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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The cases are arranged in the order of decision. The disregard of the custom of grouping the cases by counties has rendered possible what has been achieved, the printing of the cases promptly on their announcement, and affords a reason for omitting a showy page heading of the district and county, with a saving thereby of some thirty pages for textual matter. The subdivisions in the index are denoted by prefixes to the head notes, printed in distinguishing bold-faced type.

J. D. P.

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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. WILLIAM G. BARROWS.

HON. CHARLES DANFORTH.

HON. WILLIAM WIRT VIRGIN.

HON. JOHN A. PETERS.

HON. ARTEMAS LIBBEY.

HON. JOSEPH W. SYMONDS.

DICKERSON, J., died in office, September 1, 1878. HON. JOSEPH W. SYMONDS was appointed a justice, October 16, 1878.

ATTORNEY GENERAL,

HON. LUCILIUS A. EMERY.

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IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

HEZEKIAH S. PINGREE *vs.* E. BRADFORD CHAPMAN.

Oxford. Decided August 6, 1875.

Deed.

A judgment creditor extended his execution upon a specific part of his debtor's lot, and subsequently conveyed the land levied upon to one whose servant the defendant was when he committed the trespass sued for in this action. The plaintiff claimed title under a deed conveying the entire lot, "excepting the set-off; and in case the set-off should be fully satisfied or lawfully obtained by the" plaintiff, "or any one claiming under him, then this deed is to be effectual on all said lot." *Held*, that the parcel of land covered by the levy did not pass by the deed to the plaintiff.

ON REPORT.

TRESPASS, q. c. f. and for cutting and carrying away a quantity of hay on the northwesterly half of the lot numbered three in the seventh range of lots in Riley, in the county of Oxford. The plaintiff put in a chain of title from the commonwealth of Massachusetts to the deed of Olive S. Littlehale to him, dated July 7, 1869, covering the premises and then excepting the portion set off to Perkins, under whose grantees the defendant justified. The exception contained a qualification which raised the legal question stated in the opinion. This case chronologically precedes *Chap-*

man v. *Pingree*, 67 Maine, 198, but the opinions in this and the next case first reached the present reporter in July, 1878.

S. F. Gibson, for the plaintiff.

J. J. Perry, for the defendant.

VIRGIN, J. The question presented by the report is, whether upon the evidence the plaintiff can maintain this action against one holding under the Perkins levy. The defendant having cut the hay sued for, as the servant for L. E. & A. A. Chapman, the immediate grantees of Perkins, the decision depends upon the construction of the excepting clause, in the deed of Littlehale to the plaintiff, of July 7, 1869.

The deed of Bradley to Littlehale described the premises therein as being "all that part of lot numbered three, range seven, which lies on the northwardly, or westwardly, or northwestwardly side of the river or principal stream running through the lot."

The deed of Littlehale to the plaintiff adopts the same language, and then proceeds: "Excepting a certain set-off, of some twenty-five or less acres, to one Luther Perkins of Oxford. The meaning and intent of this deed is to convey to the said Hezekiah S. Pingree all of said lot, with the same metes and bounds, title, &c., as was conveyed to me, excepting the above set-off. And in case the set-off should be fully satisfied, or lawfully obtained by the said H. S. Pingree, or any one claiming under him, then this deed is to be effectual on all of said lot, according to the tenor of the above mentioned deed to me."

From the other deeds in the case it would seem that the whole of lot No. 3 contained about two hundred acres, one hundred and fifty acres lying on the northwest side of Sunday river, and on twenty-five acres of which Perkins extended his execution.

Bradley's deed to Littlehale was a deed of release without any covenants; while Littlehale's to the plaintiff was a deed of warranty.

The levy was admitted by the parties to this action, regular in all respects. Littlehale seemed willing to convey with covenants of warranty all the land described in the deed of release, except

that covered by the levy; but this was expressly excepted. If the exception had been unqualified, no doubt could have arisen as to the construction of the deed; for such as was excepted could not pass.

But the grantor, by an inexperienced conveyancer, undertakes to modify the exception, so that the deed shall convey the whole land described without exception, in case the levy should be satisfactorily or lawfully obtained by Pingree, or any one claiming under him. If the levy was valid, and held the title, whoever lawfully obtained it would hold the land, and the deed would not convey the title.

The only rational construction we perceive is, that the deed excepted the land covered by the levy, or conveyed it charged with the levy.

Case to stand for trial for alleged trespass on land not covered by the levy.

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

ANGELINE F. ANDREWS *vs.* AUGUSTUS G. PEARSON.

Oxford. Decided August 6, 1875.

Deed.

A false description in one particular, where enough remains to make it reasonably certain what premises are intended, will not defeat a conveyance. *Thus*, where, in a conveyance of a homestead farm, one of the parcels of which it was composed was described as "twelve and a half acres out of lot numbered eight in the first range,"—*Held*, that the whole parcel passed, although it in fact contained twenty-five acres.

ON FACTS AGREED.

TRESPASS, *quare clausum fregit*, and for cutting grass in 1872 on a parcel of land to which both parties claimed title, under separate deeds from the same immediate grantor, one Freeman Allen. The description in the deed to the plaintiff, dated Sept. 18, 1871, is as follows:

"My homestead farm situate in said Buckfield with the build-

ings thereon, [lying, etc.] and described as follows: Three acres, more or less, out of the northwest corner of lot numbered nine in the second range in the western division; also, the western half of lot numbered nine adjoining Paris line, containing fifty acres more or less; also, the south half of lot numbered eight in the second range, west division; and also, that part of lot numbered nine, in the first range, west division, lying north of Lane's Brook, and *twelve and a half acres adjoining the same out of lot numbered eight in the first range.*"

The defendant claims, under deed dated April 30, 1872, describing the premises as the " north-east corner of lot numbered eight, in the first range and west division of lots in said Buckfield, [etc.] containing twelve and one-half acres, more or less."

The land in dispute contains about twelve and a half acres, and is the northerly half of a parcel taken off the easterly end of lot No. 8, in the first range and west division of Buckfield, the parcel being about forty rods wide and extending the whole width of the lot, 100 rods, and containing about twenty-five acres. The defendant owns and has always lived on the remainder of lot No. 8. The said parcel adjoins the remainder of the Allen farm, and had all been inclosed and improved as part of it for tillage and grass land by said Allen and those under whom he claims for more than fifty years next preceding the conveyance to the plaintiff, claiming it as their own. The deeds to Allen and his grantors describe the parcel as containing twelve and one-half acres. Said parcel had always been considered and treated as part of the farm, and no question was made but that Allen intended to convey to the plaintiff the whole of the farm, including the land in dispute, supposing he owned it, when in fact he held no record title to it, unless by the deeds in the case. After the conveyance to the plaintiff it occurred to Allen that by the deed only half of the parcel would pass. Hence the conveyance to the defendant and this action.

A Black, for the plaintiff.

S. C. Andrews, for the defendant.

WALTON, J. Freeman Allen was the owner of a farm of ancient

and well defined boundaries. He undertook to convey it to the plaintiff. He first described it as his "homestead farm." He then undertook to give a further description of it by naming the several parcels or portions of lots of which it was composed. One of them is described as "twelve and a half acres out of a lot numbered eight in the first range." This portion of the farm in fact contained twenty-five acres. The question is whether this mistake left half of this parcel unconveyed. We think not. We think it falls within the principle, "*falsa demonstratio non nocet*,"—a mere false description in one particular, where enough remains to make it reasonably certain what premises were intended to be conveyed, will not defeat the conveyance. No one can read the description in this deed and doubt that it was the intention of the parties that the whole farm should pass.

Judgment for plaintiff.

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

JENNIE A. ROWELL *vs.* FIFIELD MITCHELL *et al.*

Somerset. Decided November 27, 1876.

Mortgage. Real action.

In a writ of entry against two defendants, B and M, there was a joint plea of *nul disseizin* with a brief statement, not filed within the time allowed for pleas in abatement, that B was mortgagee in possession, and that M was holding possession under him. The defendants offered in evidence an assignment to B of an outstanding mortgage of the premises. *Held*, that as to M, the brief statement containing matter in abatement was not open to him; but that the assignment was admissible as showing the plaintiff's rights under her title, and that she did not sustain her right of possession as claimed in her writ.

A tender of the amount due upon a mortgage after condition broken does not discharge the mortgage.

A mortgagor cannot maintain a writ of entry against a mortgagee in possession.

ON REPORT.

WRIT OF ENTRY, originally commenced in the name of Eliza

Mitchell, for one undivided half of the Burrill farm in Canaan, and one undivided fourth of a wood-lot from Burrill to Eliza Mitchell and Fifield Mitchell, dated August 21, 1865, under which she claimed title. The writ was dated November 27, 1873.

The action was entered at the December term, 1873, and continued till September term, 1874, when the death of the demandant was suggested, she having deceased August 10, 1874; her will was duly probated; Jennie A. Rowell came in as devisee to prosecute; and at the present September term, 1875, her name was substituted in place of her mother, the original demandant.

At the present term, the defendants pleaded the general issue, *nul disseizin*, jointly, and filed a joint brief statement of the grounds of their defense; that Jewett claimed title under the assignment of the Burrill mortgage and that Mitchell was in possession under him.

It appeared in evidence that David Mitchell and Eliza Mitchell, August 21, 1865, bought a farm in Canaan of Scammon Burrill, paid $2030 down, directed a conveyance of one undivided half to be made to their youngest son, Fifield Mitchell, one of the defendants, and of the other undivided half to Eliza Mitchell. Eliza and Fifield gave their joint notes for the balance of the purchase money, $1970, payable in one, two, three and four years, and a mortgage on the farm to secure its payment. She then gave (David Mitchell joining with her) a warrantee deed of her half to Fifield for the nominal consideration of $1000, upon certain conditions to be performed by him, viz: to support his father and mother comfortably through life, to pay $100 each to two daughters when married, and to pay off the $1970 and save said David and Eliza harmless therefrom.

Fifield went into possession of the whole farm. David Mitchell died May 24, 1873. Eliza Mitchell, September 4, 1873, went to live with her son, Frank, in Showhegan, about thirteen miles from the farm, having previously notified Fifield of her intention to do so, and requested him to make provisions for her support there, which he refused to do; and she was there supported by Frank to the time of her death. She made a formal entry on the farm, November 19, 1873, in the presence of two witnesses, for non-per-

formance of the conditions, stating to Fifield at the time that he had wholly neglected to support his father or her, had not paid the money to the girls when married, nor paid off the Burrill notes and mortgage, although more than four years overdue.

On March 15, 1870, Henry S. Jewett, one of the defendants, took an assignment of the Burrill mortgage and last note, and on August 31, 1871, Fifield gave Jewett a quitclaim deed of his interest in the farm, but remained in occupation.

Much evidence was introduced *pro* and *con*, as to the manner in which the parents were maintained at Fifield's.

March 8, 1875, the plaintiff demanded of Jewett a true account of the sum due on the mortgage, and on March 29th thereafter tendered him $800 "upon the mortgage that Fifield and his mother gave to Scammon Burrill, and by Burrill assigned to Jewett."

D. D. Stewart, for the plaintiff.

I. The original demandant's devisee is the proper party to prosecute the suit after her death. *Hayden* v. *Stoughton*, 5 Pick. 528, 540. *Brigham* v. *Shattuck*, 10 Pick. 306, 309. *Austin* v. *Cambridgeport*, 21 Pick. 215.

II. The neglect to support comfortably and suitably David and Eliza Mitchell was a forfeiture of the conditions of the deed, and entitled either to re-enter upon the land for condition broken; no actual re-entry was necessary under our statutes, although one was made. R. S., c. 104, § 4. *Austin* v. *Cambridgeport*, 21 Pick. 215. *Stearns* v. *Harris*, 8 Allen, 597, 598.

III. The payment of the $100 to each of the girls became due on notice of marriage. *Chancey* v. *Graydon*, 2 Atk. ch. 617. And forfeiture took place if not then paid. *Reynish* v. *Martin*, 3 Atk. c. 331.

No demand of payment of the $100 necessary. *Whitton* v. *Whitton*, 38 N. H. 127.

Nor could payment be waived by the girls. Mere silence never a waiver. *Gray* v. *Blanchard*, 8 Pick. 284.

IV. Eliza Mitchell had a right to support anywhere she desired, within a reasonable distance; there being no language in

the deed requiring her to receive support on the farm, and the refusal to support her after notice and request was a breach of the conditions of the deed. *Crocker* v. *Crocker*, 11 Pick. 252. *Hubbard* v. *Hubbard*, 12 Allen, 586, 590. *Thayer* v. *Richards*, 19 Pick. 398. *Wilder* v. *Whittemore*, 15 Mass. 262. *Pettee* v. *Case*, 2 Allen, 546, 8, 9.

V. Notes to Burrill should have been paid when due, or, at most, within a reasonable time thereafter. *Hayden* v. *Stoughton*, 5 Pick, 528. *Ross* v. *Tremain*, 2 Met. 495.

Neglect to pay for more than four years after all were due, was a breach of condition. *Fisk* v. *Chandler*, 30 Maine, 79, 82.

VI. Under the pleadings, a joint *nul disseizin*, nothing but a joint title can be offered in evidence. Title in one only does not support the issue. *Wyman* v. *Brown*, 50 Maine, 139, 145.

VII. Mitchell should have pleaded non-tenure, or disclaimed at first term. Not having done so, he has no defense. *Colburn* v. *Grover*, 44 Maine, 47. *Wyman* v. *Brown*, 50 Maine, 139.

VIII. Demandant is entitled to a qualified judgment against Jewett, so far as his title under Mitchell goes, not disturbing his possession under the mortgage. *Doten* v. *Hair*, 16 Gray, 149. *Cronin* v. *Hazeltine*, 3 Allen, 324, 326, (note). *Kilborn* v. *Robbins*, 8 Allen, 466, 472. *Doyle* v. *Coburn*, 6 Allen, 71.

J. Baker, for the defendants.

DANFORTH, J. This is a writ of entry to recover possession of an undivided half of certain lands described, and comes before this court upon report. It appears from the plaintiff's testimony that Eliza Mitchell and one of the defendants, Fifield Mitchell, on the twenty-first day of August, 1865, purchased the land of Scammon Burrill and took a deed of the whole lot as tenants in common; at the same time the said Eliza and Fifield joined in a mortgage of the same premises to said Burrill, to secure certain notes given for the purchase money. This mortgage is still outstanding, one of the notes secured by it not having been paid. On the same day Eliza, in connection with her husband, gave to Fifield a conditional deed of her half of the premises. This action was commenced by Eliza to recover her half, on the ground of a breach in

the condition of her deed. Subsequently, she having deceased, the present plaintiff came in and prosecutes this action as her devisee.

Assuming a breach in the condition as alleged, the plaintiff, standing in the place of her devisor, would be entitled to recover not only as against Fifield, but also all other persons except the mortgagee, or one having his right. As against him, she having only the right of the mortgagor, could not recover. *Conner* v. *Whitmore*, 52 Maine, 185.

The defendants, in order to bring themselves within this rule of law, offer an assignment of the mortgage from Burrill to the defendant, Jewett. This assignment appears to be valid and sufficient to give Jewett all the rights of the mortgagee. But the plaintiff objects to its reception as testimony on several grounds.

It is claimed that under the pleadings it is not competent for the defendants to protect themselves by any other than a joint title superior to that of the plaintiff, and the case of *Wyman* v. *Brown*, 50 Maine, 139, 145, is relied upon. Though that part of the opinion referred to was not necessary to a decision of the case, we see no occasion to question its soundness. But the principles there enunciated have as little application to this case as to that. The brief statement in this action so far as it relates to the manner in which the defendant Mitchell is in possession, contains matter which should have been filed within the time allowed for pleas in abatement. As it was not so filed it comes too late and cannot be considered. The defendants join in the general issue, and upon the issue thus raised the case must be decided. The plaintiff alleges the seizin of her devisor, and a wrongful joint disseizin by the defendants. Their plea admits their possession but denies the alleged disseizin. The burden of proof is upon the plaintiff to show such a title as will give her a better right to the possession than the defendants have. It is a question of title between the parties, but the plaintiff must recover upon the strength of her own and not upon the weakness of that of her opponents. *Chaplin* v. *Barker*, 53 Maine, 275. Whatever, then, is competent to show title in the defendants or rebut that offered by the plaintiff and tending to show that she, under the title set up by her, has no right to possession of the premises, is admissible in evidence. Even

a title in a stranger is competent for the purpose of rebutting that of the plaintiff. Jackson in his work on Real Actions, page 161, thus states the law: "It appears that the rule which prevents a tenant from showing a title in a stranger, is confined to those cases in which a tenant is also setting up a title in himself. So long as he is merely repelling and disproving the claim of the demandant, he may for that purpose show an adverse title in a stranger." 2 Green. Ev., § 556, and cases cited in note.

By the deed and mortgage introduced by the plaintiff, she has shown an instantaneous seizin only in her devisor and no right of possession, as against the mortgagees. If, then, Burrill was the defendant, she must fail upon her own showing. The action is not against him, therefore she has an apparent right. But it must be competent to show that such apparent right is not a real one; that notwithstanding the action is not against Burrill nominally, it is against one who legally stands in his place and is entitled to all his rights. This the assignment effects.

But it is still objected that the plea is joint and the title thus set up is the title of only one. If the defendants were seeking to establish an independent title in themselves, this suggestion would be entitled to very grave consideration. In such case the burden of proof would be upon them and they might well be holden to establish such title in this respect as by their plea they rely upon. Apply the same principle to the plaintiff. In her writ she alleges a joint disseizin, and claims possession against both defendants. Taking all the proof relating to the title upon which she rests her claim, and it not only fails to sustain her allegations, but shows conclusively that there is no such joint disseizin, and that she is not entitled to the possession, which she asks against both. It may be true that Mitchell alone could not set up such defense, for the act of setting up the mortgage as a valid claim would in itself be a breach of the condition in his deed, nor would it avail him if he could, as he is not mortgagee. But this cannot prevent Jewett from so doing, for he is mortgagee, and if her title is not sufficient to prevail against both she cannot have judgment in her favor. *Varnum v. Abbot*, 12 Mass. 474, 479, 480.

Another objection is that as Jewett now has Mitchell's title, he takes it with all its infirmities, and is equally bound with him to discharge the mortgage, or at least is estopped from setting it up as a defense. So far as Jewett does rely upon that title the effect claimed would seem to follow. Mitchell could only convey subject to the condition, and his grantee would be bound by it, and if he had first purchased the conditional titles, so far as he subsequently performed any act imposed by that condition, we might have inferred that it was done in obedience to the obligation flowing from it, and quite possibly the mortgage might have been held as discharged, notwithstanding the assignment. But the case shows that the assignment of the mortgage from Burrill was previous to any conveyance from Mitchell to him. As he took the proper steps to uphold the mortgage as a subsisting title, a subsequent quitclaim deed from Mitchell of his interest in the premises, in the absence of other testimony, can not legally control his title under the mortgage.

