final.

ON MOTION.

ASSUMPSIT for money had and received. The plaintiff in 1868, and previously, was associated with Charles E. Bailey, the intestate, in purchasing and selling hay, Bailey assisting in the purchases in Maine, and the plaintiff either alone or as a member of the firm of himself and company, attending to the sales in Massachusetts, and sharing the profits with Bailey.

In 1868, one Kidder, of Norridgewock, received from Bailey $200 to aid him in finishing his haying, for which he gave to Bailey his note, and a mortgage on the 1867 crop of hay then pressed and lying in his barn for security. Of this $200, one-half was furnished either by the plaintiff individually, or by the plaintiff

& Co. A few days after this the plaintiff purchased the pressed hay of Kidder for some $280, advanced him another $100, and gave his note for the balance which he at first declined to pay on the ground of the outstanding note and mortgage to Bailey, but was afterwards compelled to pay on an execution obtained by Kidder against him. There was evidence tending to show that Walker settled with Bailey for his share of the Kidder hay, and for his $100 advanced Kidder, that on settlement Bailey declined to deliver to Walker the Kidder note, which he retained to offset with Kidder, against a charge for hay consigned to him, Bailey, at Richmond, and for which he, Bailey, had received nothing. After Bailey's decease, his administratrix delivered to Kidder, the $200 note in exchange for the Richmond hay. Whereupon the plaintiff brought this suit for the $100, by him advanced, and for the $100 allowed the intestate in settlement for his advance to Kidder, for which $200 the intestate took Kidder's note and collected it. This suit the administratrix defended, on the ground that the action was not rightly brought, that if the plaintiff had any interest in the money loaned, it was that of a partner in the firm of E. H. Walker & Co., and, at any rate, the matter had been adjusted by Walker & Co., with the intestate as evidenced by their receipt in full to January 13, 1869. Upon the point of partnership, the evidence was conflicting, the plaintiff's brother, John S. Walker, testifying that he himself was formerly a partner of the plaintiff, but withdrew in 1865, long before these transactions, leaving his brother to carry on the business alone; while one Wise, formerly clerk of the firm of Walker & Co., deposed that E. H. Walker continued a partner till March 1, 1869, when he withdrew, and the deponent took his place in the firm.

The presiding justice instructed the jury in conclusion as follows: "In the first place, was any of the money advanced by this plaintiff? If it was by the plaintiff, then you are to consider whether this money so advanced by him on joint account went into and became a part of the Kidder note. If it did, has it ever been accounted for? If it did not, there is an end of the case; it is for you to determine."

After the jury had returned into court with their verdict, and

before it was affirmed by the clerk, the presiding justice inquired of the foreman the grounds upon which they found for the defendant. The foreman replied, "we find for the defendant upon the ground that there was a firm existing at that time."

The defendant objected to the above answer of the jury being made part of the report.

The plaintiff moved that the verdict be set aside as against law and evidence.

J. Baker, for the plaintiff.

W. P. Whitehouse, and with him *E. F. Pillsbury*, for the defendant.

Barrows, J. Two grounds were taken in defense at the trial: I. That if the plaintiff had any interest in the money loaned to Kidder, it was only that of a partner in the firm of E. H. Walker & Co., and so the suit in his individual name was not maintainable: II. That, at all events, the matter had entered into the adjustment between E. H. Walker & Co. and the defendants' intestate, made January 13, 1869.

The jury were duly instructed that if there was a partnership, and the funds were advanced by the firm, the action was not maintainable. Their attention was carefully called to the evidence, tending to show that the money was advanced by the plaintiff alone; and they were further directed, if they found that it was so advanced, to inquire whether it had ever been accounted for. The report states that "after the jury had returned into court with their verdict, and before it was affirmed by the clerk, the court inquired of the foreman, the grounds upon which they found for the defendant. The foreman replied, we find for the defendant upon the ground that there was a firm existing at that time." The foreman's answer makes the basis of the plaintiff's motion to set aside the verdict.

The defendant objected to having the foregoing answer of the foreman made part of the report.

We think the objection might well have been sustained. The foreman's answer makes no part of the record. It was not affirmed as a special finding. The attention of the jury generally does

not appear to have been called to the inquiry made by the judge or to the answer given by the foreman. The inquiry was addressed to the foreman, and at best we can only infer that the answer embodied what was uppermost in his mind. The case gives point to the remarks of Morton, J., in *Hannum* v. *Belchertown*, 19 Pick., 311, p. 313, touching the "wisdom of the rule which precludes jurors from giving evidence . . . of the reason and grounds of their determinations. These are different in different jurors, some being influenced by one reason or motive, and others by different ones. If we required perfect unanimity in their reasoning as well as in the results, agreements would become as rare as disagreements now are. Men of strong minds and sound judgments who are very sure to come to wise and just conclusions would, if called upon to state the grounds of their opinions, often give very insufficient and unsatisfactory reasons for their decisions."

Considerations of this nature doubtless led Gurney, B., at the trial of *Horner* v. *Watson*, 25 E. C. L. R., 595, to decline to hear the reasons upon which the jury based their verdict for the defendant, though some of the jury expressed the wish to state them. But in several courts of high respectability in this country, the practice has been different; and the cases cited by the plaintiff and those therein referred to may be regarded as establishing the power of the court, in its discretion, for the purpose of promoting justice or restraining useless litigation to inquire of the jury when they return a verdict upon which of several grounds taken by the parties the verdict is based, or the rule upon which they assessed the damages; though it is often said that this power is to be exercised very sparingly and with great caution.

There is a clear distinction between receiving the testimony of jurors touching these matters after they have been discharged from the consideration of the case, and exposed to the complaints, solicitation, and arguments of the defeated party, and receiving the answers of the same jurors under their official oaths before they have separated. But we think, in order to make these answers available for the furtherance of justice, and the prevention of useless litigation, that they should be made with due deliberation and a knowledge on the part of the jury, that the foreman speaks for all

on this topic, so that any mistake or omission may be corrected on the spot. Doubtless the best course where such knowledge on the part of the court seems desirable, is to submit distinct questions to the jury in the outset in writing so that their findings may be verified like a special verdict.

It is however unnecessary now to determine whether any, (and, if any, what) weight should be given to an answer of the description here reported; for an examination of the testimony satisfies us that the plaintiff's motion cannot be sustained even upon the assumption that the grounds of the verdict were fully, as well as truly stated.

The plaintiff's counsel contends that the jury found nothing which was decisive of the case.

The foreman's answer must be construed in the light of the instruction given by the presiding judge. It cannot be expected, as the plaintiff seems to claim, that it should have the precision of a special plea.

The finding that "there was a firm existing at that time" includes a finding that such firm advanced the money, if it was advanced. The plaintiff's clerk produced as a witness by him testifies pointedly and positively to the existence of a firm composed of the plaintiff and his brother, at the time of the transaction out of which this suit grew—that the plaintiff's business with the defendant's intestate was conducted not in his own name, but in that of the firm, and that the money here claimed is included on the books of the firm with other moneys advanced or paid to Charles E. Bailey, the defendant's intestate; and the plaintiff, himself, in all his transactions with said Bailey, and in his letter to the defendant in which he first asserts this claim, uses the name of the firm. Though the plaintiff's brother and alleged partner now swears that he had retired previous to this transaction and had no interest in it, still it was for the jury to settle the conflict in the testimony offered by the plaintiff, and it is by no means certain that they erred.

Had the verdict been based on the other branch of the defense, in view of the testimony of Kidder, that the plaintiff, though specially and repeatedly requested by him to call Bailey's attention

to the matter when they were all three together, never did so; in view of the proof of the general adjustment between plaintiff and deceased, and the receipt in full given to Bailey, January 13, 1869, and the non-production of the plaintiff's books, and the proof that a large balance due Bailey, at the time of his decease, was paid by the plaintiff to the defendant without any mention made of this claim during the protracted negotiations, it could not well be claimed that the evidence failed to justify the verdict.

We think the conflict of testimony upon both the grounds taken in defense was such that a verdict of the jury, based upon either, should be regarded as final. *Motion overruled.*

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

GARDINER NATIONAL BANK *vs.* SARAH HAGAR.

Kennebec, 1875.—May 13, 1876.

Fraudulent conveyances.

H. S. H., who was indebted to his father's estate in an amount far exceeding his means of payment, and otherwise owing large sums, on the day before his decease and in contemplation thereof, transferred by conveyances absolute in form all his real and personal property to his mother the administratrix, and she accepted the transfer. In an action against her for delaying and hindering creditors, *held*, that the jury would not have been justified in finding a fraudulent and unlawful motive for an act which it was so manifestly the duty of the defendant to perform.

ON EXCEPTIONS.

CASE under R. S., c. 113, § 51, for hindering and delaying creditors, alleging that on March 6, 1868, one Henry S. Hagar, being indebted to the plaintiffs in the sum of $4,388.38, and possessed of real and personal estate, of the value of $20,000, with the fraudulent intent, &c., transferred it all to the defendant without adequate or valid consideration, and that she participated in the fraud.

The defendant was administratrix of the estate of her husband, Marshall S. Hagar. Henry S. Hagar, their son, was largely

indebted to the estate, the evidence tending to show, to nearly the amount of $100,000. He was also largely indebted to these plaintiffs and others. The day before his death he transferred by conveyances absolute in form all his real and personal property to the defendant, in consideration of his indebtedness to her, and she accepted the conveyances and caused them to be recorded.

When the plaintiff stopped, the foregoing facts appearing, the presiding justice ordered a nonsuit. To this order the plaintiff excepted.

L. Clay, for the plaintiff.

Whether conveyances are made and accepted to hinder or delay creditors, is a question of fact for the jury. *Hall* v. *Sands*, 52 Maine, 355.

Whether the grantee derives from the conveyance any benefit or not, if she took it to keep the property from seizure upon execution, she is liable under the statute. *Aiken* v. *Kilburne*, 27 Maine, 252.

The object of the statute is to afford a remedy against any one to whom the property of his debtor has been transferred for the purpose of securing it from creditors and from seizure upon execution. *Spaulding* v. *Fisher*, 57 Maine, 411.

By accepting the deed and bills of sale and putting them on record, she became liable in the same manner as though she had actually participated in the transfer in its inception. *Bank* v. *Cutler*, 49 Maine, 315.

Facts and circumstances clearly indicating an intention on the part of both vendor and vendee to place the property beyond the reach of legal process, constitute legal fraud. *Wheelden* v. *Wilson*, 44 Maine, 11.

The giving of a bill of sale absolute on its face, but intended for collateral security only, though not conclusive, is a circumstance tending to prove fraud. *Emmons* v. *Bradley*, 56 Maine, 333. The debtor notoriously and deeply insolvent conveys all his attachable property without adequate consideration. These circumstances are recognized badges of fraud. *Gunn et al.* v. *Butler*, 18 Pick., 248. *Rollins* v. *Mooers*, 25 Maine, 192.

E. F. Pillsbury, for the defendant.

As no testimony was introduced except by the plaintiffs, the nonsuit was properly ordered unless the evidence would authorize a jury to find a verdict for the plaintiff. *Sanford* v. *Emery*, 2 Maine, 5. *Perley* v. *Little*, 3 Maine, 97. *Pray* v. *Garcelon*, 17 Maine, 145. *Head* v. *Sleeper*, 20 Maine, 314. *Lyon* v. *Sibley*, 32 Maine, 576.

A creditor may lawfully take payment from his debtor of his own demand, although he knows that the debtor intends thereby to defraud other creditors. *Gray* v. *St. John*, 35 Ill., 222. *Hessing* v. *McCloskey*, 37 Ill., 341.

A debtor in failing circumstances has an undoubted right to prefer any creditor, as well a parent or other near relative as a stranger; and if the debt were *bona fide* due, the strongest considerations of duty may prompt a son to prefer the claim of a widowed mother over the claims of mere strangers. *Coley* v. *Coley*, 1 McCarter, (N. J.,) 350.

J. Baker, for the plaintiffs, replied and argued at length upon the badges of fraud.

WALTON, J. The court is of opinion that the nonsuit ordered in this case must be confirmed. It is true, as the learned counsel for the plaintiff contends, that the evidence discloses some of the usual badges of fraud which attend conveyances made for the purpos of hindering and delaying creditors. But the court is of opinion that these *indicia* of fraud are entirely neutralized by the fact that Henry S. Hagar was so largely indebted to his father's estate, and that it was his mother's duty as administratrix, to secure as much of that indebtedness as her son was able and willing to pay; that the jury would not have been justified in finding a fradulent and unlawful motive for an act which it was so manifestly the duty of the defendant to perform. *Exceptions overruled.*
Nonsuit confirmed.

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

DANFORTH, J., being interested, and LIBBEY, J., having been of counsel, did not sit.

STATE *vs.* BENJAMIN JOHNSON.

Kennebec, 1875.—May 13, 1876.

Indictment.

Under a statute imposing a penalty for carrying on a business without a yearly license, the penalty may be recovered as often as the offense is repeated. A recovery for a part of the year does not operate as a license for the residue.

When the statute imposing a penalty declares that it shall go to the use of the town in which the offense is committed, an indictment to recover the penalty shows with sufficient certainty to whose use the penalty is to be appropriated, if it contains a distinct averment of the name of the town in which the offense was committed.

ON REPORT.

INDICTMENT for being a common innholder without a license, in the city of Gardiner, during September, 1874, under R. S., c. 27, §§ 12, 13, which provide a maximum penalty of fifty dollars to be recovered by complaint, indictment, or action of debt, for the use of the town where the offense is committed.

The indictment in this case alleged the offense in Gardiner, but did not state to whom the penalty was to go.

At the finding of the indictment, two actions were pending against the defendant in behalf of the city to recover in each a penalty of fifty dollars for keeping the same inn for the months of May and June previous.

The defendant's counsel objected that the indictment could not be maintained, because it did not show to whom the penalty was to go, and because of the civil suits to recover what he claimed to be the same penalty.

The case was reported to the law court to settle the questions raised by the defendant's objections.

L. Clay, for the defendant.

The statute authorizes the board to license suitable persons to be innholders, &c., until the day succeeding the first Monday in May of the next following year on the payment of one dollar to the treasurer. Such license is good for the whole time unless revoked.

The counsel contended that the penalty for not taking out such license could not exceed fifty dollars in all for the whole time, and that the pendency of the previous suits was a bar to the indictment.

W. P. Whitehouse, county attorney, for the state.

WALTON, J. The defendant is indicted for being a common innholder without a license.

I. It is objected that the indictment cannot be maintained because it does not show to whom the penalty is to go. It is only when the penalty goes to the prosecutor, or to some other person or persons, of whose existence and identity the court cannot take judicial notice, that such an averment is necessary. When, as in this case, the penalty goes to the town in which the offense is committed, and the appropriation is made by a public statute of which the court can take judicial notice, and the indictment gives the name of the town in which the offense was committed, no other or further averment is necessary. *State* v. *Smith*, 64 Maine, 423. *State* v. *Cottle*, 15 Maine, 473. *State* v. *G. T. R. R. Co.*, 60 Maine, 145. *Com.* v. *Messenger*, 4 Mass., 462.

II. It is further objected that the indictment cannot be maintained because two civil suits are pending against the defendant to recover the same penalty. We think the penalty is not the same. The first suit was for being a common innholder without a license from May 19, to June 1, 1874. The second was for being such innholder from June 1, to July 1, 1874. The indictment is for being such innholder from September 1, 1874, to the time of finding the same, a period of time not covered by either of the former suits. The court cannot yield to the argument that because a license to keep an inn will continue in force to the end of the year, therefore but one penalty can be incurred for keeping an inn without a license within that time. The court is of opinion that if the defendant should eventually be punished for violating the law in May or June, such punishment would not be a bar to his being again punished for another violation of it in September; that the

first punishment would not have the effect of a license to continue in wrong doing in the future, and to the end of the year.

Indictment adjudged good.

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

J. P. FLAGG *vs.* I. N. BATES and WEST WATERVILLE SAVINGS BANK, trustee.

Kennebec, 1875.—May 31, 1876.

Trustee process.

Where the alleged trustee, a savings bank, holding a note against the principal defendant secured by a mortgage, purchased the equity of redemption at a sheriff's sale, released to the mortgageor a portion of the real estate covered by the mortgage in consideration of $274.00, paid by the mortgageor, and indorsed that sum upon the note, *held*, that the bank was not chargeable as trustee for the money thus received.

ON EXCEPTIONS.

ASSUMPSIT on a promissory note to which no defense was made. The contention was on the question whether the bank was chargeable as trustee. The presiding justice ruled that it was not holden, and the plaintiff excepted.

E. O. Bean, for the plaintiff.

G. T. Stevens, for the alleged trustee.

LIBBEY, J. The trustee made a disclosure containing the general declaration that at the time of the service of the plaintiff's writ upon it, it had no goods, effects or credits of the principal defendant in its possession, and was then examined by plaintiff. By the disclosure it appears that Bates, the principal defendant, on the 9th day of January, 1871, hired of the trustee eight hundred dollars, giving his note therefor, payable in six months, with interest at eight per cent., secured by mortgage on certain real estate. On the 8th day of July, 1873, Bates paid the interest on the note to July 9th, 1873. On the 5th day of July, 1873,

the mortgageor's right to redeem said mortgage was sold on execution, and purchased by the trustee for twenty-six dollars. On the same day the right of said Bates to redeem a mortgage on one undivided half of his homestead, given to one John M. Libbey, and his right to redeem a mortgage on a piece of land called the Mairs lot, given to one George Mairs, were sold on execution, and purchased by the trustee for one dollar each.

The equity of redemption of the Mairs mortgage was redeemed by Bates within a year from the sale. The other two equities were not redeemed. On the 30th day of June, 1874, Bates paid the interest on the $800 note to July 9, 1874, and on the 9th day of July, 1874, he paid the trustee $274 on the note, which was indorsed under date of June 30, 1874. This payment was made under the following agreement. Bates desired to sell the Mairs lot, which appears to have been embraced in his mortgage to the trustee, and the trustee consented to the sale on condition that Bates should pay on the note what he got for the lot, after paying the Mairs mortgage, which was $274, and the interest paid on the notes June 30, 1874. The trustee, by deed of quitclaim discharged its mortgage on that lot, and Bates made the payment on the note.

Plaintiff claims that the trustee is chargeable for the $274 so paid by Bates, on the ground that the equity of redemption of its mortgage from Bates became absolute in the trustee before the payment, and operated as a foreclosure of the mortgage and payment of the mortgage debt to the extent of the value of the property embraced in the mortgage, and that the purchase of the equity of redemption for twenty-six dollars by the mortgagee is conclusive evidence that the property was, at the time the title became absolute in the mortgagee, worth the full amount of the mortgage debt. We cannot assent to the last part of this proposition. The equity of redemption was purchased on the 5th of July, 1873. The title did not become absolute in trustee till July 5, 1874. The mortgaged premises may have been worth much less in July, 1874, than in July, 1873. Assuming that the payment was made on the note by Bates without any new agreement it was an admission by Bates that there was at least that sum due

on the note. But the result of the suit does not depend upon this point. The trustee held a mortgage on the Mairs lot. It was perfectly competent for the parties to agree that in consideration of a release of the lot from the mortgage the net proceeds of the sale thereof should be paid on the note, and having been so paid under that agreement the trustee has a right to hold it, and is not chargeable. *Exceptions overruled.*

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

ROBERT E. DAY *vs.* C. W. CHANDLER and J. D. PACKARD, trustee, appellant.

Kennebec, 1875.—May 31, 1876.

Trial.

When a dilatory plea or motion is overruled and exceptions are taken, the case should proceed to trial, and should not be marked law till the trial is closed.

ON EXCEPTIONS.

ASSUMPSIT wherein the principal defendant was defaulted before the trial justice, and the case brought to the supreme judicial court by appeal of the trustee.

The trustee on the return day, September 12, 1874, the case finds, made a verbal disclosure, and the case was continued to September 19th, when the trustee again appeared and contended that there was no legal disclosure on the return day and was defaulted by the trial justice. On motion of the trustee's counsel the default was on the same 19th, taken off, and the case continued to October 3, when the plaintiff's counsel filed a written protest with the trial justice against his jurisdiction extending any further, on the ground that he had no legal right to strike off the default. The trial justice decided that he had no right to strike off the default, and the trustee appealed. The appeal was entered in the supreme judicial court at the October term, 1874.

At the March term, 1875, the plaintiff's counsel made a writ-

ten motion that the judgment of the trial justice be confirmed and the action dismissed, and execution be issued from the proper court, on the ground that the trial justice had no right to strike off the default on a day to which the action was continued, and also on the ground that the trustee could not appeal from an interlocutory judgment.

The presiding judge overruled the motion and the plaintiff excepted.

W. R. White, for the plaintiff.

L. T. Carlton, for the trustee.

LIBBEY, J. This case is an appeal by the trustee from the judgment of the trial justice against him. At the second term the plaintiff filed a motion to dismiss the appeal for the reason that the trustee had no right of appeal and this court had no jurisdiction. The motion was overruled and the plaintiff filed exceptions. The motion is in the nature of a dilatory plea; overruling it did not end the suit, but kept it in court for further proceedings. In such case the exceptions should await the final disposition of the case. The court should have proceeded and closed the case and then if plaintiff was aggrieved it should have been marked law and continued. It is improperly entered on the law docket. R. S., c. 77, § 22. *State* v. *Inness*, 53 Maine, 536.

Dismissed from the law docket.

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

JOHN LINDLEY *vs.* UNION FARMERS' MUTUAL FIRE INSURANCE COMPANY.

Knox, 1875.—April 26, 1876.

Insurance.

Where there is a stipulation in a policy of insurance, that the policy shall be void, if the insured shall subsequently make insurance on the same property, and shall not give notice thereof with all reasonable diligence to the insurers, and have the same indorsed on his policy or otherwise acknowledged by them, if the second policy is void, it will not defeat the first, even though the subsequent insurers, after a loss, pay to the insured a sum of money by way of compromise of his claim thereon.

And where the case finds that the loss was accidental, and there is nothing to show that the subsequent insurance materially increased the risk, the plaintiff's claim on the first policy would not be defeated even by a valid subsequent insurance.

Such a breach of the terms of the policy by the insured is within the purview of R. S., c. 49, §§ 19 and 20.

ON FACTS AGREED.

ASSUMPSIT, on a policy of insurance against fire.

The plaintiff, July 1, 1869, made written application to the defendant company, for insurance upon his dwelling house and outbuildings, valued at $800, and upon his two barns valued at $300 each; and the same day received from the company a policy running four years, for $500 on his dwelling house and adjoining buildings, and for $50 upon each of his barns.

On January 1, 1873, the plaintiff applied in writing to the Hartford Fire Insurance Company for insurance upon the same and other property, (representing that there was no insurance thereon;) upon house, ell and shed, valued at $2000, upon stable valued at $800, upon furniture and apparel valued at $1000 and upon organ valued at $125; and upon the same day received from the Hartford Company a policy for $1300 on his house, ell and shed, for $500 on household furniture and apparel, $100 on organ, and $200 on barn.

The first policy contained this provision: "And if the said insured or his assigns shall hereafter make any other insurance on the same property, and shall not with all reasonable diligence,

give notice thereof to this company, and have the same indorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no effect," &c.

The Hartford policy contained a provision of forfeiture, "if the assured shall have, or shall hereafter make, any other insurance on the property hereby insured, whether such other insurance is valid or invalid, without the consent of the company written hereon."

Neither of the companies received the notice, or gave the consent provided in the policies.

June 17, 1873, the "house and outbuildings" described in the policies, were suddenly destroyed by fire.

The plaintiff brought suit upon the Hartford policy, which was entered March term, 1874, answered to by the company, and settled in July, 1874, for $1000 paid by the company to the plaintiff. Whereupon the Hartford policy was canceled and surrendered, and the action entered neither party at the September term, 1874.

The writ in this case was dated August 10, 1874; the plea was the general issue, and the case was made law on facts agreed, substantially as stated above.

D. N. Mortland & G. M. Hicks, for the plaintiff.

A. S. Rice & O. G. Hall, for the defendants.

I. The cases *Jackson* v. *Mass. Mut. Fire Ins. Co.*, 23 Pick., 418; *Clark* v. *New England Mut. Fire Ins. Co.*, 6 Cush., 342; and *Hardy* v. *Union Mut. Fire Ins. Co.*, 4 Allen, 217; which establish in Massachusetts, the rule of law, that to avoid a policy containing a clause against subsequent insurance without notice, the subsequent insurance must be by a valid and legal policy, are in direct conflict with *Carpenter* v. *Providence Washington Ins. Co.*, 16 Pet., 495; and *Bigler* v. *New York Ins. Co.*, 22 N. Y., 402. And that rule has received no countenance in this state except in the dictum of Judge Tenney, in *Philbrook* v. *New England Mut. Fire Ins. Co.*, 37 Maine, 137. Its adoption in this state is still an open question; and in view of the fraudulent practices to which it is likely to lead, it is respectfully submitted that it is good law, as well as the safer policy, to hold, with the

supreme court of the United States, that if the second policy, at the time it was made, was treated by all the parties thereto as a valid and subsisting policy, and has never in fact been avoided, then the policy declared on is void.

II. But however the court might decide the foregoing proposition, the plaintiff, in this case by bringing suit upon the second policy, and collecting it, is now concluded, upon the principle of election, from denying its validity. "The general rule is, that a person cannot accept and reject the same instrument." 2 Story's Eq. Jur., § 1077, n. 2. "This same rule of election applies to every species of right." *Weeks* v. *Patten*, 18 Maine, 42. It is analogous to estoppel, and constitutes a rule of law. In order to enable a court of law to enforce the principle, the party must have acted upon an instrument in such a manner as to be deemed concluded by what he has done, that is to have elected. 2 Story's Eq. Jur., § 1080. *Smith* v. *Smith*, 14 Gray, 532. *Weeks* v. *Patten*, 18 Maine, 42. *Smith* v. *Guild*, 34 Maine, 443.

The only cases to be found which sustain such a proposition are *Philbrook* v. *N. E. Mut. Fire Ins. Co.*, 37 Maine, 137, where the abovementioned dictum stands absolutely unsupported by authority, and *Hardy* v. *Union Mut. Fire Ins. Co.*, 4 Allen, 217, which is based solely upon the dictum. In neither of these cases, however, did the fraud of over-insurance, which is a distinctive feature of this case, exist. And in the latter case the court say, that the doctrine of estoppel does not apply, because the defendants "have not been injuriously affected" by the second policy. But in the case at bar the policy contains another clause, by the terms of which the plaintiff could only recover of defendants the proportion of the loss sustained, which the amount insured by their policy bore to the whole amount insured; so that defendants are injuriously affected by the second policy, first, by being deprived of the opportunity to cancel their policy, if they so elected, or, second, by being deprived of the benefit of the reduction of plaintiff's claim in the proportion above stated.

Barrows, J. The defendants place their defense wholly on the ground that the plaintiff, in violation of the terms of the policy on which he declares, made a subsequent insurance upon the

same property, and did not give notice thereof with all reasonable diligence to the defendant company, and have the same indorsed on his policy, or otherwise acknowledged by them in writing.

It is admitted by the defendants, that the buildings insured were accidentally destroyed by fire before the expiration of the term for which they were insured, and that preliminary proof of loss was received by them without objection. It is admitted by the plaintiff, that some months before the fire he procured a policy in the Hartford Fire Insurance Company, for a term of three years upon these buildings and certain personal property therein contained, for $2100, $1500 of which was on the buildings, upon which policy, after the fire, he brought suit, which the Hartford Company compromised, after it had been one term in court, by the payment of $1000, for which plaintiff canceled and surrendered his policy in that company. But the plaintiff contends that his policy in the Hartford Company was invalid, and that he could not have compelled that company by law to pay his loss thereon, on account of a stipulation which it contained, that "if the assured shall have, or shall hereafter make any other insurance on the property hereby insured, whether such other insurance is valid or invalid, without the consent of the company written hereon . . . this policy shall be void."

The defendants not questioning the proposition that the Hartford policy was void by reason of this stipulation and the prior insurance in the defendant company, endeavor to maintain, as matter of law, that the cases in Massachusetts, in which it is held that to avoid a policy containing a clause against subsequent insurance without notice, the subsequent insurance must be by a valid and legal policy, are likely to lead to fraudulent practices, and ought not to be followed, that they have never yet been adopted in this state, or received any countenance except in a dictum in *Philbrook* v. *N. E. Mut. Fire Ins. Co.*, 37 Maine, 137, that they are in conflict with decisions of the supreme court of the United States, and of New York, and that the true rule is, that "if the second policy at the time it was made was treated by all the parties thereto as a valid and subsisting policy, and has never in fact been avoided," then a prior policy containing terms and conditions

with respect to subsequent insurance like the one here in suit will be void. The defendants further contend that the plaintiff is estopped from denying the validity of the policy in the Hartford Company, by virtue of his reception of a valuable consideration in settlement of his suit thereon.

That there is a direct conflict between the decisions of the Massachusetts court in *Jackson* v. *Mass. Mut. Fire Ins. Co.*, 23 Pick., 418; *Clark* v. *N. E. Mut. Fire Ins. Co.*, 6 Cush., 342; and *Hardy* v. *Union Mut. Fire Ins. Co.*, 4 Allen, 217; and those of the United States supreme court, in *Carpenter* v. *Providence Washington Ins. Co.*, 16 Pet., 495; and the supreme court of New York in *Bigler* v. *New York Ins. Co.*, 22 N. Y., 402, upon the principal point here raised, cannot be denied.

The doctrine of the Massachusetts court is supported by the decision of the supreme court of Pennsylvania, in *Stacey* v. *Franklin Fire Ins. Co.*, 2 Watts & Serg., 506; and while a decision of the point by our own court was not absolutely necessary to the conclusion reached in *Philbrook* v. *N. E. Mut. Fire Ins. Co.*, 37 Maine, 137, it formed so important a step in the process by which the court arrived at the result, that it was doubtless well considered, and substantially agreed to.

The case of *Clark* v. *N. E. Ins. Co.*, 6 Cush., 342, was carefully considered, the doctrine of the United States court in 16 Pet., thoroughly discussed, and the Massachusetts court adhered to the decision in 23 Pick., 418. The point was up for a reconsideration in *Hardy* v. *Union Mut. Fire Ins. Co.*, 4 Allen, 217, a case not distinguishable in its essential facts from the one before us, where the company making the subsequent insurance had recognized the validity of the policy issued by them, and had paid the insured the amount secured by it; and the court reiterated its former decisions of the principal question, and adopted the doctrine asserted in *Philbrook* v. *N. E. Mut. Fire Ins. Co.*, 37 Maine, 137, with regard to the supposed effect of a payment by the subsequent insurers upon a void policy, holding that the facts which occurred subsequently to the loss did not constitute an estoppel in favor of the defendants.

Very clearly that must be so; the defendants could be no more

injuriously affected by those acts than they would be by a donation of like amount to the plaintiff from any other party. The mere contingency that the company issuing the subsequent policy will do this, does not amount to an insurance. If the rights of the parties are to be governed by a stipulation that the policy granted by the defendants shall be void in case the assured shall afterwards "make any other insurance on the same property," not made known to the insurers and indorsed or otherwise acknowledged by them, we think both law and logic unite in declaring that an abortive attempt to make insurance does not meet the call nor avoid the first policy.

The Hartford Company have fortified their condition by stipulating for a forfeiture, "whether such other insurance is valid or invalid;" and this would include a case of simple procurement or holding of a policy whether binding or not. But such is not the condition in the policy issued by these defendants.

We find no such overpowering weight of authority or reason in favor of the defendants' construction of the terms of this condition, as inclines us to retract the intimation given by this court in *Philbrook* v. *N. E. Ins. Co.*, 37 Maine, 137. The defendants having agreed to a default unless the plaintiff's action is defeated by what is erroneously claimed to be a second insurance, the defense fails. There is another view of the case leading to the same result. In 1861, the legislature of this state designing to make the contract of insurance what it purports to be, a contract of indemnity against all fair accidental losses by the perils insured against, enacted among other provisions in c. 34, Laws of 1861, that no breach of any of the conditions or terms of the contract by the insured shall affect the contract unless the risk was thereby materially increased.

This was substantially re-enacted in R. S., c. 49, § 19; and in § 20, it is declared that "all provisions contained in any policy of insurance in conflict with any of the provisions hereof are null and void; and all contracts of insurance made, renewed or extended in this state, or on property within this state, shall be subject to the provisions hereof." The defendants claim here to be re-

lieved by this alleged breach of one of the terms of the contract by the insured.

But under the statute provisions just quoted, the plaintiff's action would not be defeated even by a subsequent valid policy of insurance, unless it also appeared that the risk was thereby materially increased. The case is barren of any such proof. The insurers expressly admit that during the life of the policy the buildings were accidentally destroyed by fire, and that notice of the loss was given to them, which they received without objection. It was against such a loss as they have admitted, that they contracted to indemnify the plaintiff. *Defendants defaulted.*

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

SANFORD STARRETT *vs.* ROCKLAND FIRE AND MARINE INSURANCE COMPANY.

Knox, 1875.—May 6, 1876.

Corporations. Stockholder.

A written agreement to take and secure a certain number of shares in an insurance company before its organization is a proposal to take that number of shares, and does not make the subscribers thereto stockholders in such company, unless such proposal has been accepted by said company after it has been organized.

The return of the name of such a subscriber to the secretary of state, as a stockholder, by the secretary of the company, under a mistake of fact, and the entry of it upon the stock ledger do not constitute an acceptance of his proposal.

Such acts of the secretary are open to explanation and control by parol proof that they were committed under a mistake of fact in respect to any particular person whose name has been thus returned and entered.

ON REPORT.

ASSUMPSIT for $2,975, dividends on five shares of the capital stock of the defendant corporation.

Plea, the general issue.

The defendant company was chartered February 7, 1852, to continue twenty years. The charter provides that the capital

stock exclusive of premium notes and profits shall be $50,000, of which fifty per cent shall be paid within ninety days after publication of this act in some newspaper printed in Rockland, and the remaining fifty per cent within two years after the payment of the first installment.

The plaintiff before the organization of the company, subscribed to the amount of $500 in a book of original subscriptions to its capital stock, the caption whereof is as follows: "Rockland, February 13, 1852. We promise to take and secure, according to the provisions of the charter the amount set against our names in the capital stock of the Rockland Marine and Fire Insurance Company, situated at Rockland."

The company organized in March, 1872. The notice was published in the Rockland Gazette, March 26, 1872.

None of the subscriptions were paid in money. The parties who took the stock gave negotiable notes on demand with interest secured by collateral; and certificates of stock were issued as these payments were made. The plaintiff made no payments towards his subscription. There was evidence tending to show that he was called upon to pay for his stock by the president of the company some considerable time after the organization and that he declined to do it.

The plaintiff put in evidence a list in a book of the company headed, "Amount stock taken and secured," in which his name appears for five shares; also a list of the stockholders of the company certified by the secretary of state, dated January 2, 1854, in which his name appears.

The evidence tended to show that for many years the company was in a losing way; that in 1864, the stock began to appreciate and have a market value, and that in 1869, and thereafter large sums were divided; that the plaintiff claimed his shares and his claim was disallowed by the defendants. The facts are more fully stated in the opinion. The case was made law on report.

A. S. Rice & O. G. Hall, for the plaintiff.

I. In joint stock business corporations, membership is originally constituted by subscription to the shares in the capital stock, 1 Red. on Rail., p. 69; each subscription being an independent under-

taking; *C. & P. R. R.* v. *Bailey*, 24 Vt., 465, or a several contract, *Price* v. *G. R. & I. R. R.*, 18 Ind., 137; *E. & N. Y. C. R. R.* v. *Patrick*, 2 Keyes, (N. Y.,) 256.

The subscription in the case at bar is by an agreement "to take and secure according to the provisions of the charter the amount set against our names in the capital stock," &c. The charter provides for payment in money at stipulated times. The promise is therefore, equivalent to a promise to pay when required by the terms of the charter. It is more explicit than the promise to "take and fill," which was held to be sufficient in *Bangor Bridge Co.* v. *McMahon*, 10 Maine, 478.

It is no defect in the subscription that the corporation was not organized until after the subscription was made. *D. & N. R. R. Co.* v. *Wilson*, 22 Conn., 435.

So far as the subscriber is concerned, his status as a stockholder is determined by the act of subscription. *Chester Glass Co.* v. *Dewey*, 16 Mass., 100. When the subscription has been accepted by the corporation the proprietorship of the subscriber becomes absolute. *Pen. R. R. Co.* v. *Dummer*, 40 Maine, 172. Entry in the stock books, demand of payment of subscription, or commencement of suit for its recovery, furnish sufficient evidence of acceptance. *Pen. R. R. Co.* v. *Dummer*, 40 Maine, 172. *Same* v. *White*, 41 Maine, 512. *K. & P. R. R.* v. *Jarvis*, 34 Maine, 360. *Thompson* v. *Woodhull*, 1 Sandf., Ch. 411. *Richmondville Union Seminary* v. *McDonald*, 34 N. Y., 379.

Evidence of acceptance in this case is by entry on stock books, returns to secretary of state, and demand of payment.

Payment by the subscriber is not necessary to constitute proprietorship of stock. The foregoing cases in the 10th, 34th, and 40th Maine reports were to compel payment from delinquent proprietors. R. S., c. 49, § 6, gives a specific and direct action against the same class of persons to creditors of insolvent corporations. One who subscribes for stock is a stockholder, within the provisions of a charter making stockholders individually liable for debts, though he has paid nothing on his subscription. *Spear* v. *Crawford*, 14 Wend., 20. If a stockholder has not paid his subscription in full he owes for what is unpaid, but is none the less a

stockholder. *Curry* v. *Scott*, 54 Penn. St. R., 270. A subscriber to the stock of an incorporated company, whose subscription is received by the directors, and regular certificates thereof issued, is a *bona fide* stockholder, although he has paid nothing for his share. Angell & Ames on Corp., c. 4, § 13, note 1, and cases there cited.

One may have all the rights and be liable to all the duties of a member without a certificate. *Agricultural Bank* v. *Burr*, 24 Maine, 256. When a corporation has proceeded regularly to ascertain its coporators, and the owners of shares in its capital stock, and has entered them in its records, all parties become *prima facie* entitled to the rights thus secured to them. *Pen. R. R. Co.* v. *Dummer*, 40 Maine, p. 174. *Same* v. *White*, 41 Maine, 512. In the absence of any provision or by-law, the delivery of certificates of stock to subscribers is unnecessary. The stock is issued fully and effectually by placing it in the name of the subscriber in the books. *Thompson* v. *Woodhull*, 1 Sandf., Ch. 411.

II. The acts of Farwell in making up the stock list are binding upon the company. The whole business was left in his charge and he accepted such subscriptions as he saw fit.

III. It is made the duty of the secretary, by law, to keep a true list of the stockholders, and of the number of shares held by each, and record every transfer of shares in a book kept for that purpose, R. S., c. 49, § 3, to make annual returns to the secretary of state of the names of all the stockholders, their residence, the amount of stock owned by each, and the whole amount of stock paid in, R. S., c. 46, § 22, and on demand to furnish any officer legally holding any execution against the company with the names of the stockholders with their places of residence, so far as known, and the amount for which every person is liable. R. S., c. 46, § 29.

The stock books, so made up, are conclusive evidence of the ownership of stock in favor of creditors as against stockholders. *Stanley* v. *Stanley*, 26 Maine, 191.

The name of the plaintiff was regularly entered in the stock books as the proprietor of five shares, and he was annually

returned to the secretary of state up to the year 1864, as their owner. And these records were conclusive evidence of his ownership of the stock, in favor of creditors. *A fortiori* the same evidence should be conclusive in his favor as against the corporation.

IV. The amount to be recovered in this action is the sum of all the dividends, except dividend No. 3, which was paid in stock notes, with interest from February 4, 1874, the date of demand. Reckoned to the last day of the March term in Knox, this amount is $2,944.27.

This places the plaintiff upon an equality with the other stockholders, none of whom had made any payment upon their stock notes. The vote declaring the stock dividend contained a proviso that the president should have the right to reserve said dividend in all cases where the stockholders were indebted to the company.

J. Baker & T. P. Pierce, for the defendants.

DICKERSON, J. Assumpsit for $2,975, money had and received with the specification annexed, that the plaintiff claims to recover the dividends on five shares of the capital stock of the defendant company of which he is the owner.

The principal question to be determined is, whether the plaintiff was the owner of the stock as alleged in the specifications. If he was, it must have been by virtue of a contract entered into between him and the defendant company. Whether such a contract was made depends upon the acts of the parties. The only act the plaintiff ever performed, tending to make him the owner of the shares in question was to sign the following memorandum, to wit, "Rockland, February 13, 1852. We promise to take and secure according to the provisions of the charter, the amount set against our names in the capital stock of the Rockland Marine and Fire Insurance Company, situated at Rockland." This paper was signed before the charter was accepted by the corporators, and before the company was organized. The plaintiff was not even one of the corporators named in the act of incorporation. There was at that time no party in being, competent to sell or to contract to sell to the plaintiff the stock in question. It was impossible for the mind of the plaintiff, and the mind of the defendants

to meet and agree to the purchase and sale of any stock in the defendant company. The paper signed by the plaintiff was simply a proposal to take so many shares, a mere *nudum pactum.* Without accepting the plaintiff's proposal the company had no authority to compel the plaintiff to take the stock, nor had he any to compel the company to give him a certificate of stock upon tender of payment or security therefor. *Pen. R. R. Company* v. *Dummer*, 40 Maine, 172. *New Bedford & Bridgewater Turnpike Corporation* v. *Adams*, 8 Mass., 138. *Essex Turnpike Corporation* v. *Collins*, 8 Mass., 292. *Perkins* v. *Button Hole & Embroidery Machine Company*, 12 Allen, 273. *Lexington & W. Cambridge R. R. Company* v. *Chandler*, 13 Metc., 311.

The counsel for the plaintiff contend that the entry of the plaintiff's name in the stock ledger, by the secretary of the company, as owner of five shares, and his return of the same to the secretary of state, together with the call of the president upon the plaintiff to secure the stock he agreed to take, constitute an acceptance of the plaintiff's offer to take stock, made before the company was organized. The duty of keeping a true list of the stockholders, and of the number of shares held by each, and also, that of making a return of the same to the secretary of state are enjoined by the statute; no vote of the directors was necessary to authorize the secretary to perform these acts. R. S., c. 56, § 22, and c. 49, § 3. The amount of the capital stock of the company was limited to $50,000. It was necessary that that amount of stock should be taken and secured before the company could commence doing business. It appears that Hon. N. A. Farwell was the active promoter of the enterprise, and that he had the general care and management of the business of the company, discharging the duties of president and secretary, until January, 1853, when Maynard Sumner, esq., was chosen secretary. From the paper of February 13, 1852, Mr Farwell prepared a list entitled, "amount stock taken and secured," which contained the name of the plaintiff for five shares. This was the only list of stockholders that the company had previous to the election of a secretary. Upon the election of a secretary, Mr. Farwell delivered over to him this list together with the books and papers of

the company. This list was delivered and received, and kept as a schedule of the stockholders of the company. From it the secretary made his first returns to the secretary of state. Subsequently in about the year 1855, the secretary transcribed this list into a stock ledger, from which he afterwards made his returns, taking care to note the changes rendered necessary by the transfer of stock.

In view of these facts the acts of the secretary are to be regarded as the action of the company. The list headed "amount stock taken and secured," officially prepared by the president of the company was deposited in its archives, and was the only evidence the company had to show who were stockholders, when the secretary was installed in office. The entry of this list in a stock ledger in order to preserve it and facilitate its use was incident to the duties of the secretary, and the returns to the secretary of state made therefrom were required by law. Acts of the officers of a company done in the line of their official duty, or under the sanction of law, are as effectually the acts of the company, as if they were done by authority of a vote of its directors. By the preparation of the list of "amount of stock taken and secured," its entry upon the stock ledger, and their returns to the secretary of state the company recognized and held the plaintiff out to the world as a stockholder, and thereby accepted his proposal to take and secure five shares of their capital stock, unless these acts are explained and controlled.

The defendants seek to escape this result by showing that the name of the plaintiff was included in these several documents by mistake of fact. To this the plaintiff replies that the defendants are estopped to show such mistake. In order to constitute an estoppel by these acts of the officers of the company it must appear that the plaintiff has thereby been induced to change his position. Big. on Estoppels, 369. The conduct of the plaintiff was not changed in consequence of these acts. He predicated no action upon them, assumed no liabilities, made no payments, nor was he in any way prejudiced thereby. There is therefore no estoppel, and the acts in question are open to explanation and control.

Mr. Farwell testifies that he committed an error in making up

the list headed, "amount stock taken and secured," and there is no question but he did. That list purports to show the amount of stock taken and secured, and the names of the stockholders. In it the plaintiff's name is put down for five shares. There is no pretense that he ever "took and secured" any stock. In respect to him the list is erroneous; it falsifies the caption. The secretary testifies that his returns to the secretary of state, and the entry of the plaintiff's name upon the stock ledger were predicated upon the veracity of the list of "amount stock taken and secured." These were, therefore, likewise erroneous in respect to the plaintiff.

It is obvious that in all these instances the plaintiff's name as a stockholder was inserted by mistake of fact. His written proposal was to "take and secure five shares of the capital stock." He never did that, and yet these acts of the officers unexplained placed him upon the same footing, as a stockholder with those who had "taken and secured stock." We have seen that the plaintiff's offer to take and secure stock did not *ipso facto* make him a stockholder, neither did the recognition of him as such by the president and secretary, under a mistake of fact make him one. Their doings on this matter were not the voluntary and intelligent acts of the defendants, and cannot be regarded as an acceptance of the plaintiff's offer, or as a waiver of his compliance with its terms. The minds of the parties never in fact met and agreed upon the plaintiff's offer.

We attach no special significance to the demand upon the plaintiff to take and secure the five shares in controversy made by the president, since the evidence that proves the demand shows, also, that the plaintiff refused to do so, thereby repudiating his offer, and refusing to become a stockholder. It is by no means remarkable that the mistake was not discovered at an earlier day, as it was at that time that the stock began to have an appreciable value. Indeed, no dividends were declared until some five years after the discovery of the mistake. Nor does it operate to the prejudice of the company or to discredit the testimony of the president, and secretary, that upon the discovery and correction of the mistake, the secretary credited the five shares to Mr. Farwell's account, as this was done in pursuance of the directions of Mr. Farwell, to

charge all the stock to him that was not secured, given long before the success of the company was assured. Those directions thus given, are entirely consistent with the good faith of Mr. Farwell, and simply show his confidence in the ultimate success of the company, and his purpose to make that possible.

In order to maintain this action it is incumbent upon the plaintiff to show that he was the owner of the five shares claimed by him during the time the dividends were declared. This he has failed to do. Indeed the evidence proves that all the capital stock of the company was then owned and held by other persons, *Goodwin* v. *Hardy*, 57 Maine, 143.

Several other questions are raised and discussed by the respective counsel, but their determination is rendered unnecessary by the view we have taken of the case.

Plaintiff nonsuit.
Judgment for defendants.

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

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

JOHN W. COOMBS *vs.* CHARTER OAK LIFE INSURANCE COMPANY.

Knox, 1875.—May 31, 1876.

Evidence. Insurance.

A Policy of life insurance conditioned upon the payment of a given premium upon a day certain, becomes void unless the premium is paid within the time named.

In an action upon a life insurance policy, the insured cannot introduce evidence that the agent of the company before or at the time of the negotiation of the insurance agreed to extend the time of payment of premium beyond the time stated in the policy.

The plaintiff and wife procured a joint policy on their lives payable to the survivor on the death of either, conditioned that if the semi-annual premium of $13.93 were not paid each six months from April 25, 1873, the policy should cease and determine. The payment of the premium due in October, 1873, was not made or tendered till December following. *Held*, 1, the policy became void for non-payment of premium; 2, the plaintiff could not

be allowed to introduce evidence "that at the time this insurance was negotiated, the agent of the company assured the plaintiff that he might pay down what money he had, and take the policy, and that he would wait for the balance any time within the year, and take care of him."

ON EXCEPTIONS.

ASSUMPSIT, on a life insurance policy issued by the defendant company, April 25, 1873, on the joint lives of the plaintiff and his wife, for the sum of $1,000, payable to the survivor on the death of either.

The policy was in its terms in consideration of the annual premium of $27.86, to be paid on or before the 25th day of April in every year during the continuance of the policy, payable one-half in each six months from that date; and it contained the provision that "in case the said premiums shall not be paid on or before the several days hereinbefore mentioned for the payment thereof, then and in every such case, the said company shall not be liable to the payment of the sum insured, or any part thereof." The plaintiff paid $13.93 premium at the date of the policy, but did not pay or offer to pay any further premium until more than six months had intervened. About December 8, the plaintiff sent the amount of the semi-annual premium to the office of the agent of the company and in the absence of the agent it was delivered to the examining surgeon of the company occupying the same office. The agent and the company declined to accept the payment and offered to return the money. Flora E. Coombs, the plaintiff's wife, died January 7, 1874.

The plaintiff offered to prove at the trial "that at the time this insurance was negotiated, Smith, the agent, assured the plaintiff that he might pay down what money he had, and take the policy, and that he would wait for the balance any time within the year and take care of him," but the presiding justice excluded the evidence and ordered a nonsuit; and the plaintiff excepted.

D. M. Mortland & G. M. Hicks, for the plaintiff.

A. P. Gould & J. E. Moore, for the defendants.

WALTON, J. The life insurance policy declared on was made, and accepted by the assured, upon the express condition that, in

case the premiums should not be paid on or before the several days mentioned for the payment thereof, the company should not be liable to the payment of the sum insured, and the policy should "cease and determine."

By the express terms of the policy, the premiums were "payable $13.93 cash, each six months from April 25, 1873." Of course one of the premiums became due October 25, 1873; and the receipt given for the advance premium states that the payment was for six months, ending at noon of the 25th day of October, 1873.

This premium was not paid. Afterwards, in December, when the plaintiff's wife was sick, and about a month before she died, the amount was sent to the office of the agent of the company, and there left; but the agent was away at the time, and it was never accepted by him or the company; and the plaintiff was notified that it would not be accepted, and the money was tendered back to him.

To avoid the forfeiture of his policy the plaintiff offered to prove "that at the time this insurance was negotiated, Smith, the agent, assured him that he might pay down what money he had, and take the policy, and that he would wait for the balance any time within the year, and take care of him." But very clearly this evidence was inadmissible. It was an attempt to vary the terms of a written contract by parol evidence of what was said at the time it was negotiated. This the law will not allow. Written contracts must speak for themselves; and the language used cannot be varied or controlled by parol evidence of what was said by the parties or their agents at the time the contract was negotiated. A written contract may sometimes be discharged, or one or more of its provisions waived, by a parol agreement subsequently made; but never by what was said previous to or at the time it was made, except in a direct proceeding in equity to reform, rescind, or compel the specific performance of it. Never in an action at law. And this rule is applicable to insurance policies as well as all other written contracts. *Odiorne* v. *Ins. Co.*, 101 Mass., 551. *Pitt* v. *Ins. Co.*, 100 Mass., 500. *McLellan* v. *Cumberland Bank*, 24 Maine, 566. *Chase* v. *Jewett*, 37 Maine, 351. 1 Greenl. on Ev., § 275.

If the plaintiff could have shown an agreement with the agent of the insurance company, by which the premium was to be regarded as already paid to him, so that the agent would have been personally responsible to the company, and the insured would have become the debtor of the agent, and not the debtor of the company, and that this agreement was known to and acquiesced in by the company, then, within the doctrine of *Sheldon* v. *Ins. Co.*, 25 Conn., 207, and *Bouton* v. *Ins. Co.*, 25 Conn., 542, the forfeiture of the policy would have been saved.

But no evidence was introduced, or offered, tending to prove such an agreement as that. The plaintiff offered to prove by his own testimony that the policy did not contain the real agreement of the parties; that while the policy declared in express terms that the premiums should be payable "each six months," by the real agreement between him and the agent, a payment at any time within the year would be in season. This the law would not allow. There would be no safety in written contracts if it did.

Exceptions overruled.
Nonsuit confirmed.

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

ALFRED SLEEPER *vs.* UNION INSURANCE COMPANY.

Knox, 1874.—May 31, 1876.

Insurance. Mortgages.

When a part owner of a vessel effects a policy for the benefit of whom it may concern, a suit in case of loss may be maintained for the whole upon such policy, in the name of the party effecting the policy, or, in case of his death, by his administrator.

Thus: Alexander owning a fourth of the Abby Brackett, mortgaged the same to the plaintiff to secure a note of $1500, and procured an insurance for $2000, "on account of whom it may concern, loss payable to him;" the vessel being lost, and Alexander dead, *held*, 1, that his administratrix could recover in an action on the policy; 2, that payment of the judgment in her favor by the underwriters was a bar to a suit by the mortgagee.

ON MOTION.

ASSUMPSIT on a policy of insurance.

E. K. Alexander was the owner of one-fourth of the schooner Abby Brackett. In November, 1866, he borrowed of the plaintiff $2250, gave him a mortgage on his house to secure one note of $750, and a mortgage on the vessel for security of another note of $1500. Capt. Alexander, then living in Rockland and about to proceed in the vessel of which he was master on a voyage, engaged one Sumner to procure for him a policy for $2000 on his vessel. Mr. Sumner procured of the defendant company a policy of $2000, in and by which the company did "cause E. K. Alexander, on account of whom it may concern, loss payable to him, to be insured, lost or not lost, two thousand dollars on schooner Abby Brackett, for one year from November 10th, 1866, against a total loss only," and gave a premium note for $221, signed E. K. Alexander, by M. Sumner. Capt. Alexander wrote from New York to his wife, to go to Mr. Sumner's office and obtain the policy of insurance; she did so. On the 27th of April, 1867, the vessel with Capt. Alexander was lost at sea. His widow, Annie D. Alexander, was appointed administratrix of his estate and called upon the insurance company to pay. They delayed payment, and she commenced an action against them and obtained judgment upon default, at the September term, 1868, of the supreme judicial court for Knox county for $2087.33 debt and $12.55 costs. Execution was issued and paid by the defendant company (less amount of premium note deducted,) to Mrs. Alexander, administratrix.

The plaintiff commenced a suit against the defendant on the same policy, and claimed to recover upon the ground that there was an agreement between himself and Capt. Alexander when the loan was made, that Capt. Alexander should procure a policy of insurance on the vessel for him, and that he notified the company before it paid the loss, that he claimed it.

The presiding justice instructed the jury to return certain findings; and further, that if the policy was for the benefit of Alexander and Sleeper jointly, the plaintiff could not recover; that if they found for the plaintiff, he must recover the $1500 note with interest to the date of the verdict.

The jury returned a general verdict for the plaintiff for $2029,

being the amount of his $1500 note; and also found specially that the policy was not effected for the benefit of E. K. Alexander alone; or for the benefit of Alfred Sleeper alone; but was effected for the benefit of E. K. Alexander and Alfred Sleeper jointly.

The defendants moved to have the verdict set aside as against law, evidence and the weight of evidence. They also alleged exceptions to the rulings and charge generally; but seemed to waive these in their argument before the law court.

C. P. Stetson, for the defendants.

I. Captain Alexander as owner, notwithstanding Sleeper's mortgage of $1500, had the right to insure the vessel for the $2000 in his own name, and for himself, and to make the loss payable to himself, and in case of loss to demand the amount of it, and if not paid, to sue for and recover the same. It would be no defense for the company to say that Sleeper was mortgagee, and claimed the amount of the loss, or to say that there was a parol agreement between Alexander and Sleeper, that the policy should be for the benefit of Sleeper. After his death his administratrix had the same right against the company.

The jury have found that the policy was not intended for the benefit of Sleeper alone, but for Alexander and Sleeper jointly.

In *Ward* v. *Wood*, 13 Mass., p. 544, where a policy was made payable to the plaintiff on account of whom it may concern, and another party was interested in the property insured, it was insisted that as another party's interest was insured, he ought to have joined in the action; but it was there held, "that it was in conformity with the contract that the plaintiff should maintain the action in his own name, and it is agreeable to usage that he should do so in policies of this form."

On a policy in the name of W., for whom it may concern, the concern being himself and another, an action may be by W. alone. 2 Phillips on Ins., § 1958.

II. It is only where the party to whom it is payable has no interest that the action can be brought in the name of the other parties interested. 2 Parsons Mar. Law, 477. *Copeland* v. *Mercantile Ins. Co.*, 6 Pick., 197.

III. The judgment in favor of Mrs. Alexander is a bar to this

action. Separate actions cannot be brought unless the distinct interests are distinctly specified. 2 Phillips on Ins., 1960.

IV. The plaintiff, if the case is as he claims, has mistaken his remedy; he should have brought a bill in equity.

V. The judgment is final for the company. A judgment by default is equally binding as a judgment after trial of the issue before a jury. Freeman on Judg., §§ 330, 532, 215.

A. P. Gould & J. E. Moore, for the plaintiff.

I. This insurance was effected "on account of whom it may concern."

It was competent for the plaintiff to show that it was obtained for his benefit, in whole or in part, and was so intended by Alexander, at the time he ordered the policy; and he can maintain this action in his own name although the policy was made payable to Alexander. 1 Arnould on Ins. pp., 25* and 26*, and note. Angell on Ins., §§ 78, 80, 81, 82, and 379. *Aldrich* v. *Equitable Ins. Co.*, 1 Wood & Minot, 272. *Stephenson* v. *Piscataqua Ins. Co.*, 54 Maine, 55, 72.

And this may be shown by parol evidence. 1 Arnould on Ins., p. 170*, note 2, and authorities. 2 Arnould on Ins., pp. 1249*, 1250*, § 433, and note (1). 2 Parsons Mar. Law, pp. 29, 30, and notes. Angell on Ins., § 82. *French* v. *Blackhouse*, 5 Burr., 2727. 2 Duer's Ins., p. 9, § 8, and p. 29, § 21. *Finny* v. *Bedford Commercial Ins. Co.*, 8 Metc., 348, 350. *Finny* v. *Fairhaven Ins. Co.*, 5 Metc., 192.

The person, on whose account the insurance is thus made, is really a party to the contract, as much as if his name was written in the policy as promisee. He has not simply a beneficial interest, but is the person whom the insurer directly promises to indemnify; and it is on this ground that an action on the policy is maintainable in his name. 1 Phillips Ins., 152. *Newton* v. *Douglass*, 7 Har. & J., 450. *Buck* v. *Chesapeake Ins. Co.*, 1 Pet., 151.

In such cases, the relation of the person who procures the insurance to the assured, or the person for whose benefit the policy is intended, is simply that of agent. And if the agent, without instructions from the principal, causes the policy to be made pay-

able to himself, he does not thereby deprive his principal of any right.

Such an agency, like all other agencies, may be revoked by the principal; and would be terminated by the death of the agent; and if the termination of the agency is made known to the insurer before a loss upon the policy is paid, he would not be justified in paying to the agent, although upon its face the policy was payable to him. The introduction of this provision would not change the right of the person for whose benefit the insurance was effected; and if the agent, in his life time and before the revocation of the agency, should recover the money on the policy, he would hold it in trust for the principal. The provision, therefore, that the policy should be payable to him, would only create a trusteeship in the agent which might be revoked, like an agency, by the *cestui que trust;* and surely would be terminated by the death of the trustee, and would not survive to his personal representatives, or descend to his heirs.

If the insurer was informed of the trusteeship, or agency and of its termination, he would not be authorized to pay the money, in case of loss, to the personal representative of the trustee, or agent; and such representative could maintain no action upon the policy to recover the amount due to the principal, or *cestui que trust.*

If the agent, to whom a policy was made payable, should in his life time undertake to maintain an action upon the policy for the benefit of his principal, the principal might forbid it; and the agent could not afterwards proceed and recover the share due to his principal, although the agent might also have a personal interest in the loss. It was so held in *Copeland* v. *Mercantile Ins. Co.*, 6 Pick., 197, see page 205. *Farrow* v. *Commonwealth Ins. Co.*, 18 Pick., 53. 2 Parsons on Mar. Law, 34.

II. If the policy was intended for the benefit of both Sleeper and Alexander, and they thus became the parties insured, either joint or several, the judgment in favor of Mrs. Alexander is no bar to this suit.

If originally they were joint promisees, Alexander being dead, Sleeper alone could maintain an action upon the policy; and

the administratrix had no such authority, even to the extent of her husband's interest. The suit in her favor would have been defeated, if properly defended. Chitty says: "When one or more of several obligees, covenantees, partners or others having a joint legal interest in the contract, dies, the action must be brought in the name of the survivor, and the executor or administrator of the deceased must not be joined; nor can he sue separately, though the deceased alone might be entitled to the beneficial interest in the contract; and the executor must resort to a court of equity to obtain from the survivor the testator's share of the sum recovered." 1 Chit. Pl., 19. *Peters, adm'r*, v. *Davis*, 7 Mass., 257. Gould's Pl., § 61, (4th ed.)

And when the last survivor dies, his executor or administrator alone can sue; and the personal representatives of the partner or other person having a joint legal interest in the contract, who first died, cannot be joined. Collyer on Part., (4th Am. ed. by Perkins,) § 666, and note 3, and authorities there cited.

It would seem pretty clear that the interest in the policy in this case of Sleeper and Alexander was joint, although Sleeper's interest may be regarded as for a definite sum, to wit, $1500 and interest, and that in case of loss his claim had priority over that of Alexander and must be first satisfied out of the proceeds.

If this be so, it is very clear that Mrs. Alexander, as administratrix, could have legally maintained no action upon the policy.

But if Sleeper and Alexander had a several interest in the policy, Alexander's administratrix could only have maintained an action for her husband's interest in the policy.

Where the contract is with two or more severally, and their interest is several, no right of survivorship accrues between them. In such case, therefore, each, on his own death transmits his several interest, and right of action, to his own representative; the case being, in effect, the same as if a separate contract had been made with each of the original parties, for his part of the debt or demand. Gould's Pl., (4th ed.,) § 62, citing Cro. Eliz., 729. 2 Burr., 1197. 1 Saund., 154.

If this contract of insurance was joint and the interests of Sleeper and Alexander therein were joint, although the whole

policy survived to Sleeper, on Alexander's death, it may be that it was competent for the defendants by agreement with Alexander's administratrix to sever the interest; and this was effected by suffering her to recover judgment on the policy, and paying to her the judgment. This would work an extinguishment of Alexander's interest in the policy, although it would by no means affect the plaintiff's interest therein, or deprive him of the right to bring an action to recover it. *Austin* v. *Walsh*, 2 Mass., 401. *Baker* v. *Jewell*, 6 Mass., 460.

It is very clear, upon the authorities, that the defendants, by consenting to judgment against them in the suit of the administratrix in law, agreed to a severance of the interests or claims of Sleeper and of Alexander's estate in the policy; and that Sleeper may now proceed alone to recover his $1500 and interest, without any reference to, or even mentioning, the extinguished interest of Alexander's estate.

III. The judgment by the administratrix is no bar to the plaintiff's claim, although she was permitted, either by the neglect or fraudulent collusion of the defendants, to recover for the whole amount of the policy. Sufficient reason and authority for this has already been given.

The plaintiff is not estopped nor in any way to be affected by that judgment; because he was not a party to it; nor was he in any way privy to that suit. He had no knowledge of its existence and, before its commencement, forbade it and notified the defendants of his interest in the policy, showed them his mortgage and notes, and forbade their paying the policy to the administratrix.

It is a general principle, and one of the elements of the doctrine of *res judicata*, that personal judgments conclude only the parties to them and their privies. Bigelow on Estoppel, 46.

In the suit of Mrs. Alexander, she did not attempt to recover for the plaintiff's interest in the policy. The declaration in her writ is upon the interest of her intestate alone, and, if the defendants permitted her to recover a sum larger than that interest, it was their own fault. They did it with their eyes wide open, and after the most explicit information of the interest of the plaintiff,

and his repeated admonition not to suffer the administratrix to collect his share of the policy. There can be no pretense of the privity of the plaintiff, in that judgment.

We have already seen that although the policy was payable to Alexander, if it was intended for the benefit of Sleeper, as well as for himself, Sleeper became as much a party to the policy as if his name had been mentioned and his interest in it defined, and that, when knowledge of this fact was brought to the defendants, they were affected by it, just as if it was expressed upon the face of the policy. We have also seen that it would have been competent for Sleeper, in the life time of Alexander, to terminate Alexander's agency, and to prevent his prosecution of a suit, in his own name, to recover the whole policy. And it will hardly be questioned that his agency was terminated by his death.

But the presiding judge seems to have entertained the idea that that agency was in some way transmitted to his widow. He says: "But the suit may be brought in the name of the agent, and he brings it in trust for the benefit of the person for whom the policy was procured. If it was for the benefit of both Sleeper and Alexander, each having an interest in the policy, then the widow, having the policy, might bring a suit and recover; then, as I understand it, she would get judgment for the whole."

It seems she is to do this as agent. In what way the agency of the husband passed to his widow as such, we don't quite understand; and certainly the chief justice did not mean to say, that the agency of her intestate would be transmitted to her, by virtue of her letters of administration. And it is equally difficult for us to conceive, how she could be made an agent of the plaintiff, by the accidental possession of a policy of insurance, which belonged to him, and to which she was not a party, and in which no agency in her was created.

The policy was payable to Alexander, not to his administrator; and unless the policy belonged wholly to Alexander, she could maintain no action upon it. It was payable to him, simply as agent of whom it concerned; at his death that agency ceased, and did not descend to his administratrix, and those concerned could only maintain an action upon it. As it was not payable to her by

the terms of the contract, it could be sued by her only upon the ground of sole property in her intestate.

But if it can be imagined that in some way inconceivable to us she was invested with an agency for the plaintiff, that agency was terminated by the plaintiff before her suit, and a subsequent judgment in her favor is no bar to this action.

Bigelow says: "It seems clearly deducible from the cases, that where an agent brings suit in his own name, for a breach of contract or for a tort, in right of his principal but not at his instance, the judgment, though in favor of the plaintiff, will not bar an action for the demand by the principal." *Bigelow on Estoppel*, p. 70. See *Pico* v. *Webster*, 12 Cal., 140.

A fortiori this would be true if the defendant, as well as the agent, had been notified before the suit, that the agency was repudiated and that he was forbidden to recover or receive the money.

APPLETON, C. J. E. K. Alexander, being the owner of one-fourth of the Abby Brackett, mortgaged the same to the plaintiff to secure a note of hand of fifteen hundred dollars. Being about to proceed on a voyage, he procured an insurance on his vessel to the amount of $2000, "on account of whom it may concern, loss payable to him."

The policy thus obtained was forwarded to the wife of Alexander. The vessel being lost and Alexander dead, his wife, Annie D. Alexander, was appointed administratrix, commenced a suit on the policy and obtained a judgment thereon which the defendants have paid.

The jury have found that the policy was for the benefit of the plaintiff and Alexander to the extent of their respective interests. The question is whether upon these facts the plaintiff can maintain a second suit upon this policy.

When a broker or part owner effects a policy "for the benefit of whom it may concern," a suit in case of loss may be maintained upon such policy in the name of the party effecting the policy or in the name or names of those for whose benefit it was made and who are, and are intended to be, insured under the clause "on account of whom it may concern" or some similar form of expression,

although they are not named in the policy. "You may bring your action," observes Bailey, J., in *Sargent* v. *Morris*, 3 B. & A., 277, "either in the name of the party by whom the contract was made or of the party for whom the contract was made."

The administratrix of the party with whom the policy was made had the same right to bring the suit as her intestate. If the party with whom a contract is made can bring an action upon it, his administrator or executor can do the same. No instance can be found where it has not so been held. If the administratrix of Alexander could not do it, it would be the only exceptional case where it could not be done. If Alexander was a mere agent the suit would have been for the benefit of the *cestui que trust.* The same result would follow if the suit is brought by the administratrix. The court in such case will protect the party interested against the nominal party.

A recovery being had for the whole amount insured, this plaintiff might have recovered of the administratrix to the extent of his insurable interest. *Burrows* v. *Turner*, 24 Wend., 276.

It has been seen that an action may be maintained on a policy in the name of the party to whom the same is payable or of the parties "whom it may concern." But one action is maintainable. 2 Phillips on Insurance, §§ 1965, 1972. There is but one party who can maintain an action, either the party to whom the policy is made payable or the person or persons "whom it may concern."

A judgment has been recovered upon the policy in the name of the administratrix. She had possession of the policy and an interest in the same. She was authorized to commence a suit, and the suit so commenced was for the benefit of whom it may concern. A judgment has been recovered by her upon the policy, which has been fully satisfied. A second suit for the same cause of action, or for a portion of the same cause, cannot be maintained. "If there be any one principle of law settled beyond all question," observes Barbour, J., in *U. S.* v. *Leffler*, 11 Pet., p. 100, "it is that whenever a cause of action, in the language of the law, *transit in rem judicatam*, and the judgment thereupon remains in full force unreversed, the original cause of action is merged and gone forever." Unless such is the law, the defendants are without pro-

tection by any judgment rendered against them in a suit by the party with whom they contracted. New parties may claim to be included in the clause "whom it may concern" and this judgment be no better or more effectual bar than the one already rendered against them.

This plaintiff, it must be remembered, had no right to revoke the suit by the administratrix, inasmuch as her intestate had an interest in the policy. He might intervene for his own protection, but he could not, even if he had received the amount claimed by him as due, have defeated the action brought by Mrs. Alexander. *Copeland* v. *Mercantile Ins. Co.*, 6 Pick., 198. The defendants have paid a judgment rendered against them by a party authorized to sue, having possession of the policy and against whose suit they could not have made any legal defense whatever.

New trial granted.

WALTON, VIRGIN and LIBBEY, JJ., concurred.

DICKERSON, J., *dissenting.* It is the uniform doctrine of all the cases that an action may be brought and maintained upon a policy of marine insurance, in case of loss, containing the clause, "on account of whom it may concern," either in the name of the person who directly negotiated the insurance or in that of the party who owned the property and was intended to be insured. *Farrow* v. *Commonwealth Ins. Co.*, 18 Pick., 53. *Sargeant* v. *Morris*, 3 Barn. & Ald., 277. *Burrows* v. *Turner*, 24 Wend., 276. 2 Phillips on Ins., 610.

The party in interest, in such case, is entitled to maintain an action upon the policy in his own name although, by the terms of the policy, the loss is made payable to the party who directly negotiated the insurance. *Williams et als.* v. *Ocean Ins. Co.*, 2 Metc., 303. *Farrow* v. *Ocean Ins. Co.*, 18 Pick., 53.

The foregoing principles apply in cases where the party who effected the insurance had no pecuniary interest in the policy. Where, however, a policy, containing the clause, "to whom it may concern," loss payable to the party who effected the insurance, is procured for the joint benefit of both parties, the general principles of law applicable to joint obligees, joint promisees and others,

obtain. In such case, if one of the joint obligees or promisees dies, the survivor alone can maintain an action upon the contract.

In 1 Chit. Pl., 19, the author says, that "when one or more of several obligees, covenantees, partners or others having a joint legal interest in the contract, dies, the action must be brought in the name of the survivor, and the executor or administrator of the deceased must not be joined; nor can he sue separately, though the deceased alone might be entitled to the beneficial interest in the contract; and the executor must resort to a court of equity to obtain from the survivor the testator's share of the sum recovered."

So in Gould's Pl., § 61, 4th ed., the same doctrine is laid down with like clearness and force as follows: "on the death of one of two or more joint obligees, promisees, &c., the action must be brought by the survivor or, if there be more than one, by all the survivors. For, by the common law, rights of action, vested jointly in several persons, survive entire, on the death of any of them, to the survivors. If, therefore, one of two joint obligees dies, his executor or administrator can neither join in an action upon the contract with the survivor, nor sue alone at law for the part which belonged to his testator or intestate." The same principle runs through all the authorities upon this subject. *Clark* v. *Howe*, 23 Maine, 560. *Strang* v. *Hirst*, 61 Maine, 9. *Peters, admr.*, v. *Davis*, 7 Mass., 257. Collyer on Part., 4 American ed., § 666.

In the case at bar, the policy contained the clause, "on account of whom it may concern," "loss payable to E. K. Alexander," who negotiated the insurance. Alexander died before any action was brought upon the policy. The jury found specially that the insurance was effected for the benefit of Alexander and the plaintiff jointly. They were, therefore, joint promisees. The plaintiff sustains the same relation to the policy as he would if his name had appeared upon the face of it. In the contemplation of the contract he was the party whom the defendant company promised no less than Alexander. Both stood upon the same footing as joint promisees.

According to the foregoing principles, upon the death of either, an action upon the policy could only be maintained in the name

of the survivor. The action brought upon the policy, by the administratrix of Alexander, could have been successfully defended upon the ground that no right of action vested in her under the policy by virtue of her capacity as administratrix. But the defendant company, for some unexplained if not unexplainable reason, after ample notice of the plaintiff's claim and an offer on his part to undertake and prosecute the defense without cost to them, suffered themselves to be defaulted, and satisfied the judgment thus recovered against them, before the present plaintiff knew that any action had been commenced.

The judgment recovered by the administratrix under these circumstances is no bar to the plaintiff's suit. He is not estopped by that judgment either as a party or a privy to it. His name nowhere appears of record in that case, nor was he in any way made privy to it. He was ignorant of the whole proceeding, and not only had no opportunity, but was denied the right, to defend that suit. That judgment does not purport to have been recovered in any respect for the benefit of the present plaintiff. On the contrary, it excludes every theory of his interest or privity therein, as the record shows that it was recovered upon the allegation of Alexander's exclusive ownership of the policy. If it be said that the plaintiff was interested in the question raised and adjudicated upon in that suit and was therefore privy to it, the answer is that, by the acts of the defendant company, the plaintiff was precluded from showing his interest, and that they are not permitted to plead their own wrong in bar of the plaintiff's rights. They compelled his silence then, and ought now to be silent themselves. The payment of the loss by the defendant company to Alexander's representative, under these circumstances, affords the defendants no protection against their liabilty to pay the plaintiff.

It is no valid objection to the maintenance of this suit that the loss is made payable to Alexander by the terms of the policy. This provision simply makes Alexander the appointee or agent of the plaintiff to receive the amount that may become due to him under the policy. It is a personal trust, revocable at the pleasure of the plaintiff, during the life time of Alexander, and is revoked *ipso facto*, by his death. The notice of his claim given by the

plaintiff to the defendants and his protest against the payment thereof to Alexander's administratrix were sufficient to advise them that the authority given to Alexander to collect the loss for him was revoked, and that they would make such payment to her at their peril. Besides, the authority of Alexander to collect and receive the loss was personal, and did not enure to his representative, but terminated at his decease. His administratrix, as we have seen, had no right to maintain an action on the policy, upon any other ground, than that he was the sole owner thereof, which the jury by their verdict have negatived.

The defendants moved to set aside the verdict, not in terms, because it is against the instructions of the presiding justice, but because it is against law. The jury were instructed as follows: "If the action is brought in the names of the persons for whose benefit it was procured, it must be brought in the names of both parties. But the suit may be brought in the name of the agent and he brings it in trust for the benefit of the person for whom the policy was procured. If it was for the benefit of both Sleeper and Alexander, each having an interest in the policy, then the widow having the policy might bring a suit and recover. Then, as I understand it, she would get judgment for the whole. Then what would be the result? If the defendant company had notice that somebody else had an interest in the policy and they paid over a portion of that judgment wrongfully, the judgment to that extent would remain unsatisfied and might be enforced to the extent of his interest, if you are satisfied that he had an interest. So that if upon the whole evidence you find that the policy was made for the benefit of both parties and judgment was obtained in the name of the administratrix, then I instruct you that this action cannot be maintained."

It is obvious that the verdict of the jury, interpreted by the special finding, is contrary to this instruction, and it is also clear from what has already been said that this instruction is erroneous, and that the verdict of the jury may be sustained in this respect by both law and fact. As it is not claimed, and does not appear, that the verdict is against law upon any other grounds, the verdict cannot be set aside for the reason alleged.

The error in the opinion of the chief justice consists in the assumption that the administratrix of one of the parties interested in a policy of insurance has the same right to bring an action upon it, that her intestate had in his life time. This is contrary to the doctrine of the most approved text books, and the hitherto unbroken line of authorities, hereinbefore cited. No case is cited to sustain this view of the case, nor is it believed that any one can be found. The case of *Burrows* v. *Turner*, 24 Wend., 276, simply decides that where one of the parties originally interested in a policy of insurance collects the whole amount of the loss in his own name, and withholds from the other party his share, he is liable to such party, therefor, in an action for money had and received. In that case both of the parties were living, and the question, whether the representative of a deceased party jointly interested in a policy of insurance with another person or the survivor alone can maintain an action upon it, did not arise and was not considered by the court. I cannot resist the conclusion that the doctrine of the chief justice upon this branch of the case is not sustained by argument, principle or authority; it is *petitio principii.*

BARROWS, J., concurred in the dissenting opinion.

DANFORTH, J., concurred in its result.

PETERS, J., being interested, did not sit.

WILLIAM PERRY, in equity, *vs.* MARIAN PERRY *et al.*

Knox, 1875.—August 4, 1876.

Equity. Trust. Pleading. Infancy.

Though a suit may proceed against an infant, defending by his guardian, no decree for the conveyance of real estate will be made against him till he comes of age.

To a bill in equity to enforce a resulting trust in land against the widow and infant son of one W. A. P., (in whom the legal title was,) on the ground that the plaintiff made payment in cash towards the premises which were conveyed to W. A. P., who gave his notes for the residue secured by a mortgage of the same premises, which notes were taken up by the plaintiff except a balance which W. A. P., subsequently agreed to, and did, pay in consideration of extra advances previously made by the plaintiff, his father,

to him, the respondents demurred and pointed out the following grounds of demurrer: 1, the bill did not allege except inferentially that W. A. P., was dead; 2, it did not allege that he died seised of the trust, or that the respondent had or claimed to have any title to the premises in question; 3, it contained no prayer for general nor for particular relief, and did not specify the relief desired, or the mode or manner in which it was to be afforded; 4, it did not allege that the notes of W. A. P. were furnished other than on his own account.

Held, that the bill as drawn was defective, and that the demurrer thereto be sustained.

BILL IN EQUITY to enforce a resulting trust.

D. N. Mortland & G. M. Hicks, for the plaintiff.

A. S. Rice & O. G. Hall, for the defendants.

APPLETON, C. J. The complainant brings this bill to enforce the execution of a trust in his favor. He alleges that on September 10, 1856, he bargained for and purchased of John S. Harding a certain tract of land specifically described and set forth in the bill; that the same was conveyed by said Harding to William A. Perry, to hold in trust for this complainant "for a consideration of four hundred dollars in cash paid down and then furnished" by him, "and of three promissory notes of said William A. Perry, secured by a mortgage of said lot and buildings by said William A. Perry to said Harding;" that this complainant "furnished money with which to pay and take up said notes, and that with the money so furnished, said notes and interest thereon had been paid either by this complainant or said William A. Perry, on or before the 27th of July, 1859, except $160.89; that on said 27th of July, 1859, Octavia Harding, administratrix on the estate of said John S. Harding, deceased, discharged the said mortgage, and on the same day William A. Perry mortgaged said lot and buildings to said Octavia, to secure the payment of $160.89; that this complainant had assisted William A. Perry, more than his other children, in consideration of which he promised to discharge the last mentioned mortgage, and that said William A. has in fulfillment of his promise paid and discharged said last mentioned mortgage.

The bill further alleges that this complainant has occupied unmolested to the present time the premises in controversy.

The defendant has demurred to the bill, thereby admitting all facts duly set forth therein.

The bill nowhere alleges, except inferentially, that William A. Perry is dead. It does not assert that he died seized of the alleged trust or that the respondents have or claim to have any title to the premises in question.

The bill contains no prayer for general nor for particular relief. It fails to specify the relief desired or the mode and manner in which it is to be afforded. Story's Eq. Pl., §§ 40, 41, 42.

If the conveyance to William A. Perry was to "hold in trust" for this complainant, as the bill alleges and the demurrer admits, and that fact is set forth in such conveyance, it would be a trust within R. S., c. 73, § 11.

The bill alleges a payment by the complainant of "four hundred dollars in cash then paid down or furnished" by him, and of five hundred and fifty dollars in the notes of William A. Perry; but it does not allege that those notes were furnished by the complainant, or at his instance, or for his benefit.

If there was no written trust, then there could only remain a resulting trust, arising from the implication of law.

When two persons make a purchase and one of them pays a definite proportion of the purchase money, intending thereby to secure an interest in the land, a trust will result in his favor in the proportion of his payment to the whole sum paid. But such payment must be for a specific and distinct interest in the estate. *McGowan* v. *McGowan*, 14 Gray, 119. *Dudley* v. *Bachelder*, 53 Maine, 403. It will be perceived the bill contains no allegation of a trust for a portion of the estate. Neither does it contain any allegation that the notes of William A. Perry were furnished other than on his own account. The payment or advance of money after the purchase has been completed will not create a resulting trust. The mere fact, therefore, that subsequently the complainant paid the notes of his son, will not create a resulting trust. The general doctrine is that the consideration of the purchase must belong to the *cestui que trust*, or should be advanced by some other person as a loan or gift. The resulting trust, too, must arise at the time of the purchase and not subsequently.

The bill is against Marian Perry, the widow of William A. Perry and the administratrix upon his estate, but it is no where asserted that she held the real estate in controversy in trust.

William A. Perry is a minor. It is not alleged that the title to the premises in controversy is in him. But assuming it to be, and that the complainants by amendments to his bill and proof can establish the existence of a trust, it cannot be conclusive against the infant during his minority. Infants are within the protection of the court even after attaining twenty-one, till such time as they have acquired or had time to acquire proper information. Lewin on Trusts, 777. It is the general rule that an infant is to have six months after coming of age to show against a decree. *Harris* v. *Youman*, 1 Hoff., 178. Though a suit may proceed against an infant, defending by his guardian, no decree for the conveyance of real estate will be made against him till he comes of age. *Coffin* v. *Heath*, 6 Metc., 76. *Whitney* v. *Stearns*, 11 Metc., 319. Story's Eq. Pl., § 70.

The bill as drawn is defective. The complainant on motion, if he deems it advisable, may have leave to amend upon terms to be fixed at *nisi prius*. *Demurrer sustained.*

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

CHARLES P. BROWN *et ux. vs* INHABITANTS OF VINALHAVEN.

Knox, 1875.—October 27, 1876.

Principal and agent. Negligence.

One suffering damage by reason of the neglect or unskillfulness of the selectmen of the town or the physician employed by them, in the performance of the duties imposed upon town officers by R. S., c. 14, in relation to the small pox, has no remedy against the town therefor.

Thus: on the breaking out of the small pox in Vinalhaven, D.C. was employed in the pest house by order of the selectmen, remained there three weeks, and was then allowed by them to depart infected in person and clothing, in consequence of which the plaintiff, an inmate of D. C.'s house, caught the infection, lost the sight of an eye, became much disfigured and suffered great damage. *Held*, that the town was not liable.

ON REPORT.

CASE, setting out that the small pox broke out in Vinalhaven in the fall of 1872; that it became the duty of the town to provide a pest house and medical attendance, which they performed employing one Conway to act as nurse; that after Conway had been for three weeks exposed to the disorder he was allowed by the physician to leave the pest house and return to the dwelling of the plaintiffs' with whom he had before resided; that, relying upon the doctor's skill and the exercise of ordinary care by him and by the selectmen and believing, therefore, that said Conway was properly disinfected and cleansed, the plaintiffs associated with him; but, in fact, he and his clothing were still infected with the contagion which was communicated to Mrs. Brown, who had the disease so badly as to lose the sight of one eye and to be greatly disfigured. If proof of these facts would sustain the action it was to stand for trial; otherwise, the plaintiffs were to be nonsuit.

G. A. Perrigo & L. M. Staples, for the plaintiffs.

The selectmen being the municipal officers were *ex officio* a health committee. R. S., c. 14, §§ 14, 15. As such they lawfully acted within the scope of their authority for the town, but negligently; they did their duty in a negligent manner.

To the general rule that municipal corporations are not liable to a suit except when the right of action is given by statute, the following statute provision is relied upon in answer as an exception "When an act that may be lawfully done by an agent is done by one authorized to do it, his principal may be regarded as having done it." R. S., c. 1, § 4, cl. 21.

This clause is cited by the court in *Kidder* v. *Knox*, 48 Maine, 551, to the point that the selectmen had the right to contract for the town as their agents, and that the town would be liable on its contracts made by them.

Being liable for the acts of its agents in contract, it is submitted that they are also liable for the same reason for their tortious acts and negligence in this case under the maxim *respondeat superior.*

D. N. Mortland & G. M. Hicks, for the defendants.

If there has been a neglect of a public corporate duty for which

no remedy has been provided by statute for the party aggrieved, this suit cannot be maintained. *Mitchell* v. *Rockland*, 52 Maine, 118.

Barrows, J. If the action cannot be maintained upon the facts alleged in the writ, the plaintiffs are to be nonsuited, otherwise the case to stand for trial.

The writ sets forth the breaking out of the small pox in the defendant town, refers to the statute provisions touching the powers and duties of towns and town officers relative to the establishment of hospitals, the regulations to be observed by physicians and nurses and others exposed to infection, and the care to be taken to prevent the spread of malignant and contagious diseases; recites the employment of one Conway as a nurse by the selectmen of the town, his reception into a pest house by order of the selectmen, and a physician employed by them in behalf of the inhabitants of the town; and alleges in substance that he was carelessly and negligently thereafterwards permitted by them to return, without being properly cleansed and disinfected, to the house which he formerly occupied, of which the female plaintiff was an inmate; and so she contracted the disease to her great injury, suffering and loss, all which matters and things are circumstantially set forth.

The plaintiffs base their claim upon the mistaken idea that the selectmen, in the performance of the duties imposed upon them by the statutes in such cases, sustain to the town by whom they are elected, the relation of a servant to his master or an agent to his principal, and that the rule *respondeat superior* applies, if they conduct themselves carelessly or unskillfully. It is not pretended that the statute gives a remedy against the town to any one injured by reason of the negligence, ignorance or inefficiency of the town officers or those employed by them in these matters. By c.14, § 10, the town is required to pay a just compensation to parties interested when the proper officer upon due proceedings had, impresses or takes up any houses, stores, lodging or other necessaries, or impresses any man, under the provisions of the chapter. But beyond this, as to any liability of the town for the doings, misdoings, or omissions of its officers in the performance of the duties imposed upon them by law, the statute is silent.

The liability of a town upon contracts made within the scope of their authority, about the affairs of the town by such of its officers as are also its agents is unquestionable. But its responsibility for the torts or neglects of its officers in the performance of duties imposed upon them by law has never been affirmed, unless created by express statute provisions. On the contrary, the distinction between "corporations created for their own benefit" and "quasi corporations created by the legislature for purposes of public policy," in respect to their liability for such wrongs and neglects, was long since declared in our parent commonwealth in the case of *Mower* v. *Leicester*, 9 Mass., 247, and we believe has never been overlooked by our own court. *Adams* v. *Wiscasset Bank*, 1 Maine, 361. The principle which must be decisive of this case was so fully discussed in *Mitchell* v. *Rockland*, 52 Maine, 118, that a reference to that case and the authorities there cited, seems to be all that is necessary. *Plaintiffs nonsuit.*

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

MARGARET E. BARTER *et al. vs.* ARNOLD GREENLEAF.

Lincoln, 1875.—March 22, 1876.

Assumpsit. Frauds—statute of. Deed—acknowledgment of consideration not an estoppel.

The acknowledgment by the grantor of the receipt of the consideration of a deed is not a conclusive estoppel that it has been so received.

When a promise of payment or some other contract or thing to be done has been relied upon as the consideration of a deed and the grantee refuses to pay or perform, the grantor may recover the value of his property as upon an implied assumpsit.

ON EXCEPTIONS.

ASSUMPSIT, on account annexed for a lot of land. Also on a tecond count setting out that October 18, 1867, in consideration that the said Margaret would convey to him the defendant a cersain lot of land, situate in Wiscasset, of the value of $300, he

agreed to give her a bond to reconvey to her said lot with the buildings thereon, on time and terms therein to be expressed, that she conveyed to him the lot and that he went into possession of the same under her deed; that she demanded the bond of him; but he neglected and refused to execute and deliver it.

The writ was dated April 29, 1873. The plea was the general issue and a brief statement of the statute of frauds.

The plaintiffs offered to prove by parol evidence, every allegation in the second count of their declaration. The defendant objected to the proof by parol, whereupon the justice presiding ruled that assuming the allegations proved, they would not be sufficient to maintain the action, and ordered a nonsuit, to which ruling and order the plaintiffs excepted.

R. K. Sewall, for the plaintiffs.

B. F. Smith, for the defendant.

APPLETON, C. J. The plaintiffs' writ contains a count for the price of certain land, and another count on a special contract in which it is alleged that the female plaintiff conveyed certain land to the defendant at his special instance and request, and that in consideration of said conveyance, he verbally promised to give her a bond for the reconveyance of said land, and the buildings thereon, which though requested he has refused to do.

The contract as set forth in the second count is within the statute of frauds and cannot be enforced. *Long* v. *Woodman*, 58 Maine, 49. But if the defendant has a deed of the plaintiffs' land, and has agreed to give a bond for its reconveyance, and refuses to perform his agreement, he should not be permitted to retain the land so conveyed without consideration, and in fraud of the plaintiffs' rights. The acknowledgment by the grantor of the receipt of the consideration of a deed is not a conclusive estoppel that it has been so received. It would seem when a promise of payment or of some other consideration has been relied upon as the consideration of a conveyance, and there is a refusal to perform that the other party may recover the value of his property upon an implied assumpsit as in *Bassett* v. *Bassett*, 55 Maine, 127. *Basford* v.

Pearson, 9 Maine, 387. *Long* v. *Woodman*, 65 Maine, 56. *Thomas* v. *Dickerson*, 2 Kernan, 365.

Exceptions sustained.

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

EMMA G. CALL, libelant, *vs.* MOSES CALL.

Lincoln, 1875.—May 31, 1876.

Divorce. Exceptions.

After divorce decreed in a libel suit, and upon the wife's motion for alimony and provision for child, the court may order the husband to pay separate sums for the support of the wife and of minor child, and enforce the order by separate executions.

In such case, *held*, 1, that a gross sum may be ordered for the support of child; 2, that on exceptions to such orders the court may in its discretion order the husband to pay a specific sum for the support of the wife and child pending the exceptions; 3, that such specific sum when paid will not be in diminution of the amount first allowed as alimony, but will be in addition thereto.

To the order of court under R. S., c. 60, § 6, for the payment of money for the defense and support of the wife, exceptions do not lie.

The power of the court under R. S., c. 60, § 7, to decree to the wife her reasonable alimony is one of discretion, and to the decision of the presiding judge determining the amount, exceptions do not lie.

Under c. 60, § 19, the court may decree a specific sum to the wife for the support of a child, the care and custody of which is decreed to her, and the payment may be ordered in one sum or by installments, and to the decision of the presiding judge determining the amount, exceptions do not lie.

ON EXCEPTIONS.

LIBEL for divorce by the wife, containing a prayer for alimony and for provision for the support of Ellen C. Call a minor child of the parties. A divorce *a vinculo* was decreed in favor of the libelant, and the custody of the child awarded to her, at the October term, 1874.

Thereafterwards upon hearing of libelant's motion for alimony and provision for the child, the libelee's counsel contended that such provision for the child should be a periodical allowance made to continue so long as the mother should have the care of her,

and until the court might otherwise order; but the court made the following order: "Libelee to pay five thousand dollars for the support of his minor child, Ellen C. Call."

The court also ordered that the libelee pay libelant nine thousand dollars instead of alimony; and further ordered that separate executions issue for these sums respectively.

To the foregoing orders and decrees and to each of them, the libelee excepted.

The foregoing bill of exceptions having been allowed, upon motion of libelant's counsel, the court ordered "that the libelee pay the sum of $450 for the use of the libelant, into the clerk's office, one-half in thirty days, and one-half in sixty days, for the support of libelant and child till next term; and if not paid in thirty days after due, executions to issue."

Whereupon libelee's counsel prayed the court to add a provision that the said sum, when paid, should be allowed in diminution of the sum to be paid by the previous order, or other provision of like effect.

But the court denied the motion and to this denial the libelee also excepted.

At the April term, 1875, the court ordered that (a similar sum) $450 be paid by libelee into the clerk's office, one-half in ten days and one-half in sixty days from final adjournment, for support of libelant and child until next term; and in default thereof executions to issue. To this order and decree the libelee excepted.

The libelee moved that the court decree that said allowance of $450 be deducted from the sum that may be finally allowed and decreed said libelant in lieu of alimony. The court refused so to order. To said orders and refusal the libelee excepted.

W Hubbard, for the libelee.

A. P. Gould & J. E. Moore, for the libelant.

WALTON, J. This is a divorce suit. It is before the law court on two separate bills of exceptions. The first was taken at the October term, 1874, and the other at the April term, 1875. Both relate to allowances made to the wife for the support of herself

and a minor child, the care and custody of which were decreed to her. The first question is whether exceptions lie in such cases.

I. The R. S., c. 60, § 6, declares that pending a libel, the court may order the husband to pay the clerk, for the wife, a suitable sum of money for her defense, or prosecution thereof, and to make reasonable provision for her support; enter such decree for the care and custody of the minor children as they think right; and enforce obedience by appropriate processes.

Obviously, the object of this provision is to provide for the immediate wants of the wife. The allowance of exceptions to such an order, and the delay that would be thereby occasioned, would in many cases leave the wife to starve, or force her to become a public charge, or to accept support at the hand of charity. Such could never have been the intention of the legislature. The court is therefore of opinion that exceptions to such an order do not lie; and that the exceptions in this case should not have been allowed.

II. The same chapter, R. S., c. 60, § 7, declares that when a divorce is decreed to the wife for the fault of the husband, the court may decree to her reasonable alimony; or, instead of alimony, may decree a specific sum to be paid by the husband to her; and use all necessary legal processes to carry their decree into effect.

The court is of opinion that the power granted in this section is addressed to the sound discretion of the presiding judge, and that exceptions to his decision do not lie.

III. The same chapter, R. S., c. 60, § 19, further declares that the court granting a divorce, may decree concerning the care, custody and support of the minor children of the parties, and with which parent any of them shall live; alter their decree from time to time as circumstances may require; and enforce their decrees by any compulsory process they may think proper.

The court is of opinion that in the exercise of this power the presiding judge may decree a specific sum to be paid by the husband to the wife for the support of a child, the care and custody of which are decreed to her; that it is not essential to the validity of such a decree that the payment should be by installments, as

the support is furnished; though perhaps, in most cases, it would be better to make it so. The amount, as in other cases of allowance in divorce suits, must be determined by the presiding judge; and to his decision exceptions do not lie.

For these reasons, both bills of exceptions must be overruled.

Exceptions overruled.

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

WILLIAM H. PLUMMER *vs.* EDWIN STONE.

Lincoln, 1875.—May 31, 1876.

Referee. Trial.

When a cause is referred to be decided upon legal principles, and the referee neither reports nor is requested to report the facts or the questions of law arising thereon, his award is final.

ON EXCEPTIONS.

ASSUMPSIT for "lodging, board and entertainment of the defendant, his horses, servants and agents" at different times between December 28, 1870, and January 1, 1873.

At the April term, 1874, the action was referred to be heard and decided on legal principles. The report of the referee in favor of the plaintiff was offered at the October term, 1874, when objection to its acceptance was made in writing, on the ground in substance that the plaintiff during the time covered by his account annexed was a common innholder; that the lodging, board and entertainment charged for was furnished in his capacity of innholder, a business that he was carrying on without a license; that though the defendant at the hearing before the referee objected that the plaintiff had no license as an innholder, and though it did not appear that at any time during said period he had any such license, yet the referee ruled against the law that the plaintiff had a right to recover and so awarded. The court overruled the defendant's objection as insufficient in law, and ordered the referee's report accepted; and the defendant alleged exceptions.

W. H. Hilton, for the defendant.

N. M. Pike, for the plaintiff.

APPLETON, C. J. This case was submitted to the referee to be heard and decided upon legal principles. Although such was the case, the law and the facts were primarily to be decided by him. *Latham* v. *Wilton*, 23 Maine, 125. The referee has not submitted any questions of law arising in the case to our decision. He might have done so, but he did not. He was not requested to report the evidence, and without such request he was under no obligation to do so. His conclusion is final.

Exceptions overruled.

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

JOHN MCLEAN, administrator, *vs.* ADDIE C. WEEKS.

Lincoln, 1875.—July 1, 1876.

Probate practice. Fraudulent conveyance.

One to whom an insolvent person has made a gift of money or other personal property, is answerable to the administrator of such insolvent for the value thereof in a suitable action—where the gift is in money, or has been converted into money, in an action for money had and received. In the absence of intended fraud, the gift is valid as against heirs or subsequent creditors, and the interest of the donee will be regarded in the distribution to be made by the administrator, under the direction of the probate court; which is the proper forum for the adjustment of the rights of the various parties interested in the fund.

The proceedings in probate and insolvency, and the adjudication of the probate judge thereon are proper and necessary evidence to establish the condition of the estate, and should be exhibited by the plaintiff, in support of his right to the possession of the gift. When not appealed from, they are conclusive upon all persons as to the matters therein appearing, in the absence of fraud.

Nor does it make any difference that the suit against the donee was commenced before these proceedings were had, if they were completed in season to be offered in evidence at the trial.

Nor does it make any difference as to the administrator's right to recover, that a portion of the debts proved against the estate accrued after the date of the gift, provided there was a sufficient indebtment to make the estate insolvent at the time of the gift.

In this case, the gift was by a consumptive, within three months at most before his death. *Held*, that the gift was so near the date of the insolvent's death, that the jury were justified by the evidence before them, in finding that he was insolvent when it was made—in the absence of any proof tending to show fraud in the proof of debts, or in the exhibition of assets, or that there had been any material change in his pecuniary circumstances subsequent to the date of the gift.

In this case, the defendant was not questioned by the plaintiff 's counsel as to matters occurring before the donor's death, nor precluded from testifying to anything material that occurred subsequent thereto. *Held*, that as to matters occurring before the death of the donor, the defendant was not a witness, unless the plaintiff, the administrator of the donor, offered his testimony as to such matters. *Held* further, that he did not so offer himself, when the judge permitted the defendant's counsel to cross-examine him as to such matters, against the objection of his counsel.

Where the decedent gave to the defendant a large sum of money, which was needed for the payment of his own existing debts, and gave it partly in consideration of love and affection, and partly in consideration of her promise to nurse him until his death, the amount being out of all proportion to the value of the services, *held*, that an instruction, that if the decedent made, not such a contract as he would make as a business transaction simply, but was influenced to it in part by friendship and regard for the defendant, it would invalidate it, was not one of which the defendant could complain—that the mingling of any intention in the contract which operates a legal fraud will vitiate it.

In this case, *held*, that the defendant having rendered services to the deceased in his last illness, for which the plaintiff, his administrator, would be bound to pay, may retain out of the money given her, (by the deceased, when insolvent,) enough to compensate her for those services, to avoid circuity of action.

On exceptions and motion.

Assumpsit by the plaintiff as administrator of the estate of William Woodman, deceased, to recover the sum of $700, which he alleged was given to the defendant by Woodman, when he was insolvent.

The writ was dated February 16, 1869. The plea was the general issue.

The evidence tended to show that about the last of August, 1868, Woodman, then in declining health, solicited the defendant to stay and take care of him during his life, and agreed to give her $700, if she would do so; to which she finally agreed and stayed with him from that time till his death, December 25, 1868.

The defendant's sister testified that Woodman, some weeks before his death, told her he had given the defendant the money,

and that he had property enough left to pay all his debts, and have some left to give to his sister.

The plaintiff at the (second) trial, April term, 1874, put in his appointment as administrator, dated the first Tuesday of January, 1869; and under the defendant's objection, the inventory of the estate, the representation of insolvency dated May 3, 1870, the adjudication of the judge of probate thereon, the warrant to the commissioners of insolvency, and the adjudication thereon, the license to sell personal property, and other probate papers.

Hiram P. Carleton, one of the commissioners of insolvency, called by the plaintiff testified that he recognized the claim of Dole as one presented to the commissioners. On cross-examination he was asked whether the plaintiff made any objection to its allowance. The defendant's counsel proposed to examine the witness for the purpose of showing that Dole's claim was not justly due and proposed to introduce evidence to prove claims allowed, and not in fact due, for the purpose of showing that the estate was not insolvent. But the presiding judge ruled that the return of the commissioners, accepted by the judge of probate, was conclusive on this point, and excluded all evidence to show that claims allowed were not due, unless it was claimed that the allowance of the claims was procured by fraud. The defendant's counsel said that, as at present advised, he did not claim that the allowance was fraudulent.

The following paper signed, William Woodman, attested by a witness, and dated Jefferson, Dec. 3, 1868, was delivered to her by Woodman, in his life time: "I, the within named William Woodman, in consideration of friendship and affection, hereby give to Addie C. Weeks for her own use and benefit, the sum of seven hundred dollars."

The defendant testified that the money was paid her in September before the writing was made. Her counsel then proposed to examine her generally as to the agreement, and what was done in regard to the seven hundred dollars between her and Woodman, but the evidence was excluded.

On cross-examination a copy of the paper was shown her and she testified that she had the original at the time of Woodman's

death and claimed to hold the money by virtue of it, that she delivered it to her counsel in 1869. Her counsel then passed the original paper to the plaintiff's counsel who put it into the case, and read it to the jury.

The defendant's counsel then asked the defendant the following questions:

I. Had the money been delivered to you before the writing was?

II. Did you claim the money before the paper was delivered to you?

III. Was any money delivered to you when the paper was?

IV. Whether you claim the money on any other grounds than the paper?

The questions were objected to and excluded, on the ground that the defendant was not a competent witness to testify to what took place between her and Woodman before his death.

There was evidence in the probate proceedings tending to show that the estate of Woodman was solvent after making the gift. The administrator returned as assets aside from the $700, $499.17. The commissioners of insolvency returned a list of claims allowed of $583.68; but in this list was included an allowance of $416.48 to the administrator on his personal account in which the credit for land from Woodman to him was reckoned at $100 less than the consideration named in the deed; and a small amount was allowed for board and expenses accruing after the gift. On the other hand there was evidence tending to show, if the results finally reached in the probate court were correct, (and as the plaintiff claimed, conclusively showing,) that after the gift he had not sufficient assets remaining to pay the debts.

The defendant's counsel specially requested the following instructions to the jury:

I. That if the $700 was delivered to the defendant by Mr. Woodman as a voluntary gift, with no intent or purpose to defraud his creditors thereby, the gift would be valid against everybody except creditors whose debts existed at the time of the gift.

II. That the burden of proof is on the creditor, or the plaintiff

representing creditors, to prove that his debts existed at the time of the gift.

III. That if items of debt existing at the time of the gift, and items accruing after the gift, are mingled in one claim, and a gross sum allowed for the whole, the creditor is not in a position to recover back the gift.

The first request was given :—The second was given by adding at the end "exceeding the amount of the assets to be distributed." The third was refused. There was no evidence in the case that the defendant had used the money or received anything for interest or the use of it.

The judge, *inter alia*, charged the jury as follows:

"The law says that a gift, which a man cannot make without depriving himself of the means of paying his honest debts, is fraudulent against creditors. There may be no moral fraud in it, either in the giving or reception of it; but it simply amounts to this, that the party cannot legally hold it, if it is necessary for the payment of existing debts, and must and ought to return it, and as the whole matter, all the concerns relating to the dead man's estate are to be settled in probate court, if the estate is found to be insolvent, the gift must be deemed invalid and set aside, and the property go into the hands of the administrator; so much of it as may be found to be necessary to pay the debts and expenses of administration to be disposed of there, and the balance only, the donee would be entitled to."

"These proceedings, being had in the court whose business it is to take care of these matters, are conclusive, unless they are invalidated by fraud; and you would say that this estate was insolvent if you found, by an examination of those proceedings there, that there was not enough to pay the debts and that the debts existed at the time; and therefore the gift could not stand unless the defendant, upon whom the burden would then rest, has shown to your satisfaction that that condition of things was brought about by fraudulent practices."

"If this $700 was partly a gift from Woodman to the defendant, she could not retain it, in case the estate proved insolvent, and it was necessary for the payment of such debts. The law

would not allow a man to associate a contract of that description with a gift, to the prejudice of those he was then indebted to. The whole would have to go back into the hands of the administrator. Whatever was necessary for the payment of the debts that were then due, should be disposed of there, and the donee should look to the bond of the administrator for the protection of her rights."

"If William Woodman, believing that he had enough to pay all his debts and the defendant what he chose to and make his sister a present also, saw fit to make, not such a contract as he would make, as a business transaction simply, but being influenced to it in part by friendship and regard for the defendant, it would invalidate the proceeding."

The jury returned a general verdict for the plaintiff for $915.25, and found specially that Woodman agreed with the defendant beforehand, that if she and her sister would remain while he lived and take care of him, he would give her the $700; that the defendant performed the agreement on her part; that $6.00 per week for the full time was a fair compensation for the services rendered by the defendant to Woodman, and that Woodman gave the defendant the $700 in part in consideration of friendship and affection, and not wholly for her services in taking care of him."

The defendant moved to have the verdict set aside, because it was against the special findings of the jury, and against law and for excessive damages, and she also alleged exceptions.

J. Baker, for the defendant.

The counsel contended that the plaintiff could not recover in this action.

I. Because an administrator cannot maintain general assumpsit under the circumstances of this case. He asked the court to review their decision reported in 61 Maine, 277.

II. Because the money was paid the defendant under a valid contract; and she performed her part of it. She must perform her contract, no matter how long the time or how difficult the task. The parties took their chances, which happened to turn in her favor.

III. It is said this was a voluntary transaction, that "friend-

ship and affection constituted a part of the consideration"; but this finding is inconsistent with the first and second special findings, in which the jury found there was a contract and that it was fully performed by the defendant.

The counsel argued that the jury were misled by an error in the charge "that if the matter of friendship and affection entered in any way into the making of that contract it would invalidate the whole transaction;" "being influenced to it in part by friendship and regard for defendant, it would invalidate the proceeding." This instruction he submitted was too broad and calculated to mislead the jury, because it did not make the suitable distinction between inducements to a contract and the consideration of a contract.

The counsel contended that the probate proceedings were inadmissible to prove that Woodman was insolvent at the exact time of delivering this money or that the suit was in behalf of prior *bona fide* creditors, because those proceedings took place subsequent to the date of the writ, and because they were *ex parte*, and because an order rendering an estate insolvent, is in practice, and was in this case, made by the judge without evidence or inquiry on the petition of the administrator. The petition in this case does not state that the estate is insolvent, but only that the petitioner is "apprehensive that the estate will be insufficient to pay the debts."

The counsel contended that even if it were the law that the gift was void as to prior creditors only, the ruling of the court, that the whole of it should go into the hands of the administrator to pay the expenses of administration and all the debts, subsequent as well as prior, out of the fund, was inconsistent therewith.

The other points made by the counsel are sufficiently indicated in the opinion.

A. P. Gould & J. E. Moore, for the plaintiff.

BARROWS, J. To secure a just and legal settlement of all that pertains to the property, liabilities and affairs of persons deceased, the business is confided to a court of special jurisdiction acting under statute provisions at once comprehensive and minute, most

of them of long standing and approved practical worth, and seldom invaded by the rage for legislation which is so apt in avoiding one evil to create a score of new ones.

Under this system the property of the deceased goes into the hands of persons who give bond for the faithful performance of their duties, and thus become the representatives, not only of the deceased, but to a certain extent of all those who have any interest in or claims upon his property, however arising, and whether growing out of the acts or contracts of the deceased, or his relations to surviving kindred, friends or objects of his bounty.

A cardinal principle of this system is to secure, as far as may be, a just and equitable distribution of the property among those who have claims on it, giving priority to general creditors over donees, heirs or legatees, and to certain classes of creditors, holding preferred claims, over the general creditors.

But in order that the person charged with this distribution under the direction of the probate court may be enabled to make it, it is necessary that he should have the aid as occasion may require of the courts of common law and of equity to obtain possession of all which ought rightfully to be the subject of the distribution. And in doing this it follows from the fact that he is the representative of all who have an interest in the distribution, that he is entitled to any remedy which any of those whom he represents might have against those who are wrongfully in possession of the fund, or any portion of it. Hence as the representative of creditors he may have remedies both at law and in equity which would not have been available to the deceased. *Caswell* v. *Caswell*, 28 Maine, 232. *Martin* v. *Root*, 17 Mass., 222. *Holland* v. *Cruft*, 20 Pick., 321. *Fletcher* v. *Holmes*, 40 Maine, 364.

While the decedent, had he lived, would have no right to reclaim a gift of money on the ground that it was needed for the payment of existing indebtment, his creditors could pursue it in his life time in the hands of the donee; and so may his administrator upon proof that without it the property of the donor when he made the gift was insufficient to pay what he then owed.

When such proof is forthcoming the law will imply a promise, on the part of the donee of the money, to do what the law re-

quires, in an action for money had and received, brought by the administrator, as it will imply such promise even against the protestation of the defendant in other cases where money is wrongfully withheld. *Howe* v. *Clancey*, 53 Maine, 130. The question as to the maintenance of the action by the administrator against the donee in case of insolvency of the estate was fully and ably argued and carefully considered by the court with the aid of an elaborate dissenting opinion when this case was first presented, 61 Maine, 277, the main subject of discussion being whether the remedy was not confined to actions by individual prior creditors against the donee, or if any process could be maintained by the administrator whether it should not be in equity.

We think that the symmetry of the law is best preserved, that a multiplicity of suits, and a failure of all remedy for what in many cases might be a grievous wrong may be best avoided, by the decision then reached upon this point, and we adhere to it accordingly.

A donee cannot complain that in place of being subjected to as many suits as there were creditors wronged by his acceptance of the gift, he is required to take his place among other parties having claims upon the estate, protected by the bond of the administrator, and entitled to receive from his hands his just due in the distribution which takes place under the direction of the probate court.

That is the proper *forum* where the amount to which the donee is entitled shall be finally determined.

The act of the donor has given him a claim upon the money, subject only to the superior claims of those who, according to legal principles and statute provisions regulating probate proceedings, have a better right. That is all which the donor could do, and it is not for the donee to withhold the possession of the fund from the administrator, when without it the demands of those to whom the donor was indebted at the time of the transaction cannot be fully paid. The gift is void as to all that class of creditors, and must be so declared at the suit of the administrator who represents them. *Abbott* v. *Tenney*, 18 N. H., 109.

To ascertain whether the money ought to be placed in the hands

of the administrator, because a part or the whole of it is required for the payment of those having claims superior to those of the donee, is the primary and chief object of a suit of this description.

How much of it is wanted, and how much the donee shall ultimately be entitled to receive, if anything, are questions which will ordinarily belong to that jurisdiction which was created for the express purpose of adjusting and closing up all the transactions of the deceased. This view of the case will be found to dispose of most of the questions raised at the trial.

When an estate is settled in probate court as an insolvent estate, the claims of all creditors are made to depend upon their pursuing the statute mode of presentation and proof. They can maintain no action against the administrator, except in conformity with those provisions, even though the estate should ultimately prove solvent. *McNally* v. *Kerswell*, 37 Maine, 550. *Bates* v. *Ward*, 49 Maine, 87.

It is obvious that in cases of insolvency, any remedy which the individual creditor should undertake to pursue against the fraudulent donee would be liable to be greatly retarded, and perhaps ultimately defeated by force of these provisions as to the mode in which he shall proceed against the estate of his deceased debtor. The aim of the law seems to be to produce an equitable *pro rata* distribution of all that remains of the dead man's property or effects, and this cannot be done by leaving assets situated like these to be made available only at the option of prior creditors and their individual disposition to litigate. There are doubtless numerous precedents for holding fraudulent donees to answer to the suits of individual creditors, as administrators in their own wrong. But those who are thus liable are by statute made liable to the suit of the legal administrator. R. S., c. 64, § 37.

And it is in this way alone that the fund can be made available for all who are interested in it, in equal and just proportions, by a single suit.

The defendant complains that the record of the proceedings in insolvency was admitted to show that the money which she holds was needed for the payment of debts of the deceased, and that

unless impeached for fraud it was held conclusive as to the matters therein appearing.

We think it was proper evidence, and in a case of this sort indispensable evidence to establish the condition of the estate. To undertake to do it by proof of the various debts would be introducing too many subordinate issues to be properly canvassed in a single trial to the jury.

That it is legitimate evidence may be considered as settled. *Bates* v. *Avery*, 59 Maine, 354.

It is also well settled that the decrees of the probate court touching matters within its jurisdiction when not appealed from are conclusive upon all persons. *Simpson* v. *Norton*, 45 Maine, 281. *Loring* v. *Steineman*, 1 Metc., 204. *Merriam* v. *Sewall*, 8 Gray, 316. *Potter* v. *Webb*, 2 Maine, 257.

Nor does it make any difference that these proceedings were had in the present case subsequently to the commencement of the suit.

If they are had so as to be put in evidence in the form of conclusive adjudications at the trial it is in season. To postpone the commencement of the suit until their completion might not unfrequently make the remedy worthless.