It is further claimed that the mortgage is discharged by the tender which is proved. This tender was made after condition broken and after possession, and not accepted. It is well settled in our state, as well as in Massachusetts, that a tender under such circumstances may lay the foundation for a bill in equity for redemption, but will not enable the mortgagor to get possession by an action at law. *Wilson* v. *Ring*, 40 Maine, 116. *Stewart* v. *Crosby*, 50 Maine, 130. *Maynard* v. *Hunt*, 5 Pick. 240. *Currier* v. *Gale*, 9 Allen, 522. *Howe* v. *Lewis*, 14 Pick. 329.

It is also claimed that even if Jewett is entitled tc possession under the mortgage, yet, as he now has the interest of Mitchell, the plaintiff may have a qualified judgment against him, so far as that interest is concerned, "not disturbing any possession taken under the mortgage," and several cases in Massachusetts are relied upon. We have no occasion to question the law of those cases, but we do not find them applicable to this. The principle settled there is that a mortgagee may have a qualified judgment against a prior mortgagee, who is also the owner of the equity of redemption. This judgment is in the nature of a decree in equity, and its purpose and effect is simply to foreclose the mortgage,

without changing the actual possession. But in the case at bar the plaintiff has no mortgage to foreclose. We are considering the case upon the assumption that the condition in the deed to Fifield Mitchell has been broken. Under the entry on that ground, the deed becomes a nullity and no time for redemption remains. The plaintiff in her writ seeks for no foreclosure, but asks for possession, absolute and entire. She is simply a mortgagor, and not under any circumstances a mortgagee. The defendant Jewett is mortgagee; and, though as having a deed from Fifield, he may be mortgagor to himself, if one person can sustain the two positions; he is in no sense mortgagor to the plaintiff.

As the view we have taken decides this case only, and not the rights of the parties to the land, except under the mortgage, the entry should be,

Plaintiff nonsuit.

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

WILLIAM K. LANCEY *et al. vs.* HENRY K. WHITE, administrator.

Somerset. Decided July 21, 1877.

Limitations, statute of.

An action of assumpsit, for the price of goods sold and delivered, commenced more than six years after the cause of action accrued, and more than two years after the administrator against whom it was commenced was appointed, is barred by the provisions of R. S., c. 81, § 88, whether such administrator has given notice of his appointment or not.

The time within which such action must be commenced may be shortened in many cases, if the representative of the deceased debtor gives the legal notice of his appointment; but it cannot be indefinitely prolonged by his failure to give it.

ON REPORT.

ASSUMPSIT against the defendant, as administrator of the estate of Samuel Parker, for lumber sold and delivered to Parker in March, 1868.

Plea, general issue, with brief statement that the cause of action, if any, against the intestate accrued more than six years before the suing out of the plaintiffs' writ, and that the defendant was appointed administrator of the estate of the intestate more than two years before the suing out of the writ, and that the action was barred by the statute of limitations.

It was admitted by the plaintiffs that the cause of action accrued to them in March, 1868; that Parker died December 28, 1872; that the defendant was duly appointed January 7, 1873; that this suit was brought May 19, 1875, and that notice and demand in writing was made on the defendant, as administrator, for payment, March 1, 1875.

The defendant also contested the plaintiffs' right to recover on other grounds, overruled by the presiding justice in instructions not excepted to, and a verdict was returned for the plaintiffs for $660.32.

Upon the foregoing facts it was contended by the defendant that the action was barred by the statute of limitations.

By consent of the parties the case was reported to the full court, upon the foregoing facts, nothing else being admitted or proved by either party. If the action is barred by the statute of limitations in actions against executors and administrators, the verdict is to be set aside and judgment entered for the defendant. Otherwise, judgment on the verdict, for the plaintiffs.

D. D. Stewart, for the plaintiffs.

The brief statement does not allege, and the case does not find, that the defendant ever gave any notice of his appointment as administrator. This omission is fatal to the defense. Laws of 1872, c. 85, § 18. R. S., c. 87, §§ 11 and 18. *Bachelder* v. *Fisk et al.*, executors, 17 Mass. 464, 468. *Clarke* v. *Tufts*, 5 Pick. 337, 341. *Burditt* v. *Grew*, 8 Pick. 108, 111. *Estes* v. *Wilkes*, 16 Gray, 363. *Heard* v. *Meader*, 1 Maine, 156, 157. *Thurston* v. *Lowder*, 40 Maine, 197, and 47 Maine, 72, 75. *Henry* v. *Estey*, administrator, 13 Gray, 336. *Thompson* v. *Burnham*, administrator, 13 Gray, 211, 212.

S. D. Lindsey, with whom was *S. Coburn*, for the defend-

ant, contended that c. 85 of the laws of 1872 had no application, either in terms or in spirit; that by its terms it was an amendment, not of R. S., c. 81, § 88, upon which the defendant relied, but of R. S., c. 87, which neither as originally enacted nor as amended by the act of 1872, in any way repealed, restricted, limited or modified § 88.

BARROWS, J. The plaintiffs contend that this suit is not barred by the statute of limitations, which was pleaded by way of brief statement, because there is no evidence that the administrator gave notice of his appointment, as required by the statutes, and ordered by the judge of probate. They admit that the cause of action accrued in March, 1868; that Parker, the defendant's intestate, died Dec. 28, 1872, almost five years afterwards, and that the defendant was duly appointed administrator, January 7, 1873. The suit was brought May 19, 1875; the written demand upon the administrator, required by R. S., c. 87, § 11, and Laws of 1872, c. 85, § 12, having been made March 1, 1875.

It is obvious that the defendant could not avail himself of the special limitation provided by these sections without making due proof that he gave legal notice of his appointment. He would be expressly precluded by § 18. But when we look into the brief statement it is plain that this is not the limitation upon which the defendant relies. He pleads that the cause of action, if any there was against his intestate, accrued more than six years before the suing out of the writ, and that he himself was appointed administrator of said intestate's estate more than two years before the commencement of the action, and he claims that the same is barred by the provisions of R. S., c. 81, § 88.

Our legislators have prudently guarded against the litigation of stale claims, as to which it may reasonably be supposed that human memory would be at fault and liable to err, and that papers might be lost, and witnesses absent or dead, by the interposition of various beneficent statute limitations, whereby those who assert rights of action are warned to proceed with reasonable diligence, if they would ever enforce them.

Abundant exceptions are furnished to relieve those who are

absent or under disability. Those who labor under no disadvantage, but neglect or postpone, from whatever motive, the proceedings necessary to test the validity of their claims, have no cause to complain when any of these statute bars which may be found applicable is set up against them.

The several provisions touching this matter are to be construed together, and its due effect given to each, so that they may operate harmoniously to secure the result intended by the legislature in the various classes of cases which they were made to cover.

Besides the provisions of R. S., c. 87, § 11, as amended by c. 85, Laws of 1872, designed to abbreviate, in favor of executors and administrators who give due and legal public notice of their appointment, the term within which most of the actions which survive must be brought, we have in c. 81, § 88, in direct connection with the numerous sections touching the limitation of personal actions, the following: "If any person entitled to bring or liable to any action before mentioned, dies before or within thirty days after the expiration of the time herein limited therefor, and the cause of action survives, the action may be commenced by or against the executor or administrator at any time within two years after his appointment and not afterwards if barred by the other provision hereof."

"The other provision" referred to is made certain by referring to R. S. of 1857, c. 81, § 103, where the phrase is "if barred by the other provisions of this chapter." The section had its origin in the general limitation act, Laws of 1821, c. 62, § 12, where it is emphasized at the conclusion by the addition of the words, "anything which may be supposed herein to the contrary notwithstanding;" and it has reappeared in all the revisions with slight changes having no bearing upon this case, and with an extension of its scope to all actions covered by the limitation act, of which it makes a part, when they survive at all. Its import is unmistakable.

If a creditor permits two continuous years of existing legal administration to elapse without commencing any suit against the administrator, and when he does sue out his writ his suit would be barred against the alleged debtor if living, his action is barred

by virtue of this section, whether the administrator gave public notice of his appointment or not.

Herein is no hardship. The probate records are always open for inspection, and reasonable diligence will enable a creditor before his claim would be barred against his debtor if living, to ascertain whether there has been a legal administration on such debtor's estate existing for two years.

If the next of kin decline to administer, any creditor, if he can find property of his deceased debtor, may have administration committed to some suitable person. If he prefers to await the action of the next of kin or others interested, he still has two years after the appointment of an administrator within which he may proceed, but no more, if his claim would be barred had his debtor remained alive.

As before remarked, the rights of absent creditors or those laboring under any species of disability are carefully protected by exceptions. There is no reason why negligent creditors should have their rights of action indefinitely prolonged by reason of the failure of the representative of the deceased to give the notice, which would enable him in many cases greatly to shorten the term within which such actions must be commenced. To hold that the statute should have that effect would be to reverse its intended operation, and to do away altogether with the plain mandate of § 88, c. 81, of the Revised Statutes.

The case before us is precisely within the purview of this section. The cases cited for plaintiff while they turned upon other provisions do not militate against the doctrine which we here declare.

In conformity with the stipulations in the report the entry must be,

Verdict set aside. Judgment for defendant.

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

DANFORTH, J., did not sit.

INHABITANTS OF BUCKSPORT *vs.* THEODORE C. WOODMAN *et al.* administrators.

Hancock. Decided October 9, 1877.

Tax. Words—Debts due.

An award by the committee of arbitration on the Alabama claims does not constitute a debt due to be taxed, under the provisions of R. S., c. 6, § 5, until an appropriation is made by congress for the payment of the award.

ON REPORT.

DEBT under the statute to recover a tax.

O. P. Cunningham, for the plaintiffs.

T. C. Woodman, for the defendants.

VIRGIN, J. This is an action of debt, brought under the statute of 1874, c. 232, to recover a tax. The sum sought to be recovered was assessed April 1, 1876, upon a certain amount awarded by the Court of Commissioners of Alabama Claims to the defendants, as administrators of the estate of Enoch Barnard, deceased, for the destruction of two ships, in each of which the defendants' intestate was part owner.

All personal property, within or without this state,—with certain exceptions not material to the decision of this case—is assessed to the owner in the town where he is an inhabitant on the first day of April in each year. R. S., c. 6, § 13. This provision fixes the liability of persons and property to municipal taxation for the municipal year. A subsequent change of residence or ownership the law takes no note of until the regular periodical time of making a new assessment. *Harman* v. *New Marlborough*, 9 Cush. 525. All the conditions regulating municipal taxation are to be considered as they exist on that day, and the liability determined accordingly; and the assessments for the year by relation take that date regardless of the particular time when actually made and completed.

Personal property for the purposes of taxation, includes "debts due the persons to be taxed," etc. R. S., c. 6, § 5.

The plaintiffs contend that the amount of the award was a

"debt due" the defendants within the meaning of the statute, and therefore taxable. But considering the nature of the award by the "Tribunal of Arbitration"—that it was a gross sum by one government to another simply— together with the contingency as to amount to be received by the defendants until after April 1, 1876, and the fact that no specific appropriation was made by congress for the payment of the judgment until April 11, 1876, we come reluctantly to the conclusion that the award was not taxable for the municipal year of 1876.

See 18 statute, 1st sess. 43 Cong. (1874) c. 459, §§ 11, 14 and 15. Laws 1st sess. 44 Cong. (1876) c. 9. *Ibid*, c. 55. See, also, *Lowell* v. *Street Com'rs.*, 106 Mass. 540.

Plaintiffs nonsuit.

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

LORING B. JONES, administrator, *vs.* ABIEL D. BACON, administrator.

Somerset. Decided October 18, 1877.

Will.

An absolute power of disposal in the first taker renders a subsequent limitation repugnant and void.

Thus, where the testator, after making sundry bequests, proceeds as follows: "And as to the residue of my estate after payment of my just debts, I give and bequeath the same to my beloved wife. . . and lastly, I further direct if there be any of my said estate left after the decease of my said wife, then the said property left be equally divided between G & T;" *Held*, that the residue of his estate after the payment of his just debts and legacies vested absolutely in his wife.

BILL IN EQUITY, to determine the construction of a will.

John Ham, October 27, 1874, made bequests by will to Emily Crowell, his niece, $50; to Mrs. Charlotte Whitcomb, $25; to his niece, Lydia Crowell, $5, and to Hattie Bacon, $50. His will then closed as follows:

"And as to the residue of my estate, whatever, after payment of my just debts, I give and bequeath the same to my beloved

wife, Harriet Ham, whom I appoint sole executrix of this my last will and testament.

"And lastly, I further direct if there be any of my said estate left after the decease of my said wife, then said property left be equally divided between Jacob Gilman, Caroline A. Thompson and Sally Brown, my sister, if she be living at the time; if not, her share to go to her husband, John Brown, if he be living; and if neither the said Sally Brown nor her husband be living, the said property be equally divided between the said Jacob Gilman and Caroline A. Thompson."

John Ham died December, 1874. Harriet Ham, named as executrix and legatee in his will, died January, 1875, before his will was approved and allowed. After her decease the plaintiff was appointed administrator of the estate of John Ham, with the will annexed, and the defendant was appointed administrator of the estate of Harriet Ham. The bill closes with a prayer that the court will direct the plaintiff what disposition to make of the residue of the estate after payment of the debts and specific legacies.

S. D. Lindsey, for the plaintiff.

S. Lancaster, for the defendant.

APPLETON, C. J. This is a bill in equity, brought by the plaintiff, as administrator with the will annexed of the estate of John Ham, against the defendant, as administrator of the estate of Harriet Ham, his wife, under the provisions of R. S., c. 77, § 5, for the purpose of obtaining the construction of his will.

The testator after making sundry specific bequests proceeds as follows: "And as to the residue of my estate, whatever, after payment of my just debts, I give and bequeath the same to my beloved wife, Harriet Ham, whom I appoint sole executrix of this my last will and testament."

The testator gives and bequeaths "the residue of his (my) estate" to his wife whom he appoints executrix. The language is the same used in the preceding specific legacies. The words embrace the entire remainder of the estate. This remainder is given to the wife. It is given in the same terms as the other

legacies, which are unquestionably absolute and which vested in the legatees. No limitation is imposed as of an estate for life. The residue is subject to the payment of the just debts of the testator. The wife is given an absolute and uncontrollable power of disposal of the estate bequeathed. "If estates," observes Shepley, J., in *Ramsdell* v. *Ramsdell*, 21 Maine, 288, 293, "be devised to a person with or without words of inheritance, and with an absolute right to sell and appropriate the proceeds at pleasure to his own use, it is not perceived how there can be a vested interest imparted to another in the same estate or property. Such full dominion in the devisee or legatee is inconsistent with and destructive of all other rights." In *Gifford* v. *Choate*, 100 Mass. 343, Hoar, J., says: "An absolute power of disposal in the first taker is held to render a subsequent limitation repugnant and void." In *Hale* v. *Marsh*, 100 Mass. 468, the testator gave all his property to his wife for life with power to dispose of the whole or any part thereof, real or personal, at her pleasure, and to manage and improve the same at her discretion, and if the income was not sufficient for her complete maintenance, he gave her power to expend so much of the principal as she might elect and for such purposes as she might deem expedient, with full power to dispose by will of such portion as might remain unexpended at her decease; but if she should die leaving any unexpended and not disposed of by will, he gave it to a third person. "The gift is of a life estate," says Foster, J., in delivering the opinion of the court, "with a full power of disposition, both by deed and will, over the entire property, without restriction as to the time, mode or purposes of the execution of the power. In such case, the authorities seem to hold that the life estate and unlimited power of disposition over the remainder coalesce and form an estate in fee, and that the devise over of what may remain is void, because inconsistent with the unlimited power of disposition given to the first taker." In *Ide* v. *Ide*, 5 Mass. 500, which is somewhat similar to the one under consideration, Parsons, C. J., says: "Whenever, therefore, it is the clear intention of the testator that the devisee shall have an absolute property in the real estate devised, a limitation over must be void,

because it is inconsistent with the absolute property supposed in the first devisee."

There would not even a question be made as to the meaning of the bequest just considered, were it not for the last clause in the will, which is as follows: "And lastly, I direct if there be any of my said estate left after the decease of my said wife, then the said property left be equally divided between Jacob Gilman, Caroline A. Thompson and Sally Brown, my sister, if she be living at the time; if not, her share to go to her husband, John Brown, if he be living; and if neither the said Sally Brown nor her husband be living, the said property be equally divided between the said Jacob Gilman and Caroline A. Thompson."

But the remainder, as we have seen has been already disposed of. It was the wife's, charged with the payment of just debts. She had the uncontrolled power of disposal of it. The last clause is not to be regarded as a withdrawal of what had just been devised. When property has been devised absolutely, and with no restrictions upon the gift, the court will be slow in giving such a construction to subsequent words as will defeat the absolute estate just devised. "A valid executory devise cannot subsist under an absolute power of disposition in the first taker." 4 Kent Com. 270. Here was an absolute power of disposition in the wife.

The cases cited for the defendant differ materially from the one before us. In *Stevens* v. *Winship*, 1 Pick. 318, the devise was to the wife for life with power to sell in case of need. In *Field* v. *Hitchcock*, 17 Pick. 182, a bequest of money to one for life and then over was held a gift of the interest and not of the principal. Here the bequest was absolute and not contingent upon its being needed by the wife for her support.

According to the true construction of the will of John Ham, it is declared:

That the residue of his estate after the payment of his just debts and legacies vested absolutely in Harriet Ham, his wife.

And it is ordered and decreed that the reasonable costs and charges of these proceedings be a charge upon the estate of said John Ham.

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

CALVIN ATWOOD *vs.* SANFORD S. CHAPMAN.

Somerset. Decided October 28, 1877.

Deceit. Fraudulent concealment. Sale. Quitclaim.

In the sale of land, the vendor is liable for misrepresentation in regard to the title as well as the quality.

Where one by quitclaim sells land set off to him on a judgment execution, and represents that his title is good, the concealment of the fact known to him and unknown to the buyer, that a petition to reverse the judgment was then pending, is fraudulent, and renders him liable in damages.

ON EXCEPTIONS.

CASE FOR DECEIT in the sale of the defendant's interest in two pieces of real estate described in a quitclaim deed to the plaintiff, dated August 29, 1873; the first piece "containing fifty acres more or less, being the same lot conveyed to the said Chapman by sheriff's deed, June 15, 1872, and recorded," etc.; and the second "being the same conveyed to said Chapman by Llewellyn Grant [by deed dated] June 18, 1872, and recorded," etc.

At the trial, the plaintiff proved the following facts:. The defendant's title came by a levy of an execution obtained in an action, *Grant* v. *Cynthia Hussey* and her husband, *John J. Hussey*, brought on account annexed, to recover the price of a certain mare, alleged by Green to have been sold by him to Cynthia and her husband for $30. Judgment was obtained in that action at the March term of this court, in 1872, by default.

That judgment before the commencement of this action was wholly reversed on review, the petition for which was entered at the September term, 1872. The defendant had full knowledge of the proceedings in review from the entry of the petition to the final judgment and appeared as counsel for Green. The sheriff's deed was of an equity of redemption from a mortgage to M. S. Parker, to secure a note of $150, which Cynthia testified she had fully paid and taken up. The conveyance from Green to Chapman was a levy by appraisement on the aforesaid execution set off to Green.

The plaintiff, after introducing the quitclaim deed, the note of

Cynthia Hussey to M. S. Parker, his own testimony and that of Cynthia Hussey, offered evidence tending to prove that Green sold the mare to John J. Hussey, the husband of Cynthia, that the consideration of the sale was $10, paid at the time of sale, and a note of Cynthia originally given to her husband for $20, on which there was still unpaid $15, making in all $25 for the mare; that she had nothing to do with the purchase of the mare, and that the defendant brought the action of *Green* v. *Hussey et al.* with a full knowledge of these facts, which testimony was excluded. The presiding justice ordered a nonsuit; and the plaintiff alleged exceptions.

S. S. Brown, for the plaintiff.

I. The nonsuit was improperly ordered, as on the testimony the jury might have found a verdict which would have been sustained by the court. *Fickett* v. *Swift*, 41 Maine, 65.

II. The defendant's conduct at the time of the sale, with his positive assertion that the title was good, was a material misrepresentation of the condition of the title. 2 Parsons' Con. 271 *et seq.*; Kerr on Fraud and Mistake, 92 *et seq.*

III. The defendant has no title to first piece of land, as the mortgage was discharged before his purchase of the equity. His ignorance of this payment, under the circumstances, is no excuse. Broom's Com. Law, 341 *et seq.*

IV. Defendant's concealment of review proceeding was a fraud. "*Suppressio veri*" as actionable as "*allegatio falsi.*" 16 Maine, 30; 2 Parsons' Con. 274, 275.

V. The exclusion of the evidence offered was wrong, as it had a direct bearing upon the question of fraud.

S. S. Chapman, pro se, with whom was *D. D. Stewart.*

DANFORTH, J. This is an action to recover damages for an alleged deceit in relation to the title to certain lands conveyed by quitclaim deed from the defendant to the plaintiff. It is before us upon exceptions to the exclusion of certain testimony offered, and to the order of a nonsuit upon the testimony.

The first count in the plaintiff's writ alleges mainly a general

statement by the defendant that his title, with the exception of certain incumbrances, was good, with an averment that he had no title to one parcel, and that the title to the other piece was subsequently defeated by a suit then pending in court. Were this the only count in the writ, the action could hardly be maintained. The general statement that a title is valid involves questions of fact and law and might be fairly understood as an expression of an opinion rather than an existing fact. But what is of more consequence here, it does not appear from the testimony that th is statement, in relation to one of the pieces at least, was not true. The judgment and levy upon which the title depended, though afterwards annulled, at that time so far as appears gave a good title. The judgment was then in force and the levy valid.

The second count is more full, and though the cause of action may not be stated with entire accuracy, it is, perhaps, sufficiently so to enable us rightly to understand the "person and case" as presented by the testimony.

In this count the cause of complaint is that the defendant falsely stated his title to be good, and fraudulently concealed a material fact connected with it, which rendered it defeasible and subsequently defeated it, whereby the plaintiff took nothing by his deed. The direct representation of the title is the same as in the first count, and standing alone, the same suggestions will apply. But taken in connection with the alleged concealment, another and a very different question is presented. It may also be true that the concealment alleged, by itself alone, might not be a cause of action. The rule of *caveat emptor* applies as well to real as to personal property. But this rule does not authorize deception in what is said or unsaid. If a person makes representations as to quality or title he is to speak the truth, or if he is placed or places himself in a position where his silence will convey a false impression, his suppression of the truth will be as much a fraud as a false statement. Hence, whether the withholding of a fact is fraudulent must depend upon the accompanying circumstances.

The testimony shows that the defendant's title to the land sold depended upon a judgment of this court, upon which an execu-

tion issued and was levied upon one parcel, while the other as an equity of redemption was sold on the same execution. Within a year from the recovery of the judgment a petition for a review of the action was commenced, and was pending in court at the time of the conveyance in question. Of this petition the defendant had knowledge, as he appeared as counsel for the respondent. The final result of this petition was the entire reversal of the judgment. To one parcel of land the defendant had a deed from the officer, to the other a deed from the judgment creditor. The fact concealed from the plaintiff was the pendency of this petition for review. Was it the duty of the defendant to make it known? We think this question must be answered in the affirmative.

The pendency of the petition was an existing fact and a material one as bearing upon the title. The sale was more than one year after the judgment. If no petition had been then commenced the title would have been safe from any attacks from that quarter. The petition pending was directly connected with the title, in fact an infirmity in it, a knowledge of which was necessary to enable the plaintiff to form an intelligent opinion of the value of that which he was about to purchase.

Sugden in his work on Vendors, 8th Am. Ed. 9, says: "If a seller knows and conceals a fact material to the title, relief cannot be refused to the purchaser." See Kerr on Fraud and Mistake, 99–102.

So where "the means of information are not equally accessible to both, but exclusively within the knowledge of one of the parties, and known to be material to a correct understanding of the subject; and especially when one of the parties relies upon the other to communicate to him the true state of facts to enable him to judge of the expediency of the bargain." *Prentiss* v. *Russ*, 16 Maine, 30, 32, 33.

The testimony shows that the defendant had this knowledge while the plaintiff had not, and such was its nature and the profession of the two men, that it may with propriety be said to have been exclusively with the defendant; and, for the same reasons, as well as from other testimony, the jury would have

been fully justified in the conclusion that the purchaser relied upon the seller to communicate all such facts.

But the testimony goes further than this. The defendant put himself in the position that by withholding the fact he must almost necessarily have conveyed a false impression. He not only stated that his title was good but he gave its origin and history, producing the papers to confirm it.

If he gives any fact he must give all the qualifications of that fact, otherwise he fails to give a true statement. When he says his title is good, and withholds an important fact which tends to impair it, he states more than the truth will authorize. When he produces a judgment from a court of competent jurisdiction with no apparent defect in it, as the foundation of his title, the plaintiff certainly had a right to understand him as asserting that, at least so far as he knew, there was no infirmity connected with that judgment, no existing fact growing out of it, which might destroy it as a muniment of title.

What explanation the defendant may be able to give of these facts we have now no occasion to inquire. We have only the testimony of the plaintiff before us, and from that we think he is entitled to have his case submitted to a jury. It is said that notwithstanding the reversal of the judgment, the plaintiff obtained a good title to that part sold as an equity. As there is no claim that the sale has been rescinded this question is not important now. If the case should go to trial other facts might and probably would be produced bearing upon this point, and if his title to that should prove good it would go in mitigation of damages.

Exceptions sustained.

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

FRANKLIN COMPANY in equity *vs.* LEWISTON INSTITUTION FOR SAVINGS.

Androscoggin. Decided December 18, 1877.

Corporations. Contracts ultra vires.

Corporations possess such powers, and such only, as the law of their creation confers upon them ; and when created by public acts of the legislature, parties dealing with them are chargeable with notice of their powers, and the limitations upon them, and cannot plead ignorance in avoidance of the defense of *ultra vires.*

The trustees of the Lewiston Institution for Savings subscribed for $50,000 of the capital stock of the Continental Mills, and having no money to pay for it, the Franklin Company, another corporation, paid that amount to the Continental Mills, taking the notes of the savings institution therefor, and a certificate of the stock in their own name as collateral security for the payment of the notes. *Held,* that the action of the trustees of the savings institution was *ultra vires;* that it is not within the authority of savings institutions, at a time when they have no funds for investment, to purchase stocks or other property, not needed for immediate use, on credit, and thus create a debt binding upon the institution; that the Franklin Company, having participated in the illegal transaction, could not claim the privileges of a *bona fide* holder of commercial paper; and that the savings institution, having received no benefit from the transaction, was not estopped to set up the defense of *ultra vires.*

Semble, upon the authorities cited, that in the United States, corporations cannot purchase, or hold, or deal in the stocks of other corporations, unless expressly authorized to do so by law.

W. P. Frye, J. B. Cotton & W. H. White, with whom was *N. Webb,* for the plaintiffs.

N. Morrill, for the defendants.

WALTON, J. The claim which we are required to pass upon originated in this way :

In April, 1875, the trustees of the Lewiston Institution for Savings subscribed for $50,000 worth of the capital stock of the Continental Mills, one of the manufacturing corporations doing business at Lewiston. The savings bank had no money with which to pay for the stock, and in July following the Franklin Company, another corporation doing business at Lewiston, agreed to pay the $50,000 to the Continental Mills, take the notes of the savings bank for the amount, and hold the stock as security. Five

notes for $10,000 each, payable in one year from date, with interest semi-annually, were prepared and signed by the treasurer of the savings bank, and sent to William B. Wood, at Boston; and he, being treasurer of the Continental Mills as well as treasurer of the Franklin Company, paid the money in his latter capacity to himself in his former capacity, and afterwards, (when does not appear) made a certificate, signed by himself and the president of the Continental Mills corporation, stating that the Franklin Company was the "proprietor of five hundred shares in the Continental Mills, as collateral." It does not appear that this certificate was ever delivered to the savings bank, or offered to them, or that any of its officers ever knew of its existence. And it does not show upon its face that the savings bank has any interest in the stock, or connection with it whatever. The Lewiston Institution for Savings having become insolvent, in May, 1876, commissioners were appointed to receive and decide upon all claims against the institution. The Franklin Company presented for allowance the five notes above described, and afterwards filed a claim for $50,000 and interest, as so much money paid out by the Franklin Company at the request and for the benefit of the savings institution. Both claims were rejected by the commissioners, and the case is before the law court on report agreed to by counsel. There is no other consideration for the notes, and no other basis for the claim for money paid, than the payment to the Continental Mills above described. The claims, therefore, are one in substance, although presented in two forms.

I. The first question is whether it is competent for the trustees of a savings bank, at a time when there are no funds in the bank for investment, to agree to take shares in a manufacturing corporation, and thereby create a debt binding upon the bank.

We think not. It is familiar law that a corporation possesses such powers, and such only, as the law of its creation confers upon it. The rule is stated with great uniformity.

"A corporation has only such powers as are specifically granted, or such as are necessary for carrying the former into effect; and these powers can only be exercised for the purposes contemplated by its charter." Brightley's Federal Digest, citing

Humphreville Copper Co. v. *Sterling*, 1 West. L. Mo. 126. *Beaty* v. *Knowler*, 4 Pet. 152. S. C. 1 McL. 41. *Perrine* v. *Chesapeake & Del. Canal Co.*, 9 How. 172. *Farnum* v. *Blackstone Canal Co.*, 1 Sum. 46.

"A corporation can do no acts, and make no contracts, either within or without the state which created it, except such as are authorized by its charter." Br. Fed. Dig., citing *Bank of Augusta* v. *Earle*, 13 Pet. 519. *Tombigbee R. R. Co.* v. *Kneeland*, 4 How. 16. *Runyan* v. *Coster's Lessee*, 14 Pet. 122.

"A corporation, being the mere creature of law, possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence." Marshall, C. J., in *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 636.

"An incidental power is one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it." *Hood* v. *N. Y. & N. H. Railroad*, 22 Conn. 1, and 502.

As corporations are created by public acts of the legislature, and all their powers, duties and obligations are declared and clearly defined by public law, parties dealing with them must take notice of those powers and the limitations upon them, at their peril; and will not be allowed to plead ignorance of those powers and limitations in avoidance of the defense of *ultra vires*. *Pearce* v. *Mad. & Ind. Railroad*, 21 How. 441. *Andrews* v. *Ins. Co.*, 37 Maine, 256.

"In the United States, corporations cannot purchase, or hold, or deal in the stocks of other corporations, unless expressly authorized to do so by law." Green's Brice's Ultra Vires, 95, note, citing a large number of authorities.

"It certainly needs no argument or authority to show that a corporation created for the purpose of insurance has no power to advance its moneys or obligations to sustain another corporation in a similar or dissimilar business." Opinion of the court in *Berry, receiver*, v. *Yates*, 24 Barb. 199.

"When the directors of the company subscribed for stock in a building corporation, whatever may have been their motive, they transcended the powers conferred upon them, and departed from

the legitimate business of the company, as much as if they had subscribed for stock in a manufacturing or steamboat company; and such subscription, in our opinion, is not binding upon the defendants, and any payments made upon it to the plaintiffs would be money received without consideration." Opinion of the court in *Mutual Savings Bank* v. *Meriden Agency Co.*, 24 Conn. 159.

If a corporation can purchase any portion of the capital stock of another corporation it can purchase the whole, and invest all its funds in that way, and thus be enabled to engage exclusively in a business entirely foreign to the purposes for which it was created. A banking corporation could become a manufacturing corporation, and a manufacturing corporation could become a banking corporation. This the law will not allow; and it has been held that notes given by a manufacturing corporation for the purchase of shares in a bank are not collectable. *Sumner* v. *Marey*, 3 W. & M. 105. That the notes given by a railroad corporation, for the purchase of a steamboat to be run in connection with its road, are not collectable. *Pearce* v. *Railroad*, 21 How. 441.

It would seem, therefore, upon principle as well as authority, that it is not within the authority of the trustees of a savings bank to invest its funds in the stock of manufacturing corporations, unless expressly authorized so to do by its charter, or the public laws of the state.

But we do not rest our decision upon this ground. We rest it upon the broader ground that it is not competent for the trustees of a savings bank to purchase on credit property of any kind, not needed for immediate use, or the investment of existing funds. No such power is expressly conferred upon them; nor do we think it can be sustained as an incidental power.

It is suggested that it may be convenient in this way to provide, in advance, for the investment of funds that may afterwards come into the possession of the bank. We think the creation of debts, by corporations or individuals, for no other purpose than to provide a ready way to dispose of future acquisitions, a proceeding of very questionable convenience; that in the great

majority of cases, it would be likely to prove, as it did in this case, very inconvenient. But it is a sufficient answer to say that the law imposes no duty upon the trustees of savings banks to provide for the investment of future funds or future deposits. Their whole duty is performed when they have provided safe investments for the funds already committed to their care. To hold that they may create debts binding upon existing depositors for the benefit of future depositors, whose money, after all, may never be committed to their care, would be a doctrine as startling as it would be unprecedented.

II. The second ground on which the claim of the Franklin Company is sought to be maintained is this: It is said that where a corporation is authorized to hire money for any purpose, mere knowledge on the part of the lender that it is to be used for an illegal purpose will not preclude a recovery. This may be true. But the claim in this case is not for money lent. It is for money paid. And the latter is the only claim which the evidence tends to support. Ordinarily such a distinction is unimportant. But in this case it is vital. It is the hinge on which the case turns. It may be true that when money is lent, and the borrower is left free to use it as he pleases, mere knowledge on the part of the lender that the borrower intends to use it for an illegal purpose will not bar a recovery. But it is well settled that if it be a part of the agreement that the money shall be used for an illegal purpose, or anything is done by the lender in furtherance of such a use of the money, a recovery therefor cannot be had. Thus, the mere knowledge of the lender that the borrower of money intends to gamble with it, if, by the terms of the agreement, the latter is left free to use it as he pleases, may not constitute a bar to a recovery of it. But it is well settled that if the money is lent for the express purpose of enabling the borrower to gamble with it, a recovery cannot be had. *Cannan* v. *Bryce*, 3 Barn. & Ald. 179. *McKinnell* v. *Robinson*, 3 M. & W. 434. *Tracy* v. *Talmage*, 14 N. Y. 162. As already stated, there is no claim in this case for money lent. And the evidence would not support such a claim if there was one. The money was never for a moment in the possession of the bank. Never, for a moment, did the

bank possess either the right or the power to use the money as it pleased. The agreement was that the Franklin Company should pay for the stock for which the trustees of the bank had subscribed, and take the stock and hold it as security. We thus see that by the very terms of the agreement the money was to be applied to a specified purpose, and that purpose an illegal one. We use the word "illegal," not in the sense of *malum in se*, nor *malum prohibitum*, but in the sense in which it is used to describe the unauthorized acts of corporations—acts and contracts *ultra vires*.

"The contracts of corporations which are not authorized by their charters are illegal, because they are made in contravention of public policy. . . . Although the unauthorized contract may be neither *malum in se*, nor *malum prohibitum*, but, on the contrary, may be for some benevolent or worthy object,—as to build an almshouse or a college, or to purchase and distribute tracts or books of instruction—yet, if it is a violation of public policy for corporations to exercise powers which have never been granted to them, such contracts, notwithstanding their praiseworthy nature, are illegal and void." Selden, J., in *Bissell* v. *Railroad Companies*, 22 N. Y. 258, 285.

"Any application of, or dealing with, the capital, or any funds or money of the company, which may come under the control or management of the directors, or governing body of the company, in any manner not distinctly authorized by the act of parliament, is, in my opinion, an illegal application or dealing." Lord Langdale, in *Solomons* v. *Laing*, 12 Beavan, 339.

These extracts are to show the sense in which the word "illegal" is used when employed to describe the unauthorized acts and contracts of corporations. And, with respect to such acts and contracts, it has been very aptly said that the powers and franchises of corporations are grants from the government; that it would be just as reasonable and just as legal to allow one who has a patent for one hundred acres of land, to take possession of two hundred acres, as to allow a corporation to usurp and exercise a power not conveyed to it in its charter.

III. Another ground on which the Franklin Company claims

to recover is that, when a contract has been executed, in whole or in part, and the corporation has thereby received a benefit, a recovery may be had by the other contracting party to the extent of the benefit thus conferred, notwithstanding the contract was *ultra vires*. It is a sufficient answer to this argument to say that the case fails to show that the savings bank has been thus benefitted. The $50,000 paid by the Franklin Company was paid directly to the Continental Mills. Not a cent of it ever came into the possession of the savings bank. The stock for which the $50,000 was paid was issued directly to the Franklin Company. The title never for a moment vested in the savings bank. Although, by the terms of the agreement, the Franklin Company was to hold the stock as collateral security merely, still, the agreement being *ultra vires*, cannot be enforced. Nothing possessing the slightest intrinsic value, not even a right of action, was ever secured to or vested in the savings bank. There is absolutely nothing on which a *quantum meruit* or a *quantum valebat* claim can be sustained.

Decision of the commissioners affirmed.
Claim of the Franklin Company disallowed.

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

ABBIE OSBORNE, administratrix of Stephen Osborne, *vs.* KNOX & LINCOLN RAILROAD.

Sagadahoc. Decided December 19, 1877.

Master and Servant. Railroad. Action. Negligence.

A person who voluntarily assists the servant of another, in a particular emergency, cannot recover from the master for an injury caused by the negligence or misconduct of such servant; he can impose no greater duty on the master than a hired servant.

A servant cannot recover for an injury incurred in assisting a fellow servant, either voluntarily, or on the request of such servant.

ON REPORT.