The defendant's counsel complains that she was not allowed to go into an inquiry as to each of these creditors' demands, and to put the plaintiff to the proof of them in this suit, after they had been allowed against the estate by the commissioners of insolvency, and that she ought not to be concluded by the adjudication of the probate court upon those matters. We think there is no valid reason why she should not be so concluded in the absence of fraud, and the ruling allowed her to show fraud, if there had been any.

Shaw, C. J., remarks in *Loring, adm'r*, v. *Steineman*, 1 Metc., p. 208, as follows: "But in many cases, courts of peculiar jurisdiction have jurisdiction of the subject matter absolutely, and persons are concerned incidentally only according to their respective rights and interests;" and he instances a question of prize, where a court of admiralty, "by adjudicating upon that question settles it definitively in regard to all persons interested in that question whether they have notice or not." He adds "and we think the distribution of an intestate estate is analogous." Under our statute

provisions relative to the establishment of claims against an insolvent estate in the probate court, we think a similar doctrine must prevail with regard to the results reached. In the absence of fraud they stand as conclusive upon all persons whose rights may be affected thereby. Hence the legislature have provided carefully for the right of all whose interests are liable to be affected, to appeal and secure further investigation.

Not only is the general right of appeal from decrees of probate courts conferred upon all whose interests in property are acted upon, but a special right to appeal from the findings of commissioners of insolvency was given by c. 113, § 10, Laws of 1870, and R. S., c. 66, § 11, to heirs-at-law and all creditors, the spirit of which plainly includes donees, whose claims are subject to reduction by reason of existing insolvency, and legatees under a will.

But independently of all this, there is good reason in principle and authority for holding the proceedings of a court of this peculiar jurisdiction binding upon the rights of those whose interests they may incidentally affect, nor does this in any manner infringe any constitutional right to trial by jury. Defendant's counsel misinterprets the ruling as to the admissibility of evidence to impeach the report of the commissioners of insolvency, and to disprove the fact of insolvency. It was not confined to misconduct of the administrator in suffering the allowance of wrongful claims, or withholding assets. When the defendant proposed to put in evidence to show that the claims allowed by the commissioners were not due, it was excluded "unless it was claimed that the allowance of the claims was procured by fraud." But any expectation of showing that the allowance was procured by fraud was disavowed.

The door was opened quite wide enough so far as the ruling went; for mere evidence tending to defeat the claim, unless it conclusively showed it to be unfounded and unjust within the knowledge of the claimant or the tribunal, would be no cause to impeach the adjudication as fraudulent or void. If the doctrine of *Caswell* v. *Caswell*, 28 Maine, 232, upon this matter of impeaching the adjudication of the commissioners of insolvency, can be supported, it must be limited to cases where, as there, the illegality of the claim appears upon its face. It was not necessary to the

decision, for the case was disposed of when the court determined that, while an administrator of an insolvent estate might in certain cases be entitled to the aid of the court sitting in equity to obtain property conveyed by the intestate to defraud his creditors, in order that it might be appropriated to the payment of debts, such process could not be maintained by one of the creditors who had proved his claim against the estate.

The defendant further objects that supposing the proceedings in insolvency admissible and importing absolute verity, they are insufficient to make it appear that Woodman was insolvent when he made this gift and therefore insufficient to establish the right of the plaintiff to have the gift returned as assets of the estate for the payment of debts and charges of administration. It is easy to suppose cases where this would be so. But the evidence introduced here shows the date of the gift very near the time of Woodman's decease, and during his last illness, and that the bulk of the debts which he owed, (to an amount considerably exceeding all that he possessed including this money) originated prior to this transaction. In the absence of any evidence tending to show that he gained or lost or transacted any considerable amount of business after this, we think there is enough to authorize the jury to find, as the instructions required, that the estate was insolvent by reason of debts existing at the time when the gift was made. The jury could not have failed to understand that it was the solvency of the donor at that point of time which was in question, and that it was incumbent upon the plaintiff to prove that he was insolvent then.

It should be understood that it is not the representation of insolvency and the decree of the judge of probate for the appointment of commissioners which is regarded as conclusive evidence of the fact of insolvency. The evidence would be imperfect without the report of the commissioners, and the accompanying documents and the decree thereon, together with the other proceedings establishing the amount of the assets. In cases where a longer time had elapsed between the gift and the decease of the donor, of course other evidence would be necessary to make out what the plaintiff is bound to prove in order to entitle him to a verdict. But these

proceedings in insolvency in the probate court are the proper foundation and are conclusive, as to the facts therein set forth unless impeached (as all judgments are liable to be) for fraud. Nor is it of any importance that some portion of the debts thus proved before the commissioners of insolvency accrued after the date of the gift.

The proof shows and the jury found that, unlike the case of *Usher* v. *Hazeltine*, cited for the defendant, Woodman was in debt beyond his means of payment when he gave this money to the defendant. The proper distribution is to be made, as we have seen by the probate court, and with the data before them, it is not perceived that there will be any difficulty in arriving at a just apportionment.

Under existing statutes the defendant could not be a witness as to what occurred before the death of Woodman, unless the administrator offered his own testimony in relation to it. R. S., c. 82, § 87. Nor as to such matters does chapter 145, Laws of 1873, aid the defendant. The suit was pending when the statute was passed. Nor was the witness prevented from stating any thing which occurred since the death of Woodman that was material. Nor was she questioned by plaintiff's counsel as to what occurred before Woodman's death.

The defendant further complains that there was an inconsistency in the finding of the jury that Woodman agreed beforehand with the defendant that if she would take care of him while he lived he would give her the $700 and that she performed her part of the agreement, and the further finding that he gave her the $700 in part in consideration of friendship and affection and not wholly for her services, and that this inconsistency was brought about by erroneous instructions upon this point.

We think the instruction taken as a whole so far as it relates to the effect of friendship and affection upon the validity of the contract was correct.

If the making over of the $700 to the defendant by Woodman was partly a gift; or to use the language of the instruction, "if Woodman in and by that transaction made, not such a contract as he would make as a business transaction simply, but was influenc-

ed to it in part by friendship and regard for the defendant it would invalidate it."

The mingling of any intention or design in the contract which the law regards as fraudulent will vitiate it. *Brinley* v. *Spring*, 7 Maine, 241. *Welcome* v. *Batchelder*, 23 Maine, 85. *Holland* v. *Cruft*, 20 Pick., 321. *Martin* v. *Root*, 17 Mass., 222. It is true that in the cases just cited there was more or less testimony indicative of positive fraudulent purpose and design. But the contract is just as much invalidated as to all those against whom it would operate as a fraud in law, as though there had been actual fraudulent intent on the part of the donor; while in the absence of such fraudulent purpose participated in by the donee the same results would not follow in respect to the rights of heirs that are suggested in *Martin* v. *Root;* but the right of the donee, innocent of all fraudulent design, would be protected in the probate court to such distributive portion, if any, as she might be entitled to by virtue of the donor's good will evinced by the act of gift. This right was recognized in the instructions given. We do not perceive that the substantial rights of the defendant were infringed at the trial save in one particular. She had rendered services in pursuance of the agreement she made with Woodman in connection with the reception of the gift which the jury have found were worth six dollars a week from the last of August to Dec. 25, when he died. They were rendered during his last illness and in the expectation of payment. They constituted a preferred claim against his estate which the administrator would be obliged to pay in full before proceeding to pay the general indebtment. Such claims need not be laid before the commissioners. *Flitner* v. *Hanley*, 18 Maine, 270. S. C., 19 Maine, 261.

Circuity of action should be avoided.

Her liability here is strongly akin to that of an administrator in his own wrong and he would have a right to retain whatever sums received by him which, if withdrawn from his hands, the rightful administrator would be compelled to pay. *Tobey* v. *Miller*, 54 Maine, 480.

The plaintiff must remit $102 and interest thereon from the

date of the writ, February 16, 1869, to the date of the verdict at the April term, 1874, as of the latter date, and thereupon the entry will be *Motion and exceptions overruled.*

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

LEONARD BRIGHTMAN *et als. vs.* INHABITANTS OF BRISTOL.

Lincoln, 1875.—August 31, 1876.

Nuisance. Municipal corporations.

When an erection itself constitutes a nuisance as a building in a public street obstructing its safe passage, its removal or destruction may be necessary for the abatement of such nuisance.

When the nuisance consists in the wrongful use of a building harmless in itself, the remedy is to stop the use.

When the act done or the thing complained of is only a nuisance by reason of its location and not in and of itself, the court will not order the destruction of what constitutes the nuisance but will require its removal or cause its use, so far as such use is a nuisance, to cease.

A stationary engine, though declared in certain conditions to be a nuisance by R. S., c. 17, § 17, is within the protection of the law, and if adjudged to be a nuisance by a court of law, is to be removed as provided by § 20, at the expense of the owner; but no law sanctions its destruction by a mob.

Buildings, the erection of which under conditions is prohibited by R. S., c. 17, § 5, are still, not being nuisances *per se*, within the protection of the law, and when destroyed by a mob, the town is liable to indemnify the owner for three-fourths the loss or injury sustained, he being himself within the provisions of R. S., c. 123, §§ 7 and 8.

In a suit against a town for indemnity for injury to property destroyed by a mob under R. S., c. 123, §§ 7 and 8, an instruction to the jury that it was the duty of the plaintiffs to satisfy them that they used all reasonable diligence to discover the offenders was *held* unobjectionable.

So, in such suit, evidence to show the property injured or destroyed was a nuisance, it not being a nuisance in and of itself, is not admissible as showing or tending to show contributory negligence on the part of the plaintiffs.

An instruction that the measure of damages was three-fourths of the actual value of the property at the time it was destroyed is the true rule as to damages.

ON EXCEPTIONS.

CASE, under R. S. 1857, c. 123, § 8, for three-fourths of the value

of a porgy oil factory situated in Bristol alleged to have been destroyed by a mob, April 29, 1868.

The plea was not guilty. At the trial at the October term, 1871, it appeared that the plaintiffs built the buildings in question, were in the occupancy of them at the time of their destruction, and had been occupying them for some time previous, under a claim of ownership not seriously questioned. The factory consisted of three buildings, containing the machinery and apparatus thereto affixed, as follows: one steam engine, two boilers, and piping, eight cooking tanks, four skimming tanks, two steaming tanks, seven cooling tanks, two store tanks, and the shafting and machinery necessary to said engine, one porgy press, and two curbs.

John Carter, a watchman employed by the plaintiffs, testified to the manner of the destruction; that he watched from the last of March, 1868, to October; that at the time the factory was burned, April 29, 1868, he was on his guard armed with a common musket loaded and had another gun at the watch house near by; that between twelve and one o'clock, a starlight night, he saw a boat with five men approaching; he hailed, they answered; that he forbade their landing, but they did land, disarmed him, and led him away; that three of the number guarded him; that six other boats with some thirty or more men in all, armed with guns, landed and in a short time the factory was on fire and consumed; that most of the men left in boats as they came, before the fire had made any considerable progress; that his keepers then left; that his gun was missing; that the nearest building was a quarter of a mile away, occupied by women and children; that it was twice that distance to a house occupied by men.

The defendants' counsel offered to prove, by the plaintiff Brightman and others, the strong and offensive odors arising from the factory, to show that it was a public nuisance, and a nuisance to the people residing in the vicinity; but all evidence to show the factory a nuisance was excluded.

There was evidence on both sides tending to show that there was a strong prejudice and hostility against porgy factories existing among a large portion of the community round about.

Upon this point, Brightman testified: "I did not know there was a strong popular feeling against my works prior to the fire. I heard a flying rumor against factories. I did not understand there was any particular hostility to me."

After introducing evidence for the purpose of showing the destruction of the factory and machinery, the plaintiffs introduced evidence tending to show that they used reasonable diligence to procure the conviction of the offenders; that they exerted themselves for that purpose, and employed one Moses Sargent of Boston, a professional detective, and others, to work for the same purpose; and that all the facts discovered tending to show the guilt of any party or parties were communicated to Henry Farrington, who was then county attorney, and that Benjamin F. Brightman, one of the plaintiffs held himself in readiness to go before the grand jury, at the request of the county attorney, but was not requested to do so and was informed by the county attorney that he need not appear unless notified that he was wanted.

The defendants requested the court to instruct the jury:

I. That if the plaintiffs erected and maintained their factory, with a stationary steam engine, without a license therefor from the municipal officers of the town of Bristol, and used the said engine for operating their works, it was a common nuisance.

II. That if the said factory was operated by the plaintiffs in such manner as to make it a common nuisance, and was a common nuisance, and such character of the factory caused or contributed to the destruction of the property in the manner alleged, the plaintiffs cannot recover.

III. The plaintiffs must use all reasonable diligence in good faith, and for the real purpose of convicting the offenders, and not merely for the purpose of laying the foundation of their action against the town for damages.

IV. That it was the duty of the plaintiffs to furnish to the municipal officers of the town, on request, such evidence as they had discovered, to the end that they might know the offenders and have an opportunity to bring their action against them.

V. That if the plaintiffs were maintaining their factory with their stationary steam engine without license therefor, they were

without legal right so to do; and if they are entitled to recover at all, the measure of damages is three-fourths of the actual value of the property, and not three-fourths of what it might be worth for such use, at that place, if they had legal right to so use it.

The first and second requests were not given, and the presiding judge gave no instructions on those points, but excluded them from the consideration of the jury. The third request was given as qualified herein; the fourth was not given; and as to the fifth, the first part was not given, but the jury were instructed that if they found for the plaintiffs, the measure of damages was three-fourths of the actual value of the property at the time it was destroyed.

The court instructed the jury that it was the duty of the plaintiffs to satisfy them that they used all reasonable diligence to discover the offenders. It was not a question of success or want of success in doing so; but if the plaintiffs used due diligence in discovering and procuring evidence to show who the guilty parties were, in good faith, and for the purpose of convicting them, and communicated such evidence and facts as they discovered, or were known to them, to the officer whose duty it was to prosecute, and were ready to act under and follow his directions, and did so act, that was sufficient, even though they never made complaint to the grand jury.

The jury returned a verdict for the plaintiffs for $3119.90, and the defendants alleged exceptions.

J. Baker, for the defendants.

A. P. Gould & J. E. Moore, for the plaintiffs.

Appleton, C. J. This is an action on the case under R. S. 1857, c. 123, § 8, to recover three-fourths of the value of a porgy oil factory, alleged to have been burnt and destroyed by a mob, on 29th April, 1868. A verdict was rendered in favor of the plaintiffs, and the case comes before us upon exceptions to the rulings of the presiding justice.

I. The defendants' counsel offered to show that strong and offensive odors arose from the plaintiffs' factory, and that it was a

public nuisance, and a nuisance to those residing in its vicinity, but all evidence to show the factory a nuisance was excluded.

It may be conceded that the factory is a nuisance within the provisions of R. S. 1857, c. 17, § 1, and that the noxious exhalations, offensive smells and stench arising from its operations approximate to the unbearable. But the manufacture is not, in and of itself, unlawful. It is not prohibited. It is sanctioned, if carried on in a place which has been duly assigned for such manufacture. The statute does not require the destruction of the buildings or of the machinery used in its operations, but that the business should not be carried on at a place, where from its location it would be a nuisance. The statute, giving the power of abatement after conviction upon due process, does not in addition confer upon an irresponsible public the right to enforce the penalties it establishes, without process of law. A lawful business may so be carried on as to become a nuisance. Undoubtedly in certain cases and under certain limitations, nuisances may be abated by those specially aggrieved thereby. But when the subject matter of complaint is lawful *per se*, and the nuisance consists not in the business itself, but in the unsuitable place in which it is carried on, its abatement must be by the judgment of the court, and by the officers of the law carrying into effect such judgment, and not by the blind fury of a tumultuous mob. Only so much must be abated as constitutes the nuisance. If it consists in the use of a building, such use must be prohibited and punished. If the location is what constitutes the nuisance, it must be removed. A smith's forge, in *Bradley* v. *Gill*, Lutw., [29.]; a tobacco mill in *Jones* v. *Powell*, Hut., 136; a manufactory for spirits of sulphur, in *White's case*, 1 Burr., 333; a distillery, in *Smith* v. *McConathy*, 11 Miss., 517; a slaughter house in *Brady* v. *Weeks*, 3 Barb., 157; a livery stable, in *Coker* v. *Birge*, 10 Geo., 336; a melting house in *Peck* v. *Elder*, 3 Sandf., 126; a gaming house or grog shop, in *State* v. *Paul*, 5 R. I., 185; a powder magazine, in *Cheatham* v. *Shearon*, 1 Swan, 213; a blacksmith shop, in *Norcross* v. *Thoms*, 51 Maine, 503; a tallow factory in *Allen* v. *State*, 34 Texas, 230; a tannery, in *Rex* v. *Pappineau*, 1 Strange, 686; have been declared nuisances, because of their unsuitable

location, but that will not justify a riotous mob in burning and destroying them. A tomb erected upon one's own land is not necessarily a nuisance; but it may become such from its location. *Barnes* v. *Hathorn*, 54 Maine, 125. But it is not therefore to be destroyed. Its use may be prohibited. The plaintiffs' porgy oil factory stands upon the same ground.

These views are sustained by an almost unbroken series of decisions. In *Rex* v. *Pappineau*, 1 Strange, 686, the defendant was indicted for a nuisance by reason of his tannery, and fined £100. A writ of error was brought, and one of the reasons given for its reversal was, "that the judgment was erroneous for want of an adjudication that the nuisance be abated." "But," says Lord Raymond, "regularly the judgment ought to be, to abate so much of the thing as makes it a nuisance. . . If a dye-house or any stinking trade were indicted, you shall not pull down the house where the trade was carried on." In the same case, Reynolds, J., says: "Roasting of coffee was formerly thought a nuisance and yet nobody ever imagined the house in which it was roasted should be pulled down." Then referring to the tannery, he adds, "I should think it would have been going too far, if they had adjudged the whole erection to be abated for a particular abuse of it in dipping some stinking skins." In *Barclay* v. *Com.*, 25 Penn., 503, the nuisance for which the defendant was indicted, was the maintenance and continuance of a barn near to and above a spring reserved for the inhabitants of Bedford, for supplying their general pump with water; and the indictment charged, that by storing hay and feeding cattle, the water of the spring was rendered impure, corrupted and unfit for use. Upon the question whether the sheriff should abate the nuisance by removing the barn, Woodward, J., says: "The offense lay in the use made of the barn and yard in close proximity to the spring, and the nuisance would be effectually abated by discontinuing such use. When an erection or structure itself constitutes the nuisance, as when it is put up in a public street, its demolition or removal is necessary to the abatement of the nuisance; but when the offense consists in a wrongful use of a building harmless itself, the remedy is to stop such use, not to tear down or remove the building itself." In

Welch v. *Stowell*, 2 Doug., (Mich.) 332, an action of trespass was brought for the destruction of a house of ill fame by the city marshal of Detroit, acting in pursuance of a city ordinance authorizing him to proceed with sufficient force and demolish the same. "It is said," observed Whipple, J., in delivering the opinion of the court, "that the house was a nuisance. This may be very true; but it was a nuisance in consequence of its being the resort of persons of ill fame. That which constitutes or causes the nuisance may be removed; thus, if a house is used for the purposes of a trade or business by which the health of the public is endangered, the nuisance may be abated by removing whatsoever may be necessary to prevent the exercise of such trade or business; so a house in which gaming is carried on to the injury of the public morals; the individuals by whom it is occupied may be punished by indictment and the implements of gaming removed and a house in which indecent pictures are exhibited is a nuisance which may be abated by the removal of the pictures. . . . . Yet in this and the other cases stated, it will not be contended that a person would be justified in demolishing the house, for the obvious reason that, to suppress the nuisance, such an act was unnecessary. . . So in the case before us the nuisance was not caused by the erection itself, but by the persons who resorted there for the purposes of prostitution." In *Moody* v. *Supervisors of Niagara County*, 46 Barb., 659, an action was brought for the destruction of a bawdy house which was likewise the resort of thieves, robbers and murderers, and it appeared that immediately before its destruction one of the police was murdered by the people congregated there. It was there held that the fact that a house is kept as a house of public prostitution renders it a common nuisance—but that a house cannot be lawfully destroyed by a mob because for the time being it is devoted to a purpose which the law characterizes as a common public nuisance; when it is the unlawful use of a building that constitutes a nuisance the remedy is, to stop such use, not to tear down and demolish the building. In *Gray* v. *Ayres*, 7 Dana, 375, it was held that what constitutes the nuisance should be abated, but not by the destruction of the house, the use of which and the practices therein constituted the nuisance,

and not the house itself. "Although," remarks Marshall, J., "the destruction of the house might have been the most effectual mode of suppressing the nuisance, yet the house itself was not a nuisance, nor necessarily the cause of one, its destruction was not a necessary means of abating the nuisance and as the right of abating is confined to that which is the nuisance, or which actually produces or must necessarily produce it, the right upon the case made out in the plea did not extend to the destruction of the house." In *Ely* v. *Supervisors of Niagara Co.*, 36 N. Y., 297, a similar case of the destruction of a house of ill fame came before the court, "The property of the plaintiff was not put beyond the pale of the law's protection," remarks Scrugham, J., "by her detestable and criminal conduct. She still had the right to expect and rely implicitly upon the zeal and ability of the proper officers to defend her house and furniture against the unlawful efforts of any public indignation her evil practices might provoke." The same views are fully sustained in Massachusetts by the opinion of Shaw, C. J., in *Brown* v. *Perkins*, 12 Gray, 89, and in Rhode Island by that of Ames, C. J., in *State* v. *Paul*, 5 R. I., 185.

When it is the use of the building which constitutes the nuisance, the abatement consists in putting a stop to such use. The law allows its officers, in execution of its sentence only to do what is necessary to abate the nuisance and nothing more; *a fortiori*, it will not sanction destruction without limit by individuals. It would be absurd to hold that a manufactory lawful in itself, but producing "offensive smells" is at the mercy of every passer by, whose olfactory nerves are disagreeably affected by its necessary processes.

Even if this was a case in which those specially aggrieved by by the plaintiffs factory would have the right to abate the alleged nuisance, yet as it does not appear by whom its destruction was caused, it cannot appear that it was caused by those who were so situated in reference to it that they would have the right of interference, if there was such right.

The decisions, to which the learned counsel for the defendants in his able and elaborate argument has called our attention, will not be found upon examination adverse to the conclusions to which

we have arrived. In *Underhill* v. *Manchester*, 45 N. H., 214, a suit was brought against the defendant town for the damages caused by the destruction of the plaintiff's property by a mob. The plaintiff kept a saloon. The property destroyed consisted of spirituous liquors, the fixtures of a bar, and the furniture of the saloon. The court held the plaintiff could not recover, because his business led to drunkenness and disorder, and by the provisions of the "act making cities and towns liable for damages caused by mobs or riots" it is provided that "no person or persons shall be entitled to the benefits of this act, if it shall appear that the destruction of his or her property was caused by his or their illegal or improper conduct." The court held that "the illegal and improper conduct" of the plaintiff in keeping a grog shop, was to be regarded as the cause of the destruction of his property. Its decision is placed entirely upon the peculiar language of the statute. Doe, J., in his opinion however says that "the rioters are liable to the plaintiff for the damage done by them. His property, though solely used in violation of law, could not be lawfully destroyed except under process of law. *Brown* v. *Perkins*, 12 Gray, 89. *Woodman* v. *Hubbard*, 25 N. H., 67." But the peculiar language of the New Hampshire statute upon which alone the judgment of the court is based, is not to be found in our statutes, and without such statutory provision, it is obvious, that the views of that court are in accordance with those we have expressed. In *Spalding* v. *Preston*, 21 Vermont, 9, an action of trover was brought for counterfeit coin partly finished against the sheriff by whom they had been seized under process and detained to be used as evidence upon the trial of an indictment against the person in whose possession they were found and likewise to prevent their being put in circulation, but the court held the action was not maintainable. "Such property," remarks Redfield, J., "so to speak is outlawed, and is common plunder." Counterfeit money is *per se* unlawful, but porgy oil is an article of commerce, and its manufacture an honest and lucrative industry. In *Meeker* v. *Van Rensselaer*, 15 Wend., 397, the destruction by individuals of a dwelling house, during the prevalence of the Asiatic cholera, which was cut up into small apartments, inhabited by poor people in a filthy condition

and calculated to breed disease, was sanctioned on the ground that it was a nuisance and "that there was no other way to correct the evil but by pulling down the building." But this case has been doubted in *Welch* v. *Stowell*, 2 Mich., 332, and in a subsequent case in New York, the court say that it can only be sustained upon the ground that in no other way could the safety of the public be preserved. In *Lord* v. *Chadbourne*, 42 Maine, 429, a suit was brought for the value of liquors kept for sale in violation of the statutes of the state, and it was held not maintainable, among other reasons, because it was provided by statute that "no action of any kind shall be maintained in any court in this state either in whole or in part for intoxicating or spirituous liquors," &c. The *status* of the liquors was illegal. They were held for illegal purposes, and with the design of violating the statute. Not so in this case. The plaintiff was engaged in a lawful business. If the place of his manufacturing was improper, that was to be determined by a jury, not by a mob of men in disguise. In *Sherman* v. *Fall River Iron Works Co.*, 5 Allen, 213, it was decided that an unlicensed keeper of a livery stable could not recover for damages to his business by the escape of gas through the ground and into a well of water upon his premises, though he might, for the nuisance to his real estate. To be legally recognized as a keeper of a livery stable he must have a license, but no license is required for manufacturing porgy oil. True, the municipal officers of a town or city by c. 17, § 6, may assign a place for the exercise of any trade or employment specified in § 5, "when they judge it necessary," but it no where appears that there has been any adjudication of such necessity.

II. It is provided by c. 17, § 17, that a stationary engine is not to be used without license and by § 19, that "any such engine erected without a license shall be deemed a common nuisance without any other proof than its use."

But the engine is not *per se* a nuisance. It may become one, when it endangers "the safety of the neighborhood." The remedy of the party aggrieved is by indictment, not by the summary distruction of the engine. By § 20, the municipal officers of the town in which it is erected have the same authority to abate and

remove it when erected without a license as is given to the health committee, or health officer in chapter fourteen for the removal or discontinuance of the nuisances therein mentioned—that is, by c. 14, § 16, they may, after notice, remove them at the expense of the owner, and if he neglects or unreasonably delays he will be liable to a fine of one hundred dollars.

The plaintiffs' engine may be a nuisance in the particular locality of its use, but its destruction is not necessary to its abatement. It may be unlawful. So too are riots and mobs. But mobs cannot set up their own criminal acts as affording an exemption from the consequences of their wrong doings.

It is not denied that the steam engine was so affixed to the realty as to be regarded as part of the same. *Richardson* v. *Copeland*, 6 Gray, 536. If annexed to and part of the factory, the damage or destruction of the same being established, the plaintiffs are entitled to the indemnity given by the statute.

III. The counsel for the defendant requested the court to instruct the jury "that it was the duty of the plaintiffs to furnish to the municipal officers of the town, on request, such evidence as they had discovered, to the end that they might know the offenders and have an opportunity to bring their action against them."

There is no evidence tending to show that any request was made by the officers of the defendant town for information, and if not, there could not have been a refusal to give it. Besides if made it would have been of no avail inasmuch as the offenders were disguised and unknown.

But upon this request, were the facts as therein and thereby assumed, still the defendants have no valid ground of complaint. The instruction given was "that it was the duty of the plaintiffs to satisfy them (the jury) that they used all reasonable diligence to discover the offenders. It was not a question of success or want of success in doing so; but if the plaintiffs used due diligence in discovering and procuring evidence to show who the guilty parties were, in good faith, and for the purpose of convicting them, and communicated such evidence and facts, as they discovered or were known, to the officer whose duty it was to prosecute, and were ready to follow his suggestions and did so act, that

was sufficient, even though they never made complaint to the grand jury."

The instruction given required the use "of all reasonable diligence" to discover the offenders, and the verdict of the jury has affirmed the fact of its exercise.

IV. The defendants offered to show that the plaintiffs' factory was "a public nuisance, and a nuisance to the people residing in the vicinity, but all evidence to show the factory a nuisance was excluded."

It is urged that this evidence should have been received as tending to show contributory negligence on the part of the plaintiffs. In *Moody* v. *Supervisors of Niagara County*, 46 Barb., 659, evidence was offered that the house destroyed was one of ill fame and that its destruction was caused by excitement arising from the murder of one of the police in it, but the court excluded the evidence because it would constitute no defense. In *Ely* v. *Supervisors of Niagara County*, 36 N. Y., 297, a house of ill fame was destroyed by a mob and the point was taken and the evidence offered to show the character of the house was excluded and the exclusion was sustained. "She," (the plaintiff) observes Scrugham, J., "was not to assume that the officers would or could not perform their duty effectually, and, therefore, having no reason to fear the injury or distruction of her property by a riot or mob, she was not careless or negligent in not anticipating that such would be the result of the evil use to which she applied the property. . . The conduct of the plaintiff was not such a cause as would naturally produce or aid in producing the destruction of her property; and its influence in that direction is too remote and uncertain to prevent its being considered such carelessness or negligence as would bar her recovery. All that her conduct can strictly be claimed to have produced was local public indignation; and this lawfully manifested, would not have occasioned or in any manner aided in the destruction of her property." Much more then, cannot the plaintiffs be regarded as guilty of contributory negligence when engaged in a lawful business, if those engaged in an infamous violation of law are not so regarded. To hold that these plaintiffs are guilty of contributory negligence because they were engaged in a manufacture

which was or might be a nuisance, would be to declare judicially that all persons, engaged in a "trade, employment or manufacture" referred to in c. 17, § 5, were guilty, by the very fact of being engaged in such trade, employment or manufacture, of such contributory negligence, that they are without the protection of the law and that by being engaged in such business they were laying the foundation of and contributing to its destruction.

The evidence offered was not admissible to show contributory negligence on the part of the plaintiffs.

The defendant's counsel requested the court to instruct the jury that "if plaintiffs were maintaining their factory with their stationary steam engine without license therefor, they were without legal right so to do; and if they were entitled to recover at all, the measure of damages is three-fourths of the actual value of the property, and not three-fourths of what it might be worth for such use, at that place if they had a right to use it."

This instruction was not given, but the jury were instructed "that if they found for the plaintiffs, the measure of damages was three-fourths of the actual value of the property at the time it was destroyed." The indemnity given by the statute c. 123, § 8, is three-fourths of the value of such injury to his property as the plaintiff may have sustained. Here the injury arose from the destruction of property. The persons by whom the property was destroyed would be responsible for its actual value. They are wrong doers and the possibility of an indictment of the owner is neither excuse nor palliation for them. Abatement by destruction of the plaintiffs' factory and engine would not have been ordered by the judgment of the court; its use might have been prohibited and a fine imposed, but purification by fire is not one of the statutory penalties. The abatement could only be legally made by the judgment of the court upon an indictment in which the parties interested would have a right to appear and defend. The possibility of an indictment is not a contingency, as affecting value, of which a mob could avail itself in reduction of damages. Neither can the defendants, whom the statute has made responsible for the action of such mob. *Exceptions overruled.*

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

MOSES CALL *et al.*, in equity, *vs.* WILLIAM J. PERKINS *et als.*

Lincoln, 1874.—November 10, 1876.

Equity. Trial. Husband and wife. Deed.

Real estate, paid for by a married man but conveyed to his wife, cannot be conveyed by her without the joinder of her husband; the joinder may be in the same or a separate deed.

If the husband paid only in part, his interest may be taken to pay his prior contracted debts, even though he have other property.

When a creditor of the husband seeks to hold land which the latter has not owned since the debt accrued, but which he has paid for and procured to be conveyed to his wife, resort must be had to equity.

If the creditor makes a levy, he may then invoke equity to complete his title.

If the bill contain the substantive requirements of the statute, it is sufficient.

Prior to the Stat. 1873, c. 130, it was within the discretion of the law court to frame issues for a jury trial in suits in equity. That statute made it imperative on such court, on motion of either party.

ON EXCEPTIONS.

BILL IN EQUITY, praying for relief, and that the plaintiffs' title by levy to certain real estate may be decreed good and valid.

The following facts appear:

June 5, 1864, the plaintiffs sued out a writ against William J. Perkins for $500, on account annexed that accrued in 1856 for earnings of a ship. June 25, 1864, all the debtor's interest in real estate was attached on that writ, and on the 28th of June, 1864, within five days, the attachment was recorded. The action was duly entered; and through a certificate from the law court, judgment was rendered iu vacation November 20, 1868; execution issued January 15, 1869; and February 13, 1869, a levy was made on the equity of redemption in the land in dispute, for $690.33, in full satisfaction of the execution. This is the title of the plaintiffs.

May 10, 1862, this land was conveyed by James Perkins, the father of the debtor, to Elizabeth A. Perkins, the wife of the debtor, for $1500; $500 was paid down, and ten notes were given to the grantor of $100 each, and payable one each year, signed by Mrs. Perkins, and secured by a mortgage signed by her alone. Three of these notes were paid prior to April 7, 1863. On that

day this mortgage was canceled, and the seven unpaid notes were given up and seven new ones were given of $105.55 each, signed by the husband, and secured by a new mortgage from the wife. One of these seven notes was paid by somebody in May, 1864, leaving six due. Mrs. Perkins by her sole deed, deeded to Fossett and Wheeler this equity of redemption, June 20, 1864, which was recorded June 27, two days after the attachment of the plaintiffs.

October 28, 1864, Wheeler and Fossett deeded the same equity of redemption to the defendant, Tukey. Tukey afterwards paid three of the notes secured by the mortgage, and the plaintiff, Call, then purchased of James Perkins the mortgage and the three unpaid notes, and took an assignment thereof. Afterwards Tukey repaid to Call the amount of said three notes, but the mortgage was not formally discharged.

The plaintiffs have the title of William J. Perkins, the husband, to this equity of redemption, by their attachment, judgment, and levy with the rights of prior creditors.

The defendant has the title of Mrs. Perkins, the wife, by her sole deed.

The suit is brought to determine which of these two parties has the paramount right in equity to this right of redemption.

The bill was filed September term, 1869. At the April term, 1872, the defendant Tukey filed a motion for a jury trial. The presiding justice ruled as matter of law that Tukey was not entitled to a jury trial and for that reason overruled the motion, and the said Tukey alleged exceptions.

At the April term, 1874, the testimony of both parties having been taken, so far as they deemed it necessary to have it taken in writing, the defendant, Tukey, claimed the right to have a jury trial, by virtue of the act of the legislature of 1873, c. 130, and made a motion in writing therefor, in the form following:

"Whereas, in the bill of complaint in the above entitled cause, it is alleged, that James Perkins contracted with William J. Perkins, son of the said James, to sell him the Perkins farm, which is the subject of litigation in this case, for the consideration of $1500, and that the said William J., being indebted to the plaintiffs on an

account in the bill named, with the view of placing the title of the premises beyond the reach of his said creditors, caused the said James to make the deed of the premises so contracted for, to Elizabeth A. Perkins, the wife of the said William J., and that said James accordingly, on the 10th day of May, A. D. 1862, made the deed of said premises to said Elizabeth A., and that the said William J. then and there paid to the said James, the sum of $500, part of said consideration for the premises, and that the said Elizabeth A. never paid any of the notes which were given by her, in payment of the balance of said consideration, nor any part of the consideration for the said conveyance to her of the said premises, which said facts are denied by Marius H. Tukey, one of the defendants in said suit, upon information and belief in his sworn answer to this suit:

And whereas, it is alleged in said bill of complaint, that said conveyance to the said Elizabeth A. Perkins, was in fraud of the creditors of her said husband, William J. Perkins, and in law a trust for his and their use, and that Cyrus Fossett and Francis Wheeler, the grantees of the said Elizabeth A., of the said premises, and also that the said Marius H. Tukey, the grantee of the said premises, of the said Fossett and Wheeler, as is set forth in said bill, had at the time when they received their conveyance of the said premises, respectively, full knowledge of all the facts alleged in said bill, as aforesaid, relating to the conveyance of said premises by said James Perkins, to said Elizabeth A. Perkins, and that they had knowledge of the payment of the consideration therefor by the said William J., and that said conveyance was in fraud of the creditors of the said William J., and in law a trust for his and their use; which said allegations in said bill are denied in the answer of said Tukey:

And whereas the said Tukey in his said answer, alleges that he purchased said premises in good faith, and paid the full value thereof, without any knowledge, information or belief that the said Elizabeth A. Perkins, or the said Fossett and Wheeler held or had ever held said premises in trust for the said William J. Perkins, or his creditors, or in fraud of their rights; and upon

information and belief the said Tukey alleges, that the said Fossett and Wheeler purchased the said premises, and had paid and agreed to pay the full value thereof, and that they held the same in good faith, without any fraud on their part, or knowledge of fraud in others :

Wherefore the said Tukey humbly prays this honorable court, that an issue may be framed, and a jury empaneled to try the several allegations in said bill hereinbefore set forth ; and to determine the truth of the allegations in the answer of the said Tukey hereinbefore set forth ; and especially that he may have the privilege of a jury trial upon all the charges of fraud, which are set forth in said bill against him."

The court overruled the motion *pro forma*, as matter of law, as one which it was not competent for the court to entertain. To which ruling and decision, the said Tukey excepted.

A. P. Gould, for the defendants.

J. Baker, for the plaintiffs.

VIRGIN, J. By the common law the husband became seised of a freehold estate in the real property of his wife, the usufruct continuing his during their joint lives. By virtue of the provisions of the Stat. of 1844, c. 117, the rule of the common law was so modified that she might become the owner of real or personal estate, by the usual modes of transfer and succession, in her own name, and as of her own property, and hold it exempt from any liability for the debts or contracts of her husband ; and her marriage had no effect upon her absolute dominion over her property owned before marriage. After that statute became operative, her control of her estate irrespective of the time when it was acquired, was unlimited. *Southard* v. *Plummer*, 36 Maine, 64. *Southard* v. *Piper*, 36 Maine, 84.

This exemption was modified by engrafting a well established principle into the statute which provided that if the property was purchased after marriage with the money or other property of the husband, or that being his it was conveyed to her directly or indirectly, without adequate consideration, and so that his creditors might thereby be defrauded, it shall be held for the payment

of his prior contracted debts—thus authorizing a subsequent conveyance directly from the husband to his wife, but in cases of fraud loading the property thus transferred with the prior debts of the husband on due proceedings. Stat. 1847, c. 27. *Johnson* v. *Stillings*, 35 Maine, 427.

These statutes being in derogation of the common law and therefore construed strictly (*Swift* v. *Luce*, 27 Maine, 285) conferred upon a married woman the right to purchase, own and control property without let or hindrance on the part of her husband, but contained no authority on her part to sell and convey. In respect to the sale and transfer of her property, her rights and powers were still to be found in the common law. And by the rules of the common law a *feme covert* can convey the fee in her real estate only by a deed executed by herself and her husband,—her sole deed being a nullity and conveying no estate. *Lithgow* v. *Kavanagh*, 9 Mass., 172. *Allen* v. *Hooper*, 50 Maine, 371. *Bean* v. *Boothby*, 57 Maine, 295. *Beale* v. *Knowles*, 45 Maine, 479. *Eaton* v. *Nason*, 47 Maine, 132. *Brookings* v. *White*, 49 Maine, 479. *Jewett* v. *Davis*, 10 Allen, 71.

On account of this disability, and for the purpose of removing it the legislature subsequently conferred upon "any married woman power to lease, sell, convey and dispose of" her real and personal property, "and execute all papers necessary thereto, in her own name, as if she were unmarried." Stat. 1852, c. 227. And lest that language might not be considered sufficiently specific to exclude the necessity of the husband's joinder, the words, "by her separate deed," were interpolated. Stat. 1855, c. 120. These statutes entirely removed her disability in this respect by conferring upon her full, complete and unrestricted power to "lease, sell and convey" to any and all persons including her husband. *Allen* v. *Hooper*, 50 Maine, 371. *Brookings* v. *White*, *sup.*

One of the practical results of this legislation was to aid certain classes of men in putting their real estate beyond the reach of their creditors by furnishing another confidential friend as grantee. The possession being apparently the same, the change of title would not become known until the creditor began to urge payment, when for the first time he would learn that the title had

some considerable time since passed to the wife, and that he was a subsequent, instead of a prior creditor. In numerous instances the title of real estate of married men in embarrassed circumstances was transferred to their respective wives and thence to third persons, thereby clogging the proof of fraudulent conveyances by this other remove from the original fraudulent grantor.

To remedy this condition of things among others, the following statute was passed:

"No conveyance of a married woman of any real estate conveyed to her directly or indirectly by her husband, paid for directly or indirectly by him, or given or devised to her by her husband's relatives, shall be deemed valid, unless her husband shall join with her in such conveyance." Stat. 1856, c. 250. This limited the power of a married woman to convey some of her property by her separate deed and without the joinder of her husband, and this made an exception to her otherwise unrestricted authority. And it was so expressed in Shepley, C. J.'s report of his revision to the legislature in 1856. In other words, R. S., of 1857, c. 61, § 1, remains as it was written by him with this verbal difference only, to wit: instead of "but" in the fifth line, the report read "except," with "which" before "cannot" to complete the grammatical construction. All the foregoing statute provisions are substantially preserved in § 1, although expressed in briefer terms, as will readily be seen by the language, so much of which as is material to our present inquiry, is as follows:

"A married woman may own in her own right, real estate acquired by . . . purchase; and may sell and convey the same 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, . . . cannot be conveyed by her without the joinder of her husband in such conveyance."

"The language of R. S., c. 61, § 1," in the language of Danforth, J., in *Bean* v. *Boothby*, 57 Maine, p. 301, "limits the wife's capacity to convey such real estate only, as has been directly or indirectly conveyed to her by her husband, or paid for by him," such real estate in the unambiguous and peremptory terms of the statute, "cannot be conveyed by her without the joinder of her husband." To

be sure a separate deed by each though executed at different dates may be sufficient. *Strickland* v. *Bartlett*, 51 Maine, 355. But "no conveyance" without a joinder, "shall" (in the emphatic language of Stat. 1856, c. 250, of which "this provision is substantially a re-enactment," *Strickland* v. *Bartlett*,) "be deemed valid." Such a conveyance then must be, as to prior creditors of the husband at least, *ipso facto*, void. Moreover, the result is the same whether this clause in § 1 is considered as an exception to the general abrogation of the common law rule applicable to the power of a married woman, to convey, or as a positive prohibition by the statute.

The legal title never having been in the husband, W. J. Perkins, it is not, and cannot be successfully, contended that he "directly or indirectly conveyed" the premises in controversy to his wife. *Bean* v. *Boothby*, *sup.* The plaintiffs however contend that although the wife derived her title directly from James Perkins, that it was "paid for by her husband." If this allegation be true, the separate deed of Elizabeth A. Perkins, of June 20, 1864, to Fossett & Wheeler, so far as these plaintiffs as prior creditors of W. J. Perkins are concerned, conveyed nothing; and whether or not her grantees or those holding under them were *bona fide* purchasers for a valuable consideration without notice that the husband paid the consideration of the deed to her, becomes immaterial.

Under one of the provisions of R. S., c. 61, § 1, property conveyed to a married woman, but paid for by her husband, may be taken as his to pay his prior contracted debts. Such property need not be wholly paid for by the husband, but if paid for in part by him, his interest may be taken. *Sampson* v. *Alexander*, 65 Maine, *post.* And the fact that the husband has other property which may be reached by some other mode, imposes no legal duty upon the creditor to pursue that course and take that property, in preference to this. *Gray* v. *Chase*, 57 Maine, 558. *Hamlen* v. *McGilliauddy*, 62 Maine, 268. It is the privilege of the creditor, and not of the debtor or those who hold his property, to elect which shall be taken.

Such property may be taken although the parties are guilty of

no actual or intentional fraud. *Sampson* v. *Alexander*, *sup.*, and cases therein cited. But it is sufficient if the allegations sustained by proof meet the substantive requirements of the statute, setting forth the conveyance, payment therefor in whole or in part from the property of the husband, and that the debt for the payment of which the land is sought to be taken, accrued before the conveyance. *Hamlen* v. *McGillicuddy*, *sup.* The allegations in this bill are within this rule although there are also allegations of fraud.

When a creditor of the husband elects to hold land which the latter has not owned since the debt accrued, but which he has paid for and procured to be conveyed to his wife, the legal title does not thereby become vested in the husband, and it cannot therefore be "taken as the property of her husband" by a simple levy; but resort to equity becomes necessary. *Low* v. *Marco*, 53 Maine, 45. *DesBrisay* v. *Hogan*, id., 554 and cases *sup.* The creditor need not make a levy, but a return of *nulla bona* will be a sufficient preliminary proceeding. But when he has levied, he has exhausted his legal remedy so far as that land is concerned and then may invoke equity to perfect his statute right. *Gray* v. *Chase*, and other cases already cited.

Whether or not W. J. Perkins paid any, and if any, what part of the consideration for the conveyance by James Perkins to Elizabeth A. Perkins, of May 10, 1862, becomes a material inquiry. It is a question of fact; and the burden of establishing it is upon the plaintiffs, the deed making a *prima facie* case in behalf of the defendant. *Winslow* v. *Gilbreth*, 50 Maine, 90.

The defendant has moved for a trial of this issue by a jury. Whether or not he is entitled to it of right under the constitution, we need not now inquire. It is within the province of the court sitting in equity to order such a trial on its own motion. And when the fact in controversy is peculiarly fit and suitable for a jury to try, the court, in the absence of any statute requiring it, have ordered it on motion of either party.

In this state the law court is the court of equity; and a single justice at *nisi prius*, under our revised statutes, has no occasion to examine into the merits of a suit in equity before the cause is

brought to a formal hearing, except so far as the rules provide. Such is the general practice in chancery. And the Stat. of 1873, c. 130, simply makes it imperative upon the court to order such an issue when requested by either party—the language "and direct the same to be tried in the county where such cause is pending," clearly indicating that the order was not intended to be made there. Such was the early practice here as appears by the order in *Bean* v. *Herrick*, 12 Maine, 263.

In the case at bar, the controversy is of such a character, and the testimony is so conflicting and has been taken in such a manner that we deem it eminently proper that the main controverted fact be submitted to a jury of the vicinity, and to the end that the jury may see as many of the witnesses as possible and hear their testimony from the stand, we shall exercise the discretion of directing what testimony may be used.

And now on motion of the defendant and after hearing of the parties, it is ordered that an issue be framed by the parties for the purpose of submitting to a jury the following question: was any and how much of the consideration of the deed of May 10, 1862, given by James Perkins to Elizabeth A. Perkins, paid from the property of William J. Perkins. And it is further ordered that said issue stand for trial at the term next to be held in the county of Lincoln; that the plaintiff here shall be the plaintiff in the trial at law; and that the parties at such trial may read in evidence such and so much as is material, and none other, of the depositions taken before the publication of the testimony on Feb. 19, 1872, excepting the depositions of such deponents as are actually in attendance at said trial, together with such other depositions as may be taken by either on or before April 1, next, including the oral testimony of any witnesses, which shall be competent, the verdict to be certified to the chief justice of the court. And all further directions are reserved until after the trial of said issue.

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

SAMUEL HARLOW *vs.* HARRIET S. HARLOW, executrix.

Sagadahoc, 1875.—March 9, 1876.

Executors and administrators. Probate practice.

A decree of a court of probate duly allowing the final account of an executor cannot be impeached in an action at law against the executor, to recover a debt due from the estate.

Any objection to such an account should be first made in the probate court, and can only be brought into the supreme court by appeal.

The plaintiff offered to prove that testator, husband of the executrix, after giving the notes in suit, conveyed a valuable farm to her for the purpose of defrauding creditors; that she took the conveyance for that purpose, and continued to hold under it. *Held*, inadmissible to impeach the decree of the court of probate in the allowance of a final account; that such a decree was in the nature of a judgment, and could not be collaterally attacked.

ON REPORT.

ASSUMPSIT on promissory notes, amounting to some $700, given to the plaintiff by the testator in his life time, and prior to the year 1870.

The defense was *plene administravit.*

The plaintiff offered to prove that the defendant's testator conveyed to the defendant, who was his wife, in August, 1870, his farm of the value of $2000, for the purpose of defrauding his creditors; that the defendant took the conveyance for that purpose, and continued to hold the farm by it. If upon the evidence offered, the action could be maintained, it was to stand for trial; otherwise the plaintiff to be nonsuit.

J. W. Spaulding, for the plaintiff.

W. P. Whitehouse, for the defendant.

WALTON, J. This is an action of assumpsit against an executrix to recover a debt due from the estate. The defense is *plene administravit.* To this the plaintiff replies, and offers to prove, that the defendant is in possession of real estate, not inventoried nor administered upon, which was conveyed to her by the testator for the purpose of defrauding his creditors; and the only question we find it necessary to consider, is whether this evidence is admissible.

We think it is not. The decrees of the probate court, in cases where it has jurisdiction, are in the nature of judgments, and cannot be impeached collaterally. And when, as in this case, it appears by the probate records that all the property inventoried has been fully and legally administered, and a final account settled, and no appeal taken, it is not competent to show that a full inventory was not returned, and that there is other property which belongs to the estate and ought to be administered upon. Such proof, if admitted, would necessarily impeach the integrity of the proceedings in the probate court, which, as already stated, the law does not allow.

This precise question was decided in *Parcher* v. *Bussell*, 11 Cush., 107, where, as in this case, to avoid the defense of *plene administravit*, the plaintiff sought to impeach the defendant's account of administration, and offered to show that a full inventory had not been returned. The court held that the decree of the probate court, duly allowing the administrator's final account, was conclusive, and could not be impeached in an action at law. "It is not the filing of the account," says Thomas, J., "which affects the plaintiff; it is the allowance of that account by the decree of a court having jurisdiction of the subject and of the parties."

Plaintiff nonsuit.

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

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

INHABITANTS OF TOPSHAM *vs.* INHABITANTS OF LISBON.

Sagadahoc, 1875.—May 3, 1876.

Amendment. Way. Exceptions. Damages.

It is within the discretionary power of the judge, and not subject to exception, to allow an amendment, legally allowable at any previous stage of the case, after issue joined and after the testimony has been put in, and when the case is about to go to the jury.

In an action by one town against another for injury to a bridge by turning the current of the stream, the defendants cannot question the validity of

the location of the way in the plaintiff town if the records show that the county commissioners had jurisdiction in the case and made an actual location which has never been quashed.

When the jury in such suit are instructed that "it is incumbent upon the plaintiffs to prove that the sole, true and efficient cause of the damage was the want of ordinary care on the part of the defendants, and that if the want of ordinary care on the part of the plaintiffs contributed to it in any degree, or if it were caused in part by a freshet which men of ordinary prudence could not reasonably be expected to anticipate or provide for, the plaintiffs cannot recover," there is nothing in such instructions to which the defendants can sustain exceptions, though the jury are at the same time cautioned not to enter into any nice logical discussion as to the meaning and effect of the word sole in that connection, but to apply their common sense and ascertain the real, true, efficient cause of the mischief; and though the instructions are not specially given in the form requested by the defendants' counsel.

When the plaintiffs have lost a new and suitably constructed bridge by the fault of the defendants, and have rebuilt the same, the measure of the damages which they are entitled to recover is not necessarily the amount which they have expended and interest, but so much thereof as under all the circumstances it was necessary and suitable they should expend to make the way safe and convenient for travelers; and it is not necessarily limited to the cost of the original structure.

The rule is compensation for the expense necessarily incurred by reason of the defendants' fault.

On exceptions, and motion to set aside the verdict as against evidence, its weight, and because the damages ($850) were excessive.

Case, founded on the negligence of the defendants in so making a county road ordered by the county commissioners, and changing the current of the stream that it washed out the abutment made by the plaintiffs on their side of the same county road.

An island lay in the stream on the line of the road between the two towns, and the negligence charged was that the defendants in building their end of it made a dump from the island to the western shore instead of a bridge and thus caused all, instead of a part only, of the stream to pour through the eastern channel. The eastern abutment and the bridge from the island to the eastern shore was carried away by the freshet of October 12, 1871. This action was brought to recover damages therefor.

The plea was not guilty with a brief statement setting out the location of a highway in Topsham and Lisbon over the *locus* and justifying under it.

The case was opened to the jury by the plaintiffs' counsel as one based on the defendants' negligence, and evidence received was not specifically objected to on the ground of the omission to allege such negligence in the writ, the point being first taken in the defendants' requests for instruction after the evidence was all out; and after the arguments had been finished, and just as the judge was about to charge the jury, the plaintiffs' attorney asked leave to amend each of the three counts in the writ by inserting the words negligently and unlawfully, twice in each count. To this the defendants objected, both in substance and because it was too late in the progress of the case. But the presiding justice allowed the amendments subject to the objection, and they were made, and he then charged the jury. To the allowance of these amendments the defendants excepted. The defendants also excepted to the admission of evidence objected to by them and admitted, and to the rejection of evidence offered by them, and ruled out in the several instances mentioned in the stenographer's report of the evidence which was made a part of the exceptions. The defendants requested the court to instruct the jury as follows, besides other requests which were satisfactorily given.

I. That the copy of the location of the road in Topsham is insufficient to authorize or require the town to make the road or abutment, or bridge at the Little River, complained of in their writ, and that for that reason they cannot recover.

II. That if they find that the defendants and their officers did exercise ordinary care in constructing the road, dump and bridge, as they did, the plaintiffs though damaged, cannot recover in this action.

III. That the defendants had a right to divert the water of the stream into one channel in making the road, if in the opinion of the jury it was prudent, and the exercise of ordinary care to make it in that manner.

IV. That the defendants were not bound to provide against unusual and extraordinary freshets, or such as they could not reasonably expect at the time they made the road, would occur.

V. That if they find that the efficient cause of the damage set forth in the writ, was an unusual and extraordinary freshet, and

that the washout would not have occurred without it, the plaintiffs cannot recover.

VI. That if they find that the abutment on the Topsham side of the stream was unsuitable for such a place and such a stream, or was not constructed with ordinary care and skill, and that this contributed in the least degree to the damage complained of, the plaintiffs cannot recover.

VII. That the negligence of the defendants in the construction of the road or dump or bridge, must be the sole cause of the damage complained of by the plaintiffs, or they cannot recover.

VIII. That the plaintiffs could maintain an action against the defendants on the facts in this case, only on the ground of their negligence or want of ordinary care in the manner of constructing the road, dump and bridge; that the burden of proof is upon the plaintiffs to show that negligence; that since there is no allegation of negligence in the plaintiff's writ, the declaration is fatally defective. The action is misconceived and cannot be maintained.

These requests were not otherwise given than as appears in the charge which follows: because they were not specially given, the defendants excepted.

The presiding justice charged the jury *inter alia* as follows:

"The town of Topsham in this case, claim that they have suffered by reason of the unlawful diversion of the waters of Little River stream by the defendants in the construction of the work which the defendants had to perform there, and that they have suffered by reason of the negligent acts of the defendants in the construction of that work.

The burden of proof rests upon the plaintiffs to establish their right to recover against the defendants by proof of those acts.

Now we are to look at the testimony in the case, and see what the positions of the parties were when entering upon the construction of that way, and what the duties and obligations of each were; and here I dispose of one or two questions which are presented with a view of preserving the rights of the parties in a possible contingency, and I am asked to rule, that the location of the road on the Topsham side, is insufficient to authorize or require that town to make the road and abutments at Little River, and for

that reason they cannot recover. It proceeds upon the idea that the commissioners of Sagadahoc, according to the record presented, had no jurisdiction to lay out that way; and in brief I say to you that the mis-recital of the name of the county in which the original petition was presented, reciting Cumberland instead of Androscoggin, or anything else in the record of the proceedings, would not deprive the commissioners of Sagadahoc of their jurisdiction to lay out the way, and that as the records show they did lay out the way, and required the town of Topsham to build it, that record would stand until it was quashed by the proper proceedings against the record itself, and the town would be bound by law to construct the bridge and abutments, and that nothing in the record, no failure there would prevent them from recovering, if they are otherwise entitled to recover. I give you the instruction that the copy of the location of the road in Lisbon, is sufficient in law to make it a legal location, such as would require the defendants forthwith to make the same. . . . .

The plaintiffs proceed upon the ground that the defendants did their part of the work in such a negligent manner, and with such a want of ordinary care in the construction of the work as resulted in injury to them. That the damage by the carrying away of their abutment in the fall of 1871, was caused by that careless, unnecessary and unlawful diversion of the stream, so as to wash against the eastern bank, and destroy their portion of the work.

It is incumbent upon and necessary for the plaintiffs, in order to entitle them to recover, taking the burden on themselves, to establish to your satisfaction that there was a want of ordinary care on the part of the defendants.

That is the measure of their duty in the construction of their work.

The construction of any bridge is liable to effect some obstruction or diversion of the currents of a stream.