CASE for negligence. Stephen Osborne, the plaintiff's intes-

tate, the servant of the railroad corporation, and master of its ferry-boat, whose duty it was to transport the cars of the defendant company across the Kennebec river, between Bath and Woolwich, left the boat, which was lying at the wharf in readiness to transport the loaded freight cars from Woolwich to Bath, and, at the request of the conductor, unshackled the loaded cars by pulling the bolt which connected them with the others, and in doing so was caught between the bunters and crushed, and died from the effects thereof, some fourteen hours after. The allegation was, that the injury was occasioned through the negligence of the company in not providing suitable couplings for the cars, that they were not the safest then known and in general use; and that the cars were not provided with a sufficient number of brakemen, and that the engines and shifting cars were negligently moved against the loaded freight cars without warning to the intestate, and without any brakemen to apply the brakes, and were forced with violence against his body.

The plea was the general issue.

F. Adams, for the plaintiff.

H. Tallman & C. W. Larrabee, for the defendants.

APPLETON, C. J. This is an action of the case against the defendants to recover damages for their negligence by which the plaintiff's intestate was so seriously injured in attempting to remove a bolt for the purpose of uncoupling certain loaded freight cars, that he died in a short time afterwards.

The plaintiff's intestate was an employee of the defendant corporation, and the injury occurred while in their service.

If the injury was the result of accident solely, the defendants being without fault, the action is not maintainable.

If the injury was caused by the negligence or misconduct of fellow servants, the law is well settled that a servant thus injured cannot maintain an action against his master for such injury. *Lawler* v. *Androscoggin Railroad*, 62 Maine, 463. *Hodgkins* v. *Eastern Railroad*, 119 Mass. 419. *Sammon* v. *N. Y. & H. Railroad*, 62 N. Y. 251.

Servants must be supposed to have the risk of the service in

their contemplation when they voluntarily undertake it and agree to accept the stipulated remuneration. *Plant* v. *Grand Trunk*, 27 Up. Canada, Q. B. 78. *Searle* v. *Lindsay*, 11 C. B. N. S. 429. *Gibson* v. *Erie Railway*, 63 N. Y. 449.

It makes no difference in regard to the liability of the defendants that the plaintiff's intestate came into the service voluntarily, as to assist the defendants' servants in a particular emergency and was killed by their negligence, for by volunteering his services he could not have greater rights nor could he impose any greater duty on the defendants than would have existed had he been a hired servant. *Degg* v. *Midland Railway*, 1 Hurls. and Nor. 773. The same rule of law is applicable if a servant, of his own motion at the request of a fellow servant, should undertake temporarily to perform the duties of a fellow servant.

If the plaintiff's intestate, through his own want of care, contributed to the injury which resulted in his death, this action must fail. Complaint is made that the cars were so constructed as to be dangerous in coupling and in uncoupling. But the plaintiff's evidence shows that they were such cars as had always been in use by the defendant corporation and by other railroad corporations in this state. Such as they were was well known to the servants of the defendant.

It was held in *Indianapolis B. & W. Railway* v. *Flanigan*, 77 Ill. 365, that a railroad company was not liable for an injury received by an employee, while coupling cars having double buffers, simply because a higher degree of care is required in using them than in those differently constructed. So in *Fort Wayne, &c., Railroad* v. *Gildersleeve*, 33 Mich. 133, it was decided that a railroad company which used in its trains an old mail car, which was lower than others, was not liable to its servant, who knowingly incurred the risk, for an injury resulting from the coupling of such old car with another, though the danger was greater than with cars of equal height.

The plaintiff's evidence shows that one should not go inside the bunters to lift the pin when unshackling cars. "We stand against them and reach over them. We stand on the outside of the bunters, reach over and pull the pin out. I can do it easily. I

guess any one can. I judge that, the customary way of unshackling. If the cars were standing apart, so that there was room to pass in I should not intend to pass in between the bunters." Such is the testimony of one of the plaintiff's witnesses. Another says: "In a moving train it is difficult to lift a bolt without coming in contact with the dead wood. Situated as this train was, I think it was dangerous. There was no trouble in waiting till the train was still." There can be no doubt that the injury sustained arose from a neglect of the obvious precautions which the business engaged in so imperatively required.

The evidence fails to show an insufficient number of servants, and as already stated, so far as the injury arose from the negligence of fellow servants, it was at the risk of the servant injured.

Plaintiff nonsuit.

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

STEPHEN FOGG *vs.* THOMAS LITTLEFIELD.

Androscoggin. Decided December 29, 1877.

Attachment. Trial. Waiver. Expression of opinion.

In an action against a sheriff for seizure of oxen, where the defense was a waiver by the plaintiff of the statute right of exemption, the presiding justice, after saying to the jury that the debtor might waive the privilege and the waiver be proved by any evidence that should satisfy them that such was his intention, that the waiver might be by words or acts or both, instructed them further: "Or he may so conduct himself that by his manner he may give the officer to understand he does not claim any privilege of exemption, but rather assents that the property may be attached." *Held*, that the instructions taken with the context cannot be construed as permitting the jury to find any other than a voluntary and intentional waiver by the debtor of his exemption privilege.

In the same action the instruction followed: "If the plaintiff gave his consent and said to the officer, 'there, all that property in that yard, comprising these oxen and those cows are mine, and you can take the oxen or any of the rest of them you see fit,' that would be a waiver, the action cannot be maintained," followed by a statement of the plaintiff's denial of this and of his version of the matter and "If this was all he said the jury would probably come to the conclusion there was no consent." *Held*, that this

instruction was not a decision by the judge of any question of fact within the province of the jury.

On exceptions.

Trespass, against a sheriff for taking and carrying away one pair of working oxen, valued at $300.

Plea, general issue with a brief statement that he took the oxen as sheriff, by William Keen, his deputy, by virtue of a writ, and that the oxen were disposed of according to law, to satisfy the judgment afterwards rendered in the action in which they were attached.

At the trial, the plaintiff claimed that the cattle were exempt from attachment by the provisions of R. S., c. 81, § 59. Evidence was introduced by the defendant tending to prove, and by the plaintiff tending to disprove, that at the time of the attachment, the plaintiff, by words and acts, waived his privilege of exemption of the cattle, and consented that the defendant might attach them on the writ then in his hands.

Upon this point of the alleged waiver of exemption and consent to the attachment, the presiding judge instructed the jury as follows:

"He (the deputy-sheriff Keen) went to the farm of this plaintiff to serve the writ. The question is, what was done there, what took place. If he went without saying anything to the plaintiff, and took that pair of cattle and went off with them as being attached on the writ, if Mr. Fogg did not own any horse, or mule or other oxen, then that pair of oxen would be exempt by law, and the officer, Mr. Keen, would be liable; because the mere standing still, the mere silence of the debtor on seeing an officer go and attach a pair of cattle and drive them off would not be giving his consent. But I will say to you this, that the exemption of a pair of cattle is a personal privilege to the owner, and that owner has a right to waive it if he sees fit. If a man has an only cow, a poor man, all the property he has in the world, and he has a family depending on it, he may go and mortgage the cow. A sale under an attachment is nothing more than a statute sale, whereas a voluntary sale by the debtor is simply

another mode of transfer. While the debtor may sell his cow, he may also voluntarily waive his privilege of exempting his cow, and give an express consent that the officer may attach the cow and sell it for his debt. How may that waiver be brought about? How shall it be proved? Why, by any evidence that shall satisfy the jury that that was the intention of the parties at the time.

"A man may waive the exemption privilege by words; he may do it by acts; he may do it by words and acts both; or he may so conduct himself at the time that by his manner he may give the attaching officer to understand that he does not claim any privilege of exemption, but rather assents that the property may be attached.

"If he (the plaintiff) gave his consent, and said to Mr. Keen, 'There, all that property in that yard, comprising these oxen and those cows, are mine, and you can take the oxen or any of the rest of them you see fit,' there is his consent,—that would be a waiver. If that is true you need not go any further,—the action cannot be maintained. But, the defendant says that is not true; he says he told him 'you perform your duty according to law and I will attend to my business.' If that is all he said, you would come to the conclusion, probably, that there was not any consent; that that was as much as to say, 'Hands off; you act at your peril; I stand on my legal rights.' There you could not find much express consent; could you see any assent?"

Other appropriate instructions were given, but those stated are all that were material upon the subject matter of waiver and consent. No instructions upon the point of waiver and consent were requested by the plaintiff.

The verdict was for the defendant; and the plaintiff alleged exceptions.

R. Dresser, for the plaintiff, admitted the correctness of the instructions in the first paragraph reported of the charge and of the instruction that one may waive the exemption privilege, by words or acts or both, but contended that it was error to instruct the jury that a man may waive the privilege by so conducting himself at the time "that by his manner he may give the officer to understand that he does not claim any privilege of exemption, but rather assents

that the property may be attached;" that it implied that the debtor's right to exemption depended to some extent upon whether he claimed the exemption, and that the debtor might waive his privilege without intending it. *Wentworth* v. *Young*, 17 Maine, 70.

To the last paragraph reported of the charge the counsel objected that it was a partial statement of the evidence and amounted to an expression of an opinion that if the plaintiff used that language that would be a waiver; that it took from the jury the question of the effect of the evidence.

I. W. Hanson & J. M. Libby, for the defendant, said in substance that the language criticised did not purport to be the exact words of the witness, but were the words of the judge by way of illustration, similar in fact to the words actually used by the plaintiff, and coupled with the express condition "if the plaintiff gave his consent," overlooked in the argument of the plaintiff's counsel; and that the charge as a whole left the question of fact fairly to the jury.

Barrows, J. The plaintiff's counsel admits that "a debtor may waive his privilege and allow his exempted property to be attached, and that he may signify such waiver by acts as well as words." But he complains because the judge instructed the jury that "he (the debtor) may so conduct himself at the time that by his manner he may give the attaching officer to understand that he does not claim any privilege of exemption, but rather assents that the property may be attached." "If he (the plaintiff) gave his consent and said to Mr. Keen, (the officer) 'There, all that property in that yard, comprising these oxen and those cows, are mine, and you can take the oxen or any of the rest of them you see fit,' there is his consent,—that would be a waiver. If that is true you need not go any further, the action cannot be maintained."

This, it is ingeniously argued, may have misled the jury to believe that the fact of waiver did not depend upon the debtor's intention, but might exist when the officer misconstrued the debtor's words and acts, and that the latter clause is objectionable

as a decision by the judge of what words and acts would amount to a waiver, when he should have left it to the jury to say whether there was one.

Had this been all that was said to the jury in this connection, it is possible the jury might have so understood it. But the context also should be examined to see what idea was in fact conveyed to them.

Now the jury had just been distinctly and carefully instructed that "the mere standing still, the mere silence of the debtor on seeing an officer go and attach a pair of cattle and drive them off, would not be giving his consent." Then, after telling the jury that "the exemption of a pair of cattle is a personal privilege to the owner, and that owner has a right to waive it if he sees fit," and likening it to a poor man's right to sell or mortgage his only cow, and instructing them that as he may sell his cow, "he may also voluntarily waive his privilege of exempting his cow, and give an express consent that the officer may attach it and sell it for his debt," he answers the question how shall such waiver be proved, by saying that it may be proved "by any evidence that shall satisfy the jury that that was the intention of the parties at the time." "A man may waive the exemption privilege by words; he may do it by acts; he may do it by words and acts both;" and then comes the language before recited, upon which plaintiff bases his exceptions.

Now, from these instructions we do not believe that a jury of average intelligence would be liable to get the impression that anything short of a voluntary intentional communication by the debtor to the officer of his willingness to waive the exemption, and consent to an attachment would amount to a waiver, or that any misconception by the officer of his meaning and intention would have that effect; or that anything would be a waiver which did not satisfy the jury that such was the intention of the party at the time.

Jurors may fairly be supposed to accept the obvious import of the instructions upon any given point, but not, as is often the case with excepting counsel, to use a critical nicety of interpretation, to extract a meaning inconsistent with propositions that have

been distinctly stated. A broad distinction had been laid down in the outset between a waiver and a mere non-claim of the exemption, and the elements of voluntariness and intention on the part of the debtor were made too prominent to be overlooked when the jury were considering whether he gave the officer to understand that he did not claim any privilege of exemption but rather assented to the attachment.

The plaintiff's position, that the instructions given by the judge amounted to a decision of the question what language would constitute a waiver, and that he thereby took from the jury their right to decide whether there was or was not a waiver here, is based upon the idea that "what a debtor says in such cases does not necessarily or conclusively indicate what he intends to express or really does express,"—that "the significance of words spoken under excitement is often modified by the tone and manner of the speaker and by his actions in connection with his words." We will not stop to determine whether one who uses language directly fitted to convey, and which does, in fact, convey to the mind of an officer the idea that he assents to the attachment of exempted property, would not be bound by the same kind of an equitable estoppel which forbids a man to assert a title to property which he has seen sold by a third party to an innocent purchaser without making known his claim.

We will regard the instructions as applied to the question of waiver only. The attention of the jury had already been called to the acts and manner of the debtor and to their possible effect in giving the officer to understand that he assented to the attachment, and all these things were to be looked at in determining whether the evidence was such as satisfied the jury that he so intended. To reach his conclusion that the judge decided a question as to the import and intent of the language, which should have been left to the jury, the counsel must ignore the first member of the sentence of which he complains. "If he gave his consent, and said," etc., runs the instruction, thus leaving it to the jury to find under previous directions whether he gave his consent; and it is plain from what immediately follows that all that was designed was to call the attention of the jury to

the conflicting accounts given by the plaintiff and officer as to what occurred at the interview. See *Pope* v. *Machias W. P. Co.*, 52 Maine, 535, 539, for instructions upon the subject of waiver, which, though differently framed, are substantially of similar import with those here given.

The sentences complained of, when carefully examined in connection with the context, do not admit of the construction which plaintiff's counsel seeks to put upon them.

Exceptions overruled.

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

HENRY H. PUTNAM *vs.* EBEN WOODBURY.

Aroostook. Decided January 14, 1878.

Post-office. Action. New trial.

A promise to pay a mail contractor for performing his contract with the post-office department is without consideration.

When a fact constituting a defense known to the plaintiff and unknown to the defendant is discovered after verdict, it furnishes a good ground for a new trial, the defendant being in no fault for his ignorance of such fact.

ON MOTIONS.

ASSUMPSIT, for carrying the mails between Houlton and Danforth from March 14 to April 10, 1872; 24 trips at $10 per trip, $240.

Plea, general issue with brief statement that the plaintiff was mail contractor on the same route.

The verdict was for the plaintiff, $159; which the defendant moved to set aside as against law and evidence. He also filed a motion for new trial on the ground of newly discovered evidence.

W. M. Robinson & J. B. Hutchinson, for the defendant.

L. Powers, for the plaintiff.

APPLETON, C. J. The defendant is the postmaster of Houlton. The plaintiff is a mail contractor. This suit is for carrying the

mail two miles each way additional to, and not required by his contract, upon the alleged promise of the defendant to pay for such extra work.

The evidence of such agreement is very conflicting, but we should hardly feel authorized to set aside the verdict as against evidence.

But since the trial, the defendant moves for a new trial on the ground of newly discovered evidence, and offers to prove that the change of route was made with the consent of the post-office department, at the instance of the plaintiff and subject to the proviso that there should be no additional expense. This is very important and material; for the defendant would not be liable upon his promise to pay the plaintiff for carrying the mail in accordance with his contract with the postmaster general.

The defendant does not seem in fault for not knowing the change of route made or authorized by the department at the instance of the plaintiff.

New trial granted for newly discovered evidence.

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

OLIVE FENDERSON, administratrix of Cyrus Fenderson, *vs.* SAMUEL BELCHER, administrator of Reuben Fenderson.

Franklin. Decided January 16, 1878.

Lien. Executors and administrators.

The lien created by R. S., c. 75, § 11, can be enforced only "by suit and attachment of the share within two years after administration granted" on the estate from which the share descends.

ON FACTS AGREED.

ASSUMPSIT, under R. S., c. 75, § 11, to enforce a lien on Reuben Fenderson's share in his father's estate.

I. Cyrus Fenderson, the father, died March 18, 1872, intestate; his estate is solvent; Olive Fenderson was appointed administratrix of his estate May 7, 1872.

II. Reuben Fenderson was the son and heir of Cyrus Fenderson; he died February 25, 1875; his estate is represented insolvent; Samuel Belcher was appointed administrator of his estate on the first Tuesday of May, 1875, and the representation of insolvency was made on the first Tuesday of September, 1875.

III. Reuben Fenderson, at the time of his father's decease, was indebted to him to a large amount; this indebtedness still exists; he inherited both real and personal estate from his father; and he had not come into possession of any part of his inheritance at the time of his decease.

Submitted without argument.

S. C. Belcher, for the plaintiff.

S. Belcher, for the defendant.

VIRGIN, J. The lien created by R. S., c. 75, § 11, can be enforced only "by suit and attachment of the share within two years after administration granted" on the estate from which the share descends.

Administration was granted on Cyrus Fenderson's estate on May 7, 1872; while this action was not commenced "within two years" thereafter, but on February 18, 1876. Therefore, according to the terms of the report, the entry must be,

Plaintiff nonsuit.

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

JAMES D. ROBINSON *et al. vs.* John B. STUART *et als.*

Sagadahoc. Decided January 16, 1878.

Bills of lading. Shipping. Evidence.

Bills of lading are transferable by indorsement.

The owners of a vessel are liable *in solido* for its debts.

The admissions or statements of a defendant, who is a competent witness but does not testify, must be regarded as true when neither contradicted nor in any way modified by other testimony.

ON REPORT.

ASSUMPSIT, for money had and received. Date of writ, August 22, 1871. The plaintiffs alleged that in August, 1865, they shipped on board the bark Savannah, at Bath, of which one Stinson was master, 95 tons of hay of the value of $2600, to be transported to New Orleans to be sold by Stinson; that in his capacity of ship master, he sold the hay for $2586.07, and that deducting freight and cargo, there was a balance of $1026.87 in the hands of the captain, which amount was received by the defendants as owners, whereby they became liable and in consideration thereof promised. One of the defendants, T. J. Southard, a sixteenth owner, at the April term, 1877, pleaded the general issue.

The evidence tended to show that the bills of lading were made out to one Houdlette, who furnished most of the hay, and were by him assigned to the plaintiffs; that the captain used the money in disbursing the expenses of the vessel.

H. Tallman & J. S. Baker, for the plaintiffs.

W. T. Hall & J. W. Spaulding, for the defendant, Southard, contended in substance that the facts relied on by the plaintiffs were not sufficiently proved by legal evidence; that it was a hard case, that their client, the only responsible owner of a small share, who had received none of the money, should be held to pay the whole bill. But little force should attach to the plaintiff's testimony of Southard's admissions, made so long ago, or to the circumstance that Southard did not take the stand to deny statements attributed to him ten years before.

APPLETON, C. J. It appears that one James Houdlette, having a bill of lading of a quantity of hay shipped on board the bark Savannah for New Orleans, indorsed the same to the plaintiffs, who thus as between them and Houdlette acquired a good title to the hay. Bills of lading are transferable by indorsement and pass the title to the indorsee. *Winslow* v. *Norton*, 29 Maine, 419. There is nothing in the evidence which discloses any right on the part of the defendants to contest the plaintiff's title.

The owners of a vessel are liable *in solido* for its debts. 1 Parsons on Shipping and Admiralty, 100.

The defendant Southard was a part owner of the bark to the extent of one-sixteenth. The other owners do not defend. It does not appear whether they are living or within the state. No plea in abatement has been filed. Judgment, therefore, must be rendered for the amount due against such of the owners as are parties and upon whom due service has been made.

The hay was sold at New Orleans by the master, who was consignee, and the proceeds applied to disburse the expenses of the vessel. The plaintiffs testify that they called on the defendant Southard, who did not contest the liability of the owners of the bark but referred him to H. S. Hagar, the ship's husband, by whom the business relating to the vessel had been transacted. Hagar, upon being called upon, admitted the liability of the vessel. The statements and admissions of Southard as testified to by the plaintiffs not having been denied or in any way modified, must be taken as true.

Defendants defaulted.

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

ISAAC T. EATON *vs.* NEW ENGLAND TELEGRAPH COMPANY.

York. Decided February 3, 1878.

Evidence. Exceptions.

An entire disclosure made by a party to a suit, as trustee in another suit, may be read in evidence against him, to show that he omitted to claim therein to be the owner of the property he sues to recover for, if the omission was inconsistent with such claim, although the disclosure contains matters foreign to the point at issue.

Upon the question, whether A was the owner of certain certificates of stock in his possession or whether he was merely the custodian of them for B, the certificates having been issued to A, and bearing upon their backs assignments by A to B, it is competent for B to show that A at the same time held in his possession as custodian for B other certificates of shares in the same company, issued directly to B and belonging to B.

An assignee of certificates of shares of stock, who leaves the certificates, with the assignments unrecorded, in the possession of the assignor, is not thereby guilty of negligence so as to be estopped to set up his title against a person who claims title to the certificates through an alteration of the assignments by the fraud and forgery of the assignor.

Exception does not lie to an instruction in the charge of a judge, which was pertinent and proper upon the question he was presenting to the jury, but which would have needed some qualification as applicable to another point involved in the facts of the case, unless the attention of the judge is called to such point by counsel at some stage of the trial before the cause is committed to the jury.

ON EXCEPTIONS AND MOTION to set aside the verdict which was for the defendants.

CASE IN TORT, alleging, in substance, that one Isaac W. Eaton, October 23, 1873, being the owner of thirty shares of the capital stock of the defendant company, and holding certificates thereof of the value of $100 each, then, for a valuable consideration, sold and assigned the said shares by his indorsement and delivery of the certificates to the plaintiff; that the plaintiff then exhibited the transfers and certificates to the treasurer of the company and offered to surrender them to him, and demanded that the transfers be entered upon the books of the company and a new certificate of the thirty shares be issued by the company to the plaintiff, all of which the said company refuse to do, to the damage, etc. The plea was the general issue.

The evidence showed that Isaac W. Eaton, the father of the plaintiff, was formerly secretary of the defendant company; that December 7, 1867, a certificate of fourteen shares of the capital stock of $50 each was issued to him, signed by himself as secretary and by the secretary and treasurer, and that July 13, 1872, a certificate of sixteen shares similarly signed was issued to him; that both certificates were transferred by indorsment signed by Isaac W. Eaton, and that the name of Richard Palmer was first inserted as transferee. Palmer's name was afterwards erased and the name of the plaintiff inserted at the apparent date of October 13, 1873. Richard Palmer died November 14, 1873. Isaac W. Eaton ceased to act as secretary about June, 1874.

The plaintiff claimed that the insertion of Palmer's name was for the purpose of executing a contemplated arrangement between Isaac W. Eaton and Palmer which never came to execution, and that the certificates were never delivered to him. The defendants contended that they had been delivered to Palmer and left by him in Eaton's custody, to enable Eaton to act as a director; that the erasure of Palmer's name and the insertion of the plaintiff's were fraudulent and void.

The defendants, against the plaintiff's objection, put in evidence plaintiff's disclosure in the action *Samuel W. Hamilton et al.* v. *Isaac W. Eaton & Isaac T. Eaton*, trustee, signed and sworn to by the plaintiff October 5, 1875, in which, after disclosing certain conveyances by his father to him, not including the shares in question, he gave an affirmative answer to the question: "Was this all the personal property you have had of your father in any way since 1871?"

After the verdict, the plaintiff filed exceptions to the admission of the trustee disclosure; also because the court allowed the witness, Stephen B. Palmer, against objection, to answer the question: "Whether you saw in the hands of Isaac W. Eaton, at the same time, other certificates issued to Richard Palmer;" also to the instruction to the jury, "that if there had been a perfected contract of transfer to Richard Palmer by a delivery to him of the certificates, and they were left with Eaton as the custodian of Palmer, he would have no right to change the transfer, and such

an alteration as appears to have been made in the transfer would be entirely unauthorized, and would convey the plaintiff no title; it would be void in law and the plaintiff would stand without title and without right to transfer."

H. Fairfield, for the plaintiff, argued in favor of the motion.

R. P. Tapley, on the same side, in favor of the exceptions, cited R. S., c. 46, § 11, which provides that "when the capital of a corporation is divided into shares, and certificates thereof are issued, they may be transferred by indorsement and delivery, but such transfer of shares is not valid except between the parties thereto until the same is so entered on the books of the corporation as to exhibit the names and residences of the parties, the number of the shares and the date of their transfer."

He contended that even if a perfected contract of transfer had been made to Palmer by this indorsement and delivery and the certificates returned to him as custodian, it was not valid except between the parties thereto until the entry required by law was made upon the defendants' books, and never having been so entered the plaintiff was unaffected by it. *Oxford Turnpike* v. *Bunnel*, 6 Conn. 552. *Fisher* v. *Essex Bank*, 5 Gray, 373. *Marlborough Manufacturing Co.* v. *Smith*, 2 Conn. 579. *Northrop* v. *The Newton & Bridgeport Turnpike Co.*, 3 Conn. 544. *Boyd* v. *Rockport Steam Cotton Mills*, 7 Gray, 406.

I. T. Drew & H. K. Bradbury, for the defendants.

PETERS, J. The defendants are sued for preventing the plaintiff from becoming the recorded owner of certain shares in their company. The plaintiff presented to the defendants certain certificates of shares, originally issued to Isaac W. Eaton and by him assigned to the plaintiff, for the purpose of procuring a transfer to himself upon the books of the company. The proffer was rejected by the company for the alleged reason that the same shares had been previously assigned by the same Isaac W. Eaton to one Palmer, the true owner thereof, although such assignment was not recorded, and that after Palmer's death, by an alteration and forgery by Isaac W. Eaton, the assignment had been changed

by inserting the name of the plaintiff instead of Palmer's name as assignee. The case comes up upon motion and exceptions, the defendants getting the verdict.

The motion is much relied on by the losing party. The facts were few. It seems that at a time while the certificates were in Isaac W. Eaton's hands they bore on their backs assignments to Palmer. With the jury the case must have hinged on the point, whether Isaac W. Eaton had ever sold the shares to Palmer or not. The plaintiff claimed that the so-called assignment was a writing merely preparatory to an intended sale, perhaps, but never used for the purpose, and therefore properly erased; and the defendants insisted that there had been a sale to Palmer perfected by delivery, and that the certificates remained with the assignor as the custodian of the assignee. The fact that the shares were once assigned upon their backs to Palmer was well established. Then, it was shown that the assignor had in his possession and keeping, at the same time he held the shares purporting to be assigned, certain other certificates of shares of the same stock standing in Palmer's name and confessedly belonging to Palmer. The plaintiff pretended that he actually purchased the shares from Isaac W. Eaton for value received. At the time of the trial Palmer was deceased. Isaac W. Eaton was present but not called. Although charged by the defense with fraud and forgery, and knowing more about the matter in contention than all the men in the world, the plaintiff (his son) kept him off the stand. Added to this, the defendants put in evidence a trustee disclosure of the plaintiff, wherein he made a full exposition of all his dealings in detail with his father for the time covered by the period of the stock transactions, but made no mention of this purchase, swearing in his disclosure that he had had no other transactions with his father more than was mentioned therein. After this evidence was admitted, the plaintiff gave not a word of explanation in relation to the disclosure or the statements which it contained. Undoubtedly, the jury found that no actual and real sale of the shares was ever made by the father to the son. And, as a most natural and reasonable deduction from that finding and the other facts, they believed there had been an actual and real and com-

pleted sale of the property to Palmer. We can see no cause to question the correctness of such a conclusion.

But the admissibility of the testimony upon which the verdict was founded is contested by the plaintiff. First, the trustee disclosure was objected to. We have no doubt that it was legally admitted. It is insisted that it laid before the jury many matters foreign to the issue. But it must be borne in mind that the point was to show what the disclosure did not contain rather than what it did contain, and therefore the whole of it was to be read in order to render the point available.

The plaintiff objected to the proof of the fact that Isaac W. Eaton held in his possession other certificates belonging to Palmer while he held these. The objection does not appear to have been against the mode of proof, being oral and not documentary, but against the fact itself as not competent to be proved. This evidence was of weight to break the force of the argument that there was no reason why Isaac W. Eaton should retain the possession of the certificates if he had sold them. It went to show the business relations of the parties. How far evidence of facts may be admissible to show the probability or non-probability of a main fact in issue, is one of the most troublesome questions in the law. Generally, collateral facts are not admissible. The evidence must be relevant. The difficulty is to decide what is and what is not relevant evidence. The best authorities clearly sustain the doctrine that "the fact of a person having once or many times in his life done a particular act in a particular way does not prove that he has done the same thing in the same way upon another and different occasion." It is sometimes permissible to show, however, what men generally have done under certain circumstances and conditions, as showing how a particular man might act under the same surroundings; and how particular sights and sounds have affected animals generally and ordinarily, as indicating what was likely to have occurred to the same kind of animal in a particular case under the same or similar conditions. 55 Maine, 438, and cases *post*. But here, the dealing inquired about was between the same persons at the same time and relating to the same kind of property. The reason of the rule which

excludes irrelevant testimony admits such as this. It would be difficult to find cases containing a precisely similar state of facts with the case at bar, but the point as decided by us is well sustained by the results in cases presenting facts analogous to it. *Trull* v. *True*, 33 Maine, 367. *Lee* v. *Wheeler*, 11 Gray, 236. *Com.* v. *Riggs*, 14 Gray, 376. *Upton* v. *Winchester*, 106 Mass. 330. *Hawks* v. *Charlemont*, 110 Mass. 110. *W. P. H. Co.* v. *Smith*, 120 Mass. 444. *Delano* v. *Goodwin*, 48 N. H. 203, 205. *Darling* v. *Westmoreland*, 52 N. H. 401. *Hollingham* v. *Head*, 4 C. B. (N. S.) 388. *Llewellyn* v. *Winkworth*, 13 M. & W. 598. Whar. Ev., § 1287; and notes; and cases cited.

Objection is made to a portion of the charge. Upon the supposition that the jury should find that there was a sale and delivery to Palmer, Eaton remaining only the custodian of the certificates for Palmer, the judge said: "Such an alteration as appears to have been made would be entirely unauthorized and would convey to the plaintiff no title. I instruct you that Mr. Isaac W. Eaton had no right to change the transfer and it would be entirely void and would pass no title to the plaintiff." This was strictly true. "The alteration" or the "transfer changed by alteration" could not of itself carry any title, because the act was forgery. No title can be obtained through the medium of forgery. Nor was Palmer guilty of negligence by placing a confidential trust in Eaton. *Waterman* v. *Vose*, 43 Maine, 504. *Belknap* v. *Nat. B. of N. Amer.*, 100 Mass. 376.

But the plaintiff insists that the instruction was erroneous in view of the statute, (R. S., c. 46, § 11) that an assignment of stock shall not be good except as between the parties until recorded. The position taken amounts to this: That, even if a title could not have been obtained through the forgery, it could have been in spite of the forgery, the plaintiff being a *bona fide* purchaser for value received. If there had been no alteration or erasure, and the plaintiff had been a *bona fide* purchaser for value and without notice of a previous sale, we are inclined to believe that the plaintiff would have been entitled to hold the shares. In such case, if not to be aided by the forgery, he should not be injured by it. He should be in as good a situation as if

no forgery had been committed. Whether he should have been charged with notice would have been a question for the jury under proper instructions, if notice or the want of it was material. If such a point had been taken at the trial, other instructions would have been necessary besides those that were given. The language of the court was appropriate to the point presented by the court. But after a most careful examination of the case and the arguments, we are satisfied that no such point was taken. The charge of the judge clearly indicated that it was not. The judge states what the "position of the parties" was and the law in relation to it. The brief of the learned counsel for the plaintiff virtually admits as much. It states the position of the parties at the trial the same as stated by the judge. It also states that "the instruction was probably given without having in mind the provision of the statute." If it was not in the mind of the court, the inference is that it was not in the mind of the counsel, for, if it had been, counsel would have communicated it to the court. It is a well settled rule, that points not taken in the trial of a cause are waived. If a presiding judge is in error as to the true positions of the parties, he should be so informed before the jury retires. In most courts, all exceptions must be taken before the jury leave the bar. By our practice, not so stringent as that, it should at least appear that the points argued in this court were raised when the cause was tried. Otherwise, a person might gain an advantage by his own neglect. He might make more by withholding than presenting his points. In *Emery* v. *Vinall*, 26 Maine, 295, 303, Whitman, C. J., said: "Every point intended to be made should be presented to the judge at the trial explicitly. If that be not done, he cannot be expected to give any opinion upon it; and, if he should not, no exceptions should lie in reference to any such point." In *Harpswell* v. *Phipsburg*, 29 Maine, 313, 315, Wells, J., said: "No request having been made to the judge presiding at the trial to charge the jury in any particular manner, an omission to do so in relation to certain principles, not then brought to his consideration, forms no ground of exception. If, in the judgment of a party, the judge omits to give appropriate instructions, his attention must be called to them, before any

objection can be taken to the alleged omission. It may often happen, upon subsequent examination, after a verdict has been rendered, that a party will be able to discover that instructions more appropriate and fit than those given could have been presented to the jury;" and he states that such discoveries cannot be used to overturn a verdict. In *Gardner* v. *Gooch*, 48 Maine, 487, 494, it was said: "If the facts in this case required the application of any rule of law which had not been given, it was the business of the counsel to ask for the appropriate instruction, and, if refused, exceptions might be sustained." In *Buckland* v. *Charlemont*, 3 Pick. 173, 175, Putnam, J., remarked: "If the point is raised in the argument at the trial, I think it is sufficient. If it is not suggested then, I think it is too late, after the verdict, to suggest it for the first time." The rule has been closely adhered to in subsequent Massachusetts cases. *Reed* v. *Call*, 5 Cush. 14. *Burke* v. *Savage*, 13 Allen, 408.

Of course the rule is not so inflexible that an exception to it might not be admitted in possible cases. It would not be in accordance with justice, however, to relax such a salutary rule here, but the reverse of it. The jury, in our judgment, would have rendered the same verdict had the ruling been as the plaintiff now contends it should have been. It was quite essential for them to find that there had never been an actual sale to the plaintiff in order to arrive at the verdict by them rendered.

Motion and exceptions overruled.

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

ROBERT G. WILEY *vs.* MARGARET WILLIAMSON.

Oxford. Decided February 15, 1878.

Deed. Mortgage.

The same rule, as to the necessity of registration, in order to give a priority of title, prevails between different assignees of a mortgage as between grantees under ordinary deeds.

A mortgagee assigned the mortgage thus: "I hereby assign to the said (assignee) the within mortgage deed, the debt thereby secured, and all my right, title and interest in the premises therein described." *Held*, that this assignment, having been recorded, transfers the mortgage title as against a prior unrecorded deed of the same land by the mortgagee, unless it is shown that the assignee had actual notice of the prior deed.

The doctrine, that a demandant cannot recover when all the deeds through or under which he claims are quitclaims, it not appearing that any of the grantors were ever in possession, cannot apply, where both sides claim to hold under titles which have descended from a common grantor.

ON REPORT.

WRIT OF ENTRY. If the plaintiff has the better title, the case to come back for trial as to amount of rents and profits; otherwise, judgment for the defendant.

Plea, *nul disseizin*, with a brief statement.

I. That the defendant was seized of the demanded premises as owner, and the plaintiff not seized and possessed, and not the owner.

II. That the plaintiff had only the title of one John Williamson, who was the original mortgagee, and had sold by quitclaim to the defendant's testator, and that at the time of the assignment he was not the owner of the premises demanded, but had sold the same to David Williamson, the defendant's testator, and they had been in open and exclusive possession since the sale by John Williamson, July 14, 1862.

Both parties claimed from the same grantor, Eames, the owner at the commencement of the transfers. David Williamson and the defendant, his widow, had been in possession of the premises from January 14, 1862, to the date of the writ, August 3, 1876, and she took by devise whatever interest he had.

The following is a synopsis of the transfers:

Mortgage, Eames to John Williamson, dated March 14, 1859, recorded March 16, 1859.

Foreclosure, commencing April 20, 1860, ending April 20, 1863.

Quitclaim, John Williamson to David Williamson, (husband of defendant) dated January 11, 1862, recorded May 5, 1871.

Warranty, Eames to David Williamson, dated January 14, 1862, recorded January 21, 1862.

Assignment of mortgage, John Williamson to Newton, January 21, 1863, recorded April 21, 1863.

Quitclaim, Newton to Twitchell, dated April 6, 1864, recorded April 9, 1864.

Quitclaim, Twitchell to Grover, dated and recorded August 10, 1866.

Quitclaim, Grover to plaintiff, dated and recorded January 21, 1868.

Each of the deeds covers the premises in dispute, some ten acres, and the defendant holds without question other lands, including a farm described in the deeds recorded March 16, 1859, and January 21, 1862.

S. F. Gibson, for the plaintiff, claimed that the deeds and assignment disclosed a complete chain of title from Eames to him through John Williamson, Newton, Twitchell and Grover, and that the quitclaim of John Williamson to David could not prevail over the subsequent assignment recorded earlier.

E. Foster, jr., for the defendant, contended, in substance, that though the plaintiff had an apparent earlier title by the registry, yet all his sources of title being mere releases, commencing with the assignment of the mortgage by John Williamson after his quitclaim to the defendant's husband, conveyed nothing. The deeds on the plaintiff's side are all quitclaims and no evidence that any of his grantors ever had possession. He has shown no seizin in himself.

PETERS, J. The demandant claims under a mortgagee. The tenant claims under the mortgagor and also under the mortgagee. The mortgagee, before his assignment under which the demandant

holds, quitclaimed the parcel which the tenant now occupies, the mortgage covering that and other parcels. The quitclaim, under which the tenant's title became cleared of the mortgage, was before the assignment of the entire mortgage, but not recorded until after the assignment was recorded, the assignee having no notice of the prior quitclaim. Upon this case, the demandant must recover. The same rule prevails between assignees of a mortgage as between grantees under ordinary deeds and conveyances, so far as the necessity of registration is concerned. *Aiken* v. *Kilburne*, 27 Maine, 252. *Pierce* v. *Odlin*, Id. 341. *Reed* v. *Elwell*, 46 Maine, 270. *Pierce* v. *Faunce*, 47 Maine, 507. *Welch* v. *Priest*, 8 Allen, 165.