When it is required by lawful authority that it should be constructed, it is incumbent upon the party upon whom that duty devolves, to use ordinary care not to do injury by means of it, not to construct it in such a way as to do unnecessary evil to others. If they do that, and if injury follows when they have used such ordi-

nary care in the construction of the work, they are not responsible for the injury.

Now, gentlemen, you perceive that right here there comes a matter which is all important in the decision of this cause, because on both sides of the case a question arises whether the parties acted with ordinary care; and perhaps the most important part of my duty in committing this case to you, is to give you such a definition of ordinary care as shall enable you to apply the evidence to the issue here, and to decide the questions of fact arising in the case correctly.

There are three main questions arising in this case. In the first place, was there a want of ordinary care on the part of the defendant town, acting through its officers, in the construction of the work which was the cause of the damage which occurred?

In the next place, was there a want of ordinary care on the part of the plaintiffs in the construction of their bridge and abutment, which contributed to the loss or damage, to the occurrence of the accident?

In the next place, was there such an outburst of the powers of nature which could not be reasonably anticipated or provided for by men in the use of ordinary care on this particular occasion, as to contribute to or cause the damage complained of?

As to two of these matters you perceive that a careful definition of ordinary care is required for a full understanding of what it imports.

You cannot give an abstract definition of ordinary care that would apply to all cases. What might be ordinary care in one set of circumstances might be no slight negligence under other and different circumstances.

Ordinary care has relation to, and must be measured by, the work or thing to be done, and the means employed or the natural instrumentalities affected, and their capacity and liability to work evil as well as good.

We must look at the work to be done, and regard its difficulties, dangers, responsibilities and probable results and effects, and then say what would a reasonable and prudent man do in such a case.

The word ordinary has a popular sense which would relax very much the true and real requirements of the rule.

The law means by ordinary care, the care which reasonable men of ordinary prudence, having reasonable and proper regard for the rights and interests of those whom their acts may affect, use under like circumstances. If you use "ordinary" merely in the sense of general, common and customary, it does not convey the whole true signification; but you will remember that ordinary care is a term which has relation to the situation of the parties on each side, and to the business in which they are respectively engaged.

Reasonable care is perhaps as good a term, and conveys as correct an idea to you of the kind of care required.

The care and diligence must vary according to the exigencies which require vigilance and attention, and conform in amount and degree to the particular circumstances under which they are to be exerted. Then you perceive that in determining what would be ordinary care in the erection of this bridge, the size and character of the stream, its liability, greater or less, to sudden and violent rises and overflows, the character of the soil on the opposite bank, and its liability to scour from the nature of the materials of which it was composed or the conformation of the shore, and the natural and probable effects of the action of the water if the current was diverted from the natural channel should be considered.

If people have to deal with a question involving the directing of great natural forces, as for example the movement of large and rapid bodies of water, or such as are liable to be made dangerous and destructive by violent rains, the very fact of the risk and danger is to be taken into account in determining whether the party directing the work acted with due and ordinary care.

Ordinary care is that care which reasonable men of ordinary prudence and capacity, having due and reasonable regard for the rights and interests of all who are liable to be affected by their acts, would use under all the circumstances in which they are called to act.

Now, gentlemen, that definition you will observe and apply in the consideration of this case, to both these parties.

It is for the plaintiffs to establish to your satisfaction that the

sole, true and efficient cause of the damage which occurred here was the want of such ordinary care on the part of the defendants.

Now, gentlemen, I have a word to say to you with regard to the force of the word sole in that connection. You are not to enter into a nice logical discussion with regard to the meaning and effect of that term. You will apply your common sense and determine what was the real true efficient cause of the accident, without which it would not have happened. It is a question for you to settle.

It is for the plaintiffs to satisfy you that it was by reason of negligence on the part of the defendants to construct their work with ordinary care as I have defined it. Incidentally comes in here a question which you will consider and determine from the testimony how the fact was, with regard to the violence of the storm. We all know perfectly well that now and then arises an outburst of the powers of nature, coming at long intervals, perhaps not more than once in a generation, sometimes occurring more frequently, which is beyond all expectation, and which no man could reasonably anticipate.

The party defendant is not liable for that which was caused by any such catastrophe.

If this storm and overflow was of that description, such a catastrophe as reasonable men could not have expected, they were not under any obligation to foresee and provide for it.

Now you have heard the comments of counsel upon the testimony in regard to this matter of overflow and height of water, and you will determine whether it was a storm of that description, realizing the force and effect of the testimony as bearing upon the question, of what was the freshet at that point, at the time when this damage was done, and whether or not it was of the character claimed.

I now present to you very briefly the general position of these parties upon the questions of fact.

On the part of the defendants, it is claimed that the Lisbon selectmen employed an engineer to direct them, and acted with ordinary care in making their embankment instead of bridging the western channel.

The employment of an engineer is for your consideration in determining this question of ordinary care, the force and effect of which you will settle and determine for yourselves.

It is not conclusive evidence that the work was properly done, or that there was no want of ordinary care in its construction. It is for you to look at the examination which was made, and determine what matters the attention of the engineer was directed to, and whether or not that covered the ground which ordinary care should cover, under the definition which I have given you. Then it is claimed on the part of the defendants, that the washing of the bank was below the Topsham abutment, and the damage was not occasioned by the change of the current; and you will call readily to mind the matters to which your attention was called in enforcing it; that the place where the damage commenced, shows that it was not produced by the embankment, but by the faulty construction of the wing wall on the upper side of the Topsham abutment, a wrong angle at the head of the abutment caused the water to strike directly against the Topsham abutment. They claim also, and it is one of the questions which you are to settle; that the plaintiffs' abutment was not constructed with ordinary care and skill, and that this contributed to produce the damage. They tell you that the experts agree that it was not a suitable mode of construction, and that the erection of a new abutment in a different manner, is a substantial confession that the first was unsuitable.

You will weigh that testimony and determine what was the action of the water there, and what was the true cause of the injury to the abutment, and whether the want of ordinary care in the construction of the abutment contributed in any degree to produce the injury.

In the consideration of that, you will apply the same definition of ordinary care which I gave you, in settling the question whether the defendants were wanting in ordinary care so far as the construction of their road was concerned.

They say also this was one of those extraordinary freshets which nobody can be supposed to foresee or provide for.

On the other hand, the plaintiffs claim that the work was done by the selectmen of Lisbon without that due and ordinary care, and with an eye to save expense to their own town, and without regard to the effect which the change in the direction of the current of the stream there would have upon the opposite bank, that if they consulted an engineer that was not the subject of the inquiry, but substantially whether the work could be done in such a way as to make the embankment stand.

It is claimed on the part of the plaintiffs that the result was that they changed what would have been a broad and easy channel into a narrow destructive stream, turning its force on to the abutment, which had stood through the ice freshet of the previous winter before the embankment was made without damage, but it was carried away by the crowding of the current over and against it, and that was the true and efficient cause of the damage without which it would not have occurred. That is for you to settle.

The plaintiffs claim that there had been, while this matter of building the embankment was pending, a freshet as high as this which should have warned the men in the exercise of ordinary care to provide for such a freshet as this one, that the real point of inquiry made of Mr. Reed, was whether there would be sufficient space left to discharge the water without overflowing or carrying away the dump, and that the statement was that there would be no danger with suitable masonry.

The plaintiffs claim that there was no fault in the Topsham abutment, that it was sufficient.

Now, gentlemen, I have called your attention to those questions which you are to pass upon; take this case and settle it according to your finding upon these three questions.

Was this damage occasioned in part by an extraordinary outburst of the powers of nature in storm and freshet, such as men of ordinary prudence, could not be reasonably expected to anticipate or provide for? If it was, the plaintiffs cannot recover. Was it occasioned in any degree by the plaintiffs' want of ordinary care as I have defined it to you, in the construction of their own abutment?

If so, the plaintiffs cannot recover.

Or was the real true efficient cause, the want of ordinary care on the part of the defendants in the construction of their work on their side of the stream. If that was the cause, the plaintiffs are entitled to a verdict.

If that should be your conclusion, the question will arise, what is the measure of damages in the case.

The plaintiffs, if entitled to recover at all, are entitled to recover upon the ground that they are bound by law to make that way safe and convenient for travelers, and for such expense as they have been necessarily put to on account of the damage done by such want of ordinary care on the part of the defendants amounting to the true and efficient cause of the injury. They would be entitled to recover not necessarily the amount which they have expended, but what, under all the circumstances, it was necessary and suitable they should expend to make the way there safe and convenient for travelers, not necessarily limited to the amount which the original abutment cost.

The inquiry on that branch of the case, assuming that the damage, the washout, was caused by the negligence of defendants, is, what was it necessary for the plaintiffs to do, and what was the reasonable and proper cost of making a suitable and proper way there, such as they were bound to make by law.

If the bridge they actually constructed since was made unnecessarily expensive, that would not be a subject of recovery against the defendants.

It is for you to look upon the matter and say what was done, whether or not the plaintiffs are entitled to recover, and if so how much."

The defendants also excepted to so much of the charge, 1, as relates to the sole cause of the injury; 2, to so much as relates to extraordinary freshets, and their influence in contributing to the injury; and 3, to so much as relates to the measure of damages.

J. Baker, for the defendants.

W. L. Putnam, for the plaintiffs.

BARROWS, J. The case is presented upon exceptions, and mo-

tion to set aside the verdict as against evidence and the weight of evidence, and because the defendants deem the damages excessive.

The action is *case*—setting forth the existence of a highway between the two towns crossing Little River, and of an abutment, bridge and embankment on the Topsham side forming a part of said highway, which the plaintiff town was bound by law to keep in repair, and alleging a negligent and unlawful obstruction of the natural course of the water by the defendants, turning the stream against the eastern bank, causing it to cut a new channel, destroying and washing away the plaintiffs' abutment, bridge and embankment, and putting them to great expense to restore the same as they were obliged by law to do.

To this the defendants pleaded not guilty with a brief statement setting out a legal location in the town of Lisbon across the western branch of Little River, and the island between the western and eastern channels, to Topsham, and alleging that all they did in the premises was done with ordinary care and skill, and without negligence, in pursuance of their legal obligation to construct the way thus located.

Much testimony was offered and heard, and the jury were taken to the locality, and had a view of the premises.

Neither of the exceptions to the admission or exclusion of testimony is relied on, or referred to by the defendants' counsel in argument. Nor do we see any occasion to notice them in detail. The rulings in those matters seem to have been correct.

The exceptions to the permission of the amendment, and to the refusal to rule that the location of the road in Topsham was insufficient to require the town to make the road or abutment or bridge, and that for that reason the plaintiffs could not recover, though prominent in the bill of exceptions, are not alluded to by the able counsel in argument, and we suppose may be regarded as waived. But however that may be, the exceptions cannot avail the defendants.

It is questionable whether it is necessary to charge that the act was negligently or unlawfully done, when the obstruction of the natural course of a stream to the injury of the plaintiff is alleged. It would rather seem that the justification of the act should appear

in the defendants' brief statement. So these defendants seem to have thought when they filed their pleadings, and the authorities cited by the plaintiffs look that way.

But if this were not so, and the amendment were material, it is well settled that the allowance of such an amendment, under the circumstances, in order to place upon the record more distinctly the issue which the parties had been litigating, is within the discretionary power of the court, and not open to exceptions. Howe's Practice, p. 385. *Pullen* v. *Hutchinson*, 25 Maine, 249.

Under statutes and rules similar to our own, touching amendments, it may be done even after verdict. *Bannon* v. *Angier*, 2 Allen, 128. *Colton* v. *King*, id., 317.

The necessity for the eighth requested instruction was obviated by the amendment. All that was applicable to the case in that request appears in the charge.

Nor would it have been proper to give the instruction requested, with regard to the obligation of Topsham to build the road and bridge. The records taken as a whole, showed jurisdiction and an actual location. Until quashed the validity of that location could not be questioned in a suit like this. *Cyr* v. *Dufour*, 62 Maine, 20. Nor do we observe any essential defects in the location. *Detroit* v. *Co. Com'rs*, 52 Maine, 210.

No complaint is now made that the jury were not instructed substantially in conformity with the second and third requests. But the defendants insist upon their exceptions to the omission to give their fourth, fifth, sixth and seventh requested instructions, specially in the form requested, and to the instructions which were given respecting the points to which those requests relate.

These requests relate to the effect of alleged contributory causes of the damage which the plaintiffs had suffered.

To test the justice of the defendants' complaints, we must look to see what positions were taken by the parties upon the evidence and what instructions were in fact given. The defendants contended that such contributory causes might be found in the negligence of plaintiffs, who (they claimed) had built an unsuitable and unsafe abutment, and in an unusual and extraordinary freshet.

Now, touching these matters, the judge, after giving an extended

definition of the term ordinary care as used in this connection told the jury: "It is for the plaintiff to establish to your satisfaction that the sole, true and efficient cause of the damage which occurred here was the want of such ordinary care on the part of the defendants." The jury were further instructed that the general result must depend upon their answers to three questions which were thus stated to them. "Was this damage occasioned in part by an extraordinary outburst of the powers of nature in storm and freshet, such as men of ordinary prudence could not be reasonably expected to anticipate or provide for? If it was, the plaintiffs cannot recover. Was it occasioned in any degree by the plaintiffs' want of ordinary care as I have defined it to you, in the construction of their own abutment? If so, the plaintiffs cannot recover. Or was the real, true, efficient cause the want of ordinary care on the part of the defendants in the construction of the work on their side of the stream? If that was the cause, the plaintiffs are entitled to a verdict."

The attention of the jury was thus directly called to the only contributory causes which had been surmised or suggested, and the jury were told that if the mischief had been occasioned "in part" or "in any degree," by either of them, the plaintiffs could not recover. This in addition to the previous instruction, that it was incumbent on the plaintiffs to satisfy the jury that the sole, true and efficient cause was the defendants' want of ordinary care.

The defendants object to the use by the judge of the term "real, true, and efficient cause" in this connection; but such epithets were properly descriptive of the cause for which the jury were to look. The defendants complain also of the caution given to the jury not to indulge in nice logical refinements as to what constitutes a sole cause, but to apply their common sense and ascertain what was the real, true, efficient cause of the damage. Such a caution though perhaps needless might prevent the jury from becoming involved in a fruitless discussion about "a chain of causation in successive links, endless;" and it is entirely consistent with the doctrine which this court has long held, as illustrated in *Bigelow* v. *Reed*, 51 Maine, 325; *Willey* v. *Belfast*, 61 Maine, 569;

Stone v. *Augusta*, 46 Maine, 127; and *China* v. *Southwick*, 12 Maine, 238.

The defendants' counsel thinks that the language of the judge conveyed to the jury an erroneous idea of the character of the storm and freshet which could be regarded as a contributory cause. Possibly the judge's imagination was affected by the eloquent description which the defendants' counsel had given of the outpouring of the heavens that day; but the test by which the jury were directed to try the storm was correct, and sufficiently prosaic. They were directed to inquire whether it was such a storm as men of ordinary prudence could not be reasonably expected to anticipate and provide for; if the disaster was attributable in part to such a storm then the plaintiffs could not recover. We think the instructions taken together gave the jury the correct rule on these points. *Gray* v. *Harris*, 107 Mass., 492. If so the defendants cannot sustain exceptions because the precise form which they preferred and suggested was not adopted. *State* v. *Pike*, 65 Maine, 111, and cases there cited.

It is also claimed that the ruling as to the measure of damages was indefinite and wrong, and prejudicial to the defendants. Upon that branch of the case the jury were told that "the plaintiffs if entitled to recover, are entitled to recover upon the ground that they are bound by law to make that way safe and convenient for travelers." The measure of damages given them was the expense that the plaintiffs had necessarily incurred on account of the damage done—"not necessarily the amount which they have expended, but what under all the circumstances, it was necessary and suitable they should expend to make the way there safe and convenient for travelers—not necessarily limited to the cost of the original abutment."

If under the rule given, the jury had gone beyond the amount which the plaintiffs had actually expended and interest, we think there would have been some ground for complaint. The judge should have said, "not necessarily the amount which they have expended, but so much thereof as under all the circumstances, it was necessary and suitable they should expend to make the way

there safe and convenient for travelers, not necessarily limited to the cost of the original structure."

The plaintiffs were entitled to compensation for the expense which they had necessarily incurred in consequence of the fault of the defendants. It could not be exactly defined. It could not in the nature of things be limited to the cost of the original structure. That might not be a safe or a just rule for either party. The right of the plaintiffs to recover anything arose out of their obligation to maintain the way and bridge there. To replace it after its destruction might cost less or more than it did to build it in the first place. It would probably be more. But, less or more, the expense which the plaintiffs had reasonably and necessarily incurred to fulfil their obligation to the public once discharged but imposed anew by the wrongful act of the defendants was the proper sum to compensate them for the injury they had suffered.

Some modification might have been necessary if the structure had been old or decayed so that a speedy renewal would in any event have been necessary. Such was not the case. The work was substantially new. The additional outlay was the natural, necessary and direct consequence of the defendants' negligence and wrong doing. Apparently the jury made some allowance for supposed needless expenditure; for the amount of the verdict does not cover the actual cost of repairs and interest. The defendants did not suffer by the indefiniteness of the instruction. If either party has cause to complain of incompleteness upon this point, it is the plaintiff. The instruction was in the main correct. *Freedom* v. *Weed*, 40 Maine, 383. *Andover* v. *Sutton*, 12 Metc., 182.

The motion to set aside the verdict was vigorously pressed in argument. But we are not satisfied that the verdict was wrong. Manifestly it does not come within the rule so often enunciated respecting the setting aside of verdicts as against evidence.

The act of the defendants in entirely closing up the roomy western channel of what in times of freshet is a rough, rapid and powerful torrent, resulted in the demolition of the plaintiffs' bridge and abutment, the sufficiency of which, if the water had been left to follow its natural course and flow, had been well tested and

established in a freshet occurring before the defendants changed the course of the stream by their embankment, nearly if not quite as high and dangerous as the one in question.

We are inclined to think with the jury that the real, true, efficient cause of the mischief—to all legal intents and purposes the sole cause—was this act of the defendants, done without reasonable care and forethought as to the probable results.

The defendants must abide the consequences.

Motion and exceptions overruled.

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

STATE *vs.* HORACE MCDONALD, appellant.

Sagadahoc, 1875.—May 4, 1876.

Trial—how instructions should be given.

Where a requested instruction, embracing, as an abstract proposition, correct law, was refused by the court; *held*, not to be error, if the law was given by the court with sufficient fullness to guide the jury to a correct result.

The court instructed the jury that the burden was upon the government to establish the guilt of the accused beyond a reasonable doubt; and that, unless his guilt was thus established, it was their duty to acquit; and was requested to further instruct them that, "if from the evidence there was any other hypothesis than the guilt of the accused, they must acquit him," which requested instruction was refused. *Held*, that the requested instruction, adding nothing to the force of that already given, was rightfully withheld.

ON EXCEPTIONS.

COMPLAINT, for search and seizure.

The presiding justice, at the trial, having instructed the jury, in substance, that it was the duty of the state to satisfy their minds, beyond a reasonable doubt, of the guilt of the accused, and that unless his guilt was thus established, it was their duty to acquit him, the counsel for the defendant requested the further instruction, that, "if from the evidence there was any other hypothesis than the guilt of the accused, it would be their duty to acquit him."

This request was refused, and the defendant, the verdict being guilty, alleged exceptions.

J. D. Simmons, for the defendant.

W. T. Hall, county attorney, for the state.

WALTON, J. The refusal of the presiding judge to instruct the jury that "if from the evidence there was any other hypothesis than the guilt of the accused they must acquit him," was not erroneous. The presiding judge had already instructed the jury that the burden of proof was upon the government to establish the guilt of the accused beyond a reasonable doubt; and that, unless his guilt was thus established, it was their duty to acquit him.

Nothing further was necessary. *Commonwealth* v. *Goodwin*, 14 Gray, 55. The requested instruction, if given, would have added nothing to the force of the instructions already given, while its peculiar and somewhat obscure form might have confused and misled the jury. We think it was rightfully withheld.

Exceptions overruled.
Judgment on the verdict.

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

STATE *vs.* HORACE MCDONALD, appellant.

Sagadahoc, 1875.—May 4, 1876.

Witness. Evidence. Words—"the best evidence." Stenographer.

A witness may be impeached by showing that he testified differently at a former trial.

The former testimony of a witness may be proved by any one who heard and recollects it.

Where it was sought to impeach a witness by showing that he had testified differently at a former trial, and the evidence of the impeaching witness was objected to on the ground that it was not the best evidence, that the legally appointed stenographer, who was present and took notes, could give better evidence, the objection was overruled and the impeaching witness allowed to testify. *Held*, 1, there is no rule of law which makes the stenographer

the only competent witness in such a case; 2, the rule which requires the production of the best evidence is not applicable.
"The best evidence," defined.

ON EXCEPTIONS.

COMPLAINT, for search and seizure.

A verdict had been rendered against the defendant at a former term, which was set aside, and a new trial granted. At the second trial, the government, to impeach one of the defendant's witnesses, offered to show that he testified differently at the former trial, by a witness who was present and heard him testify. The testimony of the impeaching witness was objected to on the ground that it was not the best evidence; that the legally appointed stenographer who took short-hand notes of the testimony could give better evidence. The objection was overruled, and the impeaching witness allowed to testify. The defendant excepted. A second exception was also taken which sufficiently appears by the opinion.

J. D. Simmons, for the defendant.

W. T. Hall, county attorney, for the state.

WALTON, J. A witness may be impeached by showing that he testified differently at a former trial; and his former testimony may be proved by any one who heard and recollects it. There is no rule of law which makes the stenographic reporter the only competent witness in such a case. The rule which requires the production of the best evidence is not applicable. Nothing more is intended by that rule than that evidence which is merely substitutionary in its nature shall not be received so long as the original evidence can be had. It does not allow secondary evidence to be substituted for that which is primary. It will not permit the contents of a deed or other written instrument to be proved by parol when the instrument itself can be produced. It has nothing to do with the choice of witnesses. It never excludes a witness upon the ground that another is more credible or reliable. The objection to the witness called by the government to prove that one of the defendant's witnesses had at a former trial testified differently was therefore rightfully overruled.

The second exception is precisely the same as that already considered in another case against the same defendant, *ante* p. 465, and the same conclusion must follow.

Exceptions overruled.
Judgment on the verdict.

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

STATE *vs.* MICHAEL NEAGLE, appellant.

Sagadahoc, 1875.—May 4, 1876.

Evidence. Trial. Jurors.

Upon the trial of one charged with having in his possession intoxicating liquors with intent to sell the same in violation of the law, the record of his previous conviction for a similar offense is admissible in evidence upon the question of intent.

And the docket entries may be read to the jury, when a more extended record has not been made.

Irregularity in the drawing of jurors is not a ground for setting aside a verdict, unless it appears that the party, moving to have the verdict set aside, was injured by the irregularity.

ON EXCEPTIONS.

COMPLAINT, for search and seizure of intoxicating liquors, on appeal from the municipal court of Bath.

On the trial of the appeal, the government introduced the judge of the municipal court as a witness, who was allowed, against objection, for substance and form, to read his docket entry of a former conviction of respondent for a similar offense. After the verdict of guilty, the defendant moved to set it aside for informality in the drawing of the jurors who sat in the trial.

In the hearing of the motion, it appeared in evidence that before the jurors named therein, who were a part of the jury who rendered the verdict, were drawn, the tickets containing the names of jurors who had served within three years previous, had been withdrawn from the jury box of the city of Bath, and still remained out, and the defendant had no knowledge of the fact before the verdict was

rendered. The judge overruled the motion, and the defendant alleged exceptions.

W. Gilbert, for the defendant.

W. T. Hall, county attorney, for the state.

WALTON, J. Upon the trial of one charged with having in his possession intoxicating liquors with intent to sell the same in violation of law, the record of a previous conviction of a similar offense is admissible in evidence upon the question of intent. So decided in *State* v. *Plunkett*, 64 Maine, 534.

And the docket entries may be read to the jury, when a more extended record has not been made. *Leathers* v. *Cooley*, 49 Maine, 337. *Pierce* v. *Goodrich*, 47 Maine, 173. *Longley* v. *Vose*, 27 Maine, 179. *Read* v. *Sutton*, 2 Cush., 115. *Pruden* v. *Alden*, 23 Pick., 184.

Irregularity in the drawing of jurors is not a ground for setting aside a verdict, unless it appears that the party moving to have the verdict set aside was injured by the irregularity. R. S., c. 82, § 78. R. S., c. 134, § 20. No such injury appears in this case.

Exceptions overruled.
Judgment on the verdict.

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

WASHINGTON GILBERT, judge of probate, *vs.* GEORGE W. DUNCAN *et als.*

Sagadahoc, 1875.—May 31, 1876.

Executors and administrators.

Where an estate is solvent, an action cannot be maintained against the principal and sureties on the administration bond by reason of the administrator's neglect to settle his account, until he has been cited before the judge of probate for that purpose.

The commission of waste or trespass by third parties, with the consent of the administrator, upon the real estate of the deceased, will not constitute a breach of the sixth condition of the administrator's bond required by R. S., c. 64, § 19, unless the estate has been represented insolvent to the judge of probate.

A paper subscribed by the administrator, and found on the files of the probate court, stating that there is due from the estate to A. B., a certain sum, that there is no personal estate, and that the real estate is insufficient to pay A. B.'s claim, does not amount to such representation, unless it also appears that such paper was presented to the judge of probate.

The condition in an administrator's bond, to administer according to law all the goods, chattels, rights and credits of the deceased, is not broken by the administrator's suffering a fraudulent and collusive judgment to be rendered against him, where there is no personal property upon which the execution can be levied, and it is in fact levied on the real estate of the deceased.

The failure to render a true and perfect inventory of the rights and credits which have come to the knowledge of the administrator is a breach of one of the conditions of the bond; and a suit can be maintained for the benefit of the estate by special permission of the judge of probate first had and obtained, therefor, although the administrator has returned an imperfect inventory, and has not been cited before the probate judge to add to it, or to account for the items omitted.

ON EXCEPTIONS.

DEBT on a bond conditioned for the faithful administration of the estate of Jonathan H. Crooker, of whom the plaintiffs in interest are the legal heirs. To the plea of performance there was a reply assigning breaches and a traverse thereto by the defendants which the plaintiff joined. After the evidence for the plaintiff was out, the presiding justice ordered a nonsuit, and the plaintiff alleged exceptions.

F. Adams, for the plaintiff.

T. H. Haskell, for the defendants.

BARROWS, J. This is an action upon a probate bond given by Duncan, and the other defendants as his sureties, to secure the faithful performance of his duties as administrator upon the estate of Jonathan H. Crooker.

It is commenced for the benefit of the estate under the express authority of the judge of probate. The bond is in the form required by the statute, (R. S., c. 64, § 19,) and the defendants plead that Duncan has well and truly kept and performed all the covenants and conditions thereof; to which the plaintiff replies alleging waste and unfaithful administration in this, that he fraudulently and collusively allowed one Charles Crooker, to obtain a judgment against him as administrator for about $3500 upon a

claim which he knew to be exorbitant, unjust and illegal, and then permitted the real estate of the deceased to be set off upon the execution issued on the same judgment, for about $2500, or one-half of its real value,—that there were rights and credits to which the said Jonathan H. Crooker was entitled, as the said Duncan well knew, (to wit, a right to a life maintenance out of the estate of Hannah Crooker, under the provisions of her will of which the said Charles Crooker was executor,) which he did not make a true inventory of, nor use to offset the fraudulent and unjust claim of Charles Crooker, as he might and ought to have done,—and that there were other rights and credits, growing out of the rents and profits of said Jonathan H. Crooker's estate, which were in arrears at the time of his death, of which no inventory was returned, that he suffered Charles Crooker to commit waste and trespass upon the estate of the deceased after a representation of insolvency, and that he never rendered any account of his administration.

Upon these alleged breaches, the defendants in their rejoinder tender an issue to the country denying the fraudulent collusion with Charles Crooker in the matter of the judgment, or that the deceased had any such right under the will of Hannah Crooker in her estate, or that there were any rents or profits of his estate in arrears at the time of his death—averring that the administrator did return a true inventory—denying that Jonathan's estate was ever adjudged insolvent, or that the administrator suffered Charles Crooker to commit waste and trespass thereon, and averring that he did render an account of his administration.

In substance four breaches are alleged in the replication.

I. A breach of the condition to administer according to law all the goods, chattels, rights and credits of the deceased, committed in the alleged collusion with Charles Crooker, in respect to the procurement of a judgment by him against the estate on a groundless claim.

II. A breach of the condition to return a true inventory in the matter of rights and credits, as above specified.

III. A breach of the condition to render an account of his administration.

IV. Failure to account for thrice the amount of waste and tres-

pass committed with his consent after representation of insolvency.

Very plainly, we think the plaintiff failed to establish the third alleged breach. It is conceded that Duncan has never been cited to account by the judge of probate. Upon the face of the inventory which he returned, and supposing it to be a true and perfect inventory, there was nothing in his hands to account for. That there cannot be a breach of this condition until the administrator has been cited to account by the judge of probate has long been considered settled law in this state. *Nelson* v. *Jaques*, 1 Maine, 139. *Butler* v. *Ricker*, 6 Maine, 268.

Nor is the plaintiff more successful as to the fourth supposed breach. That condition applies only to cases where proceedings are had in the probate court upon the estate as an insolvent estate. The records show that this estate was not so dealt with. The paper from the files of the probate court, signed by Duncan, a copy of which is to be found near the bottom of page 36 of the report, does not seem to have been acted on, nor is there anything to show that it was ever presented to the probate judge for action. It is not in the usual form of a representation of insolvency, and the estate cannot be regarded as thereby "represented insolvent" within the meaning of that phrase as used in the sixth condition of the bond. Hence no waste or trespass committed by Charles Crooker, with the consent of the administrator, however clearly proved, is within the condition or amounts to a breach of it.

The paper was rightly held to be competent only as a statement of Duncan, and so far as it has a tendency to show, in connection with other proved facts, fraudulent collusion with Charles Crooker resulting in unfaithful administration and waste, provided the acts here alleged are to be regarded as a breach of either of the conditions of the administrator's bond. The case on this point is briefly as follows:

The deceased was the *non compos* son of Mrs. Hannah Crooker, with whom he lived till her death in 1858. She left property to the amount of $10,000 or $12,000 in value, and a will, the first item of which is: "It is my will, and I hereby direct my executors to provide out of my estate, maintenance for my son Jonathan H. Crooker, in all things necessary for his support in sickness or

health during his natural life." After some other devises and provisions, the residue of her property, real or personal, is devised and bequeathed to her sons Charles and William D. Crooker, whom she makes joint executors. This will was admitted to probate at the July term of the probate court, 1858, at an adjournment of which, a petition for the appointment of a guardian to Jonathan H. Crooker was presented, upon which the regular proceedings seem to have been had, and Duncan, the present administrator, was appointed guardian in September following, and filed his bond and took out his letters of guardianship and warrant of appraisal, returned an inventory, filed an account of guardianship in December, 1867, and settled it in January, 1868, in which he charges himself with his ward's proportion of sums received of different parties for logs, pasturing and ice, to the amount of $236, and asks allowance, among other things, for $2345.24, paid Charles Crooker, for board, clothes, washing &c., for the ward, from March 13, 1858, to October 13, 1867, upon which item the probate judge seems to have allowed $1371.28. William D. Crooker took an appeal from the decree allowing this account which was pending at the time of his death; and after the death of Jonathan H., which occurred in May, 1870, and after the appointment of Duncan, as administrator, this appeal was dismissed from the docket of the appellate court. After his appointment as administrator, Duncan subscribed a paper addresssed to the judge of probate representing that there was due to Charles Crooker from the estate of the deceased $2029, that there was no personal property, and that the real estate was insufficient to pay that claim.

At the October session of the probate court, 1870, he presented a petition alleging that the personal estate was not sufficient to pay the debts by $2500, and that an advantageous offer of $1550 was made for all the real estate, upon which petition notice was ordered returnable at the November term, 1870, at which term the petition was dismissed. At the August term of the supreme judicial court in this county, 1871, Charles Crooker brought his action against Duncan, as administrator, for bills for the mainte-

nance of the deceased, from March, 1858, up to the time of his death, to the amount of $3699.47, less a credit of $236, which seems to consist of the same items for sums received for logs, pasturing and ice, with which Duncan charged himself as guardian in his guardianship account. Duncan allowed the action to be defaulted, and judgment was rendered for the amount claimed. He chose an appraiser at the making of the levy, and the real estate of the deceased was appraised at $2516, and set off in part satisfaction of the judgment thus obtained. There was testimony offered by the plaintiff to the effect that Duncan, as guardian, claimed to have control of property belonging to the Hannah Crooker estate for the benefit of his ward; that he received pay for pasturage upon it; that very large quantities of timber and wood were cut from it, after the death of Hannah and before the death of Jonathan; that Jonathan continued to live in his mother's house after her death, and that a family lived there who paid their rent by taking care of him. Among the more important and noticeable items in the bills, upon which Charles Crooker obtained his judgment against Duncan, as administrator, are numerous charges for cash paid to different persons for personal service, for wood, milk, rent and the fees paid to the appraisers of the property. It cannot be denied that there is much here, which unexplained tends strongly to prove the fraud and collusion between the administrator and Charles Crooker, which the plaintiff charges.

But the troublesome questions which arise here are—if this fraudulent unjustifiable act on the part of the administrator is admitted or proved, what condition of his bond is thereby violated? And if it can be deemed within either of the conditions, what damage has resulted? Reversing the order of these questions, we remark in reference to the second; it is difficult to see how upon the plaintiff's theory of the facts, there could be anything more than nominal damages assessed.

The real estate which belonged to Jonathan H. Crooker, descended to his heirs-at-law at his death, liable only to be sold for the payment of his debts by license from the probate court, or to be taken upon an execution which is not only levied in due form,

but is issued upon a valid judgment not tainted by fraud and collusion between the parties thereto.

A judgment thus tainted can be impeached in a collateral proceeding by any person not a party or privy thereto, whose interests are liable to be unfavorably affected thereby. *Granger* v. *Clark*, 22 Maine, 128. *Pierce* v. *Strickland*, 26 Maine, 277. *Pierce* v. *Jackson*, 6 Mass., 242.

The heirs of a party deceased have only to maintain their possession, and the person who seeks to oust them as a levying creditor, if he has no better foundation than a judgment obtained by a fraudulent collusion with the administrator of the deceased, will fail. Or, if they elect to consider him a disseizor, the proof which they must produce in order to maintain the position which they claim should be decisive of this suit in their favor, would invalidate his judgment and levy and give them judgment for possession. How can they be said to have suffered any damage? The plaintiff's counsel claims that they may have damages assessed for the cloud cast upon their title. It is too shadowy a cause. Until it is ascertained by actual experiment what expense must be incurred in prosecuting or defending, there is no basis upon which the damages can be estimated.

But if this difficulty could be surmounted, there is another, which, upon both principle and authority, we deem fatal.

The only condition of the bond, which is said to be violated by mal-administration of this sort under the circumstances of the present case, is the one which provides that the principal shall "administer according to law all the goods and chattels, rights and credits of the deceased." But this obviously relates to the personalty only, and not to the real estate over which the administrator, except by consent of the heirs, has no authority or control, unless by virtue of a license from the probate judge to sell it for the payment of debts, upon the granting of which, he is required to furnish another bond differently conditioned.

In practice the amount of the administration bond required is in ordinary cases fixed at double the supposed value of the goods and chattels, rights and credits which are to go into the hands of the administrator; and from any malfeasance, seriously prejudic-

ing the rights of the heirs in the real estate, the bond would often prove, as here, an inadequate protection on account of the relatively small value of the personalty. The language of the condition cannot by any reasonable construction be made to apply to such misbehavior of the administrator as is here alleged.

It does not follow that there is no remedy. Any such maladministration may be checked by a petition for removal, and, if it results in loss, by suit in law or equity against the parties to the conspiracy to defraud; but the sureties upon the administration bond can be held only according to their covenants.

The probate court is the proper forum for the investigation of these charges of misbehavior, and the probate judge not only has the power, but it is his duty, to remove the offender when the charge is established.

But the books show repeated instances where the administration bond has been directly or indirectly held to furnish no remedy for the improper conduct of the administrator with reference to real estate. *Henshaw* v. *Blood*, 1 Mass., 35. *Wildridge* v. *Patterson*, 15 Mass., 148. *Drinkwater* v. *Drinkwater*, 4 Mass., 354. *Nelson, J.*, v. *Jaques*, 1 Maine, 139. *Freeman, J.*, v. *Anderson*, 11 Mass., 190.

In the latter case the precise argument which is urged here, (that the statute declares that unreasonable delay to raise money out of the estate for the payment of debts and consequent subjection of the estate to be taken in execution shall be deemed waste and unfaithful administration,) was considered; and it was held that the bond did not cover such neglect.

If the actual subjection of the real estate to be taken upon an execution issued on a valid judgment, and thereby in the view of the law wasted, is not a breach of the condition referred to, still less is the futile collusion with intent to defraud by suffering it to be taken by a levy which cannot stand when proof of the collusion is exhibited.

But we think there was testimony tending to show a breach of the condition to return a true inventory of the rights and credits of the deceased, upon which it was the right of the plaintiff to have the jury pass. Looking at the evidence as to the time when

Duncan took the guardianship of the deceased, and as to his acts and declarations while he was officiating in that capacity, it would be difficult not to believe that he knew of the clear right to a maintenance out of the estate of Hannah Crooker which the deceased had under her will, which ought to have been made available; and if the testimony as to the dealings with the estate of Hannah Crooker and that which Jonathan appears to have inherited from his father, is to be credited, then it would seem probable that there were considerable sums due the estate of Jonathan for waste, trespass, rents and profits accruing in his life time.

That a failure to render a true inventory of such matters is a breach of one of the conditions of the bond, and that the return of an untrue and incomplete inventory will not save it, and that no citation before the probate court is essential to the maintenance of a suit of this description, commenced by special authority from the judge of probate for the benefit of the estate, are points which have all been settled in *Potter, J.*, v. *Titcomb*, 10 Maine, 53, and *Groton, J.*, v. *Tallman*, 27 Maine, 68.

For this cause, the plaintiff's exceptions must be sustained, the nonsuit taken off and a new trial granted, at which this matter may be more fully investigated.

But it should not be forgotten that by far the most convenient and complete remedy is afforded, even in cases of a breach of this condition, by a resort in the first place to the probate court where such specific decree may be had as will do justice to all parties; for non-compliance with which, a suit on the bond in the common law court may be maintained if found necessary, and the damages much more satisfactorily ascertained and assessed.

The wise caution contained in Redfield on Wills, part second, c. 3, §§ 2, 7, p. 83, is obviously pertinent.

Nonsuit set aside.
Case to stand for trial.

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

REBECCA E. PRESCOTT *vs.* JOSEPH PRESCOTT and trustees.

Sagadahoc, 1875.—July 27, 1876.

Debt. Scire facias. Amendment.

Where an execution is returned satisfied by a levy void because the execution does not follow the judgment, the remedy is by debt on the judgment and not by *scire facias*. The case is not within R. S., c. 76, § 18.

In a libel for divorce, the court decreed $600 in lieu of alimony, and $121.75, costs of suit payable in twenty days, from final adjournment, and $80 for overdue installments; the plaintiff, in an action of debt on a judgment, described it as for $680 debt or damage and $121.75 cost of same suit. *Held*, that the misdescription was amendable. *Held* also, where an execution issued on the judgment described in the writ, bore interest from the date of adjournment and was returned satisfied by a levy void for such variance, that debt and not *scire facias* was the proper remedy.

ON REPORT.

DEBT on a judgment recovered August term 1868, for $680 debt or damage and costs $121.75; and in a second count debt on another judgment for $24.53 recovered December term, 1871.

To the first count the defendant pleaded *nul tiel record*, and, by brief statement, that the judgment had been fully satisfied by a levy of the execution, issued on the judgment, on the real estate of the defendant, the reception of seizin thereof by the plaintiff and its record in the registry of deeds.

On the second count the defendant filed an offer to be defaulted for $29.

The plaintiff produced the record of the judgment declared on in the first count, from which it appeared that on her libel for divorce from the defendant a decree of divorce was made at the December term of this court, A. D. 1868; and the court ordered that the defendant pay to the plaintiff the sum of $20 on the last day of each month thenceforward, until further order of court.

At the next term (April, 1869,) the said Joseph Prescott was brought before the court for contempt of its authority in neglecting to make the monthly payments, and was ordered to be imprisoned until he performed the said order.

At the next (August) term, the court decreed as follows: "And upon further hearing, it is now decreed that, in addition to the

dower in the libelee's real estate to which the libelant is by law entitled, and in addition to the sums heretofore ordered by the court to be paid by the said libelee, the said libelee pay to said libelant instead of alimony the sum of six hundred dollars, and, in default of payment of the same with the costs on this libel legally taxable within twenty days from the final adjournment of this court, that execution issue for the said sum of six hundred dollars and taxable costs, to be levied on the goods and chattels, lands or tenements of the defendant, and in default thereof upon his body.

And the order for monthly payments henceforth ceases. Ordered also, that execution issue for the amount of such of the monthly installments heretofore ordered to be paid by the libelee, as have accrued since his commitment to jail."

Execution issued September 24, 1868, for $680, debt or damage, and costs $121.75, and on the 25th of said September, was levied on real estate in full satisfaction of the same, and the levy was duly recorded with the acknowledgment of the plaintiff of seizin and possession received.

The case was reported to the full court for decision according to the legal rights of the parties.

F. Adams, for the plaintiff.

W. Hubbard, for the defendant.

LIBBEY, J. This is debt on two judgments, one recovered at the August term, supreme judicial court, 1868, for $680 debt or damage and costs of suit taxed at $121.75 ; the other recovered at the December term, 1871, for $24.50 costs of suit.

The right of plaintiff to recover on the second judgment is admitted.

To the right of plaintiff to recover on the first judgment, the defendant interposes two objections.

I. It is contended that *scire facias*, and not debt, is the proper remedy. R. S., c. 76, §§ 17 and 18, is relied upon in support of this position. By § 17, "a creditor, who has received seizin of a levy not recorded, cannot waive it, unless the estate was not the property of the debtor, or not liable to seizure on execution, or cannot be held by the levy, when it may be considered void, and

he may resort to any other remedy for the satisfaction of his judgment."

By § 18, "when the execution has been recorded, and the estate levied on does not pass by the levy for causes named in the preceding section, the creditor may sue out of the office of the clerk, issuing the execution, a writ of *scire facias*, requiring the debtor to show cause why an alias execution should not be issued on the same judgment; and if the debtor, after being duly summoned, does not show sufficient cause, the levy may be set aside, and an alias execution issued for the amount then due on the judgment, unless during its pendency the debtor tenders in court a deed of release of the land levied on, and makes it appear that the land, at the time of the levy, was and still is his property, and pays the expenses of the levy and the taxable costs of the suit; and the judgment shall be satisfied for the amount of the levy."

In *Grosvenor* v. *Chesley*, 48 Maine, 369, it was decided in a case falling within the provisions of section eighteen that the only remedy is *scire facias*. Is this case within the provisions of that section? We think not. That section contemplates an execution issued upon the judgment, which has been returned satisfied by a levy and recorded. By an examination of the execution in this case, it does not appear to have been issued upon the judgment. The judgment was for $600 in lieu of alimony and costs of suit taxed at $121.75, payable in twenty days after the final adjournment of court and for overdue monthly installments amounting to $80. The executions describes the judgment on which it was issued as for $680, debt or damage, and costs of suit taxed at $121.75, with interest from date of judgment. There is a fatal variance between the judgment rendered, and the judgment described in the execution. For that reason the execution was void. It was an execution issued without any such antecedent judgment as is described in it. The question of the validity of the execution was before this court in *Prescott* v. *Prescott*, 62 Maine, 428, and it was declared void for the reason above stated. There has been no execution upon the judgment introduced by plaintiff and upon which he relies. By an examination of the record of the execution and levy, it does not appear that this judgment was satisfied.

There is no occasion for *scire facias*, to set aside a levy not appearing to be a satisfaction of the judgment, and for an alias execution upon the judgment, there having been no first execution issued upon it. In this case debt is the proper remedy.

II. It is contended that there is a fatal variance between the record of the judgment introduced in evidence, and the one described in the plaintiff's writ, and that for this reason plaintiff cannot recover on the first judgment. We think this objection is well taken. The judgment declared on in the writ is "for the sum of six hundred and eighty dollars, debt or damage and one hundred and twenty-one dollars and seventy-five cents costs of same suit." By this judgment the whole sum was due at the date of its rendition, and would draw interest from that time. By the decree or judgment in evidence, the "$600 in lieu of alimony and the costs of suit were payable in twenty days from the final adjournment, and would not draw interest till after that time; so it is apparent that the judgment in evidence is not correctly set out in the writ. The description of the judgment in the writ is the same as that in the execution upon which the levy was made, and which this court, in *Prescott* v. *Prescott* above cited, held to be a fatal variance. But it is a misdescription which is amendable, and the plaintiff has leave to amend by describing the judgment correctly, upon such terms as the presiding justice at *nisi prius* may determine, and, upon such amendment being made, judgment is to be entered up for plaintiff for both judgments; otherwise for the second judgment only.

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

JOSEPH VARNEY *vs.* BARZILLAI W. HATHORN.

Sagadahoc, November, 1875.—November 15, 1876.

Money had and received. Burden of proof.

In an action for money had and received, the burden is upon the plaintiff to show that the money received belonged in equity and good conscience to him.

Where it appeared at the trial that the defendant had collected a sum of money, seven-tenths of which belonged to the plaintiff, and three-tenths to the plaintiff's agent, who was entitled to collect the whole, and that the defendant had retained a certain sum in payment of the agent's indebtedness to him, and given the balance to the agent, a nonsuit was ordered. On exceptions, *held*, that the nonsuit was properly ordered because it did not appear how much money he had collected in all, or that he retained more than three-tenths of it in payment of the agent's indebtedness.

On exceptions.

Assumpsit, for money had and received.

The plaintiff was owner of a vessel and cargo in Bath. The master sailed the vessel on shares, three-tenths of what the cargo sold for being his share of the freight money, the residue belonging to the owner. The defendant, a creditor of the master sued him in Boston, and trusteed the purchasers of the cargo. The master, to procure a release of the funds, gave an order for the whole amount of the cargo in favor of this defendant's attorneys, out of the proceeds of which they took debt and costs amounting to $279.27, in satisfaction of this defendant's claim, and paid the balance to the master. The plaintiff brought this suit against the defendant for money had and received. It did not appear at the trial what the whole cargo sold for, or that $279.27 exceeded three-tenths of it. The presiding justice ordered a nonsuit and the plaintiff alleged exceptions.

H. Tallman & C. W. Larrabee, for the plaintiff.

F. Adams, for the defendant.

Libbey, J. This is assumpsit for money had and received by defendant to plaintiff's use. It was agreed by the parties that defendant, on the 8th of October, 1874, brought a suit against one Alden Rider and Chapin & Co., of Boston, as trustees of said Rider, in the county of Suffolk, commonwealth of Massachusetts, and that said action was settled by the parties to the writ, and the amount of said defendant's claim against said Rider and taxable costs of said action, amounting in all to $279.27, was paid by the trustees to the attorneys of the defendant who brought the suit upon the order of said Rider.

Plaintiff testified as follows: "I own 9-16ths of the schooner Sagi-

naw, and have charge of the balance of her, have had that charge for a number of years. Alden Rider was captain. He sailed her under a charter not in writing. I loaded her to keep her employed with work during the season, and loaded her with slabs. I was to have one-half of what the slabs sold for, and the other half was freight. Of the freight money the captain was to receive 3-5ths and that left 2-5ths of the freight money coming to me. I found out by Mr. Hathorn, the defendant, what became of that cargo, in a conversation with him. Mr Hathorn says, I told my folks to trustee Captain Rider's part and not anything else. When he found that he got all the money into his hands he said he did'nt know me. He told me he did not tell his Boston attorneys to trustee anything except Captain Rider's part, I have never got my pay for my interest in that cargo of lumber. I told him that the slabs were my property. He said that he had tried a good many times for his pay, and this time he trusteed the whole cargo for the amount of his bill, and he collected the costs, what belonged to me and the vessel."

On cross-examination, he said, "I allowed Captain Rider to dispose of the wood in Boston, did not know that the parties he traded with in Boston knew me; trusted to the integrity of Captain Rider to dispose of the wood and return to me my interest. Hathorn trusteed the whole cargo, took the whole amount of his bill and costs out of it, the balance was paid to the captain, and he paid it to the crew."

Alden Rider, called by plaintiff, testified in substance as follows: "I had charge of this vessel last year, and carried this cargo to Boston, to dispose of. The parties I sold the wood to did not pay me because the cargo was trusteed. I talked with Hathorn's counsel, told them that the cargo did not belong to me, told them that it belonged to Mr. Varney, of Bath. I informed Mr. Chapin so before there was any settlement. To pay my debt to Hathorn there was a check made out in my name by Mr. Chapin. He shoved it along to me to sign, I signed it and the sheriff took it. This was after I had informed him and informed Hathorn's attorney that the wood did not belong to me. The attorneys said it did not make any difference whether it belonged to me or not, they

did not know any one else but me in the trade. I told him I thought it was a hard thing to take another man's money to pay your bills. I sold the cargo to Chapin & Co. That money belonged to Mr. Varney and the vessel. The vessel was managed and owned by Mr. Varney. This money was the proceeds of that cargo."

On cross-examination he said: "The vessel was entered in Boston in my name. I told Chapin & Co., I was captain of the vessel and they bought the wood. I do not know whether they knew anything about Mr. Varney or not. The sheriff gave me Hathorn's bill receipted; my indebtedness to Hathorn was paid by me at that time."

Plaintiff recalled by his counsel testified: "I never had any contract or dealings with Chapin & Co., with regard to this wood. I did not know them. Had no knowledge of them in any way or shape."

After the plaintiff introduced this evidence he stopped and defendant moved for a nonsuit which was ordered by the presiding judge.

We think the nonsuit was properly ordered. There was no privity of contract between the parties. The plaintiff claims to maintain his action on the ground that the defendant has in his hands money, which in equity and good conscience belongs to the plaintiff, and which the defendant has no legal right to retain. To bring his case within this rule, he claims that the cargo of wood was his property; that Captain Rider was his agent in selling and receiving pay for it, and had no right to use the proceeds of the sale of the wood to pay his debts; and that defendant received the order on Chapin & Co., with full notice of these facts.

To maintain his action, it is incumbent on the plaintiff to prove that the money received by defendant was his money, and that defendant received it with notice of this fact. Has he done so? By the contract between plaintiff and Captain Rider as stated by plaintiff, captain Rider was to have three-tenths of the proceeds of the wood as his own, for sailing the vessel, and had authority to sell it and receive the proceeds. He then had a legal right to retain and use as he pleased, three-tenths of the money received for the wood.

Before the plaintiff can claim any part of the money paid by Captain Rider to the defendant, he must show that the sum paid exceeded the portion of the proceeds of the wood which Captain Rider was entitled to retain. The evidence fails entirely to prove this fact. There is no evidence showing the whole sum the wood was sold for. Nor that the sum of $279.27 exceeded three-tenths of the whole amount of the sale of the wood. It appears by the testimony of plaintiff that the sum received by defendant was only a portion of the proceeds of the wood in the hands of Chapin & Co., and that Captain Rider, collected the balance, but it nowhere appears how much. If the amount paid by Captain Rider to the defendant exceeded three-tenths of the sum for which the wood was sold, the plaintiff had the means of proving it. The jury would not have been authorized to find that fact without evidence.

Exceptions overruled.

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

ELISHA W. SHAW *vs.* GEORGE H. WILSHIRE.

Somerset, 1874.—February 14, 1876.

Mortgage. Sale.

Any written instrument, whereby the title of personal property is conveyed to a creditor of the owner for the purpose of securing payment of a debt of more than thirty dollars, designed and intended by the parties to it to operate as a mortgage, must be recorded in pursuance of the statute, (R. S., c. 91, § 1,) whether the condition thereof, as arranged and understood between the parties, is or is not expressed therein, in order to make it valid, as against any person except the parties thereto, unless the possession of the property conveyed is delivered to, and retained by, the mortgagee.

If the intention of the parties that the instrument shall operate as a mortgage, is declared or conceded, it brings the instrument within the purview of the statute requiring such mortgages to be recorded, however imperfect it may be in its form.

Ordinarily a mere receipted bill of parcels or bill of sale, in which no condition is expressed, but which the vendee named therein receives solely for the purpose of securing a debt due from the vendor, will be regarded as evidence of a pledge, of which the pledgee must retain possession in order

to make it available against an attaching creditor or subsequent *bona fide* purchaser.

In either view, if not recorded, it cannot be valid against a *bona fide* purchaser from the owner in possession.

On exceptions.

Replevin for one black horse, two bay colts, one ox-cart and fixtures, one single harness, one single sleigh. Writ dated November 19, 1872. The defendant pleaded the general issue, with brief statement denying the plaintiff's title to all except the black horse, alleging title to the harness in himself, and title to the colts, ox-cart and sleigh, in one Archibald Linn.

The plaintiff introduced the following writing:

Hartland, September, 20, 1871.

* * * * * * *

This day sold and delivered to Elisha W. Shaw, the following named personal property, to wit:

Three yearling colts, same raised by me, . . .	$200.
One single sleigh, ...	75.
Three single harnesses, ...	65.
One set cart wheels and fixtures, ...	35.

Received pay,

George H. Wilshire.

Witness to delivery,

Arnold Palmer.

Which sale included other articles, amounting in all to $1975.

The plaintiff then offered evidence, tending to show that at the time of this sale, September 20, 1871, he held a note of $2719.50 against the defendant, given December 5, 1870, upon which one Arnold Palmer was surety, and another note of $410 against the defendant and Palmer; that this sale was intended as security for the defendant's indebtedness to the plaintiff, and as security to Palmer against his liability as surety upon the note of $2719.50; that the property was delivered by the defendant to said Palmer, as agent for the plaintiff; that it was not taken away, but was permitted by the plaintiff to remain in the defendant's possession upon the following agreement; that the property was to be sold, that whenever the defendant found a purchaser for any part of it, he was to notify the plaintiff, who would take the pay, give a title

to the property, and apply the proceeds upon the defendant's indebtedness to him, where Palmer was holden; but that the defendant was not to sell any of the property without permission of the plaintiff.

The plaintiff testified that he never agreed to take the property at the prices named in the bill of sale, and that no price was ever agreed on; that the defendant's notes not having been paid on November, 1872, he demanded of the defendant the property replevied, and the defendant refused to give it up; that the property was then in the possession of the defendant; and it was testified that the sleigh was taken from his premises by the officer who served the writ on November 20, 1872; and that the ox-cart was at one Bradbury's, to whom Wilshire had lent it.

The defendant introduced evidence tending to show that on October 9, 1872, he sold and delivered the colts, ox-cart, and sleigh, to said Linn. That Linn did not know of the sale to the plaintiff, that Linn paid him $75 in money towards the property, and gave him credit for the balance of the purchase money, upon a book account which he owed Linn; that the sale to Linn was without the knowledge or assent of the plaintiff or of Palmer.

It was in testimony and was uncontradicted that, after the sale to Linn, the two colts were taken and placed in Linn's pasture, that they escaped therefrom, and were again returned to the pasture.

The officer, who served the replevin writ, testified that he found the colts in the highway, running at large near Wilshire's house, ten or fifteen rods from the house.

It appeared in testimony, that Linn was a neighbor of the defendant.

The presiding judge, among other instructions, gave the jury the following:

If the sale to the plaintiff was an absolute sale to pay a valid debt, it would be valid without recording. But if the plaintiff held his notes and claims, and took this conveyance as security, it would fall under the statute as to conveyances of property by mortgage, and must be recorded, in order to be valid as against anybody but the seller; that it would not be good against the

creditors of defendant, unless so recorded, nor against subsequent purchasers, in good faith, for value; and if any of the property was sold and delivered to Linn in good faith, for value, then Linn would have a right to hold the property, notwithstanding the conveyance to Shaw.

The plaintiff's counsel requested the court to give the following instructions:

I. If the sale of September 20, 1871, was made in good faith, to secure an actual indebtedness from the defendant to the plaintiff for money lent, and also to secure Palmer, who was a surety upon the note given by the defendant to the plaintiff, and there was a delivery of the property under the sale, then the sale would be valid against a subsequent purchaser, for value, without notice of the sale, although the bill of sale was not recorded, and the property was permitted to remain in the possession of the defendant.

II. That if the sale was made in good faith, for the purposes stated in the preceding request, and there was a delivery by the defendant to the plaintiff, of the property under the sale, and at the time it was agreed by the parties that the property should not be disposed of by the defendant, without the knowledge and assent of the plaintiff, and that when sold, the proceeds should be applied in payment of such indebtedness, from the defendant to the plaintiff, then the sale would be good against a subsequent purchaser, for value, who bought the property of the defendant, without the knowledge or assent of the plaintiff, although he had no notice of the sale to the plaintiff, and although the property was permitted by the plaintiff to remain in the possession of the defendant.