It is contended that the mortgagee did not assign the entire mortgage, but only his interest therein, such interest being that which he had not previously conveyed. The assignment contains this language: "I hereby assign . . . to the said . . . the within mortgage deed, the debt thereby secured, and all my right, title and interest in the premises therein described under and by virtue of the same." It was held in *Coe* v. *Persons unknown*, 43 Maine, 432, that a conveyance of all the right, title and interest, which a grantor has in a parcel of land, conveys only the actual title of the grantor and not such as was apparently his at the registry of deeds. There is a difference between this case and that. Here the mortgagee assigns "the mortgage deed." It was determined as long ago as the case of *Hills* v. *Eliot*, 12 Mass. 26, that an assignment of a mortgage was *ipso facto* a transfer of the premises covered by the mortgage, and the doctrine has never been questioned from that day to this. It is very common for assignors of mortgages to use the form used in this case, considering themselves not absolute owners in fee. It would be unwise to extend the principle of *Coe* v. *Persons unknown*, to cases like this.

The tenant invokes the principle approved in *Rand* v. *Skillin*, 63 Maine, 103, and in a series of previous cases, that where all the deeds, under or through which a demandant claims, are merely releases and quitclaim conveyances, and it does not appear that any of the grantors were ever in possession, such demandant

upon such title cannot recover. That doctrine is not applicable in this case. Here the title of each side comes down from the same grantor. The demandant claims under a mortgage with covenants of general warranty from such grantor.

The tenant is in possession under his unrecorded deed. The demandant knew him to be in possession, but did not know of the deed. That does not prevent a recovery by the demandant.

Action to stand for trial.

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

SETH T. SCRIBNER *et al. vs.* JOHN MANSFIELD *et al.*

Cumberland. Decided February 25, 1878.

Poor debtor. Bond. Evidence.

The approval of a six months bond in the following terms, "We, the subscribers, do approve of the sureties named in the foregoing bond: *Scribner* v. *Blossom*, per E. S. Ridlon, attorney," is a statute approval. *Poor* v. *Knight*, 66 Maine, 482.

In computing the time for the performance of the conditions of a bond given under R. S., c. 113, § 24, the obligors are bound by the date of the bond and the recital of the day of arrest therein.

Parol evidence is inadmissible to show that the bond was in fact executed on a subsequent date.

Form of a valid statute bond and approval. See statement of the case.

ON EXCEPTIONS, from the superior court.

DEBT on bond, tried before Symonds, J., with right of exceptions.

The bond was of the form following:

"Know all men by these presents, that we, John Mansfield of Portland as principal, and Nehemiah Curtis as surety, are holden and stand firmly bound and obliged unto Seth T. Scribner and William L. Blossom, both of Portland, late copartners in trade under the firm name of Scribner & Blossom, in the sum of one hundred and fifty-four dollars and fifty-four cents, to be paid unto the said Scribner & Blossom, his certain attorney, heirs, execu-

tors, administrators or assigns. To the payment of which sum we do hereby bind ourselves, our heirs, executors and administrators, jointly and severally, in the whole, and for the whole, firmly by these presents.

"Sealed with our seals. Dated at Portland, the first day of July, A. D. 1876.

"The condition of the above written obligation is such, that whereas the said John Mansfield hath been and now is arrested at Portland, in the said county of Cumberland, by virtue of an execution issued against him on a judgment obtained against him by the said Scribner & Blossom, by the consideration of our justice of our superior court, at a term of the said court which was begun and holden at Portland, within and for the county of Cumberland, on the first Tuesday of October, A. D. 1875, for the sum of fifty-nine dollars and sixty-three cents, damage, and costs of court, taxed at twelve dollars and sixty-seven cents, with thirty cents more for two writs of execution, and the officer's fees and charges for said arrest, taxed at one dollar and eighty-seven cents.

"Now if the said John Mansfield shall in six months from the time of executing this bond, cite the said Scribner & Blossom, the creditor, before two justices of the peace and of the quorum, and submit himself for examination agreeably to the one hundred and thirteenth chapter of the revised statutes, and take the oath prescribed in the thirtieth section of said chapter, or pay the debt, interest, cost and fees, arising in said execution, or deliver himself into the custody of the jailer, agreeably to the twenty-fourth section of the chapter above referred to, then this obligation to be void, otherwise to remain in full force. Signed, sealed and delivered in presence of S. D. Hall.

his
John X Mansfield, [L. S.]
mark.
Nehemiah Curtis, [L. S.]

"We, the subscribers, do approve of the sureties named in the foregoing bond.

Scribner & Blossom, creditors, per E. S. Ridlon, their attorney."

Plea, *non est factum*, with a brief statement of no breach; that the action was premature; that the bond, though bearing date July 1, 1876, was not in fact executed and delivered until about July 19, 1876, and was not approved according to law.

The plaintiffs introduced the bond, execution, and, against the defendants' objection, the officer's return thereon, dated July 1, 1876, reciting the arrest of Mansfield, and the giving of the bond, and rested.

The defendants offered the testimony of the surety, one of the defendants, as to the time when the bond was signed by him and the principal, which was admitted, *de bene esse*, against the plaintiffs' objection.

This witness testified in substance that, shortly after the 4th of July, 1876, he was requested by constable S. D. Hall to step into his office and sign the bond in suit, which he did without reading the bond or noticing the date; that he had previously agreed to sign a relief bond for the principal, in an interview had with plaintiffs' attorney a few days previously; the principal was not present when he, the surety, signed the bond; that on the 19th day of July, 1876, he was called into the principal's house as he was passing, where he found constable Hall in waiting, for the purpose of obtaining the principal's signature. The bond was not read to the principal to witness' knowledge. Principal signed by making his mark. Witness remarked to constable Hall as it was being signed that it was the 19th of July. No reply was made to witness' recollection. Witness did not see the date of the bond. The principal was not present at the trial, but was to testify as to the time when the bond was signed by him if the evidence should be decided by the justice as material.

The defendants then offered to prove for the purpose of chancering the bond if the action could be maintained at all, that the principal obligor had, when the bond was signed, and at the time of the trial, no property not exempt from attachment and execution; but the justice ruled that this evidence was inadmissible; that the bond was a statute bond; that the time of its execution was not material; and further that it was not competent to contradict by parol testimony the officer's return, as to date of arrest

and of discharge on giving bond, and thereupon gave his decision for the plaintiffs for the amount of the execution, costs and officer's fees thereon.

The defendants alleged exceptions.

H. C. Peabody, for the defendants.

E. S. Ridlon, for the plaintiffs.

VIRGIN, J. This is an action of debt on a bond bearing date July 1, 1876, given under the provisions of R. S., c. 113, § 24, to procure the release of the principal from arrest on an execution.

The bond was legally approved. *Poor* v. *Knight*, 66 Maine, 482.

The remaining questions raised by the defendants were all settled long ago in *Titcomb* v. *Keene*, 20 Maine, 381. *Wing* v. *Kennedy*, 21 Maine, 430. See especially *Cushman* v. *Waite*, 21 Maine, 540.

It is contended that the statute, (St. 1835, c. 195, § 9) construed by the cases cited, prescribed the arrest as the time from which the six months began to run, while by the present statute (R. S., c. 113, § 24) the six months commence at the date of release from the arrest. We do not so read the present statute. New provisions have been incorporated into the original section, but they in nowise affect the law in this respect. To be sure, the condition of the bond in suit, instead of following the language of the statute, by providing that the principal shall within six months from the time of his arrest (or imprisonment) cite, etc., provides that "he shall in six months from the time of executing this bond," etc. But the bond in *Cushman* v. *Waite*, *supra*, contained the same language; and it has been sustained too many times before and since the several revisions of the statute to be disturbed now.

Exceptions overruled.

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

J. M. FOGG *vs.* OTIS W. LAWRY.

Somerset. Decided February 26, 1878.

Partnership.

A creditor of one of the partners of a firm may attach such partner's interest in a specific portion of a stock of goods belonging to the firm, and is not required, in order to render the attachment regular, to take the partner's interest in the entire stock of goods.

ON EXCEPTIONS.

CASE, under R. S., c. 113, § 51, to recover damages for the fraudulent conveyance to the defendant of one W. P. Farnsworth's interest in a stock of goods which Farnsworth and the defendant owned as copartners. Immediately before the alleged fraudulent conveyance, the plaintiff placed a writ in an officer's hands for the purpose of attaching that interest, a fact known to Farnsworth and the defendant. The testimony was conflicting as to whether the plaintiff instructed the officer to make an attachment of sufficient amount of the partnership property to secure his debt, as the defendant claimed, or to make an attachment of Farnsworth's interest in a part of the stock, as the plaintiff claimed.

The presiding justice instructed the jury that a separate creditor might, on a writ against one member of a firm, attach his interest in all the copartnership property, but had no right to attach his interest in a part of the goods. The verdict was for the defendant; and the plaintiff alleged exceptions to the foregoing ruling and to another alluded to in the opinion.

S. S. Brown, for the plaintiff, contended that it was error to instruct the jury that, a regard for the rights of partnership creditors forbade the attachment of defendant's interest in a part of the goods, because if the statement of the principle were correct, no one except a partnership creditor could invoke it,—the defendant could not. *Douglas* v. *Winslow*, 20 Maine, 89. But the rule protecting the rights of partnership creditors makes no distinction between the attachment of the interest in a part and in all of the goods.

D. D. Stewart, for the defendant, cited *Douglas* v. *Winslow*, *supra*. *Moore* v. *Pennell*, 52 Maine, 162. *Allen* v. *Wells*, 22 Pick. 450.

PETERS, J. It was made a material question at the trial of this case, whether an officer, who has a writ in favor of a creditor of one of the partners of a firm, could properly attach such partner's interest in a specific portion of a stock of goods belonging to the firm, where the goods are situated together; or whether, in order to make the attachment valid, the interest of such partner in the entire stock of goods must be taken. The ruling was that the interest in the entire stock only could be attached. The learned judge evidently had in mind the rule appertaining to sale upon execution rather than that applying to an attachment upon writ. The officer could attach the interest of the debtor in any portion of the goods. Upon execution, he could sell only such interest as the debtor would have in the property attached after all the partnership debts and any balances due the other partners were satisfied and paid. The purchaser would get merely the legal estate of the individual debtor in the particular goods sold, subject to the rights of the other partners and creditors of the firm. A private creditor might not be justified in attaching his debtor's interest in an entire stock of goods of a partnership, if the demand is small and the stock large, and the debtor's interest therein much more than necessary to satisfy all claims against him. We see no more necessity of attaching the debtor's interest in the whole of a particular stock, than there would be to attach his interest in all the property of the firm of which he is a member, however extended and situated. It would often be impossible to accomplish that. The other exception is not considered. This one is sustained. *Hacker* v. *Johnson*, 66 Maine, 21. *Parker* v. *Wright*, Id. 392.

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

JOHN S. PAINE *vs.* JOHN CASWELL *et als.*

Somerset. Decided February 26, 1878.

Interest.

On a note payable on demand with interest at ten per cent, that rate of interest is recoverable up to the date of the verdict, when damages are assessed by a jury; and up to the date of judgment, when a default is entered in a suit on the note.

ON REPORT.

ASSUMPSIT.

A. H. Ware, for the plaintiff.

J. J. Parlin, for the defendants.

PETERS, J. The defendants are sued upon a note which reads: "For value received we promise to pay John S. Paine, or order, five hundred dollars and interest at 10 per cent." The question is: For how long a period can the plaintiff require that rate of interest to be paid. The note, although not so expressed, is on demand. Where a note is payable on time with interest exceeding six per cent, no more than six per cent is recoverable after maturity, there being no bargain for interest after that time. In such case, interest after the note is due is allowed only by way of damages. *Eaton* v. *Boissonnault*, 67 Maine, 540. It is different, however, if the note stipulates for extra interest after, as well as before, it is due. In such case, the rate of interest is collectible according to the contract. *Capen* v. *Crowell*, 66 Maine, 282.

Applying this doctrine, as well as it can be applied, to the present case, we think interest at the rate agreed should be reckoned up to the date of judgment to be recovered upon the note. The meaning of the parties could not have been, that interest at the rate named was payable until the note was due and not after, because there was no time after the note was delivered before it became due. It was due *instanter*. It could have been sued by the plaintiff on the moment he received it. The statute of limitations then commenced to run against it. It could not have been in the contemplation of the parties that the note was to be

immediately paid; for, in such case, the note would be but an idle form. The idea of the contract must have been that the maker would pay the stipulated interest as long as the note might run. Such a note as this is denominated in the cases as a "continuing promise" and a "continuing security." We decide that the ten per cent interest shall be allowed on the note up to the date of judgment thereon. No other rule would be practicable. Had a jury assessed the damages, their verdict would have been the terminal point at which the extra interest would stop.

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

BUCKSPORT & BANGOR RAILROAD COMPANY *vs.* JOSEPH L. BUCK.

Hancock. Decided March 1, 1878.

Corporation.

A valid subscription to the capital stock of an incorporated company is not rendered invalid by a change of its corporate name in accordance with a legislative act; and the company may sue for and recover the subscription under its new name.

A subscriber to stock of an incorporated company, who as an officer participates in the calling of a meeting for its permanent (not preliminary) organization, and is therein chosen a director and acts as such, thereby waives his right to avoid payment on the ground of the insufficiency of the notice of the call for the meeting.

A conditional subscription to stock of an incorporated railroad, *Held* valid and to constitute a part of the amount of the subscriptions required as a condition precedent to bind other subscribers.

ON REPORT.

ASSUMPSIT, on subscription to stock.

Plea, never promised, with a brief statement that the plaintiff company was never legally organized under its charter.

The facts are mostly stated in the opinion of Appleton, C. J., 65 Maine, 536.

The acts of 1870, c. 395, provide at the close of § 2, "and any seven of the persons named in the first section of this act are hereby authorized to call the first meeting of said corporation for

the choice of directors and organization by giving notice, in the newspapers, published as before named, of the time and place and purposes of such meeting, at least fourteen days before the time mentioned in such notice."

The meeting for organization under the charter was held, after seasonable notice, April 28, 1870. In the year following, after $100,000 were subscribed, the amount required as a condition precedent to bind the other subscribers to the stock, a meeting was called and held October 10, under a notice dated October 5, 1871, published in the papers October 5 and 7, at which the defendant voted and was elected a director; and he afterwards acted as such.

E. Hale & L. A. Emery, for the plaintiffs.

J. Baker & W. H. McCrillis, for the defendant.

DICKERSON, J. When this case was presented to us before, (65 Maine, 536) we decided that the defendant's liability depended upon the terms of his agreement; that his promise became binding when a subscription of one hundred thousand dollars, by good and responsible parties, had been obtained; and, *per consequence*, that the $300,000 clause in the defendant's subscription was a condition subsequent.

As it does not clearly appear from the reporter's abstract of the case, or the opinion of the court, that the legality of the organization of the corporation, or its right to maintain an action in the name of the Bucksport & Bangor R. R. Company, or the validity of a sufficient amount of the subscriptions to the capital stock of the corporation to make up the sum of one hundred thousand dollars, was then presented, considered and decided, these questions may properly be regarded as open for our determination upon the evidence as now presented. The remark in the opinion of the court that the sum of one hundred thousand dollars had been subscribed, applied to the case as then presented, and not to its present presentation.

No objection is made by the defendant to the legality of the meeting of the corporators, held April 28, 1870. The evidence shows that that meeting was notified as required by the charter;

that the charter was then accepted by the corporators, and that an organization was effected by the choice of a chairman, secretary and a board of seven directors, of which the defendant was one. The defendant was present and participated in that meeting. At a meeting of the directors, on September 13, 1870, the defendant was elected president, and chosen a member of the committee to draft a code of by-laws.

At a meeting of the directors, on September 19, 1871,—present the defendant, as president of the board—the subscription of the defendant and others to the capital stock of the corporation was accepted, subscription books were ordered to be opened from the second to the eighth of October, 1871, and the clerk was instructed to call a meeting of the subscribers to the capital stock of the company, on the tenth day of October following. The notice of that meeting was given according to the vote of the directors, and it was held at the time appointed; fourteen hundred and twelve shares were represented and a board of directors was elected, including the defendant who voted for directors, indorsing the following upon his ballot: "Joseph L. Buck, one hundred and fifty shares." The defendant continued to act as a director of the company for nearly a year after the meeting of the stockholders, held October 10, 1871.

The objection to the legality of the meeting of the subscribers to the capital stock of the company, on October 10, 1871, is based upon the alleged insufficiency of the notice. It is contended that the charter, § 2, requires "at least fourteen days' notice" of such a meeting for the choice of directors, whereas only five days' notice was actually given. Waiving a construction of that clause of the second section of the charter, in view of the foregoing evidence in the case, we think that this objection is not open to the defendant.

The charter had been duly accepted by the corporators, and the company was duly organized, by the choice of directors and other officers, at the meeting of the corporation, on April 28, 1870. All the subsequent proceedings of the directors, then chosen, were had under color of the charter, and in furtherance of the enterprise it contemplated. If there was any defect in the

notice of the meeting of the subscribers to the capital stock, on October 10, 1871, the position of the defendant, as president of the board of directors, who ordered the meeting to be called, and fixed the time and place for holding it, devolves upon him no inconsiderable share of the responsibility for such error. By the acts of the defendant as one of the corporators and directors of the company, by his voting to accept his own subscription, by participating in the call of the alleged illegal meeting of the subscribers to the capital stock of the company, on October 10, 1871, by casting his ballot as a stockholder at that meeting, and accepting the office of director of the company to which he was then elected, he waived his right to object to the legality of the organization of the company at the meeting of October 10, 1871, on account of the defect in the notice, if any there was, by which it was called. By his acts he assented to the notice of that meeting, and recognized the company as existing and proceeding regularly; he, in effect, said, "I am content;" and now that the enterprise which he contributed so largely to promote by his liberal promise of material aid, and his success in inducing others actually to invest their money therein, has proved a failure, he cannot, upon such a technical objection, go back on his pledges and record made when he was hopeful of a successful issue. *Ossipee Man. Co.* v. *Canney*, 54 N. H. 295. *Thompson* v. *Candor*, 60 Ill. 244. *Ruggles* v. *Brock*, 13 N. Y., S. Ct. 164. *Swartwout* v. *Michigan Air Line*, 24 Mich. 389. *Chubb* v. *Upton*, 95 U. S. 665. *Buffalo & Allegany* v. *Cary*, 26 N. Y. 75. *Meth. Church* v. *Pickett*, 19 N. Y. 482, 485.