The presiding judge refused to give the requested instructions, and gave the following reasons therefor:

Because it appears by the statements of the plaintiff himself, it was not an absolute sale. He says he did not take the property as payment of the debt; he still held his claim, it did not amount to a sale of the property, but a conveyance for the security of a debt.

The jury returned a verdict as follows:

"That defendant did take the black horse and single harness, that the title to the same was in the plaintiff, and assessed dam-

ages for the plaintiff in the sum of one dollar. That defendant did not take the two bay colts, the ox-cart and fixtures, and the single sleigh, and that the title to them was in Archibald Linn."

To tho foregoing instructions and refusals to instruct as requested, the plaintiff excepted.

G. W. Whitney, for the plaintiff.

There was no writing to record but the bill of sale. In form it was unconditional, and placing it upon record would give no notice that the sale was conditional, or that the defendant had any right to redeem the property.

The plaintiff could not put upon record the contemporaneous parol agreement.

Yet the written and the unwritten must be considered together in order to determine whether the conveyance was for security.

An unwritten agreement is no mortgage; nor is it such a defeasance as will change an unconditional bill of sale and make of it a mortgage.

In order to be a mortgage within the statute, it must be so in form. Enough must be put in writing to show that the sale is upon condition.

To the point that this bill of sale need not be recorded, the counsel cited *Knight* v. *Nichols*, 34 Maine, 208; and *Gushee* v. *Robinson*, 40 Maine, 412.

S. D. Lindsey, for the defendant.

The controversy here is really between the plaintiff and Archibald Linn.

The jury found that Linn purchased the two bay colts, the ox-cart and fixtures and the single sleigh in good faith and for value, and that this property was delivered to him.

The plaintiff claims title to this property by virtue of a bill of sale, absolute in form, unrecorded, and in fact given to secure a pre-existing debt.

The possession of the property remained in the defendant. There was no consideration paid by the plaintiff, and the instrument he took cannot operate as an absolute sale or transfer of the

property. As against creditors and subsequent purchasers, in good faith for value, it was fraudulent and void. *Whitaker* v. *Sumner*, 20 Pick., 399.

The sale to Shaw by defendant under these circumstances, must be treated as a pledge. *Whitaker* v. *Sumner*, 20 Pick., 399. *Hazard* v. *Loring*, 10 Cush., 267. *Walker* v. *Staples*, 5 Allen, 34.

To constitute a pledge, the pledgee must take possession; and to preserve it, he must retain possession. *Homes* v. *Crane*, 2 Pick., 607. *Bonsey* v. *Amee*, 8 Pick., 236. *Beeman* v. *Lawton*, 37 Maine, 543.

The property was not retained by Shaw. On the other hand, the possession of Wilshire was absolute and unqualified.

The case of *Walker* v. *Staples*, 5 Allen, 34, is analogous in almost every particular, and appears decisive of this case.

The refusal to give the requested instructions seems to be fully sustained by the authorities cited.

BARROWS, J. The legislature of this state have endeavored, by various enactments, to prevent the perpetration of those frauds upon creditors and *bona fide* purchasers which are liable to be practiced if the owner of personal property, still retaining the possession of it, is permitted to encumber it with mortgages or liens of which no public notice is given.

In R. S., c. 91, § 1, it is declared that "no mortgage of personal property, to secure payment of more than thirty dollars, shall be valid against any other person than the parties thereto, unless possession of such property is delivered to and retained by the mortgagee, or the mortgage is recorded by the clerk of the town or plantation, organized for any purpose, in which the mortgager resides."

Careful provision as to the place of record is made for cases in which all or any of the mortgagers reside without the state, or in an unorganized place within it, or where the mortgage is made by a corporation.

After it became apparent that, in place of taking mortgages to secure the purchase money, sellers of chattels were making a practice of stipulating in the contract of sale that the property should remain theirs until the price was paid, and the court had

held in *Sawyer* v. *Fisher*, 32 Maine, 28, and *Gushee* v. *Robinson*, 40 Maine, 412, that the statute did not extend to liens thus created because there was no mortgage from the debtor and no unconditional transfer of title from the vendor, the legislature again intervened with the requirement now embodied in R. S., c. 111, § 5, invalidating every such agreement where a note is given for the purchase money, unless it is made and signed as part of the note and unless recorded like mortgages of personal property, when such note exceeds thirty dollars.

Various other enactments show the design of the legislature that there shall be public notice of all such incumbrances or liens if they are to be maintained against any except the parties creating them. See the provisions for recording attachments of personal property too cumbrous to be moved, as well as those of real estate, and for the record of leases for terms longer than seven years. R. S., c. 81, § 24, c. 73, § 8.

We do not feel at liberty to permit transactions which are confessedly designed by the parties to operate only as mortgages and to which they intend to give no other force or effect, when not recorded in conformity with the requirements of the statute, to take effect as absolute conveyances as against subsequent *bona fide* purchasers, merely because their form only partially represents their acknowledged purpose.

Unless the conveyance to the plaintiff can take effect as a mortgage in accordance with the design of the parties to it, it cannot be held operative to pass the title at all.

It is only by recognizing its true character as a mortgage or as evidence of a pledge that one of these anomalous instruments can be regarded as valid when it comes in conflict with the rights of those who have paid their money for the property to the general owner in possession.

The transfer and delivery of this property to the plaintiff and the receipted bill of parcels which accompanied it were not designed to constitute a sale by the parties to it. The plaintiff himself so expressly testifies. It was meant only to take effect as security for an indebtment that was not discharged or regarded as paid *pro tanto*.

Supposing it to have been done in perfect good faith, the transaction constitutes either an equitable mortgage, or a pledge of the property in question, and nothing more. If an equitable mortgage, we are brought to the conclusion that it is within the requirements of the statute and should be recorded, in order to make it valid as against a subsequent *bona fide* purchaser.

In construing the statute which requires all mortgages of personal property exceeding thirty dollars to be recorded, it is the substance, intent, design and effect of the instrument, and not its form merely, which is to be regarded.

We cannot sanction what we think would amount to a palpable evasion of the statute by giving the effect of a duly recorded mortgage to an unrecorded instrument which the grantee himself declares was intended for security only. We think it would open a wide door to fraud and deprive *bona fide* purchasers of the protection which the statute was designed to afford.

The only decision to which our attention has been called, which sets form above substance to this extent, *Knight* v. *Nichols*, 34 Maine, 209, must be considered as overruled on this point. We see no reason to discriminate between an equitable mortgage and one in which the condition is more fully expressed. Upon the plaintiff's own version it was at the best, but a mortgage, and the statute requires that all mortgages of that amount shall be recorded.

There is another view of the case which brings us to the same result upon the familiar principle, that even if the presiding judge was in error, in treating the document under which the plaintiff claimed title, as a mortgage, and thereupon holding that a record was necessary to make it available against Winn, the error was an immaterial one, because upon any legal construction of the instrument the plaintiff could be in no better condition.

There is a class of cases in which it has been held that a receipted bill of parcels, accompanied with a formal delivery and designed to constitute security for a debt, amounts only to a pledge of the property, of which the pledgee must retain the possession if he would make good his right to it against *bona fide* purchasers or creditors of the party who pledges the property to him. Thus re-

garded, the case falls within the doctrine laid down by our own court in *Eastman* v. *Avery*, 23 Maine, 248, and *Beeman* v. *Lawton*, 37 Maine, 543; and that of Massachusetts, *Whitaker* v. *Sumner*, 20 Pick., 399; *Hazard* v. *Loring*, 10 Cush., 267, and *Walker* v. *Staples*, 5 Allen, 34.

If the bill of parcels which the plaintiff received, coupled with the evidence as to the purpose for which it was made and as to the delivery of the property, be deemed to amount to proof of a pledge only and not a mortgage, then the conceded facts respecting the permission given by the plaintiff for the return of the property to the possession of the pledgeor would work the destruction of his rights as effectually as the ruling complained of.

In neither view of the case, can the plaintiff's claim to hold the property as security be regarded as available against that of Winn.

Various *dicta* in cases of foreign attachment, which at first glance might seem to be in conflict with our conclusion here, will be found to be inapplicable because of the different nature of the questions under consideration. *Exceptions overruled.*

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

WILLIAM H. MOORE *vs.* DAVID S. KNOWLES *et als.*

Somerset, 1875.—March 16, 1876.

Pleading. Trial.

A brief statement filed with the general issue is equivalent to one or more special pleas in bar, under leave to plead double, setting out the various matters alleged therein; and under the brief statement and general issue, the defendant has the rights incident to both pleas.

Upon demurrer by the plaintiff to a faulty plea of the general issue, the plaintiff will not be entitled to judgment though his demurrer is sustained, if the brief statement alleges what would amount to a valid defense under a special plea in bar.

The brief statement and general issue must be so far regarded as distinct and independent pleadings that a fatal defect in the one will not necessarily destroy the other.

A special demurrer, based upon a defect in the plea of the general issue, does

not meet or apply to the brief statement filed therewith. Nor is it an admission of the facts alleged in the brief statement.

Hence, *held*, that no final judgment for either party can be rendered upon such demurrer and the joinder which the statute requires of the opposite party.

ON AGREED STATEMENT.

ASSUMPSIT against David S. Knowles, Charles H. Morse and Lowell Knowles.

Lowell Knowles alone defended. The declaration is as follows:

In a plea of the case: For that the said defendants, at said Corinna, on February 27, 1866, by their promissory note of that date, by them subscribed, for value received promised to pay Thomas R. Gardiner, or order, three hundred dollars on demand and interest; and the said Gardiner thereafterwards, on December 1, 1868, indorsed and delivered said note for value received to the plaintiff, of which the said defendants had notice, and became liable, and in consideration thereof, then and there promised to pay the plaintiff the contents of said note according to the tenor thereof.

Plea. And now the said Lowell Knowles, one of the said defendants, comes and defends, when, &c., and for plea says that he never promised the said plaintiff in manner and form as the said plaintiff in his writ and declaration hath alleged against him; and of this he puts himself upon the country.

By *V. A. Sprague*, his att'y.

Brief Statement. And by way of brief statement, the said Lowell Knowles further says, that he signed the note declared on as surety for one David S. Knowles, who was the principal in said note, and that he received no consideration therefor, which facts were well known to the payee of said note, who was the agent of the plaintiff; that the money loaned by said payee of said note to said David S. Knowles, and for which this note was given, was the money of the present plaintiff, and was loaned as such, with the agreement that the term of payment should be extended six months from the date of said note, unless the plaintiff should require payment before—for which time of payment nine dollars was paid in advance by the said David S. Knowles; that at the expiration of said six months, the said David S. Knowles, without the knowledge or consent of this defendant, agreed with the payee of said note, then

the agent of said plaintiff, to extend the time of payment thereof six months more; and for such extension paid to said payee, in addition to the interest of said note, the sum of nine dollars; that subsequently the said note was transferred and indorsed to the said plaintiff, who demanded payment thereof of the said David S. Knowles, and thereupon the said David S. Knowles agreed with the said plaintiff to extend the time of payment of said note, for one year from the 27th day of February, 1868, paying the said plaintiff for said extension for the interest then due and extra interest as per agreement, and also paying him the sum of eighteen dollars for said extension of one year, all of which was without the knowledge or consent of said defendant.

L. Knowles by *V. A. Sprague*, his att'y.

To the plea of said defendant the plaintiff demurred specially, assigning for cause that it presented no proper issue, and was no sufficient answer to the plaintiff's declaration.

The defendant joined in demurrer in proper form. And it was agreed by the parties that the full court should enter such judgment upon the foregoing plea, demurrer and joinder, by nonsuit or default, as should be in accordance with the law of the case.

D. D. Stewart, for the plaintiff.

The plaintiff alleged a joint promise by three defendants. One of whom pleads severally that he never promised, &c.

It is well settled law that in assumpsit against several defendants upon a joint contract, they cannot plead severally. If they do, and the plaintiff demurs, he will have judgment.

And the rule of law is the same where one only defends, and the other defendants are defaulted.

He cannot plead that he never promised, because he does not meet the allegation in the plaintiff's writ, which is that the three promised. He tenders no proper issue by such a plea.

It is no answer to the cause of action set out in the plaintiff's declaration, which is the plaintiff's pleading. *Burnham* v. *Ross*, 47 Maine, 456.

"A pleading must be an answer to the whole of what is adversely alleged; and a pleading, bad in part, is bad altogether." 2 Bennett & Heard's, Dig. Mass. Rep., 459.

If the plea offered by the defendant does not purport to answer the whole declaration, the plaintiff should demur, and he will be entitled to judgment. *Parker* v. *Parker*, 17 Pick., 236.

In the present case one of the defendants pleaded severally that he never promised, &c.

The plaintiff demurred specially, assigning for cause that the plea presented no proper issue, and was no sufficient answer to the plaintiff's declaration.

By the agreement of the parties, the single question presented to this court is, whether this plea is sufficient upon demurrer.

If sufficient, a nonsuit is to be entered; if insufficient, a default.

That the plea is bad is shown by the following authorities: *Meagher* v. *Bachelder et als.*, 6 Mass., 444; *Butman* v. *Abbot*, 2 Greenl., 361; *Tappan* v. *Bruen*, 5 Mass., 193; *Tuttle* v. *Cooper*, 10 Pick., 281–6–7; *Columbian Man. Co.* v. *Dutch*, 13 Pick., 125; *Ward* v. *Johnson et al.*, 13 Mass., 148.

"The law requires in every plea two things—the one, that it be in matter sufficient—the other, that it be deduced and expressed according to the forms of law; and if either the one or the other of these be wanting, it is cause of demurrer." Stephen on Pleading, 140. *Tobey* v. *Smith*, 15 Gray, 535.

The present plea is defective in both form and substance, and the plaintiff is entitled to judgment.

The statute, authorizing brief statements under the general issue, has made no change in the form of the general issue, which must, as before, be properly adapted to the case, and meet the whole of the plaintiff's declaration; and for any defect in such general issue a demurrer will be sustained, and the brief statement will be wholly unimportant. *Tappan* v. *Heath*, 16 N. H., 34.

V. A. Sprague, for L. Knowles.

Barrows, J. The main object of our statutes, permitting the use of brief statements of special matter in defense in connection with the general issue in lieu of special pleas in bar, is well stated by Shepley, C. J., in *Trask* v. *Patterson*, 29 Maine, p. 502, thus: "one of the important purposes designed to be accomplished by allowing them to be used instead of pleas and replications, was to

relieve the parties from that exactness of allegation and denial, by which parties were sometimes so entangled as to prevent a trial upon the merits."

It would be a signally perverse failure in its chief design, if it should turn out that a plaintiff could entitle himself to judgment, by demurring to a faulty plea of the general issue, accompanied by a full and sufficient brief statement, setting forth facts which constitute a perfect defense, and which, if put in the form of a special plea, would be a bar to the plaintiff's suit. It cannot be so. A well drawn brief statement, filed with the general issue, is equivalent to a special plea in bar setting out the matter alleged therein. If it alleges facts upon proof of which the defendant would be entitled to judgment, the plaintiff cannot have judgment in his favor upon a demurrer to what might be a defective and demurrable plea of the general issue, if it stood alone.

In such a case as this, the substance of the controversy is presented, not by the mere formal pleading of the general issue, but by the brief statement subjoined.

If such brief statement contain matter which is pleadable in bar and sufficient, if proved to entitle the defendant who relies on it to be personally discharged, notwithstanding the plaintiff should establish his claim beyond controversy under a naked plea of the general issue, why should it not have the same effect upon demurrer, when there is a fatal defect in the form of the plea, but none in the substance of the brief statement?

"To divest legal proceedings of all abstruse technicalities," (remarks Rice, J., in *Day* v. *Frye*, 41 Maine, p. 330,) "has been a favorite object of modern legislation. Hence the abolition of special pleading, and the substitution of the proceeding by brief statement. It was to render simple, plain and certain, that which before, to the common mind at least, was dark, complicated and uncertain."

The general issue was not what this defendant relied on for his defense. The principal promisor in the note being defaulted, and the plaintiff having discontinued against the other surety, this defendant commences his brief statement by admitting in substance all which would be put in issue by the most precise and formal

plea of the general issue, and then he proceeds to make a simple and plain, and sufficiently certain statement of the subsequent acts and facts upon which he bases his defense.

The subtleties of special pleading and its power "to prevent a trial upon the merits," would be outdone, if we were to give to this demurrer the effect which the plaintiff claims.

The force and effect of brief statements, filed with the general issue, were the subject of consideration in various cases, not long after the passage of the statute authorizing their use as a substitute for special pleading.

In *Chase* v. *Fish*, 16 Maine, 132, a suit upon a bond, the defendants pleaded the general issue with a brief statement assigning duress as a special ground of defense; and it was held that "the defendants have the same rights and no more, as they would have had, if before the statute, under leave to plead double, they had pleaded the general issue and a special plea in bar that the bond had been obtained by duress." In *Potter* v. *Titcomb*, 16 Maine, 423, it was distinctly decided that "the points in a brief statement are equivalent to one or more special pleas in bar under leave to plead double; the final judgment depends upon what the law as applied to the case may require. And this is in accordance with the old system, where, upon different sets of pleadings, some issues might be found for the plaintiff and some for the defendant." Thus we see that the general issue and brief statement are not to be confounded together as parts of one and the same plea as the plaintiff's counsel here proposes to treat them.

In *Pejepscot Proprietors* v. *Nichols*, 10 Maine, p. 261, it is said that "it is a settled principle that where the defendant pleads several pleas to the same count, or, under the general issue, in virtue of the before mentioned act of March 30, 1831, places his defense on several distinct grounds relied on; if he obtains a verdict on any one issue, or on any one of such distinct grounds, he will be entitled to judgment, though the other issues are found, or other grounds of defense are decided in favor of the plaintiff."

It seems to follow that the law cannot regard a good and sufficient brief statement vitiated, because it accompanies a plea of the

general issue which, of itself, would be unavailing by reason of defect in form or substance, or for want of support in proof.

It is familiar doctrine that where, in assumpsit, the defendants sever in their pleas, one or more of them pleading something which goes to his personal discharge, (such as infancy, bankruptcy, *ne unques executor*, and the like,) not denying the cause of action alleged in the writ, the plaintiff may prevail against some of the defendants, while he fails as to those who sustain such special matters in defense. And he is at liberty to proceed against all, and entitle himself to judgment against those whom he can legally hold, or to enter a *nolle prosequi* as to those who could sustain their separate special pleas. Chap. 201 of the Laws of 1874, was not necessary to enable him to do this. *Cutts* v. *Gordon*, 13 Maine, 474. *Hartness* v. *Thompson*, 5 Johns., 160. *Woodward* v. *Newhall*, 1 Pick. 500. *Tuttle* v. *Cooper*, 10 Pick., 281. *Salmon* v. *Smith*, 1 Saund., 207, a., in note.

If it was to be regarded as a mere plea of the general issue, the defendant's plea in the case before us, to which the plaintiff has demurred must be held bad. *Butman* v. *Abbot*, 2 Maine, 361. *Meagher* v. *Bachelder*, 6 Mass., 444. *Ward* v. *Johnson*, 13 Mass., 148.

That it cannot be so regarded under our statutes and decisions we have already seen. *Utile per inutile non vitiatur.* Its own proper force must be accorded to the brief statement, as distinct from the general issue to which it is appended, but of which it is nevertheless so far independent that a failure to sustain the one, either in law or in fact, cannot be regarded as fatal to the other. If a defendant makes an insufficient and futile brief statement, he is not thereby deprived of his rights under a good plea of the general issue, and *vice-versa.*

From these views it results that the stipulation in the case before us, that "the full court shall enter such judgment upon the foregoing plea, demurrer and joinder, by nonsuit or default as shall be in accordance with the law of the case," becomes abortive. The "law of the case" does not warrant a final judgment for either party upon these pleadings.

The special demurrer must be sustained; but it does not war-

rant a judgment for the plaintiff, for it touches only the general issue, and does not meet or apply to the brief statement.

Nor, on the other hand, do we think the demurrer can be treated as an admission of the facts alleged in the brief statement.

At *nisi prius*, either or both of the parties may have leave to amend their pleadings, as law and justice may require, upon such terms as the judge thinks proper. *Case remanded.*

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

ELIZABETH MCCLELLAN *et als.*, in equity, *vs.* JOHN R. MCCLELLAN *et al.*

Somerset, 1872.—April 6, 1876.

Equity. Trust. Words—some writing. Infants. Dower.

The change of phraseology in the revision of the statutes from "created and manifested" to "created or declared" wrought a change of the law ; so that under R. S., c. 73, § 11, an express trust need not be created by a writing; it is sufficient that it be subsequently declared by a writing signed by the party charged with the trust.

R. S., c. 73, § 11, provides: There can be no trust concerning lands, except trusts arising or resulting by implication of law, unless created or declared by some writing signed by the party or his attorney. *Held*, 1, that "some writing" means any writing, however informal, from which the existence and terms of the trust can be understood, whether intended by the signer as such or not; that letters, memoranda or other writing of a party, delivered or left by him and found among his papers, are sufficient; 2, also, that where the facts are contained in several writings, one may be signed and the others referred to.

An infant trustee, holding the legal title and having also an interest in the trust estate, is entitled to a day after attaining his majority, to answer.

In a family compact for a division of inheritance constituting one of the heirs (John) a trustee for the purpose, *held*, 1, that the signatures of the *cestuis que trust* were not essential to a declaration of his trusteeship, their assent was sufficient; 2, that John holding the estate in trust and having authority to convert it into money and apply the proceeds to the purposes of the trust, his grantees hold free from the trust, but that having died before the conveyance of the whole, the legal estate of the residue followed by the trust, descended to his son; 3, that, the trust having been declared subsequent to the descent of the property, John's widow could not be deprived of

her right of dower in the undivided portion inherited by her husband; but in all that conveyed to him by his brothers, sisters and nieces, he not having held it otherwise than as trustee, she is not entitled to dower, and she should therefore release her apparent right therein to clear the title; 4, that the infant defendant, holding the legal title as trustee, but also having an interest in the estate, should therefore be decreed to convey the residue of the estate to the new trustee, the decree to be binding on him, unless on being served with a subpœna, he shall, within six months after attaining his majority, show sufficient cause to the contrary; 5, that John's mother, being jointly interested by the terms of the settlement with the heirs and having accepted this interest in lieu of her legal interest, thereby equitably released her legal right and was properly joined as a party to the suit.

BILL IN EQUITY.

On August 20, 1864, Judah McClellan died intestate leaving a widow, seven sons and two daughters, and two granddaughters, children of a deceased sister. The heirs entered into negotiations for dividing the estate without probate administration. A compact of nine articles as a basis of settlement was drawn up, and signed by the widow and eight of the heirs, three not signing, of whom one had authorized the signing, one had signed a copy of eight of the nine articles, and the remaining son John J. McClellan since deceased intestate (March 3, 1865,) was named in article 6, which provides that "all the children shall execute a deed or deeds to John of all their interest in the real estate to enable him to carry out the provisions of the compact, John to give back a document setting forth the purposes for which the deeds are given and obligating himself to carry out the provisions."

All the other heirs, soon after the signing of the compact, gave John a power of attorney to transfer stocks, and quit claimed for nominal consideration their interest in the real estate. John sold the stocks and most of the real estate, declared and paid a dividend of $5,000, to the mother and the same sum to each of the heirs, and died shortly after, leaving these defendants as his widow and heir who was a minor, and leaving as the bill alleges, the trust unexecuted in part to wit: he did not set off to Elizabeth, the widow of Judah, a part of the homestead, did not sell the residue, and did not procure her release of dower. The complainants prayed that the defendants might be adjudged to hold the remaining property in trust for the complainants, be required to convey the same to a new trustee, and for general relief.

It did not appear that John ever gave back the document stipulated in article 6, but many documents and letters were in evidence, some of them dated before and some after the making of the compact, and signed by him, showing his efforts to bring about the compact, and his recognition of it afterwards.

It appeared that John J. McClellan, on August 28th, 1864, wrote to certain brothers residing in New York and other states, announcing the death and befitting burial of their father. In that letter he made a rough estimate of the value of the property together with a proposal for a family settlement, saying among other things the following: "This proposition is satisfactory to all here. . . If it meets your views, it stands as a basis of a peaceful settlement of father's estate. . . Some one of the family must be empowered to settle the estate. As I am here and have no business at present, it is proposed that I should take upon myself this charge. If it be agreeable to you, I am willing to undertake it, and will try to do it in a manner satisfactory to all concerned. We shall use our utmost efforts to make a speedy and peaceful settlement of the estate, and I invoke your assistance in rendering this mark of respect to the memory of our late father. . . Mother expresses her entire satisfaction and acquiescence in the proposed settlement. I shall try to sell the real estate and divide the property within ninety days from date of decease. This was accepted and the 'compact' formally written out and executed as above mentioned."

Several letters written by John J. to his brothers, sisters and nieces, recognizing the "settlement," among them a letter to Edward, of October 27, 1864, in which is the following: "After considerable trouble and a special visit to D., I have obtained the assent of the whole family to the proposed "settlement." After enumerating the pieces of property sold by him and the sums realized, he adds: "I propose to make a dividend of $5,000 on a share."

On Nov. 24, 1864, he wrote again to Edward: "I am ready to divide $5,000 per share on the 20th instant."

On Nov. 29, 1864, again to the same: "On the 21st I distributed $5,000 on a share, as follows: (then follows a detailed statement of the sums in stocks, &c.)

On Nov. 23, 1864, he wrote to the granddaughter Emily San-

born: "You are entitled to receive from your grandfather's estate on the first dividend, $2,500, being one-half of $5,000, on a full share.

"By virtue of the power vested in me, I have assigned to you

5 shares Northern Bank, Hallowell, $100 each,		$500.00
2 " Augusta "	80	160.00
6 " Ticonic "	Waterville, 75	450.00
Sept. 2st, 1864. Cash, Nov. 8th, 1864,		50.00
A. & P. Coburn's note and interest, to Nov. 21, 1864,		1040.29
Cash to balance,		299.71
		$2500.00"

He also made returns to the collector of internal revenue which he signed as "trustee."

D. D. Stewart, for the defendants contended that the bill could not be maintained because the compact was not signed by all the parties, because the widow's interest was different from that of the heirs, because no trust was created, and because a decree for conveyance cannot be made against an infant.

S. Coburn, for the plaintiffs.

VIRGIN, J. On August 20, 1864, Judah McClellan died intestate, leaving a widow, seven sons and two daughters, and two granddaughters, children of a deceased daughter. Soon afterwards, his son Samuel died, leaving two children.

The widow, seven children and four grandchildren bring this bill against the widow, and sole heir of the remaining son, John J. McClellan, since deceased, intestate, alleging substantially that the complainants and the said John, soon after the decease of said Judah, entered into a family compact as a basis of settlement of the estate of said Judah, by which all except a portion of the homestead was to be sold and the proceeds divided equally among the widow and the ten children, the two granddaughters "together taking their mother's share;" that, in order to carry out the agreement, the other heirs conveyed all their interest to John who was to sell the property and divide the proceeds as above; that John took the property in trust for the purposes mentioned, sold a part,

made one dividend of $5000 per share and died before fully executing the trust, leaving these defendants as his widow and heir. The complainants pray that the defendants may be adjudged to hold the remaining property in trust for the complainants, be required to convey the same to a new trustee to be appointed, and for general relief.

Did the acts and agreements of the widow and heirs of Judah McClellan create in fact a trust in the property of which he died seized?

Considering the title as an inheritance, the number of heirs, the release of the whole to John, the acceptance and disposal of it by him, the relations of the parties, together with the purposes and objects in view as evidenced by the distribution of the proceeds we can entertain no doubt of the fiduciary relation between the original parties. But that is not enough.

The law governing the question whether a trust can be established and enforced, is to be found in the statute concerning trusts. This statute was derived (through our mother commonwealth) from the statute of Car. 2, c. 3, § 7, which provided that "all declarations or creations of trust or confidences of any lands, tenements or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or else they shall be void." In *Forster* v. *Hale*, 3 Ves., 696, the master of the rolls construed this section as not requiring that trusts shall be "created" only by a writing; but that they shall be thus "manifested and proved;" for then the great mischief of parol declarations against which the statute was intended to guard, is entirely taken away. This view was confirmed on appeal, by Lord Ch. Loborough, in the same case in 5 Ves., 308., and the same construction is still maintained by the English courts. *Smith* v. *Matthews*, 3 De G. F. & J., 139, 150.

The Mass. statute of 1783, c. 37, § 3, so far as express trusts are concerned, was a transcript of the English.

The legislature of this state, for some cause, omitted to incorporate this or any similar provision in the statute of 1821, c. 53; but the omission was supplied in 1827, by enacting the provision in terms as "an act additional to c. 53." Stat. 1827, c. 358.

In 1837, while this statute was in force, this court said, "a trust need not be created in writing; it is sufficient if it be proved in writing under the hand of the party to be charged." See *U. Soc.* v. *Woodbury*, 14 Maine, 281. Again, in *Evans* v. *Chism*, 18 Maine, 223. "Courts of equity have not considered any of the provisions of the statute of frauds as violated by giving effect to a trust not originally created, but afterward proved or admitted to exist by some written document."

In the revision of 1841, c. 91, § 31, the original section, so far as it related to express trusts, was condensed to the following terms: "All trusts concerning lands . . must be created and manifested by some writing signed," &c. It seems the terms "created and manifested" were considered as working "a most important change in the law"—that trusts must be created by writing; and that it was not sufficient that they were subsequently admitted, acknowledged or declared in writing. *Richardson* v. *Woodbury*, 43 Maine, 206. But in the revision of 1857, c. 73, § 11, the particular phrase mentioned was changed to "created or declared." It is the same in the revision of 1871, c. 73, § 11.

One of the principal designs in revising and codifying the public laws is to condense them so far as practicable—a mere change of phraseology not being deemed a change of the law, unless such was the evident intention of the legislature. *Hughes* v. *Farrar*, 45 Maine, 72. We are of the opinion, however, that the change of the revision of 1841, from "created and manifested" to "created or declared" was more than a mere change of phraseology; and succeeding as it did, the construction given in *Richardson* v. *Woodbury*, we think the marked change of language evinced an intention on the part of the legislature to change the law as there decided; and that such a change was wrought; so that under the existing statute, as under the first, express trusts may be "created" in the first instance, or subsequently "declared" by any proper writing signed as required. In fact they frequently originate in the verbal negotiations of parties; and whenever they do so arise and are proved by "some writing signed by the party or his attorney," whether it be contemporaneous with, or prior or subsequent

to, the principal transaction, the authorities all concur in declaring the statute complied with in this respect. *Pratt* v. *Thornton*, 28 Maine, 355. *Evans* v. *Chism*, *supra*. *Buck* v. *Swazey*, 35 Maine, 41. *Bragg* v. *Paulk*, 42 Maine, 502. *Montague* v. *Hayes*, 10 Gray, 609. *Baylies* v. *Payson*, 5 Allen, 473. *Urann* v. *Coates*, 109, Mass., 581. *Faxon* v. *Folvey*, 110 Mass., 391. *Kingsbury* v. *Burnside*, 58 Ill., 310. S. C., 11 Am. Rep. 67. *Frost* v. *Frost*, 63 Maine, 399. 1 Perry on Trusts, §§ 81 *et seq.* and notes.

"Some writing" means any writing whatever, however informal, from which the existence of the trust in the estate, and the terms of it can be sufficiently understood, whether it was intended by the signer as such or not. Thus the letters, memoranda, or other writings of a party, delivered or left by him and found among his papers after his decease, have been held sufficient. Ibid.

To be effectual, the "writing" must not only show that there is a trust (*Cowan* v. *Wheeler*, 25 Maine, 267), but also what it is. *Bragg* v. *Paulk*, *supra*. *Smith* v. *Matthews*, *supra*. *Steere* v. *Steere*, 5 Johns. Ch., 1. *Baylies* v. *Payson*, *supra*. In other words, that a trust exists in a particular estate, the nature and objects of it, who the beneficiaries are and what are their respective interests. When these facts are not all contained in one "writing" but are in several, only one of them need be signed, provided the others are so referred to therein as to be deemed altogether parts of one and the same transaction. *Kingsbury* v. *Burnside*, *supra*.

By an application of these principles to the written testimony in this case, the trust, the relation of trustee and *cestuis que trust* between John J. McClellan in his life time, and these complainants and their respective interests, are clearly established. All the other heirs had released their interests to him in accordance with the terms of the proposed family settlement, which were substantially set forth in his letter of August 28, 1864. The compact was drawn and by his procuration signed by the mother and all the heirs save Francis and Emily Sanborn; and Francis had signed all the articles except the seventh, and Emily had, at John's request, authorized him to execute it for her, which he must have considered sufficient, since he proceeded with the execution of his

trust and accounted to her the same as with the others. But neither was her signature nor were those of the other *cestuis que trust* essential to a declaration of his trusteeship. Their assent was all sufficient. The "proposed settlement" was so referred to in John's letters of August 28, and October 27, 1864, (saying in the latter—"After considerable trouble and a special visit to Dexter, I have obtained the assent of the whole family to the proposed settlement,") as to make them all parts of the same. And these, together with his return as "trustee" to the revenue officer, constitute a complete declaration in writing on his part that he held the property, of which his father died seized, as trustee. Moreover, his letters in relation to the dividend, being his own record of the partial execution of his trust, demonstrated that he had the same understanding of it, and that had he lived a short time longer, he would have completed what he had accepted as a "mark of respect to the memory of his late father."

Holding the estate in trust, and having authority to convert it into money and apply the proceeds to the purposes of the trust, his grantees hold free from the trust. But having died before the conveyance of the whole, the legal estate of the residue followed by the trust, descended to his son. *Abbott, pet'r*, 55 Maine, 580, p. 591, and cases.

Moreover, the trust having been declared subsequent to the descent of the property, Lydia R. McClellan, widow of John J., cannot be deprived of her right of dower in the undivided portion inherited by her husband. But in all that conveyed to him by his brothers, sisters and nieces, he never having held it otherwise than as trustee, she is not entitled to dower, and she should, therefore, release her apparent right therein to clear the title.

Can an absolute decree for conveyance be made against the defendant, John R. McClellan?

On account of his incapacity for defending himself, equity as well as the common law is extremely careful of an infant's rights. The answer filed in his behalf, being that of his guardian rather than of himself, is not binding, and cannot be read against him; but leaves the complainant to prove his allegations. 2 Kent's Com., (12th ed.,) 245; 1 Dan. Ch. Pract., (4th Am. ed.,) 169 and notes. By

the old settled rule of practice in chancery, (borrowed in part from the common law,) in cases wherein the real estate of an infant was to be sold or conveyed under a decree of the court, a day (usually six months after attaining majority) was afforded him to show cause against the decree; and for this purpose, he was entitled to be summoned in by subpœna. Ibid. *Coffin* v. *Heath*, 6 Metc., 76. *Whitney* v. *Stearns*, 11 Metc., 319. *Dow* v. *Jewell*, 21 N. H., 470, p. 487. *Mills* v. *Dennis*, 3 Johns. Ch., 367. And the appropriate provision was inserted in the decree. 1 Dan. Ch. Pract., 165 and notes.

The statute of 7 Anne, c. 19, 1, provided "that it shall be lawful for any person under the age of twenty-one, by the direction of the court of chancery or exchequer, by an order made upon hearing all parties on the petition of the person for whom such infant shall be seized or possessed in trust . . . to convey any such lands as the court shall by order direct; and such convey ance shall be good in law." Section 2 provided, "such infants being only trustees . . may be compelled by such order to make such conveyances in like manner as trustees . . of full age."

This statute was considered by Lord Ch. King applicable to resulting trusts; and he ordered a conveyance by infant trustees in two instances at least. *Ex parte Vernon*, 2 P. Wms., 549. S. C., 2 Ab. Cas. in Eq., 520. These decisions were deemed good authority by Ch. Kent, notwithstanding the contrary decision of Lord Ch. Talbot (in *Goodwyn* v. *Lister*, 3 P. Wms., 387,) who did not seem to be aware of the former decisions. *Livingston* v. *Livingston*, 2 Johns. Ch., 541. These decisions, however, lay particular stress upon the language, "such infants being only trustees" in the second section. Thus in *ex parte Vernon*, the Lord Chancellor says, "I am satisfied that is but a trust," &c. And in *Goodwyn* v. *Lister*, "there can be no doubt with regard to express trusts by deed, but that an infant being a mere trustee, may be ordered to convey; and there is no inconvenience in directing an infant to part with an estate which is no benefit to him." Again, in an anonymous case (in 2 Ab. Cas. in Eq., 521,) it is said, "where land is given to an infant, charged with the payment of money, the infant is in equity a trustee for him to whom the

money is payable; but is not within the stat. 7 Anne, c. 19, because he takes an interest in the land; and so it is in all cases where the infant claims an interest." To the same purport are *Hawkins* v. *Obeen*, 2 Ves. Sen., 559; ———— v. *Handcock*, 17 Ves., 383; *ex parte Anderson*, 5 Ves., 240.

In the case at bar, the infant defendant holds the legal title as trustee, but also has an interest in the estate. He should, therefore, be decreed to convey the residue of the estate to the new trustee, the decree to be binding on him, unless on being served with subpœna, he shall within six months after attaining his majority, show sufficient cause to the contrary.

The objection to the parties cannot prevail.

Elizabeth McClellan, widow of Judah McClellan, had a right of dower in the real estate, and was also entitled to one-third of the personal. By the terms of the settlement she became jointly interested with the heirs. This interest was given to her in lieu of her legal interest, and by accepting it she thereby equitably released her legal right. It is essential that she be made a party in order that she may be bound by the decree, and thus save herself from any further trouble or annoyance from others, and the others from her.

Finally, all the parties are interested in the proper management of the remaining trust estate; and to this end, Charles F. McClellan, selected by the parties, is appointed trustee.

The question of costs will be reserved to await the action of the defendant, John R. McClellan, on his being called in on subpœna.

Bill sustained.

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

GEORGE E. HAPGOOD *vs.* JOHN WATSON, junior.

Somerset, 1875.—May 8, 1876.

Promissory notes. Amendment. Pleading.

A note made by a firm and payable to one of its members is valid in the hands of an indorsee.

The non-joinder of a co-promisor is sometimes a valid defense under a plea in abatement; but not under the general issue.

R. S., c. 81, § 99, which provides that the statute of limitations does not run while the promisor is out of the state, cannot be avoided on the ground that the right to recover against a co-promisor is barred.

A note signed "John Watson, jr., & Co.," was declared on as a note by the defendant subscribed "by the name of John Watson, jr." *Held,* that an amendment, by striking out the words "by the name of John Watson, jr.," was allowable.

A joint note of several was given in evidence under the general issue on a declaration alleging the individual promise of one. *Held,* not to be a variance.

The firm of John Watson, jr., & Co., in 1861, gave their negotiable note, on demand unwitnessed, to S. W. Hapgood, one of the firm; the note was by him indorsed to the plaintiff who brought suit against Watson alone in 1873. Watson had been during most of the interval out of the state. Under the general issue and brief statement of the statute of limitations, *held,* 1, that the plaintiff was entitled to recover; 2, that the proof that another promised as well as the defendant did not constitute a variance; 3, that the proof that the right to recover was barred as to one of several joint promisors is no defense for the others.

ON REPORT.

ASSUMPSIT on a promissory note of the tenor following:

"$4436.89. For value received we promise to pay S. W. Hapgood or order, forty-four hundred and thirty-six dollars and eighty-nine cents on demand and interest.

North Anson, August 31, 1861.

(Signed,) John Watson, jr., & Co."

There were indorsements of interest $673.36 to date, (September 1, 1862,) and twenty-four [hundred] and sixty-three dollars, and 44-100, January 31, 1863. Also an indorsement in blank: "S. W. Hapgood."

The writ was dated March 24, 1873.

Declaration. "In a plea of the case: for that the said defendant at North Anson, on the thirty-first day of August, 1861, by his promissory note of that date by him subscribed, by the name

of John Watson, jr., for value received, promised S. W. Hapgood to pay him, or order, the sum of forty-four hundred and thirty-six dollars and eighty-nine cents, on demand, and interest; and the said S. W. Hapgood, thereafterwards, on the same day, indorsed and delivered the said note to the plaintiff, whereby the said defendant had notice, and thereby became liable, and in consideration thereof promised the plaintiff to pay him said note according to the tenor thereof.

Also a count for money had and received under which the plaintiff claimed to recover the amount due on the note described in the first count.

The plea was the general issue, with a brief statement of the statute of limitations, which the plaintiff joined.

Upon reading the writ to the jury, the plaintiff asked leave to amend the first count, by striking out as unnecessary and surplusage, the words "by the name of John Watson, jr."

The presiding justice intimated that he saw no objection to allowing the amendment, but said he would first hear the evidence in the case, and then allow or disallow it as the rights of the parties might seem to require.

The execution of the note, by the firm of John Watson, jr., & Co., in the handwriting of John Watson, jr., was not denied, and it was read to the jury, together with all the indorsements thereon, without other objection on the part of the defendant than that of variance from the note described in the writ; which objection the presiding justice overruled.

The firm of John Watson, jr., & Co., consisted of Watson and Sherman W. Hapgood, who formed a copartnership about A. D. 1860. In a year or two after the making of the note, the defendant left for the west, and continued to reside out of this state.

After the evidence was out, the presiding justice allowed the amendment to the declaration as matter of law, subject to the defendant's objection, and the case was made law on report; the full court to order a default or nonsuit according to the legal rights of the parties.

D. D. Stewart & J. J. Parlin, for the plaintiff.

I. The objection that there was a variance, between the note

described in the declaration and that offered in evidence, has no legal foundation.

It is the ordinary case of the non-joinder of a joint contractor. The defendant can avail himself of the objection only by plea in abatement, and not upon the ground of variance between the allegation in the writ and the proof offered to support it. *White* v. *Cushing*, 30 Maine, 267. *Barry* v. *Foyles*, 1 Peters, 311. *Holmes* v. *Marden*, 12 Pick., 168. *Wilson* v. *Nevers*, 20 Pick., 20. *Scott* v. *Shears*, 9 Cush., 504. *Reed* v. *Wilson*, 39 Maine, 585.

II. The evidence shows that the defendant has been out of the state for the most of the time since the note was given, and still resides out of it.

It is not barred, therefore, by the statute of limitations. R. S. 1871, c. 81, § 99.

III. The fact that the note was originally given by a partnership to one of its members, affords no legal defense. It has been duly negotiated by the original payee to the plaintiff, and there is neither proof nor pretense that it has ever been paid, released or discharged, in any way, since it was given, or that it is not justly due. *Richards* v. *Fisher et als.*, 2 Allen, 527. *Davis* v. *Briggs et al.*, 39 Maine, 304. *Smith* v. *Lusher*, 5 Cowen, 688. *Pitcher* v. *Barrows*, 17 Pick., 361. *Thayer* v. *Buffum*, 11 Metc., 398. *Temple* v. *Seaver et al.*, 11 Cush., 314. *Van Ness* v. *Forrest*, 8 Cranch., 34.

The plaintiff is therefore entitled to judgment.

A. H. Ware, for the defendant, contended that there was a variance, and that the amendment to the declaration if admissible at all, was not admissible after general issue joined, because without amendment, the general issue would have been a successful plea; with the amendment, the plea in abatement would be too late. He also relied upon the statute of limitations, because both the makers were not out of the state.

WALTON, J. We think the plaintiff is entitled to judgment in this case.

I. The fact that the note declared on was made payable to one

of the members of the firm by whom it was signed, is no objection to a recovery. Such a note is valid in the hands of an indorsee, and a suit thereon may be maintained by him precisely as if the note had originally been made payable to some one not a member of the firm. *Davis* v. *Briggs*, 39 Maine, 304. *Pitcher* v. *Barrows*, 17 Pick., 361. *Thayer* v. *Buffum*, 11 Metc., 398.

II. Nor does the fact that the note is declared on as the promise of the defendant alone, preclude a recovery. It is well settled that the joint promise of several may be declared on as the individual promise of each. If, in proving the defendant's promise, the evidence happens to show that others also promised, a variance is not thereby created between the allegations and the proof. It is none the less the defendant's promise because others promised with him. It is true that the non-joinder of a co-promisor is sometimes a valid ground of defense; but to make it so, it must be pleaded in abatement; it can never be taken advantage of under the general issue. *White* v. *Cushing*, 30 Maine, 267. *Barry* v. *Foyles*, 1 Peters, 311. *Scott* v. *Shears*, 9 Cush., 504. *Reed* v. *Wilson*, 39 Maine, 585.

III. Nor is the plaintiff's right to recover barred by the statute of limitations. The evidence satisfies us that the defendant has resided out of the state for a sufficient length of time to avoid this ground of defense. It may be that the right to recover against his co-promisor is barred; but that is no defense for him. R. S., c. 81, § 99.

IV. We entertain no doubt whatever of the power of the court to allow the amendment of the declaration in the particular stated in the report. No new cause of action was thereby introduced.

Judgment for plaintiff.

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

STATE *vs.* PROPRIETORS OF NORRIDGEWOCK FALLS BRIDGE.

Somerset, 1874.—May 31, 1876.

Indictment. Way. Towns. Corporations.

When a toll bridge is so built that it consists of two distinct structures, one extending from the shore to an island, and the other extending from the island to the opposite shore, and a highway is laid out and established over one of these structures, the burden of supporting it is changed from the bridge company to the town, within which that portion of the highway is situated.

ON EXCEPTIONS.

INDICTMENT, setting out the existence of a toll bridge across the Kennebec river between the towns of Anson and Madison, constituting a part of the public highway in and between these towns; that the toll bridge was the property of the proprietors of the Norridgewock Falls Bridge Corporation, created by act of the legislature of this state, passed February 9, 1827; and that the said company were bound by law to maintain and keep it in repair; and alleging that it was out of repair, and that the defendants neglected and refused to repair.

Within two years after the charter, the defendants built their bridge in pursuance thereof, from the Anson shore to an island in Madison, (59 Maine, p. 540,) on the western end of which they erected their toll house. Between the island and the Madison main shore, (to the east,) through a narrow channel about two rods in width, a part of the waters of the Kennebec flowed. S. C., p. 540.

A question was afterwards raised as to whose duty it was to build, maintain and keep in repair the short bridge. It was first built by the defendants.

In 1845, the county commissioners, on appeal, located a town way across the island and eastern channel. In 1846, on petition therefor, they located a highway over the town way, and corresponding thereto, and to the way originally built by the bridge proprietors, and continued the same "through Madison and a part of Cornville and Skowhegan as prayed for."

It is admitted that the short bridge was carried away by the great freshet in the fall of 1869, and has not been rebuilt.

An indictment was sustained against the inhabitants of Madison, for the same defective highway alleged in this indictment. (63 Maine, 546.)

At the trial, the defendants requested the presiding justice to instruct the jury that the laying out of the highway over the bridge by the county commissioners, would constitute a defense to this indictment. But the presiding justice, for the purpose of the trial, and of presenting the legal question raised to the full court, declined to give the requested instruction, but on the contrary instructed the jury that it was no defense; and the defendants, the verdict being guilty, alleged exceptions.

J. S. Abbott, for the defendants.

WALTON, J. This is an indictment against the proprietors of a toll bridge. They built their bridge across the Kennebec river, between the towns of Anson and Madison, at a point where there was an island in the river, so that the bridge, when completed, consisted of two distinct structures; one from the Anson shore to the island, and another from the island to the Madison shore. A highway was afterwards laid out over that portion of the bridge extending from the Madison shore to the island; and this court has already decided that thereby the town of Madison became liable for its support. *State* v. *Madison*, 63 Maine, 546. In the concluding paragraph of the opinion the court there say: "The highway described in the indictment was legally located and established in the town of Madison, and it was the duty of that town to keep it safe and convenient for travelers." And the only question to be decided in this case is, whether the bridge company is also liable to indictment for the non-repair of that portion of the bridge over which the highway was located.

We think not. The only object of an indictment for a bad road is to enable the court to impose a fine and appoint an agent to make the needed repairs. To hold that two independent corporations are liable to keep in repair, and to rebuild, if necessary, one and the same bridge; and that the court may assess two fines

and appoint two independent agents to do the work, would be absurd. Two bridges cannot occupy the same site; nor can two agents, acting independently of each other, build one and the same bridge. The attempt to do so would lead to a hopeless conflict of authority. One might determine to build a wooden bridge, the other an iron bridge. One might determine to have wooden piers, the other stone piers; and so on. The result of such a conflict of authority is obvious.

Nor do we perceive any reason why the bridge company should be held liable to keep in repair, or to rebuild, that portion of their bridge over which a highway has been located. They can no longer exact toll for crossing it. It is now a public highway, and free to all. We think the company should not be.

Our conclusion is, that when a toll bridge is so built that it consists of two distinct structures, one extending from the shore to an island, and the other extending from the island to the opposite shore, and a highway is laid out and established over one of these structures, so that the bridge company no longer has the right to exact toll for crossing it, the burden of supporting it is changed from the bridge company to the town within which that portion of the highway it situated. *Exceptions sustained.*

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

JAMES HARMON *vs.* JAMES WRIGHT.

Somerset, 1875.—July 3, 1876.

Evidence.

Where money was deposited by the plaintiff with the defendant; and the defendant's theory was that it was payable by him absolutely to one (of three selectmen) who had already signed a certain paper; and the plaintiff's theory was that it was only payable to the selectmen on condition that two at least of their number should sign it, otherwise the money to be returned; and two refused to sign; and the defendant upon notice thereof and demand refused to return the money, but, after suit brought, paid it to the one who signed, *held*, that, the defendant's liability, if any, accruing before the date of the receipt offered and excluded, he could not relieve himself therefrom

by showing that he paid the money in controversy to a third party after that time.

Where, in the same case, after suit brought, the selectman who signed the paper, paid the plaintiff $15 in consideration that he would carry out the original trade made with the selectmen, and took his receipt for the money, *held*, that the receipt, being *res inter alios* and by its terms not to affect this suit, was properly excluded.

On exceptions and motion.

Assumpsit, on the money counts.

"Also, for that the said defendant, at said Skowhegan, on the sixteenth day of March, A. D. 1874, in consideration that the said plaintiff would, and then and there did, pass into the hands of, and deposit with, the said defendant, the sum of thirty dollars, then and there promised the plaintiff to return and pay said sum of thirty dollars to him on demand, if neither V. R. Tuttle nor E. H. Elliott, or would upon request, as selectmen of Canaan, sign a certain agreement, in writing, of that date, given by George W. Johnson as one of the selectmen of said Canaan in behalf of said town, to the plaintiff; and which agreement, in writing, required the signature of another member of the board of selectmen of said Canaan in order that it might become binding on said town. And the plaintiff avers that he thereafterwards presented said agreement, in writing, to said V. R. Tuttle and E. H. Elliott, selectmen as aforesaid, and requested them to sign the same, which each of them, then and there, refused to do, and that he, said plaintiff, thereafterwards gave due notice of said refusal to the defendant, and demanded of him the return and payment of said sum of thirty dollars, which said defendant, then and there, refused to return and pay to the plaintiff according to his agreement aforesaid."

The defendants pleaded the general issue and filed an account in set-off.

The plaintiff testified in support of the facts stated in the declaration; and on cross-examination in substance that the town of Canaan sued him in Peter Martin's name on account of a land transaction in which Martin had conveyed land to the plaintiff; that he had negotiated with the selectmen for a settlement of that suit, and came to a verbal agreement that on the payment of $30

by him they would pay their costs and withdraw the suit, that in order to have the settlement binding, and to prevent the liability of another suit he had a paper drawn up for the selectmen to sign, that the paper was signed by one of their number, George W. Johnson, and witnessed by this defendant, whereupon he deposited the $30 with the defendant, to be paid over to the selectmen of Canaan, when another one of their number should sign the paper, and in case of their refusal, the money to be returned to him; that the other selectmen objected to the terms of the writing, refused to sign it; and that the defendant, on notification and request, refused to return the money.

The defendant also testified, substantially denying that when he received the money there was anything said about its being returned. He testified that the plaintiff afterwards demanded the $30 of him, and continued: "I asked him why; he said the selectmen won't sign it. I says, I cannot help that, I cannot pay you the money and subject myself to the liability of paying it twice. This money was put into my hands to pay to Johnson, I cannot pay it to you. Well, said he, you agreed to pay it back to me if the selectmen did not all sign that writing. I denied it, said I, there was no reason why I should, you know I was only acting as a matter of courtesy between you and the town. You did your own business and finally received the writing. Well, said he, if you won't pay back the money, give me a writing that if they won't sign within thirty or sixty days you will pay it back. I says, I shall not do that. You get an order from George Johnson and I will pay you the money upon the writing. Said he, if you won't do either of those things, I will sue you," etc.

The paper drawn up for the signatures of the selectmen and signed by Johnson was of the following tenor:

"SKOWHEGAN, March 16, 1874.

In consideration of $30 to us paid, and on payment of $25 note to Mary A. Lewis, by James Harmon, we, George Johnson, E. H. Elliott and V. R. Tuttle, acting as agents for the town of Canaan, do agree with said Harmon, to stop the suit and pay the costs commenced by Peter Martin against James Harmon, December, 1873, for consideration money claimed on land deeded to said

Harmon by Peter Martin, August 28, 1873, and to allow no more suits brought for same, in the interest of said town, and to save said James Harmon, harmless in every sense of the word, in consequence of accepting said deed, made August 28, 1873, and paying the consideration money claimed; that Peter Martin, his heirs or assigns, shall never be allowed to claim anything more, as consideration money for same.

GEO. W. JOHNSON, } *Selectmen of*
} *Canaan.*

Witness: J. WRIGHT."

The case states that "two papers were offered by the defendant and excluded by the court; the defendant objecting and reserving his legal rights. If the rulings were erroneous and injurious to the defendant, the verdict to be set aside." The papers offered and excluded were of the following tenor:

"Canaan, April 8, 1874. In consideration of fifteen dollars to me paid by George W. Johnson, of Canaan, I do hereby agree to fully and completely carry out the agreement made with the selectmen of said town of Canaan, at said town, on Saturday, the fourteenth day of March, 1874, in relation to the settlement of an action, *Peter Martin* v. *James Harmon*, commenced in December, 1873; and I do further agree to pay for all damage, costs and trouble that have arisen, or may arise, to said Johnson, or to the town of Canaan, in consequence of any failure on my part to carry out and fulfil my part of said agreement; and the above is not to affect the suit between James Wright, defendant, and myself (James Harmon.)

(Signed,) James Harmon."

"Skowhegan, May 5, 1874. Received of James Wright, thirty dollars in full for money deposited in his hands by James Harmon for the town of Canaan by direction of George W. Johnson, March 16, 1874.

(Signed,) George W. Johnson."

The verdict was for the plaintiff, and the defendant moved to have it set aside as against evidence, and alleged exceptions.

J. Wright, pro se.

W. Folsom, for the plaintiff.

DICKERSON, J. The exclusion, by the presiding justice, of the receipt of May 5, 1874, and the paper dated April 8, 1874, was neither erroneous, nor injurious to the defendant. The defendant's liability to the plaintiff, if any, accrued before the receipt was signed, and he could not discharge himself therefrom, by showing that he paid the money in controversy to one of the selectmen of the town of Canaan after that time. Besides, the defendant was permitted to introduce parol evidence of the fact stated in the receipt, and could not have been prejudiced by the exclusion of the receipt itself.

The paper of April 8, 1874 was executed subsequently to the commencement of this suit, and by its terms was not to affect it. It was *res inter alios*, and could not be admitted without a violation of the intention of both the parties to it.

The principal question of fact in the case, whether the defendant agreed to pay the plaintiff back the thirty dollars in controversy in the event of a specified contingency which, the plaintiff claims, happened before the commencement of this suit, was submitted to the jury, and decided in favor of the plaintiff. We have no doubt but it was competent for the defendant to bind himself by such agreement, and we do not feel at liberty to set aside the verdict as against the weight of evidence, since there is a preponderance of evidence in support of the verdict. The defendant argues with considerable plausibility and force that the witnesses who corroborate the plaintiff's testimony are not entitled to credit, but the jury who saw and heard them thought otherwise, and we see no sufficient ground for disturbing their verdict.

Exceptions and motion overruled.

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

BARROWS, J., concurred in the result.

MARK GRAY *vs.* INHABITANTS OF HOULTON.

Aroostook, 1875.—July 1, 1875.

Insane persons. Town.

The written complaint required by R. S., c. 143, § 12, to be given to municipal officers, to examine and decide any case of insanity in their town, is sufficient if served upon any one of such officers.

ON EXCEPTIONS.

DEBT, brought to recover for the services and expenses of the plaintiff in conveying to the insane hospital at Augusta, one Charles McCann, a person adjudged to be insane by two justices of the peace and quorum, by virtue of R. S., c. 143, § 15.

The defendants pleaded that they did not owe.

The following complaint in writing was made and given by a brother of the insane person, to the chairman of the board of selectmen of the town of Houlton.

"HOULTON, May 10, 1873.

To the selectmen of Houlton:—Daniel McCann of Houlton, complains that his brother, Charles McCann, of said Houlton, is an insane person, dangerous to the community, and prays you immediately to inquire into the condition of said Charles McCann, and to take such further steps as you may deem proper in the premises. (Signed,) Daniel McCann."

This complaint was made under the provisions of R. S., c. 143, § 12. The presiding judge ruled that such complaint should have been served upon at least two of the selectmen and thereupon, on motion of the defendant, ordered a nonsuit. To this ruling the plaintiff excepted.

W. M. Robinson & J. B. Hutchinson, for the plaintiff.

C. M. Herrin, for the defendants.

PETERS, J. It was decided in *Newbit* v. *Inhabitants of Appleton*, 63 Maine, 491, that a "notice and request to the overseers," required to be given by an inhabitant to enable him to recover of a town for the support of a pauper, was sufficient, if served upon

a single overseer. That case is not distinguishable from this. The reasons given for the decision in that case are as applicable here. The complaint required in this case must be a written one. It could not very well be delivered to more than one of the selectmen. It would then be the duty of that officer to communicate with his associates in regard to it. *Exceptions sustained.*

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

EBENEZER C. BLAKE *vs.* JAMES C. MADIGAN *et al.*

Aroostook, 1875.—September 5, 1876.

New trial. Trial. Watercourse.

A new trial will not be granted, on the ground of newly discovered evidence, when the party complaining, by proper diligence, might have discovered such evidence and had it at the trial.

When from the nature of the issue a party had reasonable cause to anticipate that the point, to which certain testimony introduced at the trial is applicable, would be controverted; such party is not entitled to a new trial on the ground that he was taken by surprise by the testimony thus introduced.

A reservation of water necessary and sufficient to carry two run of mill stones; *held*, a reservation of a quantity sufficient for the purpose with the machinery in actual or contemplated use at the mill at the time the reservation was made, and not restricted then or afterwards to such quantity as with improved machinery and facilities would perform the same work; *held*, also, to reserve an absolute right to the use of the quantity of water named; and to be a reservation of a fixed measure of power to be used for any purpose, and not confined to the grist mill.

A party has no right to an instruction upon an abstract legal proposition not raised by the evidence in the case.

J. P., owning a mill privilege on both sides of the stream "except the privilege of taking as much water from the dam as will be necessary for the use of the tan house so as not to injure the grist mill," conveyed to the plaintiff the privilege on the east side, "except what may be necessary and sufficient for carrying two run of mill stones on the west side, and also when not required for the use of the saw mills what may be necessary for such other machinery as may be erected on the west side," making no mention of reservation for the tan yard. In the trial of the action against J. P.'s representative for the unauthorized use of the water, there was no evidence as to the use of any water for a tannery; and the presiding justice declined to instruct the jury as requested by the plaintiff, "that as against the plaintiff

the defendants have not a right to water sufficient to carry two run of mill stones besides enough for the tannery, and that the defendants have no right to any water for the use of the tannery under the clause, 'such other machinery as may be erected on the west side of said creek,' the tannery having already been erected." *Held*, that the plaintiff had no ground for exceptions for this refusal, the questions not having been raised by the evidence. *Held*, also, that the first exception in the plaintiff's deed is an abstract quantity of water sufficient to carry two run of mill stones, and its use is not limited to the running of the grist mill, but it may be applied to a carding machine and cabinet shop. *Held*, further, that under the true construction of the deed the rights of the parties to the water of the creek are: 1, the defendants have a right to the use of a quantity of water sufficient to carry two run of mill stones, operated by the water wheels in use at the time the deed was made, for the use of their grist mill and any other machinery, (saw mills excepted,) on the west side of the creek; 2, the plaintiff has the right to use all the rest of the water of the creek, when required for the use of the saw mills, in process of construction when the deed was made, operated by the water wheels then in use for such purpose; 3, the defendants have the right to the use of the water of the creek for any machinery, (saw mill excepted,) on the west side of the creek, subject to the rights of the plaintiff as above defined.

ON EXCEPTIONS and MOTIONS of the plaintiff to have the verdict set aside as against evidence, and for a new trial on the ground of newly discovered evidence.

CASE for unauthorized use of water of the Meduxnekeag creek.

The plaintiff had title to a saw mill privilege with a right of water on the east side, the defendants to a grist mill privilege with right of water on the west side. The defendants used the water for other purposes than to run their grist mill. The plaintiff claimed that that use was unauthorized, also that they used more water in their grist mill than they were entitled to. The trial turned mainly on the construction of the deed from the Putnams to Kelleran, under which the plaintiff claimed, granting the land and mill privilege on the east side of Meduxnekeag creek "with the right and privilege of all the water of said creek only excepting what may be necessary and sufficient for carrying two run of mill stones on the west side, and also when not required for the use of the saw mills of said Kelleran what may be necessary for such other machinery, as may be erected on the west side." At the date of the suit the defendants were using water for five run of stones, two cleansers and four bolts; they were also using water to run a carding machine, and for a cabinet shop.

The defendants claimed at the trial that, owing to their improved water wheels and other modern improvements, they were using no more water, then, than they were anciently using with their tub wheels, and two run of stones.

The verdict was for the defendants. The case and the plaintiff's exceptions appear in the opinion.

J. Baker, for the plaintiff.

J. C. Madigan & J. P. Donworth, for the defendants.

LIBBEY, J. This is an action of case for the unauthorized use by defendants of the water of the Meduxnekeag creek, in Houlton, from the 7th of April, 1869, to January 15, 1873, which the plaintiff avers belonged to him.

On the 21st of November, 1834, the mill privileges, on both sides of the creek on lot No. 38, were owned by Jay S. and Lysander Putnam, except "the privilege of taking as much water from the mill dam as will be necessary for the use of the tan house so as not to injure the grist mill," which was conveyed by Jay S. Putnam to James A. Drew, February 19, 1829. J. S. Putnam owned the whole privilege on the west side of the stream, and three-fourths of the privilege on the east side as tenant in common with Lysander Putnam.

On that day, they conveyed to Edward Kelleran a part of said lot with the privilege on the east side of the stream by deed of warranty by the following description, "a certain parcel of land and mill privilege lying in said Houlton, being a part of lot numbered thirty-eight on the plan of said township, being all the land and privilege of said Putnams lying on the east side of the Meduxnekeag creek, and pertaining to said lot numbered thirty-eight, together with the right and privilege of all the water of said creek, only excepting what may be necessary, and sufficient for carrying two run of mill stones on the west side of said creek, and also, when not required for the use of the saw mills of said Kelleran or those purchasing of or acting under him, what may be necessary for such other machinery, (saw mills excepted,) as may be erected on the west side of said creek. The said Putnams and said Kelleran further covenant and agree that they will keep and maintain

a good and sufficient mill dam, on said privilege, the charge and expense of the same to be borne and paid, one-half by said Putnams and the other half by said Kelleran."

The plaintiff, through several mesne conveyances, holds the title conveyed to Kelleran by this deed, and he admits that the defendants have all the title remaining in the Putnams after this conveyance.

It appeared in evidence, that prior to November 21, 1834, Jay S. Putnam had had a grist mill on the west side of the stream, but at that time it had been taken down, and was rebuilt in 1835; that the Putnams had had a saw mill on the east side of the stream which had been taken down prior to the 21st of November, 1834; and at that time Kelleran was constructing, on the privilege on that side, a double saw mill, or two mills under one roof, and had one saw in operation that fall, and that the rest of the machinery was put in some time afterwards. That mill is the one owned by the plaintiff.

The defendants' grantors, William Mays and James M. Vanwart, on the 9th day of September, 1857, leased to Richard L. Baker, for the term of fifteen years, a small lot of land on the west side of the stream, "and after reserving for the grist mill sufficient water for three run of stones, and the right of water formerly granted to James A. Drew for a tannery, and Edward Kelleran for saw mills, the said lessee shall have a right of water to the extent of eighteen inches square from the flume of said mill, and to construct and maintain under said mill a water wheel with such gearing thereto as he may require for the application of said water power to such machinery as he may erect," &c., with a covenant by the lessors to permit the lessee to renew the lease for another term of fifteen years, or pay him the value of the improvements made on the premises. This lease was recorded December 17, 1857. The wheel constructed under this lease was called the Baker wheel. The defendants became the owners of the grist mill, April 10, 1862, and at the expiration of the lease elected not to extend it for another term, and took and paid for the improvements of the lessee, by appraisal as provided in the lease, November 23, 1872. From that time to the 15th of January, 1873, the machin-

ery operated by the Baker wheel was used by the defendants' lessees.

After the defendants purchased the grist mill, they made improvements in it, putting in new improved wheels, five run of stones, four large and one small run, two cleansers and four bolts.

There was no evidence of any use of water for the tannery during the time covered by the plaintiff's writ.

The legal rights of the parties depend upon the construction to be given to the deed of the Putnams to Kelleran, of November 21, 1834.

The plaintiff requested the court to instruct the jury as follows:

I. The deed from the Putnams to Kelleran is to be construed most strongly against the grantors and in favor of the grantee if there is doubt about the intention of the parties.

II. That that deed grants all the power and privilege in the stream, "except what is necessary and sufficient to carry two run of mill stones," and, as the grantors made no exception as to the water for the tannery, they would be estopped by their covenants to deny that what the tannery was entitled to was a part of what was necessary to carry two run of mill stones, and as the defendants are in privity of estate with said grantors, they are equally bound thereby.

III. That, as against the plaintiff, the defendants have not a right to water sufficient to carry two run of mill stones besides enough for the tannery.

IV. Nor have the defendants a right to any water for the use of the tannery under the clause in the deed "such other machinery as may be erected on the west of said creek," because the tannery had already been erected and was then in operation.

V. That by the term of the Kelleran deed, he had a right, next in priority, after "water sufficient to carry two run of mill stones on the west side," to all the water "required to run the saw mills of said Kelleran" built by him in 1834 and finished in 1835.

VI. That the language in the deed is to be construed as conveying a measure or quantity of water sufficient to carry all the machinery which Kelleran had in his saw mills when completed, as that is what the parties manifestly had in contemplation at the time of the conveyance.

VII. That the second exception in the deed to Kelleran is void for inconsistency with the grant, and for uncertainty and indefiniteness.

VIII. At any rate it cannot have any force till the rights of the saw mill are fully satisfied.

IX. That if the jury find that there was no grist mill on the west side of the stream, November 21, 1834, when the Kelleran deed was given, then the quantity of water reserved by the Putnams in that deed, "necessary and sufficient to carry two run of stones," was an abstract quantity and had no reference to any particular mill, either the old one or the one built in 1835, but must be governed by what was usual, ordinary and reasonable, at that time for the purpose.

X. That if it was not customary, in 1834, to have cleansers in grist mills with separate wheels and power, water for cleansers was not reserved to the defendants' grantors by the terms in the deed in addition to the two run of stones.

XI. That under the reservation of water sufficient to carry two run of mill stones, the defendants would have no right, as against the saw mill, to water for operating the carding machine or cabinet shop; and if the defendants permitted them or either of them to be run when the water was required for the plaintiff's saw mill, during the time covered by the writ, they are liable in this action."

These requested instructions were not otherwise given then as appears in the charge of the court a report of which is a part of the case, and to the refusal to give them as requested the plaintiff excepts. He takes no exception to the charge given.

By reference to the charge it appears that the first request was given. The second, third and fourth requests were not given, for the reason that there was no evidence in the case that any water was used for the tannery during the time covered by plaintiff's writ. The plaintiff has no ground for exception for this refusal. As there was no evidence that any portion of the water excepted in the grant to Kelleran was used for the tannery, the question, whether the water granted for the use of the tannery in 1829 should be held to be a part of the exception in the Kelleran deed,

was not raised. A party has no right to an instruction to the jury upon an abstract legal proposition not raised by the evidence in the case.

The fifth and sixth requests were given in substance, and it is not urged by the learned counsel for the plaintiff that the charge upon these points did not state the law correctly.

The seventh request was not given, but upon this point the presiding judge instructed the jury as follows: "And here again arises a question, 'and also when not required for the use of the saw mills of said Kelleran or those purchasing of or acting under him.' It is said that at the time of this deed Kelleran had no saw mill, but you will consider that. The testimony is that at this time, the 21st of November, 1834, there was a frame for two double saw mills erected, and that a short time subsequently one saw was in operation. Now did not that deed contemplate that there should be more than one mill? I instruct you that it must have been in contemplation that he meant the mills that were about being erected; otherwise the deed would not have a proper interpretation. In addition to that the grantors, the Putnams, reserved all the water for their other machinery when it was not necessary for the defendants and for Kelleran to run his saws.

Now you perceive that was an important reservation, as much so as reserving a sufficient quantity of water to run two run of mill stones; that when it was not necessary for the Kelleran mills, then they might run any other machinery on the west side excepting a saw mill. That must have a reasonable construction, because Kelleran could not go and build enough mills to exhaust all the water, excepting what was necessary for two run of stones; but it must have reference to the number of saw mills which they contemplated building at that time." . . "There is no question in this case but that the plaintiff has succeeded to all the rights of Kelleran, and the defendants have succeeded to all the rights of the reservation in this deed."

We think this instruction presented the law correctly to the jury. In construing the deed to Kelleran, all its parts should be considered together, and a construction given which will give effect to each clause, if they are not inconsistent with or repugnant to

each other. The intention of the parties as ascertained from the whole deed is to govern. An exception in a deed is of a part of the thing granted, or which would be granted but for the exception. What will pass by words in a grant will be excepted by the same words in an exception. Shep. Touch., 100. *Bowen* v. *Conner*, 6 Cush., 132. *Hammond* v. *Woodman*, 41 Maine, 177. *Moulton* v. *Trafton*, 64 Maine, 218.

The second exception is not void for inconsistency with the grant. It is a part of the thing granted. It is not void for uncertainty and indefiniteness. Suppose Kelleran, owning all the water of the creek, had made a grant to the Putnams of water, in the same words of this exception, would the grant be void for uncertainty? Would not the grantees take all the water for such other machinery as might be erected on the west side of the creek when not required for the grantor's saw mills? If that would be the legal effect of the words in a grant, they should have the same effect in the exception.

We think under the true construction of the Kelleran deed, the rights of the parties to the water of the creek are:

I. The defendants have a right to the use of a quantity of water sufficient to carry two run of mill stones, operated by the water wheels in use at the time the deed was made, for the use of their grist mill and any other machinery, (saw mills excepted,) on the west side of the creek.

II. The plaintiff has the right to use all the rest of the water of the creek, when required for the use of the saw mills of said Kelleran, in process of construction when the deed was made, operated by the water wheels then in use for such purpose.

III. The defendants have the right to the use of the water of the creek for any machinery, (saw mills excepted,) on the west side of the creek, subject to the rights of the plaintiff as above defined.

The eighth, ninth and tenth requests were given in substance in the charge. The eleventh request was not given, and was properly refused.

The first exception is of an abstract quantity of water sufficient to carry two run of mill stones, and its use is not limited to the

running of a grist mill, but it may be applied to a carding machine or cabinet shop.

The only exception, to the admission of evidence against the plaintiff's objection, which is relied upon by the learned counsel for the plaintiff, is to the admission of the lease from Mays & Vanwort to Baker. This lease was by the defendants' grantors, for the term of fifteen years, duly recorded, subject to the rights of Kelleran to the use of the water. The defendants were not parties to the lease, had no right to control the lessees in the use of their machinery, and were not liable for any tort committed by them upon the rights of the plaintiff while they occupied under that lease. It was properly admitted. *Leonard* v. *Storer*, 115 Mass., 86.

The plaintiff moves to have the verdict set aside as against evidence. On a careful examination of the evidence submitted to the jury we think it sufficient to authorize the verdict.

He also moves for a new trial on the ground of newly discovered evidence. He alleges, as grounds for this motion, that he was surprised at the trial by the evidence of the defendants' witness, Robbins, as to the quantity of water used by the defendants' water wheels, and at that time had no means within his knowledge by which he could show the fallacy of that evidence; that since the trial he has discovered evidence which will show its fallacy; that he has discovered evidence showing that the tannery was in use during the time covered by his writ, using three hundred inches of water; that the tub-wheels in use in 1834, would use only one hundred and forty-four inches of water to each run of stones, and that there was not so much leakage or waste of water at his flume as was testified to by the defendants' witnesses.

He alleges newly discovered evidence on some other collateral points, but these are the principal and material points to which the alleged newly discovered evidence relates.

"A new trial will not be granted on account of newly discovered evidence when the party complaining, by proper diligence, might have discovered such evidence and had it at the trial. The law holds parties to the exercise of due diligence in the preparation of their cases. It is not sufficient that a petitioner for review or new

trial affirms that, with all the diligence in his power, he could not have discovered the evidence sought to be made available. The court must be satisfied from the evidence in the case that such evidence could not have been discovered by diligent inquiry before it will disturb the verdict." *Atkinson* v. *Conner*, 56 Maine, 546. *McLaughlin* v. *Doane*, 56 Maine, 289.

"The same principle requires that the court should be satisfied of the fact of surprise before it will grant a new trial on that ground." "When, from the nature of the issue, a party has reasonable cause to anticipate that the point, to which certain testimony is applicable, will be controverted, and when, by proper diligence, such party might have obtained the testimony claimed to be newly discovered, he cannot be said to be taken by surprise by the testimony thus introduced." *Atkinson* v. *Conner*, before cited.

Applying these rules to the case at bar, we think the plaintiff is not entitled to a new trial. In his writ he claims to recover of the defendants, on the ground that they had used more water, in operating their machinery, than they were legally entitled to. He thus put in issue the quantity of water necessary to carry two run of mill stones by the water wheels in use in 1834, and the quantity used by the defendants during the time covered by his writ. He called upon the defendants to be prepared with evidence to meet these issues, and should have expected them to produce the best evidence in their power of the quantity of water used by their wheels; that is, by actual measurement of the quantity of water used by the wheels when their mills were in operation. He should have been prepared with the same kind of evidence. He fails to show that in the exercise of due diligence, he could not have had it. True, he says he did not have access to the defendants' mill for that purpose, but he does not show that he even requested permission of the defendants for such access. He admits that he had access to their mill, from time to time, to see what machinery they were running, without objection by them. His general declaration that he had not access, is not sufficient. He cannot be said to be taken by surprise by the testimony on this point. If he was taken by surprise by that evidence, he

should have asked the court for a postponement of the case till he could test the accuracy of the evidence by measurement of the water, or get evidence to disprove it in some other way.

At the trial there was a good deal of evidence from experts on both sides as to the quantity of water necessary to carry two run of mill stones by the tub wheels in use in 1834, and the quantity of water used by the defendants' wheels. The alleged newly discovered evidence on these issues is merely cumulative, tending to support the plaintiff's theory at the trial. It comes from five witnesses who testify as experts, having knowledge of the use of water wheels, and of the science of hydraulics. . We think this cannot be regarded as newly discovered evidence within the rules of law applicable to motions for a new trial, for newly discovered evidence. If the evidence of experts, which is merely cumulative, is to be regarded as newly discovered evidence, sufficient to entitle a party to a new trial, there would be no end to litigation in the class of cases in which the evidence of experts is admissible. This kind of evidence can be extended to an almost unlimited extent, and can be discovered as well before, as after trial.

If the plaintiff desired to raise the question of the use of water for the tannery, at the trial, he must have had the means of doing so by the proper evidence. The tannery was in the immediate vicinity of his saw mill, taking water from the same dam, and under his own observation. He must have known who operated it. The witness whom he calls on this point was his neighbor, and was at home at the time of the trial. It is too much for plaintiff to say that this evidence is newly discovered.

The rest of the alleged newly discovered evidence in regard to the use of water by the mills is merely cumulative, and comes from witnesses residing in Houlton, near the plaintiff, and well acquainted with him. The evidence fails to prove that the plaintiff, in the exercise of due diligence, could not have discovered that evidence before the trial.

Exceptions and motions overruled.

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

SUSAN C. AUSTIN, executrix, *vs.* SUMNER DUNHAM.

Hancock, 1875.—January 1, 1876.

Review,—upon condition.

A review may be granted to a party who has become insane and been placed under guardianship, upon the condition that the petitioner will stipulate that no objection shall be made to the respondent's testifying generally upon the trial of the case in review. And when the review is granted upon such stipulation made, it is binding upon the legal representative of the petitioner after his decease.

ON EXCEPTIONS.

REVIEW.

The original action was tried at the October term, 1872, when a verdict was rendered for the defendant. After that, a guardian was appointed for the original plaintiff, Benjamin F. Austin, who had become insane. A petition for review was then filed by the guardian, which was granted, the record of which shows as follows: "Review granted upon the following condition: The petitioner stipulates that no objection shall be made to the respondent's testifying upon the trial of the case in review."

Whereupon a writ of review was sued out, after which the original plaintiff, (Benjamin F. Austin,) died and the action was tried in the name of his executrix, Susan C. Austin. At the trial the defendant, Dunham, was called, and against the objection of the present plaintiff was allowed to testify generally in the cause as a witness for himself; and he did testify to a verbal bargain, material to the case, made by him with said original plaintiff during his lifetime. The verdict was for the defendant, and to the admission of his testimony, as aforesaid, the plaintiff excepted.

A. Wiswell & A. P. Wiswell, for the plaintiff.

E. Hale & L. A. Emery, for the defendant.

VIRGIN, J. A review may be granted to a party who has become insane and been placed under guardianship, upon the condition that the petitioner will stipulate that no objection shall be made to the respondent's testifying generally upon the trial of

the case in review. And when the review is granted upon such stipulation made, it is binding upon the legal representative of the petitioner, after his decease.

In cases wherein a party is not entitled "as of right" to a review, the granting or declining of it rests wholly in judicial discretion; and it may be granted upon such conditions imposed upon the party seeking it, as the court may consider reasonable. *Jones* v. *Eaton*, 51 Maine, 386.

In the original case, the defendant was a material witness and obtained a judgment. If a review were unconditionally granted, the insanity equally with the death of the plaintiff would exclude the defendant. R. S., c. 82, §§ 87 and 88. This fact was considered by the judge who heard the petition, and he granted the review upon the condition named, which was considered reasonable and was accepted by the petitioner. His legal representative cannot be permitted to reap the benefits of the review and repudiate the condition without which the review would not have been granted. *Exceptions overruled.*

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

BENJAMIN P. WARE *et al.*, *vs.* JOHN E. GOWEN AND B. & B. R. R. COMPANY, trustees.

Hancock, 1875.—March 15, 1876.

Trustee process. Words—due absolutely, and not on a contingency.

When labor contracted for is performed, and there remains only to fix its amount and value, the fact, that by the contract the payment is to be made on an estimate and certificate of a third person, does not constitute a contingency within the meaning of the statute. R. S., c. 86, § 55.

The phrase, "due absolutely and not on a contingency," is applicable to the past earnings of a party payable in the future on the estimate and certificate of a third person.

Thus: the defendant wrought for the railroad company to the end of May. By the contract, he was to be paid on the middle of June, for the work of May, on the estimate and certificate of the company's engineer. On June 4th the company were served with the plaintiffs' summons to answer as the

trustees of Gowen; the estimate and certificate were completed on June 10th. *Held*, 1, that the company were chargeable as trustees; 2, that payment was due absolutely and not on a contingency; 3, that the amount due on June 1st was not payable till the 15th. R. S., c. 86, § 61.

ON REPORT.

The question was whether the alleged trustees were holden.

T. W. Vose, for the plaintiffs.

H. D. Hadlock, for the defendants.

LIBBEY, J. By the disclosure of the trustee it appears that at the time of the service of the writ the principal defendant was engaged in the construction of the railroad of the trustee from Bucksport to Bangor, under a contract in writing, containing the following stipulations as to the payment for the work. "In way and manner as follows, to wit: ninety per cent of amount of work done in accordance with schedule prices to be fixed by the engineer of said road, on the fifteenth day of the month following that on which the work is done, and upon the estimate and certificate of said engineer, and at the same rate and time, and in the same manner in each succeeding month, and the reserved sum of ten per cent, shall be paid upon the certificate of said engineer, that said road has been completed in accordance with this contract." The writ was served on the 4th day of June, 1873. The estimate of the work for the preceding month of May, was completed June 10, and the entire amount was $33,481.62, ninety per cent of which was $30,133.46. The trustee had advanced towards payment of this sum $450 before service of the writ.

R. S., c. 86, § 55, clause 4, provides that no trustee shall be charged: "by reason of any money or other thing due from him to the principal defendant, unless at the time of the service of the writ upon him, it is due absolutely and not on any contingency." § 61 of the same chapter, provides that, "any money or other thing due absolutely to the principal defendant, may be attached before it has become payable; but the trustee shall not be compelled to pay or deliver it before the time appointed therefor by the contract." Was the pay for the work performed in May due absolutely and not on any contingency at the time of the service of the

writ? We think by the true construction of the contract it was, though not payable till the fifteenth of June. The work had been performed. There was nothing further for the contractor to do to be entitled to pay. It only remained for the engineer to measure the work and make his estimate in order to fix the amount to be paid. If the engineer should neglect or unreasonably refuse to make an estimate and certificate of the work, it would not deprive the contractor of his right to pay, but he might bring his suit and prove the amount of work in some other way. The case falls within the rule established in *Ricker et al.* v. *Fairbanks et al.*, 40 Maine, 43. *Trustee charged for* $29,683.46.

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

BUCKSPORT & BANGOR RAILROAD COMPANY *vs.* JOSEPH L. BUCK.

Hancock, 1875.—April 13, 1876.

Corporations. Railroad.

It is not necessary to fix the capital stock to enable a corporation to maintain an action on the subscription agreement.

The Penobscot and Union River Railroad Company was chartered March 1, 1870, the capital stock to consist of not less than $100,000, nor more than $1,200,000: the route to be from Bangor to Bucksport, and thence to Ellsworth, (40 miles.) The corporators accepted the charter, chose directors among whom was the defendant who was afterwards chosen president and authorized to purchase land and issue scrip therefor. The defendant with others signed a subscription book in substance this: "We the subscribers bind ourselves to pay the sum written against our names, as called for by the treasurer hereafter to be elected, same being part of the capital stock, for the purpose of constructing a railroad from Bucksport to Bangor (18 miles,) said road to be built under the provisions of a charter entitled," &c. "No subscription shall be binding until the sum of $100,000 shall have been subscribed by good and responsible parties. Bucksport, August 25, 1871." The defendant subscribed $15,000; the aggregate subscription including that of the town of Bucksport amounted to $234,500. At a directors' meeting, the defendant being present, voted that the subscription of Fred Spofford, J. L. Buck, (the defendant,) and others to the capital stock of this railroad be accepted upon the conditions therein stated. The road was built from Bucksport to Bangor. In a suit by the company against the de-

fendant for his subscription, *held*, that the action was maintainable, that the defendant's liability did not depend upon the number of shares or upon any specific and fixed capital, but upon the terms of his agreement.

ON REPORT.

ASSUMPSIT, brought on a paper signed by the defendant which will be found stated in the opinion at length. After the evidence was out, the case was made law on report. If, in the opinion of the court, the action was not maintainable, a nonsuit was to be ordered, otherwise, the action to stand for trial. The facts, sufficient to raise the legal questions, appear in the opinion.

E. Hale, L. A. Emery & T. C. Woodman, for the plaintiffs.

J. Baker, A. Wiswell & A. P. Wiswell, for the defendant.

APPLETON, C. J. The Penobscot & Union River Railroad Company was chartered March 1, 1870, c. 395, of the special acts of that year. The route was to be from Bangor to Bucksport, and thence to Ellsworth, the distance being forty miles.

By § 2, it was provided that the capital stock should consist "of not less than one thousand nor more than twelve thousand shares of one hundred dollars each."

On April 28, 1870, in pursuance of notice duly given, a meeting of the corporators was had, the charter accepted and directors chosen, among whom was the defendant.

On September 13, 1870, at a meeting of the directors the defendant was chosen president and empowered to purchase land and issue scrip therefor.

On August 25, 1871, the defendant with others signed a subscription book which is in these words.

"We, the subscribers hereunto, for and in consideration of one dollar to each of us in hand paid, the receipt whereof we do hereby acknowledge, and for other considerations, do hereby bind ourselves and our heirs to pay the sum written against our names, as called for by the treasurer hereafter to be elected, same being part of the capital stock, for the purpose of constructing a railroad from Bucksport to Bangor, or such point in Brewer, opposite Bangor, as may be deemed expedient; said road to be built under

the provisions of a charter entitled 'the Penobscot & Union River Railroad Company,' either in the present form, or as it may be amended by the legislature of this state; such alteration, if any, to be in accordance with the vote of a majority of the board of directors, legally chosen by the stockholders of the road. No subscription shall be binding until the sum of one hundred thousand dollars shall have been subscribed by good and responsible parties, and no subscriber shall be bound for any further sum than that written by himself when making his subscription.

It is understood that the capital stock of the contemplated railroad shall be three hundred thousand dollars (300,000.) It is further understood, that so soon as one hundred thousand dollars shall have been subscribed, said stockholders shall choose a board of seven directors, each share of one hundred dollars being entitled to one vote, and said directors as soon as practicable, thereafter shall choose a president and also a treasurer. Bucksport, August 25, 1871."

The defendant subscribed for the sum of fifteen thousand dollars.

At a meeting of the directors, on September 19, 1871, the defendant being present, a subscription book was presented signed by the defendant and others to the capital stock of that portion of the road between Bucksport and Bangor. At this meeting it was voted: "That the subscription of Fred Spofford, J. L. Buck, (the defendant,) R. P. Buck, J. E. Gowen and others to the capital stock of this railroad be accepted upon the conditions therein stated."

It was further "voted, that the books of the company be opened for subscriptions to the capital stock of this company, (upon the same conditions as those already made,) at the custom house, Ellsworth; Second National Bank, Bangor; Bucksport National Bank, Bucksport, from the 2d to the 8th of October next."

"Voted, that the clerk cause notice of the opening of the books for subscription, in accordance with the foregoing vote, to be published in the Ellsworth American, and in the Bangor Whig and Courier."

The clerk was directed to call a meeting of the subscribers to

the capital stock at the town house in Bucksport on the 10th day of October next—which was two days after the time limited for subscriptions which expired on October 8.

At the meeting on October 10, more than a thousand shares had been subscribed and the time within which subscriptions were to be received had expired. It may be presumed that the road from Bucksport to Bangor was deemed of the first importance, inasmuch as the subscriptions were limited to that portion of the road and the plaintiff corporation assessed the subscriptions with the conditions therein expressed. After electing the defendant and others as directors, they were authorized by vote to contract immediately for the construction of said road from Bucksport to Bangor and to issue mortgage bonds of the corporation to an amount not exceeding twenty thousand dollars a mile, &c.

The capital stock, then, on October 10, was the amount subscribed at that date. The opening of subscriptions and the time within which they were to be made had expired. The meeting was of "the subscribers to the capital stock." They took then no measures for further subscriptions, but proceeded to issue bonds and to direct the contracting of the railroad. In the *Lexington & West Cambridge R. R. Company* v. *Chandler*, 13 Metc., 311, it was held that the vote of the directors to close the subscription book for shares at the number then subscribed for, on a given time, was in effect a vote fixing the number of shares at the number then subscribed for, as ascertained by the books, and that it fixed the number lawfully for the time being. So here, the limiting of the time of subscription, the returning of the subscription book, the acceptance of the subscription, and the action of the corporation may be regarded as fixing the number of the shares for the time being.

Nor can this defendant complain. His subscription was not to be "binding until the sum of one hundred thousand dollars shall have been subscribed by good and responsible parties." The necessary implication from the language is that it was to be binding when that amount should be obtained. It was obtained and the subscription by its terms became "binding." If binding, its payment can be enforced.

The clause in the subscription "that it is understood that the capital stock of the contemplated railroad shall be three hundred thousand dollars," was not a condition precedent, without the obtaining of which the defendant was not to be liable. His liability, according to the terms of his subscription, accrued when the hundred thousand dollars should be obtained. It was the intention of the subscribers, undoubtedly, that the work to Bangor should commence when one hundred thousand dollars should be subscribed, with the expectation, however, that the further sum mentioned would be obtained, but the obtaining of such sum was not made a condition precedent.

The number of shares by the act was from one thousand to twelve thousand. If more than one thousand was required the number might be enlarged. The subscription limited the liability of the subscribers to one hundred dollars a share. "The security of the subscribers," observes Shaw, C. J., in the case already cited, "is in the provision limiting the amount to which he may be assessed. The security for the enterprise is found in the provision authorizing the directors to enlarge and fix the number of shares so as to finish the capital required to complete the work and expressly authorizing and requiring them to proceed when two hundred and fifty shares are subscribed. Of course each subscriber, when he subscribes, knows that he will be liable to assessment when the number is taken, and in subscribing assents to the terms." Here the required number and more was taken. "The subscribers for stock," observes Shepley, C. J., in *Kennebec & Portland R. R. Co.* v. *Jarvis*, 34 Maine, 360, 364, "must have known, when their subscriptions were made, that the amount of capital then provided for was subject to enlargement or diminution by a vote of the corporation. The contract of a subscriber to the stock cannot, therefore, be considered as made upon condition that the corporation should have a certain number of shares or a fixed capital. Such a construction would deprive the corporation of the power to alter that by-law without a violation of its contracts with the stockholders. This could not have been the intention of the parties. The agreement provided for payment of the amount of the shares without any reference to a fixed capital, or to any number of shares

or to any assessment to be made on other shares." The reasoning of the court in that case is precisely applicable to the one under consideration. It follows, that so far as the defendant is concerned, as a subscriber, under his contract, his liability does not depend upon the number of shares or upon any specific and fixed capital, but upon the terms of his agreement.

The defendant and others by their contract promised "to pay the sum set against" their "(our) names as called for by the treasurer hereafter to be elected." The contract is like that in 34 Maine, 363, in reference to which Shepley, C. J. says, "The promise is not to pay all 'legal assessments.' It is to pay for the shares as he should be required by a vote of the company without any reference to assessments or payments to be made on other shares." The defendant and others were liable to the extent of their subscription, and their liability would not be enlarged by the increase of subscribers, while such increase might be indispensable to the success of the enterprise. It seems well settled that it is not necessary to fix the capital stock to enable a corporation to maintain an action on the subscription agreement. *Penobscot & Kennebec R. R. Co.* v. *Dunn*, 39 Maine, 587. *Kennebec & Portland R. R. Co.* v. *Jarvis*, 34 Maine, 360. *Penobscot R. R. Co.* v. *Dummer*, 40 Maine, 172. *Penobscot & Kennebec R. R. Co.* v. *Bartlett*, 12 Gray, 244. *City Hotel* v. *Dickinson*, 6 Gray, 586.

It should be remembered this is an action on the defendant's contract. It is not a proceeding under the statute as were the cases of the *Somerset & Kennebec R. R. Co.* v. *Cushing*, 45 Maine, 524, 530, and the *Somerset R. R. Co.* v. *Clark*, 61 Maine, 380. The distinction is taken in all the cases cited between proceedings under the statute to enforce the payment of the balance remaining due after a sale of shares for non-payment of assessments and suits upon the promise of a party.

It is further to be observed that the subscription paper in terms states that this amount is only "part of the capital stock;" so that the promise to pay does not require the whole capital to be subscribed, but only the specific sum of one hundred thousand dollars, which being subscribed, the promise to pay attaches. *Athol Music Hall Co.* v. *Carey*, 116 Mass., 471.

By the act of February 1, 1873, c. 232, the name of the Penobscot & Union River R. R. Co., was changed to that of the Bucksport & Bangor R. R. Co., and this change was accepted at a legal meeting of the stockholders.

The defendant's promise was not binding until a subscription for one hundred thousand dollars should be obtained. It was binding when obtained. The assessments were upon the amount of one hundred thousand dollars. That they were made upon an increased amount was no injury to the defendant. His liability was not thereby increased. The additional subscribers were needed for the success of the enterprise. The defendant was a director and president of the corporation. Contracts were made upon the strength of the promise of the defendant and others. The road has been completed. The defendant has promised to pay and no sufficient reason is shown why he should be absolved from the performance of his promise. *The action to stand for trial.*

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

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

THADDEUS S. SOMES *et als. vs.* HENRY L. WHITE *et als.*

Hancock, 1875.—April 18, 1876.

Shipping.

An action cannot be maintained by the owners of one vessel against the general owners of another vessel for a collision caused by the fault of the latter vessel, she being at the time of the injury in the possession and control of the master as owner, *pro hac vice*, sailing her "on shares."

The personal liability of general owners of vessels for a master's defaults, whether arising *ex contractu* or *ex delicto*, depends solely upon the fact whether the master is the charterer and owner, *pro hac vice*, or not.

ON FACTS AGREED.

CASE, commenced September 25, 1873, against the defendants, as general owners of the schooner "Midnight," in favor of the plaintiffs, as general owners of the schooner "Thames."

It is agreed that both vessels were sailed on shares by their respective masters, and under their control, as is customary in such cases in this state; and the question submitted is whether, under such circumstances, an action for collision by the general owners of the "Thames," against the general owners of the "Midnight," can be maintained in this court.

If maintainable, the action to stand for trial; if not, plaintiffs to be nonsuit.

A. Wiswell & A. P. Wiswell, for the plaintiffs.

E. Hale & L. A. Emery, for the defendants.

PETERS, J. The case finds that the master had the control of the defendants' vessel, sailing her on shares. Nothing else appearing, this would constitute him an owner thereof, *pro hac vice*. This has ever been the doctrine of this court. For recent adjudications affirming the principle, see *Bonzey* v. *Hodgkins*, 55 Maine, 98; *Tucker* v. *Stimson*, 12 Gray, 487.

The plaintiffs admit it to be well settled, that in such a case the general owners are not, ordinarily, liable for the contracts made by the master concerning the sailing and management of the vessel. But they contend that in case of collision they are liable for the master's fault or negligence. They argue that there is a reasonable distinction between claims against owners for the acts of a master arising from his contracts and such as are founded strictly in tort.

We do not assent to the correctness of the position of the plaintiffs. We do not perceive by what principle or rule of law it can be maintained. A personal liability of owners for the master's defaults, certainly must depend upon the fact, whether the relation of master and servant (or principal and agent) exists between themselves and the master or not. The liability must arise under the maxim *respondeat superior* if at all. But where the master is owner *pro hac vice*, no such relation exists. That is the very point established in the cases before referred to. Those cases turn upon the exact finding, that the master is not the agent or servant of the owner. Claims against the owner for the obligations of the master, whether arising *ex contractu* or *ex delicto*,

stand upon the same foundation; when this is removed there can be no liability at all.

The plaintiffs seek to avoid the effect of this reasoning, by attempting to draw a distinction between the liabilities attaching to the possession and control of ponderous property like a ship and articles of ordinary consequence like a carriage or coach, The argument is, that the general owners can be easily ascertained; that their names are upon the papers of the ship; that third persons can protect themselves, in dealing with the captain, by caution and inquiry, as far as contracts are concerned, but cannot protect themselves against the negligence and fault of the master in the conduct of the vessel, and that upon the grounds of public convenience and policy the apparent owner should be liable therefor.

But the argument is more plausible than sound. There was formerly an inclination in the courts to apply such a rule to the owners of real estate occupied and controlled by tenants, and for the same reasons that are urged for its application in the case of vessels. But, as applied to real estate, the doctrine has been rejected of late years by most courts, and emphatically so by our own court in *Eaton* v. *E. & N. A. R. R. Co.*, 59 Maine, 520. Still, there is more reason for adopting the policy contended for, in the matter of real estate than in that of vessels. We do not see why the owners of the vessel, who are out of the possession and control of her, should be liable for injuries caused by collision, any more than the owners of the cargo should be liable therefor. And it is always conceded, even in the courts of admiralty, that the owners of cargo are not liable to any extent in such a case, notwithstanding the vessel at the time of the collision is pursuing a voyage under a charter-party with the owners of the cargo and carrying their property alone. But the master, while owner *pro hac vice*, is no more the agent of the general owners of the vessel, than of the owners of the cargo. Both the vessel and the cargo are under his possession and control for the time being. By the maritime law, the vessel is made a surety for the protection of all persons against the negligence of the master while conducting the vessel, when he is the charterer thereof, and that would seem

to be protection enough. The exigencies of trade and commerce require no more.

The present statutes of this state and of the United States, affecting the rights and remedies pertaining to ownership in vessels, (which we have no space for here,) strongly militate in their force and effect against the argument of the plaintiffs. See R. S., of Maine, c. 36, §§ 5 and 6. R. S. of U. S., § 4282 and five succeeding sections.

Nor is the plaintiffs' position sustained by the decided cases to any extent. The exact question presented here arose in *Thorp* v. *Hammond*, 12 Wall., 408, but no decision was reached, as the court were evenly divided. There may be found some *dicta*, favorable to the plaintiffs' view, in some of the early English cases, but mostly before the doctrine of *pro hac vice* ownership was fully accepted by the English courts. See Ab. Sh., 57, and notes.

There are many analogous cases where the principle under discussion may be regarded as affirmed adversely to the plaintiffs in this case. Thus, it is decided, that general owners out of possession are not liable for supplies purchased by the master for the vessel; nor for repairs ordered by him without their authority; nor for his neglects in the performance or non-performance of his charter parties; nor for his embezzlements of the cargo of shippers. In *Sproat* v. *Donnell*, 26 Maine, 185, it was held that, when a vessel was sailed on shares, the general owner was not liable to the owners of a cargo of lumber shipped on board for a part of it used as fuel during the voyage. In *Sproul* v. *Hemmingway*, 14 Pick. 1,, it is decided that the owner of a brig, which came in collision with a schooner while the brig was being towed by a steamer over which the brig had no control, was not responsible for the damages sustained by the schooner. That case is exceedingly like this case. In the case of the *R. B. Forbes*, Sprague's Decisions, 328, it was determined by Judge Sprague, that, where a ship without sails was lashed to a steamer alongside, and so towed, the steamer furnishing the whole motive power, and the ship came in collision with a sailing vessel, the steamer was responsible for the injury; and he left undetermined whether the ship was also liable (in admiralty) or not. *Fletcher*

v. *Braddick*, 2 Bos. & Pul., 182, much referred to in subsequent cases, is not really an opposing authority. The result there turned upon the finding of the court that the ship should be considered the ship of the owners. She was chartered to the British government, and while, during her voyages, her destinations were controlled by government officers, the navigation of the ship was managed by the owners who hired and paid the master and crew.

Similar contracts of letting were made during our late civil war. between owners of vessels and the United States, and in several cases of collision the owners were held responsible for injuries, upon the ground that the management of the navigation of the ship was not within the control of the United States, so as to constitute the government, *pro hac vice*, owners thereof. *Leary* v. *United States*, 14 Wall., 607. In *Skolfield* v. *Potter*, Davis' R., 392, it was maintained by Judge Ware, that owners should be responsible at least for sailors' wages although out of possession of their ship. But even an exception to this extent was disapproved in the case of *Giles* v. *Vigereaux*, 35 Maine, 300.

It will be found upon an examination of still other authorities that in the cases where the responsibility of the owners has been sought to be maintained, the inquiry has almost universally been, whether, under the contract of letting, the master or the owners had the possession, command and navigation of the ship. There can be no difference in this respect between a ship and any other species of personal property. The law of principal and agent cannot be applied where no agency exists. Owners are not answerable for a collision which in no sense is directly or indirectly caused by themselves. 3 Kent's Com., 194. *Blanchard* v. *Fearing*, 4 Allen, 119. *Webb* v. *Peirce*, 1 Curtis C. C. R., 104. *Scott* v. *Scott*, 2 Stark., 438. *Hutton* v. *Bragg*, 7 Taunt., 14. *Fenton* v. *The City of Dublin Steam Packet Company*, 8 Ad. & E., 838. In *Hutton* v. *Bragg*, *supra*, Dallas, J., says, "it may be considered that the charterer of a ship is during the existence of the charter-party to all intents and purposes the owner of the ship." In the last case above cited (a case of collision) Patterson, J., says, "the issue is whether the owners had the possession and care of the vessel; which brings us back to the question, whose servants were the crew."

The authorities both English and American, touching the question presented for our decision, with but very little exception, strongly incline the same way. *Plaintiffs nonsuit.*

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

JOSEPH CARD *et ux. vs.* CITY OF ELLSWORTH.

Hancock, 1875.—July 1, 1876.

Way,—defective.

While the female plaintiff, with horse and wagon, was traveling along the highway, her horse became frightened at a large rock, dug out of the earth by the town and left in the traveled way in a situation calculated to frighten horses passing by. In attempting to dismount from the wagon, she fell and was injured. Neither she nor the horse was at fault. The rock was, *per se*, a defect in the way. *Held*, that if she was dismounting to prevent upsetting while the horse was restless and unmanageable from the fright, (the plaintiff's version,) the defect in the way may be held to be the proximate cause of the injury. *Held*, also, that if the horse was manageable, and the plaintiff was dismounting to lead the horse by, when he started up and threw her down, but not on account of any fright at that moment at the rock, (the defendants' version,) the defect in the way could not be considered as the proximate cause of the injury. *Held*, further, that a town may be liable to a traveler for an injury occurring from the fright of his horse at an obstruction in the traveled way, which is an actual defect therein, although not coming in contact therewith; but not unless the object of fright presents an appearance that would be likely to frighten ordinary horses; nor unless the appearance of the object is such that it should reasonably be expected by the town that it naturally might have that effect; nor unless the horse was, at least, an ordinarily kind, gentle and safe animal, and well broken for traveling upon our public roads.

ON REPORT.

CASE, for an alleged injury to the female plaintiff by means of a defect in the highway, stated in the report thus:

"She was riding with a young woman in a wagon, and came upon a place where a large rock had been raised by the defendants from the ground, and remained within the traveled way, in such a position as to be calculated to frighten a horse such as the parties were then driving, going within a rod or so of the obstruction. The

horse being frightened, and unwilling to pass the obstruction, the young woman got out and took the horse by the head, and while the plaintiff was getting out, the horse started and threw her from the wagon, and she was injured thereby.

No question is made but that the rock was a defect in the highway, which the defendants were bound to keep in repair, or about notice; and it is admitted that the plaintiff and the person with her were in the use of common care and prudence in all that was done by them at the time; and no question is made as to the suitableness of the horse and team used at the time.

The plaintiff contends that she was getting out of the wagon to save herself from the danger of injury by an upset liable to be occasioned by the horse being restless and unmanageable.

The defendants contend that the plaintiff was in the act of getting out of the wagon, in order to have the horse led toward the obstruction, and that the horse was not at that moment unmanageable, although he made a step which threw the plaintiff down as she was attempting to get out.

It is admitted that neither the horse nor the wagon came in actual contact with the rock.

If the action is not maintainable upon the facts as contended for by the plaintiffs, because there was no actual collision or contact with the rock, then a nonsuit is to be entered.

But if an action is maintainable upon the facts as contended for by the plaintiffs, and not maintainable, provided the facts as contended for by the defendants are true, then the action is to stand for trial, in order to submit the facts in dispute to a jury.

And if the action is maintainable upon the facts, as the defendants claim them to be, then a default is to be entered, and the damages to be assessed by a jury, unless a reference or a commission shall be agreed upon."

A. Wiswell & A. P. Wiswell, for the plaintiffs.

The plaintiffs' right to recover is not affected by his or her having contributed to the injury unless he or she was in fault in so doing. Shear. & Red. on Neg., p. 31, and cases there cited. It is not necessary that there should be actual contact of the horse or carriage with the obstruction. *Lund et ux.* v. *Tyngsboro*, 11

Cush., 563. Objects in a highway likely to frighten horses of ordinary gentleness, may be nuisances. *Ayer* v. *Norwich*, 39 Conn., 376. *Dimock* v. *Suffield*, 30 Conn., 129. Objects within the limits of a highway, which in their nature are calculated to frighten horses of ordinary gentleness, may be nuisances which make the highway defective within the meaning of the statute. *Morse* v. *Richmond*, 41 Vt., 435. *Bartlett* v. *Hooksett*, 48 N. H., 18. *Foshay* v. *Glen Haven*, 25 Wis., 288, (3 Am. Rep., 73.) Shear. & Red. on Neg., § 388, and decisions referred to. It is there said: "Some recent decisions in Massachusetts tend to a different conclusion, but they stand alone, and their reasoning does not enforce our conviction of their soundness."

E. Hale & L. A. Emery, for the defendants, relied upon these three propositions.

I. The rock, in its quality as a defect in the road, did not frighten the horse, but the fright was by some other quality of the rock.

II. Upon the defendants' theory, the rock was not the proximate cause, and the plaintiffs must disprove the defendants' theory before they can recover.

III. Upon the defendants' theory, the rock was not any cause at all, and the plaintiffs must disprove this theory before going on.

The statute imposing liability upon towns is penal, as well as remedial, and is to be construed strictly. *Moore* v. *Abbot*, 32 Maine, 46. *Moulton* v. *Sanford*, 51 Maine, 127. The defect or want of repair is either inert matter left incumbering the street upon or over it, or structural defects endangering the public travel. An object frightening horses is not necessarily and *ipso facto* a defect, within the meaning of the statute. *Davis* v. *Bangor*, 42 Maine, 522. The fact that the horse was frightened at the appearance of an object does not render that object a defect within the meaning of the statute. *Merrill* v. *Hampden*, 26 Maine, 234. The reported cases in this state are cases of actual contact. So also in these cases in Massachusetts. *Keith* v. *Easton*, 2 Allen, 552. *Kingsbury* v. *Dedham*, 13 Allen, 186. Though the object frightening the horse was also an obstruction, yet if its quality as an obstruction did not frighten the horse, the town is

not liable. *Cook* v. *Charlestown*, 98 Mass., 80. *Cook* v. *Montague*, 115 Mass., 571. In *Lund* v. *Tyngsboro*, the plaintiff jumped to avoid a collision; that is, to avoid the thing as a defect, an obstacle to travel.

The rock was perhaps the remote cause of the injury, but it was not the proximate cause. *Bigelow* v. *Reed*, 51 Maine, 325. The maxim of proximate cause is applied more rigorously in statute torts than in common law torts. *Moore* v. *Abbot*, 32 Maine, 46. *Moulton* v. *Sanford*, 51 Maine, 127. *McDonald* v. *Snelling*, 14 Allen, 290. The obstruction must be something more than the occasion, it must be the cause. *Livie* v. *Janson*, 12 East, 648. *Smith* v. *Lee*, 14 Gray, 473. *Jenks* v. *Wilbraham*, 11 Gray, 142. *Marble* v. *Worcester*, 4 Gray, 395. *Libbey* v. *Greenbush*, 20 Maine, 47.

PETERS, J. In our opinion the defect in the way was the proximate cause of the injury, if the facts are as the plaintiffs claim them to be. The travelers had no knowledge of the defect in the way until they came upon it. The horse becoming frightened and unmanageable, the female plaintiff was getting out of the wagon, to avoid the threatened danger, when the accident occurred. She was in the use of common care, in doing so. We think this statement brings the case within the principle of *Lund* v. *Tyngsboro*, 11 Cush., 563; and of *Page* v. *Bucksport*, 64 Maine, 51. In the series of antecedent events, the act done through the agency of the defendants is the only act occasioned by negligence. Neither the horse nor the driver was in fault. That act was the moving and controlling cause of the accident. The other events were agencies only, through which it operated. *Bigelow* v. *Reed*, 51 Maine, 325. *Lake* v. *Milliken*, 62 Maine, 240.

But it is otherwise, if the facts are as the defendants claim them to be. If the horse was at rest and manageable, and the persons traveling got out of the wagon, apprehending difficulty in driving the horse by the obstruction, and the horse, (not from any fright) started up as the plaintiff was dismounting, and an injury thereby happened to her, we do not think that in such case the defect could be considered the proximate cause of the injury. In that case, no one was in fault. It was a casualty and misfortune

merely. The rock in the road had no direct agency in causing the horse to start too quickly. Undoubtedly the defect in the way was one of a series of events or things without which the accident would not have happened; but it was not the "juridical cause" of it. This is made clear by a reference to the discussions in such analogous cases as *Tisdale* v. *Norton*, 8 Metc., 388; *Denny* v. *N. Y. Central R. R. Co.*, 13 Gray, 481; *Hoadley* v. *Northern Transportation Co.*, 115 Mass., 304; and numerous other cases.

The other question in the case is, whether the defendants are liable for an injury occurring from the fright of the horse at the rock, neither the horse nor the carriage coming in collision or contact with the rock. Upon this point the weight of authority is with the plaintiffs. There are able opinions in that behalf in the courts of New Hampshire, Vermont, Connecticut, and of several other states. The same doctrine is also advocated in several respectable legal treatises. *Bartlett* v. *Hooksett*, 48 N. H., 18. *Morse* v. *Richmond*, 41 Vt., 435. *Dimock* v. *Suffield*, 30 Conn., 129. *Ayer* v. *Norwich*, 39 Conn., 376. *Foshay* v. *Glen Haven*, 25 Wis., 288. Red. & Shear. on Neg., 31. Angell on Highways, § 261.

The inclination of the court in Massachusetts, as exhibited in the earlier cases, was apparently favorable to the same view. In *Howard* v. *North Bridgewater*, 16 Pick., 189, 190, the court say, "but there may be such obstructions out of the traveled path, as will render the road unsafe; such, for instance, as would frighten horses." But in the later cases, the opinion of that court, upon the exact question presented here, as well as upon other questions more or less like it, has been most unequivocally the other way. In *Keith* v. *Easton*, 2 Allen, 552, it was decided, that an incumbrance "upon the side of a way," was not a defect in the way, merely because it exposes the traveler's horse to become frightened by the sight of it, or by sounds or smells issuing from it. In *Kingsbury* v. *Dedham*, 13 Allen, 186, the application of the same doctrine was extended to a case where the object at which the horse took fright was within the traveled way, and was of a nature calculated to frighten horses, but was not *per se* an actual

defect or incumbrance in the way of travel. In *Cook* v. *Charlestown*, 98 Mass., 80, it was held that the town was not liable, even though the incumbrance at which the horse became frightened, was in the traveled part of the way, and was of itself an obstruction and defect therein. There was in that case no collision with the obstruction itself, and the accident occurred at a point in the road where there was no defect. *Cook* v. *Montague*, 115 Mass., 571, is to the same effect. Still, individuals who have or maintain upon the highways obstructions which caused fright in horses are held, in Massachusetts, responsible to travelers for injuries occasioned thereby. *Barnes* v. *Chapin*, 4 Allen, 444. *Jones* v. *Housatonac Railroad Co.*, 107 Mass., 261. And, in the same state, it has been held that a town may be answerable for damages where an injury is caused by a horse shying at one defect, and the carriage hitting the same or some other defect, upon the highway. *Bigelow* v. *Weston*, 3 Pick., 267. *Bly* v. *Haverhill*, 110 Mass., 520; *Woods* v. *Groton*, 111 Mass., 357.

In our own state, there are but few cases where the question is touched. *Cobb* v. *Standish*, 14 Maine, 198, is a novel case where the proposition under discussion is reversed. There the horse was ensnared into a miry pit, instead of being frightened from it. The town was held because the indications of danger were concealed from the notice of the traveler and his horse. It was decided in *Merrill* v. *Hampden*, 26 Maine, 234, that if a hole in the road was filled up with stones before the accident so as to be safe for the horse and carriage to pass over, the fact that the horse was frightened at its appearance would not render the town liable for an injury happening on that account. But it is intimated in the opinion, that there might be conditions in the highway for which a town would be responsible, where an injury is caused by a horse taking fright at the appearance of the road. *Lawrence* v. *Mt. Vernon*, 35 Maine, 100, was the case of an injury by a horse taking fright at a pile of shingles on the side of the road outside of the traveled way. The judge at the trial instructed the jury that if the shingles were of a character likely to frighten horses they were a defect in the public way. The court say that the instruction withdrew from the jury the de-

termination of a question of fact. No other criticism is passed upon that instruction. In *Davis* v. *Bangor*, 42 Maine, 522, it was decided that a tree standing upon a cart upon a public way was not an incumbrance for which the town was answerable to a traveler whose horse became frightened thereat and ran away. In that case, no notice appears to have been taken by counsel or court of any distinction on account of the injury being caused by the fright of the horse at, instead of by a collision with, the supposed defect. In *Clark* v. *Lebanon*, 63 Maine, 393, it was determined that a town is liable where the injury was caused by a horse running away on account of a fright produced by the carriage to which the horse was attached coming in collision with a defect in the way. That case very strongly resembles the case at bar. There the horse became alarmed through the sense of touch. Here he became alarmed through the sense of sight. There is no other difference or distinction between the cases. *Jewett* v. *Gage*, 55 Maine, 538, is a case where an individual was held liable for an object in the highway which caused an injury to a traveler by frightening his horse.