It did not require the assent of the subscribers to the capital stock of the company to authorize the legislature to change its name; the statute confers that right upon the legislature without such assent; and the defendant's agreement was made subject to that legislative prerogative. The clause in the defendant's agreement, "such alterations, if any, to be in accordance with a vote of a majority of the board of directors, legally chosen by the stockholders of the road," contains some of the requisites of a condition precedent; it is not such in terms; it need not be performed before the promise of the corporation; nor is it the moving cause

or consideration of the contract. *Mill Dam Foundry* v. *Hovey*, 21 Pick. 417, 438. If that clause is anything more than an expression of the wishes of the defendant, or directory to the board of directors, it is a condition subsequent and constitutes no bar to the maintenance of this action in the name of the present plaintiffs, who compose the identical company, though under a different name, that the defendant originally contracted with.

A third ground of objection to the defendant's liability is that the subscription of the town of Bucksport cannot legally be included in the amount of capital stock subscribed for prior to the meeting of the stockholders, on October 10, 1871, because the vote of the town authorizing that subscription was not warranted by the call in the warrant. It is conceded that without that subscription the precedent condition of obtaining a subscription of one hundred thousand dollars to the capital stock had not then been complied with.

The article in the warrant was as follows: "To see if the town will vote to take stock in the Penobscot & Union River Railroad Company, and, if so, how much; and to provide for raising the money to pay for the same." The vote of the town upon the first clause of that article was as follows: "That the selectmen be and are hereby authorized and instructed to subscribe sixty-five thousand dollars to the capital stock of the Penobscot & Union River R. R. Co., upon the same conditions as private subscriptions to said stock have been or may hereafter be made."

R. S., c. 3, § 5, as repeatedly construed by this court, while in terms requiring the warrant to specify in distinct articles the business to be acted upon at a town-meeting, leaves a large discretion to be exercised by the voters, when assembled, as to the disposition they may make of the matter submitted for their action. The statute requires that the articles in the warrant shall distinctly apprise the voters of the subject to be considered, without prescribing any rule for their action upon it. It is in general competent for the town to adopt or reject the proposition submitted, wholly or in part, or to adopt it with specific limitations or conditions. The particular subject to be considered at the town-

meeting in this case was the taking of stock in the Penobscot & Union River Railroad Company. Whether or not to take any of that stock, or, if any, how much, and whether absolutely or conditionally, were questions submitted to the discretion and decision of the voters attending the meeting. They voted to subscribe for a specified amount of the capital stock of the company, upon conditions deemed by them reasonable and wise; and, as they are free from illegality, the subscription must be regarded as valid. The preliminary subscription of one hundred thousand dollars, therefore, was obtained prior to the meeting of the stockholders on October 10, 1871, and, by the terms of the defendant's subscription, it was then competent for the stockholders to choose a board of directors and other officers. The subsequent proceedings of the company and its directors was in accordance with the requirements of the charter; and the plaintiffs, having thus performed the conditions of their contract with the defendant, are entitled to enforce the fulfillment of the defendant's promise to them.

The objection that Edward Swazey was not the legal clerk of the company is not tenable. He was at least clerk *de facto*, and hence his acts would be valid. But he was, in fact, clerk *de jure*, having been duly chosen and qualified as such, September 19, 1871, and by the charter the clerk holds over until a successor is chosen and qualified. So, also, it is obvious that the defendant's promise was to the company and not to its treasurer, and that the action is properly brought in the name of the promisee. The other questions discussed by the learned counsel for the defendant are *res adjudicata*.

Judgment for the plaintiffs for the sum of $15,000, *and interest upon the respective assessments from the demand of the treasurer.*

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

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

Inhabitants of Nobleboro *vs.* John L. Clark.

Lincoln. Decided March 7, 1878.

The authority of an agent to execute a deed in behalf of his principal, need not be given in express terms; but may be implied from the express power given. The power to sell the land of the principal necessarily implies the power to execute a proper deed to carry the sale into effect.

Thus: At a legal town-meeting "chose H agent to sell the balance of the town landing, if he thinks it will be for the interest of the town to do so." *Held,* that by this vote H had authority to sell the demanded premises, and to execute a proper deed of conveyance thereof in behalf of the town.

In Maine, where a deed is executed by an agent or attorney with authority therefor, and it appears by the deed that it was the intention of the parties to bind the principal or constituent,—that it should be his deed and not the deed of the agent or attorney—it must be regarded as the deed of the prinpal or constituent, though signed by the agent or attorney in his own name. R. S., c. 73, §§ 10 and 15.

In determining the meaning of the parties to a deed, recourse must be had to the whole instrument.

The deed sets out that the inhabitants of the town of N conveyed to Clark a certain tract of land. In witness whereof, they, "by the hand of Hatch, hereunto duly authorized, . . . have set their seal, and the said Hatch has hereunto subscribed his name." Hatch, as agent of N, acknowledged the instrument to be the free act and deed of the inhabitants of the town. *Held,* that it was the deed of the inhabitants of N.

On exceptions.

Writ of entry, dated April 5, 1876, to recover a parcel of land in Nobleboro.

The plaintiffs put in deed from John Borland to the town of Nobleboro, dated and acknowledged May 24, 1804, and recorded September 17, 1805, admitted to cover land described in the writ.

The defendants put in the record of a legal town meeting of the inhabitants of Nobleboro, held March 16, 1874, at which the town duly voted as follows: "Chose J. Arad Hatch agent to settle with the railroad company, and sell the balance of the town landing if he thinks it will be for the interest of the town to do so, and to settle all other matters with the railroad company." Also a deed of the following tenor, signed and acknowledged as appears therein, and covering the land described in the writ:

"Know all men by these presents, that the inhabitants of the

town of Nobleboro, in the county of Lincoln and state of Maine, in consideration of the sum of one hundred dollars, paid by John L. Clark, of said Nobleboro, the receipt whereof they do hereby acknowledge, do hereby remise, release, bargain, sell and convey, and forever quitclaim unto the said John L. Clark, his heirs and assigns forever, all their right, title and interest, in and to a certain tract of land, situate in said Nobleboro, and bounded and described as follows: [Here follows the description.] Containing two acres, more or less, excepting, however, from the above described premises, the land taken and crossed by the Knox & Lincoln Railroad Company. To have and to hold the same, together with all the privileges and appurtenances thereunto belonging, to the said John L. Clark, his heirs and assigns forever. In witness whereof, the inhabitants of said town, by the hand of J. Arad Hatch, of said Nobleboro, hereunto duly authorized by a vote of the inhabitants of said town, at the annual town-meeting held in said town on the 16th day of March, A. D. 1874, have hereunto set their seal, and the said J. Arad Hatch has hereunder subscribed his name this tenth day of March, in the year of our Lord one thousand eight hundred and seventy-five. Signed, sealed and delivered in presence of William H. Hilton.

(Signed) J. Arad Hatch. [Seal.]

"Lincoln, March 13, 1875. Personally appeared J. Arad Hatch as agent of the said town of Nobleboro, and acknowledged the above instrument to be the free act and deed of the inhabitants of said town. Before me, Wm. H. Hilton, Justice of the Peace."

The presiding justice ruled that the deed did not pass the title to the defendant, and that he failed to make out a valid defense. The verdict was for the plaintiffs; and the defendant alleged exceptions.

O. D. Baker, for the defendant, contended that the authority to sell implied the power to make a deed, and that Hatch signed as attorney for the town, not as an attorney at law, but as attorney in fact, made so by a vote of the town; and that it was not necessary that an agent or attorney should sign the name of

his principal or express his agency in his signature; that taking the whole deed together, it was manifestly the execution of the principal, and cited the following cases in addition to some stated in the opinion. *Burrill* v. *Nahant Bank*, 2 Met. 163. *Decker* v. *Freeman*, 3 Maine, 338. *Clark* v. *Manufacturing Company* and cases, 15 Wend. 256, 258. *Williams* v. *Bacon*, 2 Gray, 387. *Trueman* v. *Loder*, 11 Ad. & E. 589. *White* v. *Proctor*, 4 Taunt. 209. *Hutchins* v. *Byrnes*, 9 Gray, 367. *Craig* v. *Franklin County*, 58 Maine, 479. *Haven* v. *Adams*, 4 Allen, 80. *Frontin* v. *Small*, Ld Raym. 1418. *Townsend* v. *Hubbard*, 4 Hill, 351. *Tenant* v. *Blacker*, 27 Ga. 418. *Unwin* v. *Wolseley*, 1 T. R. 674. *Thompson* v. *Carr*, 5 N. H. 510. *Ward* v. *Bartholomew*, 6 Pick. 409. *Cofran* v. *Cockran*, 5 N. H. 458.

A. P. Gould & J. E. Moore, for the plaintiffs, contended that there was nothing in the vote authorizing Hatch to make a deed, and nothing in the deed to show that Hatch signed for the town, and cited and discussed the following cases. *Hutchins* v. *Byrnes*, 9 Gray, 367, 369. *Abbey* v. *Chase*, 6 Cush. 54, 56. *Brinley* v. *Mann*, 2 Cush. 337. *Stinchfield* v. *Little*, 1 Maine, 231 and cases. *Elwell* v. *Shaw*, 16 Mass. 42. *Fowler* v. *Shearer*, 7 Mass. 14. *Cofran* v. *Cockran*, 5 N. H. 458. *Ward* v. *Bartholomew*, 6 Pick. 409. *Springfield* v. *Miller*, 12 Mass. 415.

LIBBEY, J. In this case two questions are raised.

I. Had J. Arad Hatch authority, as agent of the plaintiff town, to execute the deed to the defendant, relied upon by him.

II. If he had such authority, did he properly execute it, so as to bind the plaintiffs, in executing the deed to the defendant.

We think Hatch had authority to execute a deed of the demanded premises in behalf of the plaintiffs. The plaintiffs, at a legal meeting therefor, held March 16, 1874, passed the following vote: "Chose J. Arad Hatch agent to settle with the railroad company, and sell the balance of the town landing if he thinks it will be for the interest of the town to do so, and to settle all other matters with the railroad company." By this vote the authority to sell the balance of the town landing is not limited to

a sale to the railroad company. It had already taken a part of town landing for its road. There is no intimation that the railroad company desired to purchase the balance.

The authority to sell is general. It is not necessary that the authority to the agent to execute a deed in behalf of his principal should be given in express terms. It is sufficient if such authority is implied from the express power given. The power to sell the lands of the principal necessarily implies, and carries with it, the power to execute a proper deed to carry the sale into effect. *Marr* v. *Given*, 23 Maine, 55. *Valentine* v. *Piper*, 22 Pick. 85.

Is the deed to the defendant of the demanded premises properly executed by Hatch? The sale was made by him to the defendant. He paid for the land. The plaintiffs received and retain the money. The deed should be upheld, if it can be consistently with the rules of law. It was early settled in Massachusetts that a deed executed by an attorney, to be valid, must be made in the name of his principal. *Fowler* v. *Shearer*, 7 Mass. 14. *Elwell* v. *Shaw*, 16 Mass. 42. *Brinley* v. *Mann*, 2 Cush. 337.

After a careful examination of the English and American authorities by the court, the same rule was affirmed as the law of this state in *Stinchfield* v. *Little*, 1 Maine, 231. In *Decker* v. *Freeman*, 3 Maine, 338, this court, while declaring the rule as determined in *Elwell* v. *Shaw* and *Stinchfield* v. *Little*, to be the settled law of this state, say: "But we are not disposed to extend it to cases fairly distinguishable from those which have been cited." The grantors named in the deed then under consideration were "the proprietors of the township lately called Pearsontown, but now Standish, by Benjamin Titcomb, Samuel Freeman and Joseph Holt Ingraham, a committee legally appointed," etc.; and the attestation clause was as follows: "In witness whereof, the said proprietors, by their committee aforesaid, who subscribe this deed in the name and behalf of said proprietors, have hereunto set their hands and seals;" and the committee signed their own names only. It was held to be the deed of the proprietors of the town. After commenting on the several clauses of the

deed, the court, Weston, J., says: "The committee, therefore, do not act in their own name, but in the name of the principal, and that is all that the rule of law requires;" and he quotes from *Wilks* v. *Back*, 2 East. 142, that "there is no particular form of words required to be used, provided the act be done in the name of the principal."

In *Haven* v. *Adams*, 4 Allen, 80, the deed then under consideration named the Grand Junction Railroad and Depot Company, a corporation, etc., as grantor, and the attestation clause was thus: "In testimony whereof, said party of the first part have caused these presents to be signed by their president, and their common seal to be hereto affixed. Samuel S. Lewis, President." [Seal.] The court held the deed to be well executed as the deed of the corporation. Chapman, J., in the opinion of the court, after commenting on *Brinley* v. *Mann*, *supra*, and *Abbey* v. *Chase*, 6 Cush. 54, says: "The question in such cases is, whether the deed purports to be the deed of the principal, or the deed of the agent executed by him in behalf of the principal. In the first case, it is held to convey their property because it is their deed; in the latter case, it does not convey their property, because it is his deed. It is always a mere question of construction. In this case, it purports to be their deed, and it therefore conveys their title."

In *Montgomery* v. *Dorion*, 7 N. H. 475, the deed purported to convey the premises to the petitioner by Joseph Dorion, but was executed as follows: "In testimony of the foregoing, I. Winslow, Jr., being duly constituted attorney for the purpose, by all the foregoing grantors, has hereunto set his hand and seal. Isaac Winslow, Jr." [Seal.] Richardson, C. J., in delivering the opinion of the court, says: "In this case, in testimony that the grantors, who are named as such in the deed, make the conveyance, the agent puts his hand and seal to the instrument. This seems to be tantamount to putting his hand and seal to the deed for them, which is sufficient." In *Hale* v. *Woods*, 10 N. H. 470, the deed was signed David King, attorney for Zachariah King. The court said that the deed of an attorney, to be valid, must be in the name, and purport to be the act and deed of the principal;

but whether such is the purport of an instrument, must be determined from its general tenor, and not from any particular clause.

In *Deering* v. *Bullitt*, 1 Blackf. 241, it was said that in determining who were parties to a deed executed by an attorney, as in ascertaining the nature and effect of it, recourse must be had to the whole instrument.

In *Hunter* v. *Miller*, 6 B. Munroe, 612, the instrument was signed W S H, seal, for T T & M H, but the body of the instrument stated that the principals were to convey. The court held that it did not bind the agent, and laid down the following rule, that "if it clearly appears on the face of the instrument who is intended to be bound, and if the mode of execution be such as that he may be bound, the necessary consequence of the universal principle applicable to contracts is, that he is bound, and that, if such appears to be the intention of the parties, he alone is bound."

It is contended by the counsel for the defendant that the rigid, technical, common law rule has been relaxed by the provisions of our statutes. R. S., c. 1, § 4, clause XXI, is a rule for the construction of statutes and not of contracts. Sections 10 and 15 of c. 73 are as follows: Sec. 10, "There can be no estate created in lands greater than a tenancy at will, and no estate in them can be granted, assigned or surrendered, unless by some writing signed by the grantor, or maker, or his attorney;" Sec. 15, "Deeds and contracts, executed by an authorized agent of an individual or corporation in the name of his principal, or in his own name for his principal, are to be regarded as the deeds and contracts of such principal." Section 15 was derived from the act of 1823, c. 220, which was as follows: "All deeds, bonds, contracts and agreements, purporting to be made and executed by any agent, attorney or committee, for and in behalf of any other person or corporation, shall be considered as the deed, bond, contract or agreement of the principal or constituent, and not of the agent, attorney or committee, notwithstanding the same may have been signed, sealed and acknowledged in the name of the agent, attorney or committee; provided it appear by said deed, bond, contract or

agreement, to have been the intention of the parties to bind the principal or constituent." This act was passed soon after the decision of *Stinchfield* v. *Little*, *supra*, and was undoubtedly intended to modify the technical rule of the common law as declared by the court in that case. The construction of sec. 15 was before this court in *Sturdivant* v. *Hull*, 59 Maine, 172; and Barrows, J., in delivering the opinion of the court, after stating the provision of the act of 1823, says: "We do not think that the true intent, meaning and application of these provisions, as originally enacted, have been changed in the subsequent revisions of 1857 and 1871." The two statutes should receive the same construction. The intention of the parties to bind the principal or constituent,—that the deed or contract should be his deed or contract—must appear by the deed or contract itself, and no evidence *aliunde*, except evidence of the authority of the agent or attorney, can be received to show such intent.

Applying the principles settled by the courts, and the provisions of our statute to the question under consideration, we think the true rule in this state is that where a deed is executed by an agent or attorney, with authority therefor, and it appears by the deed that it was the intention of the parties to bind the principal or constituent,—that it should be his deed and not that of the agent or attorney—it must be regarded as the deed of the principal or constituent, though signed by the agent or attorney in his own name. In determining the meaning of the parties, recourse must be had to the whole instrument—the granting part, the covenants, the attestation clause, the sealing and acknowledgement, as well as the manner of signing. If signed by the agent in his own name, it must appear by the deed that he did so for his principal. This may appear in the body of the deed as well as immediately after the signature.

Applying this rule to the deed under consideration, we have no doubt that it must be regarded as the deed of the inhabitants of Nobleboro. They "remise, release, bargain, sell and convey." In witness whereof, they, "by the hand of J. Arad Hatch of said Nobleboro, hereunto duly authorized, . . . have hereunto set their seal, and the said J. Arad Hatch has hereunder subscribed

his name." Hatch, as agent of said town, acknowledged the instrument to be the free act and deed of the inhabitants of the town. These provisions of the deed are tantamount to an assertion that he signed the deed in behalf of the town. There is nothing in the deed tending to show that he signed for himself. In witness of the grant by the inhabitants of the town, he, as their agent, affixed their seal and signed his name. It sufficiently appears by the deed that the agent executed the deed in his own name for his principals.

Exceptions sustained.

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

ADELINE P. MERRY, administratrix of Corydon T. Patterson, *vs.* JOHN LYNCH.

Lincoln. Decided March 7, 1878.

Principal and Agent.

An agent for the sale of goods, with an interest in the proceeds, is not deprived of the power to sell, by the death of the principal.

The terms of the agency were that the agent should sell the goods and out of the proceeds pay certain lien and other claims, and apply the balance, first to the payment of certain notes he held against the principal and return the overplus to the principal. *Held*, that the power was not extinguished by the death of the principal; that the agent had a right to sell and apply the proceeds as agreed, and to pay his own notes in full, even though the estate was rendered insolvent and other creditors received only a percentage.

In the case stated, the notes were delivered by the defendant to the plaintiff and by her presented to the commissioners. *Held*, that their allowance by the commissioners as a claim against the estate without the procurement or authority of the defendant in no way affected his rights.

ON REPORT.

ASSUMPSIT, for money had and received.

J. Baker, for the plaintiff.

A. P. Gould & J. E. Moore, for the defendant.

LIBBEY, J. From a careful examination of the report of the

evidence it appears that in 1874 the plaintiff's intestate, Corydon T. Patterson, was possessed of a farm and brick yard, which he leased for one year to Edward F. Brewer, with covenants that the lessee should manufacture a kiln of bricks in the yard, each party to pay certain portions of the expenses, as stipulated, and when the bricks were burnt, each party should have one-half of them.

After the bricks were burnt, three suits were brought against Brewer by laborers, and the bricks were attached to enforce the lien claimed by them for their labor in manufacturing them.