We think, upon the plaintiffs' showing, this action can be maintained. It is a strong case of the kind. The horse was suitable. The driver used proper care. The object which produced the fright was in the traveled way. It was *per se* an incumbrance upon and a defect in the way. It was an object likely to terrify a horse. The roads are required to be "kept in repair so that they are safe and convenient for travelers with horses, teams and carriages." It is admitted that the road was not "in repair." Was it safe and convenient? Of course, a town is not accountable for every obstruction upon its highways which would produce fright in horses, nor merely because the road is not safe and convenient. It is impossible to define the municipal obligation by any general rule. Each case must depend somewhat upon its peculiar facts. Of course, whether a road is or not out of repair is generally for the jury to decide. But there are certain conditions of a road which cannot legally be regarded as defects; such as, because the road is hilly; or not all wrought; or because crowded with per-

sons or teams; and there are other classes of cases where no liability can exist. Illustrations of many such are given in *Keith* v. *Easton*, *supra*.

We are not convinced, however, that a recovery can be had in no case where the injury is caused by the fright of a horse at an object upon a highway. Fear is not a despicable quality in the character of man or beast. "Fear has many eyes." "Early and provident fear is the mother of safety." It was fear that impelled the traveler, (*Lund* v. *Tyngsboro*, *supra*,) to leap from his carriage to avoid a dangerous defect in the way, when his safety really depended upon his remaining in the carriage. The passenger who jumped from a coach through fear of his safety and thereby received an injury, made the same mistake. *Ingalls* v. *Bills*, 9 Metc., 1. But in those cases the defect was regarded as the responsible cause of the injury.

The defendants insist, that the accident is not imputable to the fact that the rock was in the traveled way. They say, that, if it had been situated on the side of the road or just outside of the limits of the road, the result would or might have been the same. In *Cook* v. *Charlestown*, *supra*, (Massachusetts case) it is said: "There is nothing to show that the horse was more frightened than he would have been if it (obstruction) had lain close besides his path, instead of directly in it." The defendants also rely on the argument, that innumerable things on and about a highway may annoy and frighten a horse which cannot be regarded as defects for which a town would be responsible, and that for that reason in this peculiar class of cases there should be no liability upon the part of the town at all. While these suggestions would have considerable force in many cases, they do not furnish any defense under the particular circumstances of the case at bar. *Non constat*, that the result would have been the same under the conditions supposed. We think the more reasonable presumption in this case, to be, that the horse would have gone safely along had the impediment not been in the traveled way. Nor does it follow that a town may not be responsible for some objects, because they are not responsible for all objects, in the highway which detract from the convenience and safety of traveling.

How far, if at all, the court would be inclined to admit the doctrine adopted in this discussion beyond the facts now before us, we cannot now decide. But in no case like this can a liability of the town exist, unless the object of fright presents an appearance that would be likely to frighten ordinary horses; nor unless the appearance of the object is such that it should reasonably be expected by the town that it naturally might have that effect; nor unless the horse was, at least, an ordinarily kind, gentle and safe animal, and well broken for traveling upon our public roads.

The action to stand for trial.

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

WILLIAM LEWIS *vs.* NOAH FOSTER.

Penobscot, 1875.—January 1, 1876.

Officers. Oath.

The commissioners appointed in accordance with R. S., c. 113, § 8, *et seq.* need not be sworn.

ON EXCEPTIONS.

On motion of the defendant's counsel, a commissioner was appointed by the court to take the disclosure of the defendant, under the 8th section of the 113th chapter of the revised statutes.

The parties appeared before the commissioner who administered the oath to the defendant, and proceeded to take his disclosure; the commissioner himself not being sworn.

The commissioner found that he was clearly entitled to the benefit of the provisions of said section, and determined that the execution run against the defendant's property only.

Upon the return of the commissioner's report in accordance with the above determination, the plaintiff's counsel appeared and in writing objected to the report and prayed that the same be rejected, set aside and annulled, for the reason that the commissioner, before entering upon the discharge of his duty, was not sworn as by law required.

The presiding justice overruled the objection; to which ruling, in matter of law, the plaintiff excepted.

B. Kimball, for the plaintiff.

H. L. Mitchell, for the defendant.

VIRGIN, J. Public officers are usually required to take an oath of office, though by our statute there is an express exception to this rule. R. S., c. 11, § 22. So where the court, jury or commissioners, or any other body or persons are authorized by a general law to act judicially, and their appointment or selection is without the act or assent of the parties whose rights they are to determine, the law usually requires an oath. *Bradstreet* v. *Erskine*, 50 Maine, 407. The office of commissioner whose appointment and duties are prescribed in R. S., c. 113, § 8, *et seq.*, is a statute office; and neither this nor any general statute requires him to take an official oath. Even if it did, the objection comes too late. *Raymond* v. *Co. Commissioners of Cumb. Co.*, 63 Maine, 110.

Exceptions overruled.

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

STATE *vs.* INTOXICATING LIQUORS, CHARLES E. BLACKWELL, claimant.

Penobscot, 1875.—January 1, 1876.

Intoxicating liquors. Constitutional law.

Imported foreign liquors are liable to seizure and forfeiture under R. S., c. 27, while the importer retains possession thereof in the original package, but for the purpose and with the intent to break it and sell them in this state in quantities less than a package.

ON EXCEPTIONS.

LIBEL under the search and seizure statute; and the controversy was about four cases of imported whisky. It was admitted by the state, that, at the time of the seizure, they were in the original packages unbroken, as imported, and were lawfully imported by the claimant; and were then in his possession, as his property, and had never been sold by him.

The claimant contended, that under these facts the liquors were not by law liable to forfeiture, whether he then had any intent to sell the same in any way in this state or not.

For the sake of presenting the question of law involved, to the full court, the justice presiding gave, among others, the following instructions to the jury.

If the liquors were of foreign manufacture and lawfully imported by Blackwell, the claimant, and were in the original and unbroken packages as imported when seized, still if Blackwell then had them in his possession for the purpose of breaking the packages and with the intent to sell them in quantities less than a package as imported, then the liquors would be liable to forfeiture.

And if in such case the intent was to sell them either in the imported package without breaking, or in quantities less than an imported package by breaking them, according as the claimant found a demand to sell them to customers in the one way or the other, then in such case the liquors would be liable to forfeiture.

To which rulings and instructions the claimant excepted.

F. A. Wilson & C. F. Woodard, for the claimant.

VIRGIN, J. Are imported foreign liquors liable to seizure and forfeiture under our statute while the importer retains possession thereof in the original package, but for the purpose and with the intent to break it and sell them in this state in quantities less than a package?

The claimant contends that this question must be answered in the negative by reason of the federal statute allowing their importation, and article X, amendments of the U. S. const.

But "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states" · · U. S. const., art. I, sect. 8, § 3. Among the delegated powers is that of "regulating commerce with foreign nations." art. X, *supra*.

By virtue of these provisions, the federal authority (so far as it is essential in the consideration of the present case) ceases with the "regulation of commerce with foreign nations," while at this point of termination of federal power, begins that of the state,

which never having been surrendered it may exercise in any manner deemed conducive to the best interests of its citizens.

The precise point at which the federal authority ceases and that of the state begins, has been defined in general terms by the supreme court of the United States. By these decisions it is declared that while a sale of the goods imported is the general object of importation, and the right of sale is an inseparable incident thereto, still this incidental right is limited to a sale by the importer himself, and in the original package. And when by any act of the importer the thing imported has become a component part of the general mass of property in the state—as when the original package has been broken up for use or for retail by the importer, and also when the commodity has passed from his hands into the hands of a purchaser—it has then lost its distinctive character as an import and has become subject to the laws of the state. *Brown* v. *Maryland*, 12 Wheat., 419. License Cases, 5 How., 574. To the same effect is *Pierce* v. *State*, 13 N. H., 536, 581, and *State* v. *Robinson*, 49 Maine, 285.

A sale in the original package only, being authorized by the federal statute, the breaking and selling in a less quantity is without that authority, and is within the prohibition of the state law; and a fixed intent that the package shall be broken and sold must place the liquors in the same category. It would hardly be considered reasonable that the federal law should protect property until an actual unauthorized sale were completed, when the intent to make such a sale is avowed. Such "aid and comfort" to violators of the internal regulations of a state is not within the spirit of the regulations of foreign commerce. *Fisher* v. *McGirr*, 1 Gray, 1, 26, 27.

We do not perceive any material difference in the two rulings made at *nisi prius*. The intent to break and sell is the same in each—a customer only being wanted in each. Whether a purchaser ever calls or not is immaterial—the intent to sell whenever an opportunity occurs being the material fact which works the forfeiture. *Exceptions overruled.*

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

HENRY E. PRENTISS *vs.* FRANCIS E. PARKS *et als.*

Penobscot, 1873.—May 3, 1876.

Judgment. Trial.

To sustain an action of debt or assumpsit against the subsequent owners or occupants of a mill dam for the arrearages of annual compensation under R. S., c. 92, § 15, the plaintiff must show himself the party entitled to such annual compensation by a record of a valid judgment upon his complaint for flowage of the same lands, on which judgment such annual compensation was awarded.

The proceedings upon such complaint are not, as a whole, according to the course of the common law, and jurisdiction will not be presumed although they are had in a court of general jurisdiction.

If the record of such judgment shows no notice to, nor appearance by, the respondent therein named prior to the issuing of the warrant to the commissioners, the defect is fatal to the maintenance of a suit under § 15; and it is not cured by the fact that the commissioners gave due notice of the hearing before them, and the further fact that part of the defendants in such latter suit appeared before the commissioners, and afterwards in court, to object to the acceptance of the report, and to make an unavailing motion to have the default originally entered taken off.

The recital in the warrant to the commissioners that there was due notice to the respondents does not amount to proof that such notice was given.

ON REPORT.

ASSUMPSIT, on account annexed to the writ which is dated November 1, 1872, containing nine items for flowing land in Danforth for nine years, from A. D. 1863, to A. D. 1871, both inclusive, at $75 a year with another item for costs of court in complaint for flowage $72.17, in all $747.17. There were other special counts founded on the same matter.

If upon the evidence offered and legally admissible, the action could be maintained, it was to stand for trial; otherwise judgment to be for the defendants. The facts sufficient to raise the legal points decided appear in the opinion.

J. F. Godfrey, for the plaintiff.

D. D. Stewart, for the defendants.

BARROWS, J. This is an action of assumpsit against the three defendants, Parks, Dresser and Dodge, to recover damages and

costs of court allowed to the plaintiff in a complaint for flowage of his land in Danforth, in the county of Washington, against George W. Butterfield, A. L. Butterfield and W. H. Decker.

A copy of the record of the judgment in *Prentiss*, complainant for flowage, v. *Butterfield et als.*, recovered at the October term of this court, in Washington county, A. D. 1871, was offered in evidence by the plaintiff, and is made part of the case subject to all legal objections by defendants. The case was hereupon reported to the law court with the stipulation that "if upon the evidence offered and legally admissible, this action can be maintained the case is to stand for trial, otherwise judgment to be entered for defendants."

Several objections to the maintenance of the action upon the evidence offered are suggested. If one is found fatal it is needless to look further. The record introduced shows that a complaint, by the plaintiff against Butterfield and others for the flowage of certain lands of his in Danforth by reason of a saw and grist-mill and dam erected on lot No. 3, in the 5th range upon and across the Baskahegan stream, by one Stinchfield, which came into the possession and ownership of said Butterfield and others in 1865, was entered at the April term, 1866, and thence continued till the October term, 1869, when notice to the respondents was ordered. The record does not show that this order was ever complied with; but the case was thereupon continued until the October term, 1870, when, the defendants not appearing, a default was entered and commissioners were appointed who, at the October term, 1871, made their report by which it appears that they gave notice to Parks and Dresser, two of these defendants, "as the present owners of said mill and dam," and to two of the original respondents, the third being absent from the state, and that Parks and Dresser appeared and were present during the examination, and were heard by the commissioners upon the questions before them, and that the commissioners thereupon made the report called for by the statute and their commission, and awarded the damages for the collection of which this suit is brought.

When the report was presented at the October term, 1871, the record further shows that two of these defendants, Parks and

Dresser appeared and objected to the acceptance of the report, and moved to have the default originally entered struck off, which motion after a full hearing was denied, and the report was accepted and judgment entered up thereon. The warrant to the commissioners, issued at the October term, 1870, recites, under a whereas, the pendency of the complaint for the flowing of lands, the names of the parties, and that "said respondents after due notice have not appeared and answered thereto but made default," and the consequent appointment of commissioners. The present defendants object that the record does not show such notice to the respondents in the original complaint for flowage as the statute regulating that proceeding requires, or, in fact, any notice to those respondents, or any appearance by them.

The counsel for the plaintiff claims that the questions here are whether the absence of the notice ordered by the court is fatal, and whether the appearance of Parks and Dresser, two of these defendants, before the commissioners and subsequently in court, to move to take off the default, and the proceedings thereon, cure the defect.

The plaintiff must recover, if at all, by bringing his case within the provisions of R. S., c. 92, § 15, which enables "a party entitled to such annual compensation" to "maintain an action of debt or assumpsit therefor against any person who owns or occupies the said mill . . . when the action is brought;" and to "recover" thereon "the whole sum due and unpaid, with costs;" and gives him "a lien, from the time of the institution of the original complaint, on the mill and mill-dam . . . for any sum due not more than three years before the commencement of the complaint."

The plaintiff, to show himself "entitled to such annual compensation," must show a valid judgment therefor obtained in his favor against the proper parties as respondents, under the provisions of chapter 92. The defendants here sustain no such relation to the judgment that as to them it must be deemed valid until reversed. They are neither parties nor privies to it; and since, by force of the provisions of § 15, they are liable to be unfavorably affected by it they are free to test its validity in this suit. *Downs* v. *Fuller*, 2 Metc., 135. *Carpenter & Cushman* v. *Spencer*, 2 Gray, 407.

But we are not called upon in this case to determine how far exact conformity to the course of proceeding marked out in chapter 92, in cases of complaint for flowage is required in order to enable the complainant to avail himself of the remedy against subsequent purchasers or occupants given in § 15.

The general rule doubtless is that a remedy given by statute must be strictly pursued; and it is strongly argued in the present case, in support of some of the objections, that there should be precise conformity in all the proceedings to the requirements of the statute, and that nothing short of this will entitle the party whose lands are flowed to the remedy given by § 15, even though he might have a judgment against the original respondents which would be valid as against them, and not liable to be reversed or quashed on error, or certiorari, at their instance.

But whether a general appearance of the respondent in the original complaint, and an imparlance, would or would not have the effect to cure an informal or defective service so as to enable the complainant to maintain a suit against the subsequent owner or occupant under § 15, we think it clear that unless the record shows either a regular service according to the statute or a waiver, by an appearance on the part of the original respondents or otherwise, the judgment cannot avail the plaintiff in a suit like this, nor show him "entitled to such annual compensation" within the meaning of § 15.

The proceedings, as a whole, are not according to the course of the common law. R. S., c. 92, § 8. *Vandusen* v. *Comstock*, 3 Mass., 184, 187. There is therefore no presumption of jurisdiction although they were had in a court of general jurisdiction; and every fact essential to the exercise of the special jurisdiction must appear upon the record. *Penobscot R. R. Co.* v. *Weeks*, 52 Maine, 456. *Morse* v. *Presby*, 5 Foster, 302. *Galpin* v. *Page*, 18 Wall., 350, 367. *Commonwealth* v. *Blood*, 97 Mass., 538.

One of these essential facts is due notice to the respondent. The record offered here shows no notice to the respondents therein named nor any appearance by them, unless the recital, under a whereas, in the warrant to the commissioners that "said respondents after due notice have not appeared and answered thereto but made default," can be deemed record proof of notice.

We do not think the recital in that document can have such effect. The order for the appointment of commissioners is a species of interlocutory judgment, before the entry of which it should be made to appear that the respondents have had notice and an opportunity to be heard. This is expressly required by R. S., c. 92, §§ 6, 7, 8, 9. If the respondent has nothing to offer in defense he may still wish to be heard as to the appointment of commissioners.

It is not true, as contended by the plaintiff, that the respondents lost no rights by the default, because the proceeding was not finished, and they had an opportunity to be heard before the commissioners. They are entitled to the notice, and the record must show not only that it has been ordered, but that it has been served, or service waived, in order to make the proceeding valid as between the immediate parties to it.

The warrant to the commissioners is a process in pursuance of the interlocutory judgment. It cannot be used to supplement a record of such judgment that is defective in the matter of a jurisdictional fact like that of notice.

Nor can the abortive attempt of two of the present defendants to appear and have the default taken off in a proceeding to which they were not parties, nor even privies to the judgment that might be rendered therein, avail to cure the radical defect of a want of notice to the original respondents. They could not have their day in court in a suit to which they were not parties and by which they were not concluded. As the record shows no service of the original complaint for flowage upon the respondents therein named nor any appearance by them, it is not necessary to consider the other alleged defects in the proceedings.

Such a record cannot be regarded as affording a suitable basis for the maintenance of this suit. According to the stipulation in the report, the entry must be

Judgment for the defendants.

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

ADONIJAH WEBBER *vs.* MARY J. READ.

Penobscot, 1874.—May 17, 1876.

Replevin. Exceptions.

In an action of replevin where the identity of the property and the genuineness of the writing under which the plaintiff claims it are questioned, the burden is upon him to establish both facts.

The accuracy of a ruling upon a point of law will not be examined on exceptions, when the special findings of the jury upon the facts are such as to render the ruling immaterial.

Thus: where the judge instructed the jury that if the horse replevied came into the possession of the defendant by the plaintiff's consent, and no demand was made for a return until after the writ was made and put into the officer's hands for service, the action was prematurely brought, and the plaintiff alleged exceptions, and the jury found specially that the horse was the property of the defendant; *held*, that the instruction thereby becoming immaterial, it was unnecessary to inquire into its correctness.

In an action of replevin, where a demand is necessary to terminate a bailment, and no demand is made until after the writ is filled out and put into the hands of an officer for service, whether the action is prematurely brought, *quære.* See 47 Maine, 520; 15 Mass., 359; 110 Mass., 446.

ON EXCEPTIONS AND MOTION.

REPLEVIN, for a horse claimed by the plaintiff under a writing of the following tenor:

"KENDUSKEAG, February 12, 1869.

Received of A. Webber, one last spring colt; the same Webber & Scripture had of North; and one mare William Meguire had, which I agreed to keep and return to said Webber in six months, or pay $73 and interest. The colt and mare to remain the property of said Webber till paid for.

(Signed,) O. B. READ."

The writ was dated January 18, 1873, in which the plaintiff averred the unlawful taking of the horse on November 11, 1872. The officer's return shows that the property was replevied January 20, 1873.

After the death of O. B. Read, his wife, (the defendant) received the horse by allowance of the judge of probate.

Both the identity of the horse and the genuineness of the writing were denied by the defendant; and the evidence tended to

show that no demand upon the defendant for a return was made in behalf of the plaintiff until two days after the making of the writ, and after it had been placed in the hands of an officer for service; and the presiding justice instructed the jury substantially, that if the facts were thus, the action was prematurely brought. To which instruction the plaintiff alleged exceptions.

The jury returned a general verdict for the defendant, and also found specially that the horse was his property.

The plaintiff moved to set the verdict aside as against evidence.

D. F. Davis, for the plaintiff, submitted without argument.

J. F. Godfrey, for the defendant.

WALTON, J. This is an action of replevin for a horse, which the plaintiff claims was delivered, when a colt, to the defendant's deceased husband, upon condition that it should be his, if he paid for it; otherwise to be returned to the plaintiff; and the plaintiff produced a writing, purporting to be signed by the deceased, to that effect.

The identity of the horse, and the genuineness of the writing, were denied. It was also claimed that the action was prematurely commenced, the writ having been sued out and put into the hands of an officer for service, two days before a return of the horse was demanded.

At the request of the plaintiff's counsel, the jury were directed to find specially whether the horse replevied was or was not the property of the plaintiff; and they found that it was not; that it was the property of the defendant.

This finding rendered the rulings of the presiding judge upon the last point, namely, as to whether the action was or was not prematurely commenced, immaterial; for if the horse replevied was the property of the defendant, and not the property of the plaintiff, of course the action could not be maintained, whether it was or was not prematurely commenced; and the accuracy of the rulings upon that point need not be examined. We will add, however, that the question is not free from difficulty. See 47 Maine, 520; 15 Mass., 359; 110 Mass., 446.

The only remaining question is, whether the finding of the jury

is so clearly against the weight of evidence as to require us to set it aside. We think it is not. The burden of proof was upon the plaintiff, to prove the identity of the horse and the genuineness of the writing, both of which were denied; and we do not think the evidence upon these points is so clear and conclusive that a finding against the plaintiff must necessarily be wrong.

Motion and exceptions overruled.
Judgment on the verdict, and
for a return.

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

PENOBSCOT RAILROAD COMPANY *vs.* GIDEON MAYO.

Penobscot, 1874.—May 30, 1876.

Limitations,—Statute of.

The procuring of the settlement or discharge of an existing and known cause of action by fraudulent means is not the fraudulent concealment of such cause of action within R. S., c. 81, § 92.

When the fraudulent settlement is such as to entitle the person defrauded to an action, the limitation to the action commences to run from the time of the discovery of the fraud.

ON EXCEPTIONS.

ASSUMPSIT by nominal plaintiffs for Nathaniel Wilson the plaintiff in interest.

A full statement of this case, as first presented to the law court in 1872, will be found in 60 Maine, 306. The case at the April term, 1873, was referred under a rule of court to Samuel F. Humphrey, on legal principles, to report any facts and questions of law that either party might desire with right of exceptions.

The referee, among other things, found in substance, that the defendant in consideration of certain bonds of the plaintiff company, gave his note to them or order for $4000, dated March 28, 1862, payable in one year with interest; that the note was held by the treasurer of the plaintiff company in trust as security to the directors of the company, of whom the plaintiff in interest was one,

for the several amounts of money by them advanced to the plaintiff company, and due to them as individuals in proportion to the advances made by each; that while the other directors, as well as Wilson, had made such advances, they did not present any claims in this suit; that the amount of the indebtedness of the plaintiff company for advances by three directors at the date of the note was $9631.48, of which the plaintiff in interest advanced $6917.-61; and that the plaintiff in interest was entitled to receive 6917–9631 of the amount due on the $4000 less such amounts received by him since May 28, 1862; that after making a certain deduction stated he found due Wilson as of August 26, 1873, the sum of $4260,50; that the defendant October 31, 1863, sold and delivered to John A. Poor, president of the E. & N. A. Railway Co., $75,700, of the bonds of the Penobscot Railway Company, and received in payment therefor $25,500 of the bonds of the E.& N.A. Railway Co.; that these $75,700 of Penobscot Railroad Co. bonds included the $68,700 of bonds sold to the defendant by the plaintiff corporation for his note for $4000, dated May 28, 1862, as appears by vote of the directors of that date; that the defendant at the meeting of the directors of the plaintiff company July 13, 1864, Nathaniel Wilson, one of the board being absent, stated in presence of the other directors, substantially, that he had turned over said bonds of the plaintiff company to the E. & N. A. Railway Company, receiving nothing in payment therefor, entirely suppressing the fact that he had sold them as aforesaid, and thereby inducing the directors to cancel the said $4000 note and give it up to him; that Wilson first knew, January 7, 1868, that Mayo instead of giving the $68,700 of bonds in question to the E. & N. A. Railway Company, had sold them to J. A. Poor, president of said company; and that the plaintiffs' claim on the note was not barred by the statute of limitations.

The referee's report concludes as follows: "I do therefore hereby make this my final award and determination in the premises, to wit: that the said plaintiff recover of the said defendant, the sum of $4,260.50, damage and costs of reference taxed at $228.-93, together with the costs of court, to be taxed by the court.

Dated at Bangor, this 26th day of August A. D., 1873.

(Signed,) S. F. HUMPHREY, referee."

Upon the return of the referee's report to the court, the defendant's counsel filed objections to its acceptance and to the rulings of the referee in matters of law and moved that the report be set aside. The presiding justice, *pro forma*, overruled the objections and motion, and the defendant alleged exceptions.

C. P. Stetson, for the defendant.

A. Wilson & A. Sanborn, for the plaintiffs.

APPLETON, C. J. At a meeting of the directors of the plaintiff corporation held April 20, 1860, it was voted that certain bonds of the company to the amount of sixty-eight thousand dollars should be delivered to the defendant, the president of the company "to be used by him, the said president, for the company, as he shall deem expedient."

At a meeting of the directors held May 28, 1862, Mayo the defendant and Wilson the plaintiff in interest, being present, it was voted to sell the bonds in Mayo's hands to him for $4000, and that "the note be retained by said treasurer as security to the directors for the several amounts by them advanced to said company, and now due them, as individuals, from said company, and when collected shall be divided to said directors in proportion to the sum actually due each."

A note was given by Mayo for the sum of $4000 to the plaintiff corporation dated May 28, 1862.

At a meeting of the directors held July 13, 1864, Wilson being absent, it was voted that the directors cancel the note given by Mayo, May 28, 1862, for $4000.

The referee has found in substance that this cancellation was obtained through the fraudulent misrepresentations of the defendant, and that the plaintiff in interest first knew on January 7, 1868, of the fraud by which this cancellation was affected.

The statute of limitations is pleaded in bar. As the note was dated May 28, 1862, and this suit was commenced January 3, 1870, the action upon the note cannot be maintained unless the plaintiff can bring his case within R. S., 1871, c. 81, § 92, which is in these words: "If a person liable to any action mentioned herein, fraudulently conceals the cause thereof from the person

entitled thereto, or if a fraud is committed which entitles any person to an action, the action may be commenced at any time within six years after the person entitled thereto discovers that he has just cause of action."

The plaintiffs rely upon the fact that the surrender of the note was obtained through the misrepresentation and fraud of the defendant and that the plaintiffs and the officers, excepting the defendant, and the directors for whose benefit the note was held were ignorant of such fraud and misrepresentation until January 7, 1868.

The cause of action was the note of the defendant. Its existence was known to the officers of the plaintiff corporation and to those for whom it was held in trust. Its existence was never concealed. The statute of limitations began to run from the maturity of the note.

The surrender of the note may have been fraudulently obtained. But the fraudulent settlement of an existing cause of action, by means of false representations and by the concealment of the truth, is not the concealment of the cause of action which is thereby settled. It is the settlement of a known and existing cause of action, not the concealment of an existing but unknown cause of action. *Rice* v. *Burt*, 4 Cush. 208. It is in and of itself a substantive grievance, for which redress may be sought, but not the original cause of action.

The cases all show that upon this branch of the section the action is not maintainable. *Cole* v. *McGlathry*, 9 Greenl., 131. *McKown* v. *Whitmore*, 31 Maine, 448. *Rouse* v. *Southard*, 39 Maine, 404. *Nudd* v. *Hamblin*, 8 Allen, 130. *Argall* v. *Bryant*, 1 Sandf., S. C., 98. *Northrop* v. *Hill*, 57 N. Y., 351.

If a fraud has been committed, which would entitle the plaintiff to an action, "the action may be commenced at any time within six years after the person entitled thereto discovers that he has just cause of action." But the "just cause of action" must be one arising from the fraud committed and discovered. It is for the fraud committed. This clause of the section has no reference to the original cause of action, for that being well known could not

be discovered. The knowledge of the existence of the note was contemporaneous with its existence. The limitation is from the discovery of the cause of the fraud, and the "just cause of action" is for the fraud. But this action is not for a fraud committed, if one has been committed entitling the party defrauded to a "just cause of action," but for the original note, which long before the commencement of this suit had been barred by the statute of limitations.

It becomes unnecessary to examine the various other grounds of exception alleged by the counsel for the defendant.

Exceptions sustained.

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

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ISRAEL P. RUMSEY *et als. vs.* NICHOLAS L. BERRY.

Penobscot, 1874.—July 1, 1876.

Contract.

A contract for the sale and purchase of wheat to be delivered in good faith at a future time is not void as a "wagering contract," but when under such an agreement it is understood by the parties that no wheat is to be delivered but only a payment at the time appointed of the difference between the contract and the market price, it thus becomes a wagering contract and the law will not enforce it.

The plaintiffs in good faith at the request and for the benefit of the defendant made an agreement for the sale of wheat to be delivered within a certain time at the option of the defendant, he to furnish sufficient "margin" to secure them against loss. The defendant failed to comply with his part of the contract, and a loss ensued. *Held*, that under such a contract the law will give to the plaintiffs a remedy for their loss.

ON EXCEPTIONS.

ASSUMPSIT. The writ was dated August 4, 1872, and contained a count upon an account annexed, and one for money paid, laid out and expended. The action was brought to recover a balance alleged to be due from the defendant to the plaintiffs under the following facts admitted or proved at the trial.

The defendant, a resident of Bangor, Maine, was in Chicago, Illinois, and there met the plaintiffs who are and were in 1872,

when the transactions took place, commission merchants, brokers, and members of the board of trade in Chicago, and authorized the plaintiffs either personally or by his agent, April 22, 1872, to sell for him, 10,000 bushels of wheat at $1.30 and $1.31 per bushel, to be delivered at any time he (Berry) pleased during the month of May following. The plaintiffs thereupon did, in their own name according to said orders, contract to deliver said wheat to third parties. By custom and law at Chicago, so long as the defendant furnished to the plaintiffs sufficient "margin" so called, to secure them against loss in the event of a rise in the price of wheat, the plaintiffs must carry said contract along open under the directions of the defendant, until the last day of May; but if upon demand for additional margins upon the rise in the price of wheat, said "margins" were not furnished within a reasonable time, then the plaintiffs had a right at any time to purchase in wheat at the market price, to fill said contract, or to settle on the best terms possible with the parties to whom they had contracted to deliver the wheat, and claim of the defendant reimbursement for any loss incurred. Soon after April 22d, wheat commenced to rise in price, and upon demand, the defendant furnished $700 as a "margin," but wheat continued to advance in price, and upon demand for further "margin," the defendant failed to furnish it, and the contract was canceled by the plaintiffs with the parties with whom they had contracted to deliver in one or the other of the months above described, at a loss of about $3000, only $700, of which was covered by the margin deposited; and this suit was to recover the difference, and the verdict of the jury was the full amount claimed. The defendant testified at the trial, that at the time the plaintiffs and the defendant entered into this contract, the defendant had no wheat, and that the plaintiffs knew it; but it was proved at the trial and admitted by the defendant, that in pursuance of the agreement of the plaintiffs to sell wheat for the defendant, that the plaintiffs did contract with certain persons in Chicago, and become personally responsible to deliver them 5000 bushels of wheat at $1.31, and 5000 bushels at $1.30 per bushel, on some day in May, at seller's option, and that they did either actually deliver the wheat or make

satisfactory settlement with the parties, at a loss of about $3000; hence the defendant claimed at the trial, and his counsel asked the presiding judge to instruct the jury, that said contract was merely betting upon the price of wheat during the balance of the month of April, and the month of May, and therefore a "wagering contract," and therefore illegal and invalid, as a foundation of the action. This instruction the presiding justice refused to give, but did instruct the jury that such a contract would be valid under the laws of this state, and, in the absence of proof to the contrary, would be presumed to be valid under the laws of Illinois, where the contract was made.

The verdict was for the plaintiffs for $2,305.62.

The defendant alleged exceptions.

J. F. Godfrey, for the plaintiffs.

F. A. Wilson & C. F. Woodard, for the defendant.

DANFORTH, J. The plaintiffs are and were in 1872, brokers, commission merchants and members of the board of trade in Chicago, and, at the request and for the benefit of the defendant, a resident of Bangor, contracted with third parties for the sale of a quantity of wheat.

This contract was entered into upon the 22d day of April, 1872, and the delivery was to be at the option of the defendant, at any time during the month of May following. The plaintiffs were personally responsible for the performance of this agreement, and the defendant was on his part under obligation to furnish sufficient "margin" to secure against loss in case of a rise in wheat. This he failed to do, a considerable loss followed and this action was commenced to recover the amount of it.

The liability of the defendant by the terms of the contract is not denied, but the presiding justice was requested "to instruct the jury, that said contract was merely betting upon the price of wheat during the balance of the month of April, and the month of May, and therefore a 'wagering contract' and therefore illegal and invalid, as a foundation of the action." This instruction was refused and the jury were instructed that the contract was valid under the laws of this state and in the absence of proof to the

contrary would be presumed to be valid under the laws of Illinois, where it was made.

No question is here raised as to whether any fact in relation to the nature of the contract and proper for the consideration of the jury was taken from them. The request was not for instructions as to the nature and effect of a wagering contract, but that as a matter of law this was such. As the agreement was not in writing it might have been proper for the presiding justice, had he been so requested, to have defined a wagering contract and have left it to the jury to find whether by a fair inference from all the testimony this was within the definition. But virtually the request was that the court should decide the question as a matter of law. This was done, and nothing is now presented but simply to ascertain whether the case shows any error in that decision.

Such error we fail to discover. The testimony so far as reported reveals nothing inconsistent with an ordinary sale of an article to be delivered in the future. While it may indeed appear a little singular and even suspicious that a man residing in Bangor, having no wheat of his own, should undertake to sell and deliver wheat in Chicago; still we cannot assume that any one has violated the law and been guilty of immoral and corrupting practices in his business transactions, without proof, even though he may ask it himself, for the purpose of being relieved from the obligation of a losing contract.

Besides we utterly fail to discover any wrong on the part of the plaintiffs. Their business was a legitimate one, and so far as appears, their connection with this transaction honest. Their profits were not to be affected by the result, their commissions were not to be increased or diminished by any contingency. It is true they were aware that the defendant at the time had no wheat. But the fact itself being immaterial, their knowledge of it is equally so. It is not only common but perfectly legal and sometimes necessary to contract for the sale and future delivery of an article which at the time has no existence, but which is afterwards to be purchased, raised or manufactured.

It does not appear that the defendant had any intention beyond what appears upon the face of the contract, or if he had that the

plaintiffs were cognizant of it. The mischief and illegality arises when the apparent contract is not the real one, when it is a mere cover for ulterior designs and such as are not authorized by law. A contract for the sale and purchase of wheat to be delivered in good faith at a future time is one thing, and is not inconsistent with the law. But such a contract entered into without an intention of having any wheat pass from one party to the other, but with an understanding that at the appointed time the purchaser is merely to receive or pay the difference between the contract and the market price, is another thing, and such as the law will not sustain. This is what is called a settling of the differences, and as such is clearly and only a betting upon the price of wheat, against public policy, and not only void, but deserving of the severest censure. This distinction is recognized in the *case of Chandler*, reported in The American Law Register, for May, 1874, and the Chicago Legal News of April 11, 1874, relied upon by the defendant. That case both in the reasoning and conclusion reached, has our entire approbation, and were the facts in the case at bar the same as developed in that we should not hesitate to apply the same principles of law.

The result is, that whatever might be the conclusion properly reached from the facts applicable to the defendant alone, the case fails to show on the part of the plaintiffs any complicity with a wagering or illegal contract. *Exceptions overruled.*

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

PETERS, J., did not sit.

BARROWS, J., delivered the following dissenting opinion:

I cannot help thinking that the opinion fails to apply the sound legal doctrine, which it affirms, to the facts and rulings in the case. The case finds that the plaintiffs knew that the defendant, a citizen of Bangor, had no wheat to sell, but at his request bound themselves by contract, for him, to deliver 10,000 bushels during the next month at the seller's option, at a certain price; that defendant furnished plaintiffs with $700 as a "margin," but failing, though requested, to make further advances, as the price of wheat rose, they in accordance with the custom in Chicago, can-

celed the contracts at a loss of about $3000, and brought this action to recover the difference between that sum and the $700 margin deposited.

If there was not enough in this to justify the defendant's request that the presiding judge would rule as matter of law that this was a wagering contract, and illegal and void, still it seems to me very clear that its character was so suspicious that it ought to have been left to the jury, under proper instructions, to say what the true intent of the parties was. Instead of doing this, the presiding judge cut off the defense by a peremptory ruling that under such circumstances the contract would be valid.

It is futile and evasive to argue that this ruling was justified, because, upon its face, the contract was a lawful one for the delivery of wheat at a future day. If it were designed and understood to be a mere gambling transaction, its terms would still be the same.

The real question was, whether it was the intent and expectation of these parties that the wheat should be delivered, or whether it was, that in case of a rise, a settlement was to be made upon such terms as they could get, and in case of a fall they were to receive the difference from the parties with whom the contract was made.

Nor do I think it can be rightly said that "no question is here raised as to whether any fact in relation to the nature of the contract, and proper for the consideration of the jury was taken from them."

The defendant excepted to the instruction given, as well as to the refusal to instruct. I think his exceptions should be sustained. I do not understand that the party who knowingly furnishes one with money to be used at the gambling board is any more entitled to the aid of the court to recover it, than the winning gambler would be to enforce the wager.

DICKERSON, J., concurred in this dissenting opinion.

CUTTING, J., was "inclined to concur in this."

ELIAKIM E. BYARD *vs.* GEORGE F. PARKER, and a new house and lot.

Waldo, 1874.—February 11, 1875.

Liens. Judgment.

No authority is conferred upon the courts of this state to grant any judgments *in rem* against houses or real estate.

ON REPORT.

The writ in this case, dated September 18, 1869, commands the officer "to attach a new building, used by George F. Parker of Winterport for a dwelling house by himself, and the lot upon which the same stands," and there particularly described, and to summon the said George F. Parker to appear at the ensuing term of this court for Waldo county, "to answer unto Eliakim E. Byard of Winterport aforesaid, who claims a lien upon said dwelling house and lot, for labor performed in erecting said dwelling house, by virtue of a contract, dated January 5, 1869, with said George F. Parker, for forty dollars, according to the specification hereto annexed, which amount said George F. Parker, who *owns* the same, neglects and refuses to pay, to the damage," &c. There was no more express assumpsit laid than may be inferred from the foregoing phraseology, nor any statement of indebtedness, as consideration for a promise, unless the word printed "owns" (as above) should have been "owes." The specification annexed was this:

"GEORGE F. PARKER to ELIAKIM E. BYARD, DR.

1869, June 8. To amount due on our contract in writing dated January 5, 1869, for finishing outside of your dwelling house, which contract I have executed. . . . . $40.00."

It was supported by Mr. Byard's affidavit to its correctness, and contained a description of the property upon which a lien was claimed, of which George F. Parker was said to be the owner, concluding thus: "and I had ceased to labor, or furnish labor or materials for such new building on the twenty-fifth day of June, 1869;" but it purported to be sworn to June 24, 1869, and was recorded in the town clerk's office in Winterport, July 10, 1869. There was a special attachment of the property upon the writ in

this case. The plaintiff put in the written contract of January 5, 1869, and testified to the performance of it on his part, and that he had not been paid.

It was admitted that no notice of the claim of a lien had ever been given to anybody, and that Mrs. Parker, wife of the defendant, owned the land upon which the building was erected. See the next case of *Verrill* v. *Parker and wife and new house and lot.*

T. W. Vose, for the plaintiff.

N. H. Hubbard, for the defendant.

PETERS, J. This purports to be an action against the defendant and a new house and lot.

The plaintiff is entitled to judgment against the defendant. But we have no power to render any judgment against the house and lot. There can be no *in rem* judgment in a proceeding like this. It will depend upon facts to be shown in other proceedings, whether the attachment of the real estate can be made available to the plaintiff or not. It is only where a notice to the general owners of property attached, is required by law to be given, that an effectual judgment directly against such property can be obtained. That requirement exists only in the case of an attachment of logs and vessels, but not when buildings are attached. The owner of the house and lot is not a party to this suit; nor is there any authority conferred upon this court to make her a party. We have therefore, no power to consider and settle her rights in this action. The writ is appropriate to enforce a lien, as far as this proceeding goes. See R. S., c. 91, § 36; *Sheridan* v. *Ireland*, 61 Maine, 486; *Parks* v. *Crockett*, id., 489.

We see no reason why the plaintiff should not recover the amount of his claim, less one dollar and twenty-six cents, which he inadvertently omitted to give a credit for.

Defendant defaulted for $38.74, *with interest from date of writ.*

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

WILLIAM VERRILL *vs.* GEORGE F. PARKER *et ux.*, and lot and new building.

Waldo, 1873.—February 11, 1875.

Contract. Husband and wife.

The plaintiff contracted orally with a husband to expend labor upon the real estate of his wife, without mention as to whom the credit was to be given; it was done, in the husband's absence, under the care and to the satisfaction of the wife; he did not deny his liability, but she did hers. *Held*, that they might be regarded as jointly liable.

ON REPORT.

ASSUMPSIT, to recover for labor performed, at the request of the husband, in the erection of a building upon the land of the wife. By the writ dated January 18, 1869, the officer was commanded to attach a lot of land particularly described, and a new building thereon, "as the estate and goods of George F. Parker and his wife, Mrs. Parker;" and "to summon the defendant" (if he was found within the precinct) to appear at the term of this court then next, "to answer unto William Verrill, of Winterport, who claims a lien upon said land and new building, for labor and materials furnished for erecting said building to the amount of sixty-five dollars and fifty cents (less twelve dollars received) according to the specifications annexed; which amount George F. Parker and Mrs. Parker, wife of said George F. Parker, of said Winterport, who own the same, refuse to pay; to the damage," &c. The plea was the general issue, with a brief statement, denying the existence of any lien. The specification of items, annexed to the writ, was headed "George F. Parker and wife to William Verrill, Dr.," and consisted of five charges for labor and two sums ($10 and $2) credited. It was supported by Mr. Verrill's affidavit of its correctness and of a description of the land, and that "the owner of the land aforesaid, to the best of my knowledge, is Mrs. Parker, wife of said George F. Parker, and the owner of the said new building so far as I know, is said George F. Parker;" and that he ceased to furnish labor on such new building October 20, 1868. This statement was recorded in the office of the clerk of Winterport, Nov-

ember 18, 1868. The officer returned upon the writ an attachment of the land and building, and that he had caused so much of his return as related thereto to be recorded in the registry of deeds and of the town clerk aforesaid.

The plaintiff testified to the performance of the labor by him, at the request of George F. Parker, who hired him to do the work, saying that the land belonged to his (Parker's) wife, which the plaintiff always supposed to be the case. The Parkers lived in the next house, about twenty rods from that erected for them by Mr. Verrill; and he stated that she was frequently there while he was at work upon the building; procured him nails at the village once or twice, &c., &c.; that Captain Parker said he had got to go away and leave him, but wanted him to go on to do the job right, to the satisfaction of his wife and he would be satisfied; that both expressed themselves as satisfied; that he notified Mrs. Parker in writing that he claimed a lien upon the house, and she then expressed no dissatisfaction, or objection to his performing the work; but said she was satisfied and wanted the work to go on; that Captain Parker returned home from sea some weeks after the job was done, and wanted a contract, which the plaintiff deemed unnecessary, as the work was completed satisfactorily, but the captain insisted that there ought to be one, that he wanted one, and so the plaintiff signed one prepared by the captain long after the job was done, although he claimed at the trial that the paper did not exactly correspond with the verbal agreement under which he worked. He admitted, on cross-examination, that Mrs. Parker never employed him, and that he gave her no notice that he claimed a lien until after the work was done.

Mr. Parker testified that he owned the house, contracted with Mr. Verrill for its erection, and still owed him a balance for the work. The plaintiff introduced deeds of the lot as follows: from Hannah H. Hardy to George F. Parker, July 28, 1864; from George F. Parker to Alden Parker, July 21, 1865; from Alden Parker to Ellen T. Parker, of same date as that last named, July 21, 1865; and a mortgage thereof by George F. Parker to Walter Haley, February 1, 1869. Each of these deeds was recorded at the time of date.

The case was then withdrawn from the jury, and submitted to the full court for decision.

T. W. Vose, for the plaintiff, relied upon the unreported case of *John P. Rich* v. *George F. Parker et ux., and a lot of land and a new building thereon*, as being identical in its facts with this, and in which this court gave judgment for the plaintiff.

N. H. Hubbard, for the defendants.

The action being against two defendants must fail because their is no evidence of any promise by Mrs. Parker.

There is no lien upon her land because notice was not given till the work was done.

PETERS, J. In the case of *Byard* v. *Parker*, *ante* 576, argued with this case, we have decided that we can give no judgments against land and buildings ; but, in a case of this kind, only against the personal defendants.

It remains only to decide whether the defendants are personally liable or not, and for how much. We think both of them must be regarded as the contracting party, and liable to pay; the husband, because he admits it; and the wife, because the labor was done upon her property, and for her benefit, and expended before her eyes. The implication is not a strained one, that their promise should be considered as joint. The preponderance of evidence gives the plaintiff his whole bill. *Defendants defaulted.*

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

INHABITANTS OF BELFAST *vs.* INHABITANTS OF MORRILL.

Waldo, 1874.—March 14, 1876.

Officer. Overseers of the poor. Pauper.

The acts of an officer *de facto* are valid as to third parties.

Where the law requires an election to be by joint ballot of two branches, *held*, that an election by the separate action of each branch is sufficient to give at least color of title to the office.

When one of a board of officers is not legally elected, but is an officer *de facto* he may legally join in the action of the board with those who are officers *de jure*.

Thus: the mayor and aldermen of Belfast were *ex officio* overseers of the poor; the city clerk who was not the mayor nor an alderman was irregularly elected as an overseer, and chairman of the board, and joined in the action of the board authorizing the supplies to the pauper, and gave the written notices to the defendant town. *Held*, 1, that the city clerk legally joined in the action of the board, and might be counted as one towards constituting a required majority; 2, that his notices to the defendants, and their replies thereto, he having been known and recognized by them as an acting overseer, were legal and binding.

On exceptions.

Assumpsit, for pauper supplies furnished John Campbell.

By the city charter of Belfast, the powers of selectmen are vested in the mayor and aldermen, so that in case there is no election of overseers of the poor, the mayor and five aldermen are such overseers. The charter also provides that all elections of officers shall be by joint ballot of the two boards in convention.

In the years 1870 and 1871, when the supplies were furnished there was no election of overseers by joint ballot, but by a concurrent vote it was ordered that the mayor and aldermen, and city clerk Quimby, who was neither, be overseers of the poor. Quimby was made chairman of the board, and with three of the aldermen authorized the furnishing of the supplies by one Hayford; the notices to the defendants were signed by Quimby in behalf of the board. At the trial the presiding justice allowed the plaintiffs to prove that Quimby was an acting overseer, and instructed the jury that if Hayford had authority from four acting overseers of the poor, the irregularity of their election would not avail the defendants, and that if the defendants received the notices from Quimby it made no difference to them whether he was regularly or irregularly chosen, if they knew and recognized him as one of the overseers of the city, and replied to the notices received from him.

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

W. H. Fogler, for the defendants, contended that Quimby was not even an overseer *de facto*, because there was at the time an existing board of overseers *de jure* who were acting as such, and

because the proceedings of the aldermen and common council were not such as to give him color of title to that office; that the answer of the defendants to Quimby's notice was no waiver, the notice not being signed by an overseer; that the supplies were not furnished by a majority of the overseers of Belfast, Quimby being one of the four who authorized the supplies and not an overseer.

W. H. McLellan, for the plaintiffs.

LIBBEY, J. The charge of the presiding judge gave to the jury the rule of law applicable to the case correctly. It was sufficient for the plaintiffs to prove that the supplies were furnished to the alleged pauper by a majority of the acting overseers of the poor of Belfast, and that notice was given by one of the acting overseers. *New Portland* v. *Kingfield*, 55 Maine, 172. The evidence introduced by the defendants tended to prove that the election of the mayor and aldermen, and Quimby the city clerk, by the city council as overseers of the poor, of Belfast, for 1870 and 1871, was irregular and in a manner not authorized by the city charter, still they acted as overseers under color of an election by the city council which had power to elect overseers of the poor. They were officers *de facto*, and their acts as such were valid as respects third parties affected thereby. *Brown* v. *Lunt*, 37 Maine, 423. *Cushing* v. *Frankfort*, 57 Maine, 541. *Fowler* v. *Bebee*, 9 Mass., 231. *Bucknam* v. *Ruggles*, 15 Mass., 180. *State* v. *Carroll*, 38 Conn., 449. *Brown* v. *O'Connell*, 36 Conn., 432.

It is contended by the counsel for the defendants that inasmuch as there was no legal election of overseers of the poor by the city council, the mayor and aldermen, having by the city charter the powers of selectmen of Belfast, were overseers of the poor *de jure;* that to bind the defendants the supplies must have been furnished by at least four of the overseers of the plaintiff city; that Quimby though an overseer *de facto* could not act with the overseers *de jure* to constitute a quorum of the board. By the joint order of the city council, under color of which Quimby acted, the board of overseers was made to consist of seven. When one of a board of officers is not legally elected or qualified, but is an officer *de facto* he may legally join in the action of the board, with those who are officers *de jure*. *Scadding* v. *Lorant*, 5 Eng. Law & Eq., 1630.

But it is sufficient for the determination of the case that the mayor and aldermen and Quimby, the city clerk, were acting overseers under color of the election by the concurrent order of the city council. Their action as such is valid as respects the defendants.

The motion to set aside the verdict as against evidence is not pressed by the defendants' counsel. The evidence on the question of settlement is sufficient to authorize the verdict.

Exceptions and motion overruled.

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

JAMES A. DUTTON *vs.* GEORGE A. SIMMONS.

Waldo, 1874.—April 11, 1876.

Officer.

The certificate by an officer to the register of deeds of an attachment of the real estate of Henry "M." Hawkins, when the name of the defendant in the writ is Henry "F." Hawkins, is such a misdescription of the person sued as will render the attachment void.

The officer's return upon the writ, that he has duly made to the register of deeds the certificate (as required by law,) is only *prima facie* evidence of the facts therein stated, and his return may be contradicted and controlled by the production of the certificate itself.

ON REPORT.

REAL ACTION.

Both parties claimed through Henry F. Hawkins; the plaintiff, directly by deed; the defendant by a deed from Bradstreet M. Hawkins, levying judgment creditor of Henry F. The levy, if all proceedings were regular, gave the earlier title. The officer's return upon the back of the writ, *Bradstreet M. Hawkins* v. *Henry* F. *Hawkins*, showed an attachment of the real estate of the defendant seasonably made, the parties correctly described, and the return required by R. S., c. 81, § 56, to the registry; but the plaintiff, against the defendant's objection, put in a copy of the officer's return left with the register of deeds, and the indorsement thereon, and the entry of the same attachment in the attachment book,

wherein it appeared that the officer having the writ in that case, in his return to the registry, gave the name of the defendant as Henry "M." Hawkins, instead of his true name, as it appeared in the writ, Henry "F." Hawkins. This error raised the contention in the case which after the evidence was out was made law upon so much thereof as was legally admissible.

J. Williamson, for the plaintiff.

N. Abbott, for the defendant.

PETERS, J. Both parties claim title to the demanded premises through Henry F. Hawkins. The deed to the demandant was prior to the levy of the tenant, but subsequent to the attachment on which the levy was made. The demandant, however, claims that the attachment was defective, because in the return of the officer to the registry of deeds, the defendant in that suit was described as Henry "M." Hawkins, when his true name was Henry "F." Hawkins, by which latter name he was sued. The question is, therefore, whether the misdescription is such as to render the attachment void.

The "names of the parties" to the suit were required to be returned. Can the name Henry "M." Hawkins be taken to mean Henry "F." Hawkins? Formerly, but one christian name was known to the law. The omission or insertion of a middle name, or its initial, was regarded as immaterial. Such is, probably, the law of the supreme court of the United States, and of many, if not most, of the state courts in this country at the present day. *Games* v. *Stiles*, 14 Peters, 322. *People* v. *Collins*, 7 Johns., 549. But there has been a growing dissatisfaction with the doctrine of the ancient cases upon this subject; and in this state (and Massachusetts) the old doctrine must be regarded both by the precedents and practice as overruled. In Bishop's Crim. Law, Misnomer, may be found cited many of the cases upon the question *pro* and *con*. The English courts have also long since departed from the old rule, under the influence of some of their statutes of amendment. In *Com.* v. *Hall*, 3 Pick., 262, "Charles" Hall and "Charles James" Hall, are regarded as different names. *Com.* v. *Shearman*, 11 Cush., 546, decided that "George" Allen and

"George E." Allen are not the same name. "Nathan" Hoard and "Nathan S." Hoard are not the same name. *Com.* v. *McAvoy*, 16 Gray, 235. There are many other Massachusetts cases either directly or indirectly supporting the same view. In this state the cases of *State* v. *Homer*, 40 Maine, 438, and *State* v. *Dresser*, 54 Maine, 569, are to the same effect. It is also with us well settled that a person's middle name may be represented by its initial letter instead of writing the name in full. That is almost a universal practice. There was a distinction in some of the English cases depending on the fact whether the middle initial was a vowel or not. If it was, it was regarded as a name of itself. But if a consonant it was not a name. This nice distinction was grounded upon the idea that a vowel can be sounded by itself, but that a consonant cannot be sounded without the aid of a vowel. But this attempted distinction did not receive much recognition in the courts of that country, and has received none in the American courts, that we are aware of. *Arbouin* v. *Willoughby*, 1 Marsh, (E. C. L.,) 477. *Lindsey* v. *Wells*, 3 Bing., N. C., 777. *The Queen* v. *Dale*, 17 Ad. & E., N. S., 63. *Kinnersley* v. *Knott*, 7 Mann. G. & S., 980. *Regina* v. *Avery*, 18 Ad. & E. N. S., 576. See *Kelly* v. *Laws*, 109 Mass., 395.

The tenant claims that the name is described in the return with substantial correctness, and that the error is one of inaccuracy only and not fatal to the validity of the attachment. He would have had, probably, less difficulty to contend with, had the error been the omission of the middle letter, (as if written Henry Hawkins,) or if only the initial of the Christian name had been written, but correctly given, (as H. F. Hawkins). In such case perhaps the omission could have been supplied by parol proof. A person may have different names by reputation. Proceedings have been sustained in important cases where a person is described in either one or the other of the above ways. *State* v. *Taggart*, 38 Maine, 298. *Hubbard* v. *Smith*, 4 Gray, 72. *Collins* v. *Douglass*, 1 Gray, 167. *Commonwealth* v. *Gleason*, 110 Mass., 66. *Regina* v. *Avery*, *supra*. But those are cases where the description of the person is said to be inaccurate or incomplete

merely. Lord Campbell, C. J., in one of the cases before cited, says: "It may be said, initials are a short way of stating the Christian name." But the description of Hawkins in the officer's return was not a diminished one, correct as far as it went, and inaccurate merely, but it was essentially and positively false. It may have been caused by a slip of the pen, but as there is no power of amendment in the case we see no remedy for it. It is not a misdescription so patent upon the face of the papers as to correct itself. *Nye* v. *Drake*, 9 Pick., 35. *Litchfield* v. *Cudworth*, 15 Pick., 23. *Slasson* v. *Brown*, 20 Pick., 436. *Commonwealth* v. *Mehan*, 11 Gray, 321. *Frost* v. *Paine*, 12 Maine, 111. We think that Henry "F." Hawkins and Henry "M." Hawkins are not the same name.

Deciding the foregoing point as we do, brings before us another question, and one of much practical importance. The officer's certificate to the registry of deeds, was admitted in evidence to contradict his return upon the writ. This was objected to. Was it admissible for that purpose? We think it was. It has been settled that it was the officer's duty to certify on the writ the fact that he had filed an attested copy with the register of deeds, and that without it the attachment would be void. *Carleton* v. *Ryerson*, 59 Maine, 438. (See 1 Allen, 61.) It is upon this ground that it is now contended that the evidence admitted should have been excluded. The argument is, that the officer's statement in his return upon the writ being necessary, it must be conclusive. There is no doubt that the estoppel must apply to the demandant in this case, if it does to the defendant in the suit where the attachment was made. If it applies at all, it must affect not only that defendant but his privies, and, as the demandant took his deed after the attachment, he would stand in the present suit in that attitude. *Bott* v. *Burnell*, 11 Mass., 163. *Campbell* v. *Webster*, 15 Gray, 28. *Angier* v. *Ash*, 26 N. H., 99.

The precise point in issue may never have been decided in this state. It was so understood by Justice Kent in *State* v *Leach*, 60 Maine, 58, p. 74. Still, we think several reported cases exhibit a strong leaning upon the point if not decisive of it. In *Nash* v. *Whitney*, 39 Maine, 341, it was held, (among other rea-

sons,) that an attachment was a nullity because the certificate filed in the registry did not contain the statements as required by law. The facts of the case are rather vaguely stated, and the evidence admitted was not (as here) objected to, although the point was made as to the conclusiveness of the officer's return on the writ. In *Kendall* v. *Irving*, 42 Maine, 339, Tenney, C. J., expressed an opinion that the attested copy left with the register would be the correct source of evidence from which the court could conclude whether an effectual attachment was made. In *Lincoln* v. *Strickland*, 51 Maine, 321, a certificate to the registry was received in evidence and passed upon by the court, but the case does not show what the officer's return on the writ was, or whether the admitted evidence was objected to or not. In *Farrin* v. *Rowse*, 52 Maine, 409, an officer's certificate filed with the register of deeds was decided to be fatally defective, but the report of that case does not show whether the certificate was admitted in evidence with or without objection.

But upon principle, we are satisfied, the officer's return on the writ cannot control the certificate made and filed by him in the registry of deeds. It is undoubtedly a general rule of the common law, that the return of a sheriff on a process, except in relation to himself when sued, is absolutely conclusive. The rule is very general, but not universal. An averment, in rare instances, is permitted against the return of a sheriff, to avert certain hardships that would result from the general rule, as described in *Lewis* v. *Blair*, 1 N. H., 68. In examining the origin of the general rule, it will be seen that several causes in the cases (old and new) are assigned for it. We think none of them sufficient to require us "to give effect to an admitted falsehood," in the case at bar. One reason given (in old cases) is, that "the sheriff is a sworn officer to whom the law gives credit." But his return on the writ has no more the sanction of an oath, than his return to the registry has. If one return should be credited, so should the other be; and the manifestly correct one should control. Another reason assigned is, that an officer's return becomes "a parcel of the record," and the point is, that a record should not be contradictable by parol. *Gardner* v. *Hosmer*, 6 Mass., 325. But this argument fails here,

for the reason that both the return to the registry, and the return upon the writ are of the nature of record evidence, and the return to the registry is the original of the two, the other being a mere certificate of what was done before. Besides, an officer is not permitted to make contradictory returns. It is of the earliest law, that a sheriff "cannot make a return contrary to a record, or contrary to his former return on record; as if he return upon a *venire facias* twelve jurors, he cannot say upon his *distringas*, that one *nil habet*." See Com. Dig., Retorn, (E. 4.) where other illustrations are given. The present is an analogous case thereto to some extent. Here the officer returns to the registry in five days. He necessarily makes his return on the writ afterwards. Should he be allowed to falsify his prior (*quasi*) record? Another reason anciently given, was upon the ground of "general convenience." If a return was traversable, "extreme inconvenience would result therefrom." This argument is perfectly convincing so far only as parol evidence is concerned. The demandant here seeks to defend, and not impeach a record. The case then not falling within the reason of the rule which excludes all contradiction of an officer's return, the rule does not apply.

The argument for this conclusion is strengthened by various considerations. The statute is mandatory. The return filed in the registry is to be the foundation on which the attachment rests. It is in terms made a condition precedent to the validity of the attachment. The object of the statute is, that the records at the registry of deeds shall of themselves afford satisfactory evidence whether any incumbrance exists upon an estate or not. Other statutory provisions are based on this idea. An attachment may be dissolved by a plaintiff, or vacated by a court, by a certificate or bond filed in the registry. By the act of 1873, (c. 128,) a recorded deed must take precedence of an unrecorded attachment. It is a notable fact, that the original act of 1838, provided that the officer's return, that he had filed the certificate in the registry of deeds, should be "sufficient" evidence that he had done so. That would be *prima facie* evidence, and not conclusive. Undoubtedly, the return on the writ is *prima facie* evidence of the truth of the facts legitimately stated therein.

The tenant sets up that the demandant's deed was obtained by fraud. That is not a question, ordinarily, for our inquiry. But the case furnishes no satisfactory evidence of fraud.

Judgment for demandant.

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

WILBERT NOYES *vs.* CALEB GILMAN.

Washington, 1874.—March 9, 1876.

Promissory note.

A. gave to B. a negotiable note; B. drew an order on A. to pay to C. or order the amount of the note. In answer to a letter (not in evidence) from C., A. writes, "the order . . . . to pay you the note is good;" C. indorsed the order to D., who sues A. as an acceptor thereon. *Held*, that the order may operate as an assignment of the note, but not as an independent negotiable instrument upon which an action can be maintained in the name of an indorsee.

ON REPORT.

ASSUMPSIT, on an order drawn by one Uriah Nelson, in favor of J. F. Greely, and by him indorsed and delivered to the plaintiff. The writ is dated September 18, 1869, and contains three counts; 1, for that the said defendant at Yuba, to wit, at said Machias, in January, 1865, by his promissory note of that date, by him signed for value received, promised one Uriah Nelson, to pay him or order the sum of eight hundred dollars in gold coin on demand with interest at two per cent per month, and alleging the indorsement and delivery by Nelson to one J. F. Greely, and by him to the plaintiff, etc.; 2, for that one Uriah Nelson, at Yuba, to wit, at said Machias, on the thirteenth day of April, 1866, drew his order, etc., directed to the said Gilman as follows:

"Mr. Caleb Gilman, Dear Sir: Please pay the amount of your note to J. F. Greely or order, the note was eight hundred dollars, interest at two per cent a month, from January, 1865, and oblige yours, Uriah Nelson; Yuba, April 13, 1866;" and alleging the presentation of the order to the defendant, its acceptance by him,

and its subsequent indorsement by Greely to the plaintiff, whereby he directed the contents thereof to be paid to the plaintiff, etc., and the defendant in consideration thereof promised the plaintiff to pay him the contents of said order according to the tenor thereof, to wit, the sum of eight hundred dollars with interest at two per cent a month, from and after January, A. D. 1865, in gold coin, according to the tenor of said note and order; 3, the money counts joined.

The plea was the general issue.

The plaintiff at the trial presented the order declared on in the second count with the indorsement. He also put in a letter from the defendant to Greely, dated Sacramento, April 27, 1866, containing among other things this: "Yours of the 23 inst., I received this morning . . . the order from Nelson to pay you the note is good, but I cannot pay it immediately," and closing in substance thus: as soon as my partner who is owing me can let me have the money, "I can then forward it to you, which I will do by Wells, Fargo & Co."

The defendant testified that Uriah Nelson resided in British Columbia; that he gave Nelson his negotiable note for eight hundred dollars in 1865, or possibly in 1864, that he had never seen or heard from it since, and had never paid it.

The case was made law on report. If the action cannot be maintained, the court to order a nonsuit; otherwise a default for the sum found due.

C. R. Whidden, for the plaintiff.

J. Granger & A. McNichol, for the defendant.

PETERS, J. We think the order can operate as an assignment of the note, but not as an independent negotiable instrument upon which this action can be maintained. The words "value received" are not in it, but they are not indispensable. *Townsend* v. *Derby*, 3 Metc., 363. Still it is some indication of what was in the minds of the parties when the order was drawn. The order was not presented to the defendant. He was informed of it by letter. It does not appear how the order was described to him in the letter. But the answer is to the effect that he would pay the note (not the

order) to the person in whose favor the order was drawn. If this was in any view an acceptance, it was only a conditional one. There is, at any rate, an implied understanding that the defendant will pay the note to such person upon the condition that he shall surrender the note when payment of it is made. When the maker pays the note he is entitled to its possession. The note is not completely described in the order. Its date and time of payment are not named. It is declared that it "was" $800. But, if there had been a partial payment on it, the defendant would be entitled to have the amount deducted when the note should be paid. Inasmuch as the order is not drawn for an absolutely certain sum, and would be payable only upon a contingency, it cannot be regarded as a negotiable instrument, and this action (by an indorsee) cannot be maintained. *Hubbard* v. *Mosely*, 11 Gray, 170. *American Exchange Bank* v. *Blanchard*, 7 Allen, 333.

Plaintiff nonsuit.

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

IGNATIUS SARGENT, executor, *vs.* INHABITANTS OF MACHIAS.

Washington, November, 1875.—March 14, 1876.

Words,—owner defined. Exceptions.

In R. S., c. 18, § 53 as amended by c. 46 of the acts of 1872, which provides for the recovery of damages for an injury to the owner of adjoining land by the raising or lowering of a street or way, the "owner" designated is the owner at the time of the injury.

Where a case is before the law court on exceptions, an objection not stated in the bill is not available.

ON EXCEPTIONS.

PETITION to the county commissioners for increase of damages to real estate by reason of raising a street.

An original petition was made to the selectmen, who awarded $50 damages. The petitioner, feeling aggrieved, petitioned for an increase of damages. The parties met the commissioners for a hearing June 23, 1874, and agreed "to refer the whole matter, as

set forth in the petition, to the county commissioners as the committee prescribed by the statute for the determination of such questions," who, after hearing had, awarded $250 damages and costs. To the acceptance of their report the defendants filed a written objection, that after the injury to the real estate and previous to the filing of the report in court, the petitioner had conveyed all his interest in the premises. The court overruled the objection and accepted the report. The defendants excepted.

G. Walker, for the defendants, in arguing his exceptions, relied also upon the want of title in the petitioner at the time of the injury as an objection to the report.

L. G. Downes, for the plaintiff.

DANFORTH, J. The original petition in this case is founded upon R. S., c. 18, § 53, as amended by chapter 46 of the acts of 1872, which provides for the recovery of damages for an injury to the owner of adjoining land by the raising or lowering of a street or way. After an adjudication by the municipal officers, the petitioner feeling aggrieved by their judgment, petitions to the county commissioners for an increase of damages, whereupon "the parties agree to refer the whole matter, as set forth in the petition, to the county commissioners as the committee prescribed by the statute for the determination of such questions." That tribunal, after a hearing, made their report to this court. The respondents made in writing an objection to the acceptance of that report which objection was overruled and exceptions filed. The objection is that after the injury to the real estate and previous to the filing of the report in court, the petitioner had conveyed all his interest in the premises to one Ruby L. Stuart.

This objection clearly can have no foundation in law. The statute giving this claim to damages, gives it to the owner. This must necessarily be understood to mean the owner at the time of the injury. No other person is or can be injured. It is from that time the claim dates, and the statute of limitations begins to run. From that time the claim for damages and the land left, are two separate and distinct things; a sale or conveyance of one would in no respect control or affect the other. In

case of the decease of the owner after the claim accrues, so completely distinct are they, that, while the land subject to the easement acquired descends to the heir, the damages goes to and may be recovered by the administrator as assets. *Neal* v. *K. & L. R.*, 61 Maine, 298, 300.

In the argument of counsel, the want of title in the petitioner is also relied upon as an objection to the report. Whether this objection might or might not have been valid is a question not now before us. The proceedings in a case like this, by the provisions of the statute authorizing it, are to be the same as provided respecting highways. Assuming then that the county commissioners acted as a committee and not as referees, "the title of the petitioner as respects damage" was in issue. R. S., c. 18, § 8. Under the agreement in this case, it could be no less so. *Thurston* v. *Portland*, 63 Maine, 149. Hence if the county commissioners acted as referees the question should have been raised and submitted to the court by their report. If they were a statute committee only, the question should have been raised by a written motion to set their report aside or objections in writing to its acceptance. R. S., c. 18, § 13. *Bryant* v. *K. & L. R. Co.*, 61 Maine, 300.

This question is presented in neither of these ways and is not therefore open for consideration. Were we now to consider it we should be passing upon a ruling that has never been made. The case is before us upon exceptions alone and by the provisions of the statute last referred to, can be here in no other way. At *nisi prius* no question of this kind was presented or ruled upon, as appears by the case and hence no exceptions could be filed.

Exceptions overruled.

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

ISAAC KENNEDY *vs.* SAMUEL COCHRANE.

Washington, 1875.—March 24, 1876.

Contract.

A contract prohibited and void by the law of the state where it was made, will not be enforced in another jurisdiction.

ON FACTS AGREED.

ASSUMPSIT, on account annexed.

The plaintiff was an innkeeper in St. Stephen's, New Brunswick, duly licensed, under the statute of that province, to sell liquor as a retail dealer; the liquor sued for was sold at retail by the plaintiff to the defendant, who then was, and is now, a resident of Calais, Maine; the liquor sold was not for re-sale, but was for the defendant's own use; the items of the account were charged by the plaintiff to the defendant, who has never paid the account nor any part of it; the items were all for glasses and pints of liquor, except the first item which was to balance of old account $2.01, which old account was for liquor.

Acts of New Brunswick on the subject, make a part of the case.

"N. B. Act of assembly 1873, c. 10, § 1. No person shall directly or indirectly barter or sell any liquors without license for that purpose first obtained."

"Sect. 16. No innkeeper or tavern keeper, who shall sell upon trust or credit, any liquors, mixed or unmixed, to any person, shall have any remedy against the said person, his executors or administrators, either in law or equity, for the recovery thereof."

If the action is maintainable, the defendant to be defaulted; otherwise, the plaintiff to be nonsuit.

J. Granger & G. F. Granger, for the plaintiff.

G. A. Curran, for the defendant.

APPLETON, C. J. This is an action of assumpsit for liquors sold the defendant by the plaintiff, a licensed innholder in St. Stephen's, New Brunswick. The sale was by the glass or pint, and charged at the time of delivery.

By an act of the general assembly of New Brunswick, passed in

1873, c. 10, § 16, it was enacted that "no innkeeper, or tavern keeper, who shall sell upon trust or credit, any liquors, mixed or unmixed, to any person, shall have any remedy against the said person, his executors or administrators either in law or equity, for the recovery thereof; and if any bill, bond, note, mortgage or other security or conveyance shall be made and delivered, the consideration, or any part of the consideration of which, shall be proved to be for liquors sold, the same shall be taken to be fraudulent and void in all courts of justice," &c.; "and if any pawn or pledge shall be left, by any person, with any tavern or innkeeper, it shall be lawful for any justice of the peace of the county in which such pawn or pledge may have been left on complaint and proof of the same, to order the said pawn or pledge to be restored, and shall further convict the inn or tavern keeper, who may have received the same, in a penalty not exceeding twenty dollars for each offense."

The tavern or innkeeper who sells on credit is without remedy. All securities given for such sales are declared fraudulent and void. All pawns or pledges left, are to be restored, and the tavern or innkeeper receiving the same, is liable in a penalty of twenty dollars for each offense.

The liquors, for which this suit is brought, were charged. They were not sold for cash. They were sold on trust or credit, and hence they were charged. If sold on trust or credit, the plaintiff is without remedy, by the law of New Brunswick, where the sales were made. Sales of liquors on trust or credit must be regarded as prohibited, when by the statute, the seller is without remedy. The license to sell applies only to sales for cash. Such is the obvious intention of the statute.

The sales to the defendant were in palpable violation of the law of the place where they were made. The plaintiff could not recover in New Brunswick. Is his chance improved by a change of jurisdiction?

The general rule is, that contracts void by the law of the land where made, are void everywhere else, and that what is a good defense in the place of contract, is a valid one wherever the contract is attempted to be enforced. It is well settled by the prin-

ciples of international comity, that the laws of every people in force within their own limits, ought to have the same force as to contracts there made, everywhere, so far as they do not prejudice the powers or rights of other governments, or of their citizens. It would be a queer illustration of the comity of nations to enforce in a foreign jurisdiction a contract void by the law of the place where it was entered into. Nor do we think there is to be found anything in our statutes or decisions, which should particularly encourage an attempt to enforce a contract like the present in this jurisdiction. *Plaintiff nonsuit.*

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

THOMAS KENNEDY *vs.* INHABITANTS OF WESTON.

Washington, 1875.—April 18, 1876.

Pauper.

A person living in an unincorporated place, who furnishes supplies to a person falling into distress in such place, cannot recover therefor against the inhabitants of the oldest incorporated town adjoining such place, unless the pauper has at the time his legal settlement in such town.

ON REPORT.

ASSUMPSIT, on account annexed for supplies furnished to a pauper.

The account annexed charges "for board, clothing, bedding, nursing and attendance furnished Jane Smith, a pauper, sick with the small pox at my house from November 9, 1871 to December 25, 1871, $425;" and for several other items of services and payments for her, including funeral expenses and burial, amounting with the first item to $622.50.

Also another count for that one Jane Smith, a person having no legal settlement in Maine, fell into distress in said Crooked Brook Plantation, etc., on the 9th day of November, 1871, and then and there stood in need of immediate support and relief, and the plaintiff then and there and from that time to December 25th, A. D.

1871, furnished and provided, and continued to furnish and provide the said Jane Smith with food, clothing, bedding, board, labor, support, nursing, attendance, medicine and medical aid whereby the plaintiff necessarily incurred expenses on account of said support and relief, amounting in all to six hundred and twenty-two dollars and fifty cents. And the plaintiff avers that at the time said Jane Smith so fell into distress and was in need of immediate support and relief in said Crooked Brook Plantation, said plantation was an unincorporated place, and said Weston was the oldest town adjoining it, by reason whereof said defendants were liable for expenses as above incurred by the plaintiff for her support and relief, &c., &c.

There was evidence tending to show that the services were rendered, and the payments made as charged in the first count and under the circumstances stated in the second count.

After the evidence was out the case was reported to the full court for default or nonsuit according as the action is or is not maintainable.

A. McNichol, for the plaintiff.

L. Powers, for the defendants.

PETERS, J. The plaintiff lived in an unincorporated place. The supplies were furnished by him to a pauper in that place. He claims to recover therefor against the town of Weston, as the oldest incorporated town adjoining that place. He can do so, if it all, only upon the strength of § 32, c. 24, R. S., which is this: "Towns are to pay expenses necessarily incurred for the relief of paupers by an inhabitant not liable for their support, after notice and request to the overseers, until provision is made for them." But he cannot recover under this section, for two reasons: first, because he was not an "inhabitant" of the defendant town; secondly, because the supplies were not furnished to the pauper "within" the town, but while she was actually residing elsewhere. The statute does not embrace the plaintiff's case. Such is the obvious import of the language of the statute; and to that effect are the decisions. *Miller* v. *Somerset*, 14 Mass., 396. *Kittredge* v. *Newbury*, id., 448. *Mitchell* v. *Cornville*, 12 Mass., 333. *Smith*

v. *Colerain*, 9 Metc., 492. *Hawes* v. *Hanson*, 9 Allen, 134. *Beetham* v. *Lincoln*, 16 Maine, 137. *Windham* v. *Portland*, 23 Maine, 410.

The defendants could have furnished the pauper, and recovered of the town where her settlement was, if in this state, or, if she was a foreign pauper, could have received remuneration from the state, had they seen fit to do so. R. S., c. 24, § 22. Acts of 1874, c. 230. And by § 23, of the same chapter, the plaintiff had a remedy against the town of the pauper's settlement, if she had one within this state. Beyond this, the statutes do not seem to be adequate to furnish relief, in a case like this.

Judgment for defendants.

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

APPENDIX.

IN MEMORIAM.

PROCEEDINGS OF THE PENOBSCOT BAR ON THE DEATH OF

JUDGE JONAS CUTTING.

On November 11, 1876, in the supreme judicial court in Bangor, the following proceedings in memory of the late Judge Cutting occurred. Present, Appleton, C. J., and Peters, J.

Hon. A. W. Paine, in behalf of the bar, introduced resolutions adopted by them on the occasion, simply remarking that he had heretofore announced to the court the lamented decease of their late brother, at which time he had suggested that the bar proposed at some future day to give a fuller expression of their appreciation of the character of the deceased. The bar had since adopted resolutions appropriate to the occasion, which at their direction he would now present, leaving it for others, and more especially for him, who had for so many years been so intimately connected with the deceased in professional and official life, to second the views expressed. He then read the resolutions and moved the concurrence of the court in their adoption. The resolutions are as follows:

The bar of Penobscot county, at the April term of the S. J. C., A. D. 1875, on the retirement of Hon. Jonas Cutting from the bench, where he had held a place for twenty-one years, presented to the court resolutions appropriate to the occasion, which resolutions were responded to by the court, entered upon its record, and published in its reports:

Death having now put its seal upon his life and character, this bar, of which he was so long a member before his appointment to the bench, and among whom he was numbered when called from earthly duties and honors, deem it proper to pay a final tribute to his memory as a brother eminent and respected, as a man, a lawyer and a jurist. Therefore,

Resolved, That renewing and repeating the expressions of high respect for his great learning and unspotted integrity, for his impartiality and ability as a presiding justice, as set forth in these resolutions, we would now more particularly pay a like tribute to his character as a member of the bar, during a long, active and successful professional life. His were years marked by faithful performance of duty, animated and controlled by an abiding and conscientious sense of obligation to truth and right, and rendered successful by the industry and application and ready appreciation that prepared him to meet the requirements and the exigencies arising in all matters entrusted to him; and by that high sense of honor and that controlling love of right and justice and fair dealing that secured the confidence of the court and the attachment of his brethren; and above all by that deep-seated integrity in his whole life and intercourse with man, which accompanied and regulated his thoughts, his aims and his acts personal, professional and official.

Resolved, That we tender to the family of our deceased brother our sympathy in their sorrow at the loss of one so dear to them and so true and faithful in all his domestic relations.

Resolved, That a copy of these resolutions be forwarded to the widow and relatives of the deceased, and that the same be presented to the court for their concurrence.

JUDGE KENT'S REMARKS.

May it please your Honors:—In rising to offer some remarks in connection with the resolutions just read, I feel that my long and intimate connection with our friend and brother, and my knowledge of his character gained through nearly fifty years of unbroken, uninterrupted and most unreserved friendship, justify, if they do not require from me, on this occasion, an expression of my own

deep convictions of his true character and some reference to a few of the most striking characteristics of his mind and heart.

Judge Cutting's life was not an eventful one, in the common acceptation of that word. He was, in his outward life, a lawyer, pure and simple. All his years of active life were given to the law. He was more than twenty-five years at the bar, in unremitted and laborious practice, and twenty-one years on the bench of the supreme court. Political life had no charms for him, and its honors and enticements never seduced him from his chosen path. He fully realized that "the law is a jealous mistress," and he escaped all chiding by constant devotion to his first love.

His professional life was wholly spent at this bar. It was here and in this court room that he labored faithfully, ably and successfully, asking for no higher place and for no wider field. It is meet that here, and by this bar, and by this court, in this, to him, most familiar and honored spot, due honor should be paid to his memory, and more than formal expressions of sorrow be given, as we so sadly miss his ever welcome presence in our midst.

There is one word that better than any other characterizes the man, the magistrate and the lawyer—INTEGRITY! I do not say *honesty*, for that word to most minds carries only the idea of pecuniary faithfulness—the performance of contracts and the fulfillment of express obligations. Integrity covers and includes the whole man—his heart, his intellect, his judgment, his ruling motives and his controlling principles. When, therefore, I say that JUDGE CUTTING was a man of integrity, I mean that he was a man honest in thought, word and deed, true to himself and to his fellow men. This integrity was in his nature, and it always seemed to me that he not only acted uprightly, but that he never debated with himself when, if ever, a slight deviation promised ample and tempting remuneration. This inwoven integrity, resting never on the selfish and narrow maxim that "honesty is the best policy," but on the pure sense of duty and justice and absolute right, was ever with him through his long life of work and responsibilities; and when at last the summons came that called him away from earth, its cares and duties and trials, he went calmly to his grave,

without a stain upon his honor and without a cloud on his reputation.

Entrusted during the years of his professional life with the interests, rights and reputation of many of his fellow men, when called to lay them down he could claim and feel the consoling consciousness that no man conld rightly say that he had ever suffered wrong by any act or neglect on his part.

This genuine and unadulterated integrity was exhibited without ostentation or pretense in his whole life. Everywhere and at all times he was simple, single and sincere. He said what he meant, and he meant what he said. His "yea was yea," and his nay most emphatically nay. His daily walk was in a straight path, and he knew not how to seek and find the by-paths of indirection or mystification. Neither flattery nor seductive promises could allure him aside or tempt him to walk in devious ways.

With all his great keenness and accuracy as a lawyer, and his quick perception and appreciation of the mistakes of an opponent, and of the opportunities for success thus opened, I speak from knowledge when I say that not all the wealth or honors of the world could have tempted him to intentionally and consciously aid in the success or consummation of fraud.

He was true to his client, but he claimed that his client should be true to him. He ever remembered his oath of office, and that it required him to conduct himself within the courts with all good fidelity as well to the court as to his clients. He never forgot that this oath, in its first impressive injunction called upon him "to do no falsehood nor to consent to the doing of any in the court."

I dwell upon these traits in the professional life of our deceased brother, rather than on his well known reputation for learning, ability and success at the bar, because I would impress upon all, and especially upon the younger members of the profession, what a long professional and judicial life has left as a conviction in my mind more deeply year by year. The longer I live, and the more I see of men, the less I value mere genius, eloquence or success, and the more I value purity of life, integrity of purpose, and faithfulness in duty. And standing in this presence, at this bar, where I have so long been a brother, and with the illustration in the

character of our friend, I do not deem it unbecoming or assuming in me to speak thus decidedly and earnestly to those who are to fill the places which the elders have left or must soon leave.

Judge Cutting loved and honored his profession. He was not, insensible or indifferent to its honors and emoluments. But he was actuated by higher motives than a mere love of money or reputation. As I said on another similar occasion and in reference to another honored member of this court, then recently deceased, he felt, as every true and highminded lawyer must feel, that there are higher rewards and higher motives than those that are merely mercenary, which should move and control him in action. No man who does not honor his profession can be honored by it. But the upright lawyer who has spent his days and nights in preparation, and has mastered his profession in its principles and in its details, and stands up as the advocate for his fellow man, when his interests or his character or his liberty are at stake, always feels that he has assumed a responsibility, which mere money can never adequately compensate. And when engaged in the conflicts of the forum, earnest and faithful in presenting the cause of his client, and while true to him and his duty, equally true to the court and to himself, he thinks not an instant of his pecuniary reward, but he exerts his best powers of eloquence and argument, in the discussion of great principles, or minute details, with no other feeling than that of duty, and with no other thought than of the honorable regard which may follow from its performance. As soon would the soldier, in the hour of the sternest fight on the battle-field, think of his pay and rations.

I have alluded to my intimate personal relations with our deceased brother. In our early professional career we became connected as partners and remained thus united for more than eighteen years. We were afterwards associates on the bench of this court for fourteen years and always neighbors and in intimate social relations. He was not naturally demonstrative, or accustomed to exhibit outwardly his inmost feelings.

He was never profuse in expressions of friendship, and never sought to extend his popularity by indiscriminate and heartless professions. But he was a man of keen sensibilities, and strong

feelings, often hid under a calm and quiet exterior. He was kind, generous, and forgiving, and had neither hatred, envy or malice in his heart. He was the friend of all, but his intimates, to whom he unbosomed his inner self, were few.

> "The friends he had, and their adoption tried,
> He grappled them to his soul with hooks of steel."

In view of my intimate personal relations, before alluded to, so confidential and so long continued, I feel that I shall be pardoned if I speak of my own individual loss, and of my private grief.

When I heard that he was dead, I felt that "the world would have less of sunshine for me hereafter." I felt that I had lost, not an associate, but a brother, who had so long been indeed "very pleasant" to me. Yet with the sorrow came the consoling remembrance, which will be a cherished memory with me whilst life shall last, that through these long years of intimacy there had never been an hour of estrangement—nor an angry or even an unkind word, or the slightest shadow across our friendship, confidence and mutual respect. And I feel that it is due to the memory of our brother, to say, now that he has departed, what I know he would have me say of our personal relations. I should feel that I had not done justice to him in these last public tributes to his life and character, if I had not spoken of our more than common intimacy and friendship.

As I stand here to speak from a full heart of my departed friend, my memory at once reverts to those early days of hope, ambition and effort when the present was satisfying and the future full of promise. I recall that bright galaxy of young lawyers at the Penobscot bar, who commenced with us, and who soon gave a high character and standing to the whole body, by their learning, ability, industry and noble aspirations. A band it was of real brothers, with less of envy or jealousy and with more of genuine kindness and pride and interest in each other, than I have seen or known elsewhere in my long experience.

As I look around me I see not one of my brethren of those earliest years now at the bar. I am cheered and comforted that I am addressing one on the bench who was of this band of brothers, and who yet remains to adorn the seat of justice which he

has so ably and faithfully filled. We all know that he has done a great work for jurisprudence, and we rejoice to know that he will yet work while the day lasteth. I am sure he will unite with me in recalling these pleasant memories of pleasant days, and in this tribute to one of our number so long known to us both as a friend well beloved and worthy of our love.

And now his earthly life is ended, and he has gone to his grave, his duties all done, his work accomplished—his record made up. He has gone with the respect of all, with the confidence of his fellow-citizens unabated, with the love of his family and friends who know him best, and by those domestic and familiar tests of real character which best exhibit the inner man. That character yet remains with us.

It is a legacy to this bar worth more than dollars—or rich bequests, if rightly appreciated and made effectual by careful examination and practical imitation. It calls upon us all to stand in our place, as he stood, upright and unflinching in the discharge of the duty of the place and of the hour—in the fear of God, but knowing no other fear, until the summons comes to us also

> "To join the innumerable caravan,
> Which moves to that mysterious realm,
> Where each shall take his chambers,
> In the silent halls of death."

JUDGE PETERS' RESPONSE.

Judge Peters, presiding at this term of the court, followed Judge Kent, paying the following tribute to the worth of the deceased judge:

Gentlemen of the Bar: It falls to my lot, in behalf of the court, to respond to the resolutions you have presented in commemoration of the virtues of our distinguished and much lamented friend. I most heartily concur in all the encomiums your committee have so earnestly and eloquently expressed.

The character of Judge Cutting, both professional and personal, has been so fittingly portrayed at this meeting, as well as at a recent public meeting held by the Penobscot bar upon the occasion of his retiring from the bench, that I do not think it is re-

quired of me to add many words to what has been already so happily said. Still, I esteem it a privilege to have the opportunity of adding something to the record of this occasion, as a memento of the very great personal respect and admiration which I have always entertained for our departed friend.

It always seemed to me that the leading element in the character of Judge Cutting as a man, lawyer and judge, was his great *simplicity;* using that word in its highest and best sense. An eminent writer says: "The greatest truths are the simplest; and so are the greatest men." This predominating faculty was conspicuous in all his public and private life. It affected him through and through. His motives and actions were so transparent you could easily see through them.

It was eminently a part of his moral nature. It would naturally follow that he was an honest man. His integrity was free of all spot or taint. This great virtue, uprightness, was as deeply imbedded in his nature as in any man I ever knew. No surroundings could affect him to swerve from what he thought was right. He was an honest man in the liberal sense of the term. That is, he was an unselfish man. He coveted nothing not his own. He was satisfied with what he had and with what he was. He built no castles in the air. He was a sincere man. There were no false sides, equivocations, duplicities or shams about him. He despised them utterly.

His mental character was strongly marked by this fortunate faculty. His perceptions were quick, vigorous, accurate and clear. There was a definiteness of thought or action in what he said or did. His mind traveled in a straight line to the point sought for. It easily held the track it started upon. He could readily discard all matters collateral to a discussion. Not that he did not see all the points involved in an investigation. On the contrary, he had himself a rare ingenuity of reasoning, in technical cases, (when he pleased,) bordering on nicety and refinement, where necessary to bring about just and satisfactory results. For fine technical analysis, he was not easily excelled. Still, his reasoning power was generally distinguished for its directness, as well as for its penetration and force. Not that he was not a wide-minded man. He

showed at the bar, and upon the bench, that he had abundant stores of practical judgment and common sense. He had a thorough knowledge of the principles of the common law, and displayed great acuteness, and a wonderful readiness in applying them in cases. He had pre-eminently the faculty of analyzing the false structure of an adverse legal argument, and dissipating it to pieces. His mind was well fitted for arguments to the court. In that branch of the legal arena, Saladin's sword was not sharper than his intellect. His individual and his judicial opinions and judgments were all free of doubt and uncertainty, carefully formed, and tenaciously maintained.

His style of speech was always neat and simple. He made but little use of the "jewelry of rhetoric" in his discourse, but clothed his ideas in a plain, expressive, and graceful garb. It was an effective style. The great poet says: "An honest tale speeds best, being plainly told."

Judge Cutting's style of character is strongly exhibited in the fact that he became closely identified with no other associations of public life, excepting those pertaining to the bar and the bench. No love of political preferments, no desire to enter after the pursuit of wealth, could draw him away from this arena. He made the law his chosen profession, and pursued it with all that continuous toil and devotion which alone can bring success to the practitioner. Nothing but labor and talent can conquer here. A lawyer can win an enduring fame only by merit. A late judge of eminence expresses the same idea in the following striking description of the bar. He says: "There is no shamming, and no short cuts to eminence there. Stern justice applies its measuring rod with unflinching impartiality to all comers there, whether from the walls of the universities, or from the fields and flocks, or the highways and by-ways of common life in any department. There is there no favoritism, and no stinted or grudging recognition of power and strength in that field. The humblest may there expect a patient hearing, and the most highly favored can demand no more." It was upon this field that Judge Cutting won his eminent and honorable fame.

In character, in manners, in all things, a great excellence was

his simplicity. He was modest at the bar, he was arrogant nowhere. He presided upon the bench with ease and simplicity, "having the happy medium of promptness and deliberation," without affectation or pretension, and exhibiting no undue official pride. But nowhere did he display a greater simplicity or purity of character, than in all the walks of private life. There his tastes were simple and his wants few. He was unostentatious in all ways, kind and affectionate, sympathetic and generous, confiding with and fond of those he well knew, and a delightful personal and social companion. He greatly enjoyed wit and humor and conversational pastime. He was for a great while my near neighbor, and although much my senior in years, became to me a companion and a friend. Our personal relations have imprinted most pleasant and abiding images upon my memory.

I saw him often when it was evident that his sands of life were fast running out. His thoughts were evidently turned to a meditation of death. He met the mystery of mysteries with great tranquillity and peace of soul. It was not a new theme to him. His religious faith had always been as steadfast as an anchor. He had a perfect belief of his immortality beyond the grave. He was bound to no church, nor the tenets of any. Nor did he allow himself to be troubled with the fine distinctions between different theological creeds and dogmas; but "in the presence of death he exhibited a faith which towered above creeds and dogmas, and whose roots were in the depths of his soul."

The state will remember Judge Cutting as one of her best jurists. The bar will remember him as one of the most learned, laborious, able and upright ministers of the law who ever sat upon our bench. And all classes of men will remember him as the pleasant neighbor, the honest citizen, the wise counselor, and the good and conscientious judge.

In compliance with your request, the resolutions of the bar are ordered to be entered on the records of the court; and after the chief justice has expressed his concurrence in these proceedings, as a further mark of respect this court will then be adjourned.

CHIEF JUSTICE APPLETON spoke as follows:

The allusion of my honored and life-long friend to the early days of our professional career, brings back in the freshness of youth, the memories of those, who full of hope and with lofty aspirations, began with us the struggles of life. How tender the recollection of their manly life; how just the tribute to their worth. But of that number how few remain. One by one they have left us:

> "How some they have died, and some they have left me,
> And some they are taken from me—all are departed—
> All, all are gone—the old familiar faces."

All, save my old associate in judicial life, who full of years and of honor, with the intellectual vigor of early manhood and the mature judgment of age, with a past life of purity and spotless integrity, is still with us to pay the fitting tribute of respect to one, who was the partner of his professional and the associate of his judicial life. I entirely and fully agree with him in his estimate of our departed brother—a learned, able, impartial and upright judge. Such with consentaneous unanimity was the voice of the bar, the bench and the public, and well may we mourn for one who was almost the last remaining link connecting us with the professional days of our early life.

This closed the proceedings, and the court adjourned.

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ANNUITY.

See WILL, 5, 6, 7.

APPEAL.

See PRACTICE, 5. PROBATE COURT, 6.

ARBITRATION.

1. A promise to pay in six months, the amount awarded by an arbitrator, is not avoided by delay of the arbitrator to make the award within that time, provided the promisor consents to the delay. Such consent is in effect a waiver of the delay. *Adams* v. *Macfarlane*, 143.

2. On submission to arbitration of mutual accounts between the parties, an agreement that an annexed statement of disbursements and collections shall be taken by the arbitrator to be correct, does not preclude the arbitrator from hearing evidence in relation to items not included in such statement. The term correct in that connection does not mean complete. *Ib.*

3. When a cause is referred to be decided upon legal principles, and the referee neither reports nor is requested to report the facts or the questions of law arising thereon, his award is final. *Plummer* v. *Stone*, 410.

See EXCEPTIONS, 5. TRIAL, 8.

ASSIGNMENT.

1. The true consideration of an assignment of the property of a debtor for the benefit of his creditors is the agreement of the assignee to perform the trusts imposed upon him by the assignment; and that, in contemplation of law, constitutes a full and complete consideration. *Thomas* v. *Clark*, 296.

2. The statute, R. S., c. 70, § 2, which declares that the assignor shall make oath to the truth of the assignment, does not prescribe any particular form of oath. *Held*, that an oath and certificate in the form following were sufficient: "I, L. C., do solemnly swear that I have placed and assigned all my property of every description in the hands of said A. B., to be divided among all my creditors who shall become parties to said assignment within three months from the date thereof, in proportion to their respective claims. Signed) L. C. YORK, ss. (date.) Personally appeared L. C. and made oath that the above affidavit by him subscribed is true. Before me, W. M., justice of the peace." *Ib.*

3. The statute R. S., c. 70, § 3, requiring the account of the assignee to be *rendered* to the judge of probate within six months, does not require it to be *allowed* within that time. Thus, where the assignment was dated October 16, 1872, and the assignee rendered his account to the judge of probate on the first day of the following April; *held*, that the fact that the account was not allowed till the May term of his court, was unimportant. *Ib.*

AUDITOR.

The case had been before an auditor, who returned his minutes of the testimony taken before him as part of his report. The plaintiff offered the report in evidence. The defendant objected on the ground that it was irregular to make the evidence of the witnesses before the auditor a part of the report. The presiding judge admitted the report, except that portion which contained the documents and evidence laid before the auditor. *Held*, that the defendant had no ground of exception to such admission, nor to instructions that "the auditor's report was *prima facie* evidence of the amount which the plaintiff was entitled to recover, that it was competent for the defendant to disprove it, but it must stand unless he had impeached it." *Howard* v. *Kimball*, 308.

BAILMENT.

See REPLEVIN, 3.

BILL OF SALE.

See MORTGAGE, 12.

BOND.

See DAMAGES, 3. EXECUTORS AND ADMINISTRATORS, 2, 3, 5, 6. POOR DEBTOR, 1, 2. REPLEVIN, 1. TOWN, 11.

BRIEF STATEMENT.

See PLEADING, 1, 2, 5, 6, 7, 8, 9.

BURDEN OF PROOF.

See MONEY HAD AND RECEIVED, 1, 2. PLEADING, 5. REPLEVIN, 2. TRIAL, 22.

CASES AFFIRMED, DOUBTED AND OVERRULED.

Angeline Nott's case, 11 Maine, 208, and *Portland* v. *Bangor*, 42 Maine, 403, overruled in *Portland* v. *Bangor*, 120. *Tillson* v. *Bowley*, 8 Maine, 163. *Low* v. *Mitchell*, 18 Maine, 372, questioned in *State* v. *Wentworth*, 234, so far as they relate to cross-examination.

CERTIORARI.

1. A writ of certiorari lies only to correct errors in law; and where the record contains no error, the writ cannot be issued.

Lapan v. *Co. Commissioners*, 160.

CONSIDERATION.

CONSTITUTIONAL LAW.

1. The fourteenth amendment of the federal constitution, provides among other things, that no state shall deprive any person of liberty without due process of law. *Held*, that the *ex parte* determination of two overseers of the poor to send a woman to the house of correction, is not such process. *Portland* v. *Bangor*, 120.

2. The city of Portland sued the city of Bangor for supplies furnished the alleged pauper, in the workhouse of the plaintiff city, committed under a warrant of two overseers of the poor. *Held*, that the commitment was illegal, that the plaintiffs could not recover, and that the decisions in Nott's case, 11 Maine, 208, and in *Portland* v. *Bangor*, 42 Maine, 403, holding to the contrary, are inconsistent with the fourteenth amendment of the federal constitution. *Ib.*

CONTRACT.

1. Where a plaintiff sues upon an account annexed containing items of a legal and items of an illegal character, each class of which would sustain an action by itself, but for the illegality, he cannot be debarred from recovering for such items as are legal, merely because the two classes of items are embraced in the same account and sued for in the same suit. *Goodwin* v. *Clark*, 280.

2. A plaintiff cannot recover for his personal services, portions of which were rendered in an employment of selling liquors unlawfully, the contract of service being an entirety; but he is not to be prevented from recovering for his services contracted to be rendered in a lawful employment, merely because, during the term of his employment, he occasionally assisted his employer in such unlawful business gratuitiously, not expecting or seeking any compensation therefor. *Ib.*

3. A contract for the sale and purchase of wheat to be delivered in good faith at a future time is not void as a "wagering contract," but when under such an agreement it is understood by the parties that no wheat is to be delivered but only a payment at the time appointed of the difference between the contract and the market price, it thus becomes a wagering contract and the law will not enforce it. *Rumsey* v. *Berry*, 570.

4. The plaintiffs in good faith at the request and for the benefit of the defendant made an agreement for the sale of wheat to be delivered within a certain time at the option of the defendant, he to furnish sufficient "margin" to secure them against loss. The defendant failed to comply with his part of the contract, and a loss ensued. *Held*, that under such a contract the law will give to the plaintiffs a remedy for their loss. *Ib.*

CORPORATION.

COSTS.

COUNTY COMMISSIONERS.

See AMENDMENT, 1, 2. CERTIORARI, 1, 2. WAY, 4, 6.

COVENANT.

See DOWER, 1.

CROSS-EXAMINATION.

See EVIDENCE, 17. TRIAL, 19. WITNESS, 5, 6.

DAMAGES.

EQUITY.

ESTOPPEL.

EVIDENCE.

EXCEPTIONS.

See NEW TRIAL, 2. PRACTICE, 1, 4. QUO WARRANTO, 2. TRIAL, 2, 3, 4, 9, 13, 18.

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See AMENDMENT, 4. DEBT, 1. DIVORCE, 1.

EXECUTOR AND ADMINISTRATOR.

HUSBAND AND WIFE.

See DEED, 2. EQUITY, 9. MARRIED WOMAN, 2.

IMPEACHMENT.

See WITNESS, 7.

INDICTMENT.

INSANE PERSON.

See INSANE HOSPITAL. REVIEW.

INSOLVENCY.

The note in suit was given by the defendant to the plaintiff while they were both inhabitants of Nevada, and the discharge in insolvency was regularly granted under the laws of that state while they were yet citizens thereof. *Held*, a legal defense here. *Clark* v. *Cousins*, 42.

See ATTACHMENT, 1, 2, 3.

INSOLVENT.

See EXECUTORS AND ADMINISTRATORS, 3. GIFT, 1. PROBATE COURT, 1, 2, 3, 4.

INSURANCE.

1. Where there is a stipulation in a policy of insurance, that the policy shall be void, if the insured shall subsequently make insurance on the same property, and shall not give notice thereof with all reasonable diligence to the insurers, and have the same indorsed on his policy or otherwise acknowledged by them, if the second policy is void, it will not defeat the first, even though the subsequent insurers, after a loss, pay to the insured a sum of money by way of compromise of his claim thereon.
Lindley v. *Union Ins. Co.*, 368.

2. And where the case finds that the loss was accidental, and there is nothing to show that the subsequent insurance materially increased the risk, the plaintiff's claim on the first policy would not be defeated even by a valid subsequent insurance. *Ib.*

3. Such a breach of the terms of the policy by the insured is within the purview of R. S., c. 49, §§ 19 and 20. *Ib.*

4. A policy of life insurance conditioned upon the payment of a given premium upon a day certain, becomes void unless the premium is paid within the time named. *Coombs* v. *Charter Oak Company*, 382.

5. In an action upon a life insurance policy, the insured cannot introduce evidence that the agent of the company before or at the time of the negotiation of the insurance agreed to extend the time of payment of premium beyond the time stated in the policy. *Ib.*

6. The plaintiff and wife procured a joint policy on their lives payable to the survivor on the death of either, conditioned that if the semi-annual premium of $13.93 were not paid each six months from April 25, 1873, the policy should cease and determine. The payment of the premium due in October, 1873, was not made or tendered till December following. *Held*, 1, the policy became void for non-payment of premium; 2, the plaintiff could not be allowed to introduce evidence "that at the time this insurance was nego-

INVENTORY.

See EXECUTORS AND ADMINISTRATORS, 6.

JUDGMENT.

1. The general rule that a judgment of a court having jurisdiction of the subject matter and the parties and the process and rendered directly upon the point in question is conclusive between the same parties, is not complied with, when the same person though a party in both suits is such in different capacities; in the one individually, in the other as administrator.
Lander v. *Arno*, 26.

2. A. gave his promissory note to B., and conveyed to him a parcel of land as security for the payment of the same, taking B.'s agreement to re-convey the land when the note should be paid; B. conveyed the land to C.; afterwards in a real action, A. recovered the land of C., upon the ground, either that the deed from A. to B. was never delivered to B., or that it was obtained from A. by duress; the administrator of B. now sues A., upon the note. *Held*, that the judgment in the former action is not *per se*, a bar to the present suit. *Held*, also, that the former judgment can be made available, as a defense to this suit, by showing such an inseparableness of connection in the parts of the transaction, that the note could not have been delivered if the deed was not, and that the note must have been obtained by duress if the deed was; provided it appears that the plaintiff's intestate actually defended the former action, or that he stood in a relation to it giving him the legal right to do so. *Held*, further, that oral evidence may be received to prove any facts which go to establish such a defense, so far as such facts do not appear of record, either in support of a plea in bar or under the general issue. *Ib.*

3. Where a note and a mortgage to secure it are executed at the same time, a judgment against the validity of the mortgage will not be *per se* a bar to a suit upon the note. *Ib.*

4. Judgment in a suit against a non-resident of the state, upon whom no personal service has been made, but whose estate is returned as attached upon the writ, and notice is given by publication, under R. S., c. 81, § 12, is substantially but a judgment *in rem*, good only against the particular property attached, and of no effect as to the person of the defendant, or as to other property. *Eastman* v. *Wadleigh*, 251.

5. Such a judgment cannot be made the basis of an action of debt, in order to obtain satisfaction of it out of other property than that returned as attached in the original suit. *Ib.*

6. A former judgment will not be a bar to further litigation unless the same vital point was put directly in issue and determined. That was not the case in the equity suit between these parties. The question there settled was as to the plaintiff's right to redeem the half of the ship and to an account of her earnings. *Held*, that the decision was not conclusive against his rights to the sum due from Kimball to Page, under the assignment and acceptance.
Howard v. *Kimball*, 308.

MONEY HAD AND RECEIVED.

See AMENDMENT, 3. DAMAGES, 1. PLANTATION, 1. PROBATE COURT, 1.

MORTGAGE.

MUNICIPAL COURT OF PORTLAND.

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PAUPER.

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POLICE REGULATION.

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PROBATE COURT.

PRO HAC VICE.

PROMISSORY NOTES.

PROXIMATE CAUSE.

QUO WARRANTO.

1. Upon filing an information in the nature of a *quo warranto* the time and manner of notice is discretionary with the court.

Reed v. *Canal Corporation*, 53.

2. In such case an order for defendant to answer if after an appearance is a discretionary matter to which no exceptions lie;—if before appearance and before notice it is void. *Ib.*

3. An information in the nature of a *quo warranto*, presented by the attorney general, acting *ex officio*, in behalf of the state, is the appropriate remedy in cases of nonfeasance, or malfeasance, abuse of power, or misuse of privilege by a corporation chartered by the state; and judgment of ouster and seizure against the delinquent, is the proper judgment thereon.

Reed v. *C. & O. Canal*, 132.

RAILROAD.

1. The act of February 4th, 1872, c. 32, which prohibits any railroad company from constructing or maintaining any track or running any engines or cars on any street or highway so near any depot of any other railroad as to endanger the safe and convenient access to such depot and the use of it for ordinary depot purposes, being only a police regulation for the safety of the public, no constitutional objection exists against its application to a road chartered before its passage.

P. S. & P. R. R. Co. v. *B. & M. R. R. Co.*, 122.

2. The statute requiring railroad corporations to inclose the land taken for their road with fences is a police regulation, designed to secure the safety of the public travel and transportation, and is obligatory, as such, upon all railroad corporations, whether chartered before or after its passage.

Wilder v. *Maine Central*, 332.

3. A parol agreement between a railroad company and an adjoining owner, for the removal and discontinuance of a fence on the line of the railroad, does not run with the land, and cannot therefore bind his grantee. *Ib.*

REVIEW.

A review may be granted to a party who has become insane and been placed under guardianship, upon the condition that the petitioner will stipulate that no objection shall be made to the respondent's testifying generally upon the trial of the case in review. And when the review is granted upon such stipulation made, it is binding upon the legal representative of the petitioner after his decease. *Austin* v. *Dunham*, 533.

SALE.

See LAW AND FACT, 2, 3. PEDDLER, 1, 2, 3.

SCHOOL DISTRICT.

1. When more than one-third of the voters of a school district, present and voting at a school district meeting, object by their votes to the location of the majority, it is sufficient, under R. S., c. 11, § 32, that the clerk of the district make a record of such fact. *Norton* v. *Perry*, 183.
2. The clerk is not required to record the names of the voters objecting. It is enough that he records the state of the vote. *Ib.*
3. The certificate of the municipal officers of a town, of their determination where a school house is to be placed after an application, notice to all parties interested, and a hearing as required by § 32, is conclusive upon the district. *Ib.*
4. If the location is defective by reason of the vague description of the premises to be taken, such defect will not revive or render valid a preceding and different location, without a sufficient statute majority, and to which more than one-third present and voting objected, and subsequently within the time required by statute, applied under the provisions of the statute, to the municipal officers of the town in which the district was situated, to make a location. *Ib.*
5. When a location by the municipal officers is void by reason of its insufficient and defective description of the premises to be taken, the district must proceed anew to make a valid location. *Ib.*
6. The municipal officers have ten days within which to give their certificate to the clerk of the district, of their determination of the place where the school house is to be placed. *Ib.*
7. They may make their certificate, notwithstanding at some previous time, they may have been unable to agree, and may have so certified, if their certificate is not recorded, and is withdrawn, and their determination is duly filed within the ten days. *Ib.*

SCIRE FACIAS.

See AMENDMENT, 4, 5. DEBT.

SEAL.

See PROMISSORY NOTE, 2.

SEARCH AND SEIZURE.

See INTOXICATING LIQUORS, 1, 2. TRIAL, 1.

SENTENCE.

See TRIAL JUSTICE. TRUANT, 3, 4.

SERVICE.

See ABATEMENT, 3. INSANE HOSPITAL.

SHIPPING.

1. An action cannot be maintained by the owners of one vessel against the general owners of another vessel for a collision caused by the fault of the latter vessel, she being at the time of the injury in the possession and control of the master as owner, *pro hac vice*, sailing her "on shares."

Somes v. *White*, 542.

2. The personal liability of general owners of vessels for a master's defaults, whether arising *ex contractu* or *ex delicto*, depends solely upon the fact whether the master is the charterer and owner, *pro hac vice*, or not. *Ib.*

SMALL POX.

See TOWN, 12, 13.

SPECIFIC PERFORMANCE.

See EQUITY, 1, 2, 3, 4.

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STOCK.

See CORPORATION, 4, 5. TOWN, 1.

TOWN LINES.

See TOWN, 6, 7.

TOWN MEETING.

See TOWN, 1, 2, 9, 10.

TRESPASS.

1. Trespass *quare clausum fregit* may be maintained by a tenant at will against his landlord for a forcible entry upon him before the tenancy is terminated.
Marden v. *Jordan*, 9.

2. Where a woman is led into a void marriage with a married man, under his false pretense that he is a single man, he being at the time a married man and having a lawful wife alive, *held*, that an action for deceit therefor is an action of trespass on the case within the meaning of R. S., c. 87, § 9, which declares among other things that actions of trespass on the case survive; and *held* further, that in case of his death, the right of action survives against his personal representative. *Withee* v. *Brooks*, 14.

3. The statute requires the collector to keep a distress for taxes four days, and then sell. Where the distress was taken on the fifth of March, and adver-

TRIAL.

TRIAL JUSTICE.

TROVER.

TRUANT.

TRUST.

TRUSTEE PROCESS.

VAGRANT.

VARIANCE.

See AMENDMENT, 4. EVIDENCE, 14, 27. LIMITATIONS, STATUTE OF, 3.

VENUE.

See TRESPASS, 8.

VERDICT.

In a case where there was a conflict of testimony upon both grounds taken in defense, it was *held* under the circumstances of that case, that a verdict upon either ground was final. *Walker* v. *Bailey*, 354.

See TRIAL, 15, 16, 17.

VOTE.

See PLANTATION, 3, 4, 5. SCHOOL DISTRICT, 1, 2, 4. TOWN, 1, 2, 4, 8, 9, 10, 11.

WAGER.

See CONTRACT, 3, 4.

WAIVER.

See ARBITRATION, 1. ASSUMPSIT, 1. WITNESS, 2.

WARRANT.

See INTOXICATING LIQUORS, 2. MILLS, 5. PLANTATION, 5. TOWN, 8, 9. TRUANT, 2.

WASTE.

See EXECUTORS AND ADMINISTRATORS, 3.

WATER COURSE.

See EVIDENCE, 12.

WATER POWER.

1. A reservation of water necessary and sufficient to carry two run of mill stones; *held*, a reservation of a quantity sufficient for the purpose with the machinery in actual or contemplated use at the mill at the time the reservation was made, and not restricted then or afterwards to such quantity as with improved machinery and facilities would perform the same work; *held*, also, to reserve an absolute right to the use of the quantity of water named; and

WAY.

4. A highway in two counties located by the commissioners of both counties acting jointly, cannot be discontinued in whole or in part by one of said boards acting separately. *Ib.*

5. What obstructions or other inconveniences will render a highway defective, so as to make the town liable if an injury is thereby occasioned, is, to a considerable extent, a matter of opinion or judgment, and one in relation to which persons of ordinarily good judgment are liable to differ. The same is true as to what constitutes due care. The court will not, therefore, assume that the jury have acted dishonestly or perversely, simply because they have come to a conclusion different from that to which the court would have come upon the same evidence. *Weeks* v. *Parsonsfield*, 285.

6. In an action by one town against another, for injury to a bridge by turning the current of the stream, the defendants cannot question the validity of the location of the way in the plaintiff town, if the records show that the county commissioners had jurisdiction in the case, and made an actual location which has never been quashed. *Topsham* v. *Lisbon*, 449.

7. When a toll bridge is so built that it consists of two distinct structures, one extending from the shore to an island, and the other extending from the island to the opposite shore, and a highway is laid out and established over one of these structures, the burden of supporting it is changed from the bridge company to the town, within which that portion of the highway is situated. *State* v. *Norridgewock Bridge*, 514.

8. While the female plaintiff, with horse and wagon, was traveling along the highway, her horse became frightened at a large rock, dug out of the earth by the town and left in the traveled way in a situation calculated to frighten horses passing by. In attempting to dismount from the wagon, she fell and was injured. Neither she nor the horse was at fault. The rock was, *per se*, a defect in the way. *Held*, that if she was dismounting to prevent upsetting while the horse was restless and unmanageable from the fright, (the plaintiff's version,) the defect in the way may be held to be the proximate cause of the injury. *Held*, also, that if the horse was manageable, and the plaintiff was dismounting to lead the horse by, when he started up and threw her down, but not on account of any fright at that moment at the rock, (the defendants' version,) the defect in the way could not be considered as the proximate cause of the injury. *Held*, further, that a town may be liable to a traveler for an injury occurring from the fright of his horse at an obstruction in the traveled way, which is an actual defect therein, although not coming in contact therewith; but not unless the object of fright presents an appearance that would be likely to frighten ordinary horses; nor unless the appearance of the object is such that it should reasonably be expected by the town that it naturally might have that effect; nor unless the horse was, at least, an ordinarily kind, gentle and safe animal, and well broken for traveling upon our public roads.

Card v. *Ellsworth*, 547.

See CERTIORARI, 2, 3. DAMAGES, 7. LORD'S DAY, 1, 2. NUISANCE, 1. RAILROAD, 1. TRESPASS, 4, 5.

WILL.

WITNESS.

WORDS.

ERRATA.

Page 88, line 5 of opinion. Substitute "agreement" for "argument."
Page 96, 8th last line. Substitute "excepted" for "accepted."
Page 122, head note, 5th line. Substitute "police" for "public."
Page 145, 2d last line. Omit "if."
Page 195, head note. Substitute "c. 90" for "c. 91."
Page 292, 5th last line. Substitute "J. H. Drummond" for "J. Drummond."
Page 332, insert "Kennebec" before "August."
Page 407, line 1. Substitute "9 Allen" for "9 Maine."

For index pages of cases cited, see "Table of Cases cited by the Court."