Patterson and the defendant receipted to the officer making the attachments, for the bricks, and thereupon Brewer conveyed to Patterson his half of them in consideration that he would pay the bills against them contracted by Brewer, sell them, appropriate the proceeds to the payment of the bills sued, and account to him for the balance, if anything.

Soon after this, Patterson, with the consent of Brewer, made an agreement with the defendant by which he was to have all of the bricks, perform Patterson's agreement with Brewer as to his half, pay certain bills against Patterson for wood and burning the bricks, sell them and account to him for the net proceeds of the sales, and to appropriate the proceeds to the payment of the money advanced to pay said bills, and to the payment of three notes which he held against Patterson, and account to him for the balance, if any. The bricks were delivered to the defendant under this agreement and possession thereof retained by him. He paid the bills against Brewer and Patterson as agreed, and shipped and sold a part of the bricks in December, 1874. The balance were shipped in April, 1875. The net proceeds of the sale of Patterson's half of the bricks shipped in April, 1875, was $351.36. Patterson died April 20, 1875.

It is claimed by the plaintiff that the bricks shipped in April were not shipped till after Patterson's death; and by the defendant that they were shipped before his death. The view we take of the case renders it immaterial to determine how the fact is upon this point.

It is claimed by the counsel for the plaintiff that, under the agreement between the parties, the title to the bricks did not pass

to the defendant; that at best for the defendant he was only constituted the agent of Patterson to sell the bricks for him and account for the proceeds; and that Patterson's death before the shipment and sale of the bricks in April, terminated the defendant's power to sell, and having sold afterwards without authority, and received pay, he is accountable to the plaintiff for the money received.

We think neither of these points tenable. By the contract the defendant was to have the bricks. The manner of payment was fixed. They were delivered to him; nothing remained to be done but to determine the price to be paid, and that was to be the net proceeds of the sale by defendant. We think the property passed to the defendant, and having the title he had a right to sell after Patterson's death and apply the proceeds as agreed between them. But the same result would follow if by the agreement between the parties, the defendant was constituted the agent of Patterson to sell the bricks. He was to pay the bills due from Brewer and Patterson, growing out of the manufacture of the bricks, and was to be reimbursed by the proceeds of the sale. He was to pay his notes against Patterson from the proceeds, and had the possession of the bricks to enable him to make the sale. If he was an agent, it was an agency with the power of sale coupled with an interest in the proceeds of the sale; and it is well settled that in such case the death of the principal does not terminate the power. The defendant had the right to sell after the death of Patterson and apply the proceeds of sale as agreed between them. He settled with the plaintiff in accordance with his contract with her intestate, paid to her the balance in his hands, and gave up to her his notes. This was all he was legally required to do.

But the notes surrendered by the defendant were presented to the commissioners on Patterson's estate, it having been rendered insolvent, and allowed and returned by them to the probate court as a valid claim against the estate, in favor of the defendant; and it is claimed by the counsel for the plaintiff, that the defendant is thereby estopped from setting up the defense that he had the legal right to apply the proceeds of the sale of the bricks to the payment of the notes, and had so applied them. We are satisfied

from the evidence that the notes were presented to the commissmissioners for allowance by the plaintiff without authority from the defendant; and that the allowance by the commissioners was without his procurement or authority. Under such a state of facts the allowance and return of the notes in the name of the defendant, as a claim against the estate, can in no way estop him, nor affect his rights.

As the action cannot be maintained upon the evidence reported it is unnecessary to consider the question of the competency of the defendant and his wife as witnesses as to matters that occurred after the death of Patterson.

Judgment for the defendant.

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

HANNAH M. TARR, administratrix of Thomas S. Tarr, *vs.* GEORGE W. SMITH.

Sagadahoc. Decided March 7, 1878.

Exceptions.

An exception to the admission of incompetent evidence will not be sustained unless the excepting party is thereby aggrieved.

Thus: Where, in a trial, the statement of a third person was improperly admitted in evidence against objection, an exception was taken, and he was subsequently called as a witness by the excepting party and testified to the truth of the statement, which was not afterwards controverted; the exception was not sustained.

ON EXCEPTIONS AND MOTION.

REPLEVIN of goods, obtained by one Morton, a retail dealer of Lisbon, of the plaintiff's intestate, a wholesale dealer of Lewiston, on the ground that they were obtained through the fraudulent representations of Morton. The plea was *non cepit*, with a brief statement that the goods were the property of one Joseph G. Morton, and held by the defendant as deputy sheriff on certain writs.

A witness called by the plaintiff was allowed, against the

defendant's objection, to relate a conversation he had with Morton about the time of the commencement of the replevin suit and after the attachments, the substance of which was that Morton said the whole amount of his indebtedness was about $700 at the time he purchased the goods in question.

Morton was afterwards called as a witness by the defendant, and testified on cross-examination to items of his then indebtedness which amounted in the aggregate to $787.

The verdict was for the plaintiff, with damages assessed at $269.45. The plaintiff offered to remit the damages except one dollar. The defendant alleged exceptions.

J. W. Spaulding, *F. J. Buker & J. Millay*, for the defendant, contended though the admissions of Morton, made before attachment, were admissible, on the ground that they were in disparagement of his own title and no other rights had intervened, yet after the attachment and other rights had intervened, his admissions were not admissible to affect their rights, and cited 1 Greenl. Ev., § 180. *Bartlet* v. *Delprat*, 4 Mass. 702. *Clarke* v. *Waite*, 12 Mass. 439. *Bridge* v. *Eggleston*, 14 Mass. 245. *Spencer* v. *Godwin*, 30 Ala. 355. *Tapley* v. *Forbes*, 2 Allen, 20. *Wesson* v. *Washburn Iron Co.*, 13 Allen, 95, 99. *Lyman* v. *Gipson*, 18 Pick. 422, 425. *Horrigan* v. *Wright*, 4 Allen, 514. *Gilligham* v. *Tebbetts*, 33 Maine, 360. *Savery* v. *Spaulding*, 8 Iowa, 239.

In cases like this such declarations made even before the attachment have been held not admissible. *Hines* v. *Soule*, 14 Vt. 99.

L. H. Hutchinson & A. R. Savage, for the plaintiff.

LIBBEY, J. This is replevin by which the plaintiff seeks to reclaim goods which she alleges one Morton obtained from her intestate by fraudulent representations in regard to his property and indebtedness. The defendant claims to hold the goods by virtue of an attachment made by him as deputy sheriff, on a writ against Morton. The plaintiff had introduced evidence of the representations made by Morton when he purchased the goods, as to the amount of his property and liabilities. For the purpose of showing his representations as to the amount of his indebtedness

to be false, she offered evidence of the admissions of Morton, made to the agent of her intestate after the attachment of the goods by the defendant. This evidence was objected to but admitted; we think it was inadmissible. It is true that the defendant is not a *bona fide* purchaser, nor is he entitled to the rights of one. As an attaching officer he represents Morton's title, and has no greater rights as against the plaintiff than Morton had. *Jordan* v. *Parker*, 56 Maine, 557. But he, nevertheless, represents the lien created by the attachment in favor of the attaching creditor, upon the title of Morton as against him; and after the lien was created, it was not competent for Morton to defeat it by admissions tending to show that he had no title, but that the title was in the plaintiff. We find no authority that affirms the admissibility of such evidence. The case is similar in principle to an action against an assignee in bankruptcy, to try the title to property claimed by him as a part of the assets of the bankrupt. In such case the assignee represents the title of the bankrupt, but he holds that title for the creditors, and the declarations of the bankrupt affecting such title, made after his bankruptcy, are inadmissible. 1 Greenl. Ev., § 180, and cases cited in note. In *Carnes* v. *White*, 15 Gray, 378, the declarations of the insolvent debtor affecting the title, made after the defendant acquired his title, but before the petition in insolvency was filed, were offered by the defendant and excluded by Shaw, C. J., but the court held them admissible against the assignees, solely on the ground that they were made before the commencement of the proceedings in insolvency.

Strong v. *Wheeler*, 5 Pick. 410, and *Lambert* v. *Craig*, 12 Pick. 199, are unlike the case at bar. The issue to be determined in those cases was not one of title to property attached, but was whether the first attaching creditor was entitled to recover against the defendant. The court held that upon that issue the second attaching creditor, who had been admitted to defend, represented the defendant, and the same rules of evidence applied to the case that would apply if the defendant himself was defending.

But the defendant was not aggrieved by the admission of the evidence. Morton was in court and was called by him as a wit-

ness, and testified to his indebtedness at the time he purchased the goods in suit, stating it to have been larger than his admissions, which had been admitted, tended to show it. The admissions of Morton were more favorable to the defendant than his evidence in court, and the question of his indebtedness ceased to be a matter in controversy between the parties. *Whittier* v. *Vose*, 16 Maine, 403. *Tapley* v. *Forbes*, 2 Allen, 20.

The issue before the jury was whether Morton procured the goods by fraud. There was evidence tending both ways, but upon the whole we think it sufficient to authorize the verdict.

Exceptions and motion overruled.

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

IVORY F. HALL *et als. vs.* MARCELLUS B. PREBLE.

Androscoggin. Decided March 8, 1878.

Will.

A testator made his widow residuary devisee with power to hold and use all the property during her life, and to expend all of it if necessary for her care, comfort or support. *Held*, 1. That she took a life estate, with full power to convey the real estate in fee, at pleasure, without restraint as to her use of the proceeds for her care, comfort or support. 2. That she was made the sole judge as to whether it was necessary to convey for the purpose named. 3. That her quitclaim deed of land in the usual form was a sufficient execution of her power under the will, and conveyed the fee.

ON REPORT.

WRIT OF ENTRY.

A. M. Pulsifer, *W. W. Bolster & J. R. Hosley*, for the plaintiffs.

N. Morrill, for the defendant.

LIBBEY, J. Both parties claim the premises under the will of Daniel E. Hall, deceased. The demandants, as his surviving brothers and sisters at the death of Annie E. Hall, his widow, and the tenant, by deed from said Annie E. Hall, devisee under said will.

The main contention between the parties is, as to the true construction of the third clause in the will of Daniel E. Hall. It reads as follows: "I give and bequeath all the residue and remainder of my estate, both real and personal, including all moneys that may be received upon my policy of insurance upon my life, unto my beloved wife, Annie E. Hall, during her life. It is my intention and desire that said Annie E. Hall shall hold and use to her benefit, all the property, both real and personal, owned by me at the time of my decease, during her life, the same as if absolutely hers, and at her death whatever may be left, I wish equally divided among the survivors of my brothers and sisters. To avoid all contentions and disputes, it is my request and directions that said Annie E. Hall shall immediately upon my decease, by will, devise and direct that such portion of said estate as shall be left at her decease, be divided between the survivors of my brothers and sisters according to my intention as expressed in this will. I wish it distinctly understood that I place no restriction upon my said wife in regard to her use of my said estate, desiring and intending that she shall use and expend every dollar of the same, if necessary, for her care, comfort and support."

It is claimed by the demandants that Annie E. Hall took a life estate only under this clause in the will, and had no power to convey the fee; and further that she did not undertake to convey the fee by her deed to the tenant, but her life estate only. On the part of the tenant it is claimed, that she took the fee, or if not the fee, a life estate, with full power to convey the fee as she might see fit, and that by her deed to the tenant she did convey the fee.

"The first and great rule, in the expositions of wills, to which all other rules must bend, is that the intention of the testator, expressed in his will, shall prevail, provided it be consistent with the rules of law." *Shaw* v. *Hussey*, 41 Maine, 495. To ascertain the intention of the testator, every clause and word of the will are to be taken into consideration, because one clause is often modified or explained by another. Every implication as well as every direct provision is to be regarded.

The general rule is well settled that "a devise to one, without words of inheritance, but containing the power to dispose of the

property without qualification, is treated as equivalent to a devise with words of inheritance." *Shaw* v. *Hussey*, *supra*. *Ramsdell* v. *Ramsdell*, 21 Maine, 288. *Hale* v. *Marsh*, 100 Mass. 468, and cases cited. To this general rule the courts have established an exception. In *Ramsdell* v. *Ramsdell*, this court, after a careful examination of the authorities, declared it thus: "The rule to be extracted from these cases would seem to be, that where a life estate only is clearly given to the first taker, with an express power on a certain event or for a certain purpose to dispose of the property, the life estate is not by such a power enlarged to a fee or absolute right; and the devise over will be good." In *Shaw* v. *Hussey*, it is stated thus: "The exception is, when a testator gives to the first taker an estate for life only, by certain and express words, and annexes to it a power of disposal."

Whether this case is within the general rule or falls under the exception, the result must be the same if Mrs. Hall, the devisee, conveyed the fee to the tenant. But from a careful examination of all the provisions of the will we are satisfied that it was the intention of the testator that she should take a life estate, with full power to convey the fee at her pleasure, without any restriction upon her use of the same, for her care, comfort or support. The provisions of the will by direct terms as well as by necessary implication, give her the full power of disposal of the whole of the residue and remainder of the estate, and make her the sole judge of the necessity of the sale and use thereof for her care, comfort or support. This construction gives to each word and clause of the will its natural and common import.

It remains to be determined whether Mrs. Hall, by her deed to the tenant of the demanded premises, conveyed to him the fee in execution of the power under the will. We think she did. It is not necessary that there should be an express declaration in the deed that it is made in execution of the power. It is sufficient if the deed purports to convey a fee. When a person conveys land for a valuable consideration, he must be held as engaging with his grantee to make the deed as effectual as he has the power to make it. The deed of Mrs. Hall to the tenant, following the specific description of the premises, declares the premises to be "the

same devised to me by my late husband, D. E. Hall, late of Auburn." If any direct reference to the will was required this is sufficient. It contains the usual words of inheritance. True it is a deed of quitclaim of all her right, title and interest in and to the premises, and it is claimed that this language is fully answered by holding the deed to be a conveyance of her life estate only. But she had a right and interest in the premises to convey them in fee for her sole use and benefit. Her power was not to convey in behalf, and for the use of another. It was to convey for herself. Having granted all her right, title and interest in the premises to the tenant to hold in fee, she cannot be held as having conveyed to him her life estate only, still holding the power to convey to another in fee. She conveyed for full value. Her deed sufficiently declares her intention to convey under the will, and by it the tenant took the fee.

Judgment for the tenant.

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

JOSEPHUS BRADFORD *vs.* JOHN HANSCOM.

York. Decided March 27, 1878.

Husband and wife. Married woman.

Trespass by the husband for digging and carrying away earth within the limits of the highway upon which the farm of his wife was bounded, they living upon the premises together, he occupying and carrying on the farm permissively without any contract. *Held,* that this was not a release to the husband within R. S., c. 61, § 2, and that, if it were so, the right of action for such an injury would remain in the wife after as well as before the release.

ON REPORT.

TRESPASS, q. c. f., and for digging and carrying away earth beside the highway upon which the farm of the plaintiff's wife was bounded. The legal title was in her. The evidence tended to show that both plaintiff and his wife lived together upon the

premises; that the plaintiff carried on the farm permissively without any contract.

G. C. Yeaton with *C. Record*, for the plaintiff.

I. T. Drew with *A. Oakes*, for the defendant.

VIRGIN, J. The legal title to the farm was in the wife of the plaintiff. She had never "released the right to control" it to her husband, as provided in R. S., c. 61, § 2; and if she had done so, it would in nowise affect the right of action for an injury of this character to the property. That would remain in the wife after as well as before such release. *Collen* v. *Kelsey*, 39 Maine, 298. *Woodman* v. *Neal*, 48 Maine, 266, 269. R. S., c. 61, § 5. *Green* v. *No. Yarmouth*, 58 Maine, 54.

Judgment for the defendant.

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

ZADOC BISHOP *et al. vs.* SAMUEL WHITE *et al.*

Penobscot. Decided March 27, 1878.

Contract.

Neal cut and hauled logs for the defendants, for which they agreed to pay him $5 per M. The plaintiffs afterwards agreed to cut, haul and drive logs for the defendants, at $7 per M (for some and $6.50 for others,) a million feet with what Neal hauled and to carry out the trade with Neal, one-half the logs to be hauled by the M for the defendants, the other half, the defendants to pay stumpage on and own. *Held*, that the logs cut by Neal are to be included in and treated as the logs cut by the plaintiffs, both as to the amount to be paid for cutting, hauling and driving, and the proportion to be owned by each party.

ON EXCEPTIONS AND MOTION of defendants.

ASSUMPSIT, on the following contract, dated November 24, 1869, and signed by the parties:

"Bishop & Muzzey, on their part, agree to go on townships Nos. 7 and 8, on Pleasant brook, and cut and haul and drive into the Mattawamkeag stream, pine logs for seven dollars and 50-100,

and spruce, cedar, hackmatack and ash for six dollars and 50-100, per M feet. Bishop & Muzzey agree not to haul or interfere with any timber that Wm. A. Farrar may want to haul into the Inlet; also to carry out the trade that White & Hodgdon have made with John H. Neal to cut and haul logs on Pleasant brook. Bishop & Muzzey agree to cut, haul and drive into the Mattawamkeag one million feet or more, with what John H. Neal hauls. One-half of said logs are to be hauled by the thousand for said White & Hodgdon; the other half Bishop & Muzzey are to pay stumpage on and own. Said logs are to be cut under and agreeable to permit from T. W. Baldwin to White & Hodgdon.

"White & Hodgdon, on their part, agree to pay said Bishop & Muzzey six dollars on the pine and five dollars on spruce, cedar, hackmatack and ash, per M feet, for one-half of said logs, when they are done hauling, the balance when they are delivered in Mattawamkeag; and all goods and money said White & Hodgdon may furnish said Bishop & Muzzey, they shall pay said White & Hodgdon for interest and commission twelve per cent. White & Hodgdon agree to furnish said Bishop & Muzzey goods and money to haul one-half of the above named logs for the above named twelve per cent, Bishop & Muzzey to deliver said logs in the Mattawamkeag for the above named price, free from all incumbrance except stumpage."

The defendants contended at the trial that the hauling of the logs, hauled by Neal before the mark was changed, was to be settled for upon the same basis as the other logs covered by the contract, and that the plaintiffs and the defendants had the same interest and rights therein as in the other logs. But the plaintiffs contended that, as to those logs, they could recover for the hauling just as Neal could have recovered therefor. And the presiding justice instructed the jury thus: "Neal having hauled by the thousand a quantity of logs marked with the general mark of logs belonging to the defendants, to wit: 'H V,' etc., and differing from the mark adopted for the use of the plaintiffs and defendants afterwards, that being 'K,' etc., the plaintiffs having paid Neal for hauling the said logs marked 'H V,' etc., they have the right under the written contract to recover from the defendants

the same for hauling such logs as Neal would have been entitled to recover of the defendants if he had not been paid therefor by the plaintiffs. That is, the plaintiffs can recover precisely as if they were Neal himself. They stand in his shoes. That would be $5 per M for the hauling; and for the driving, there being no stipulated price, a reasonable compensation therefor."

The verdict was for the plaintiffs; and the defendants moved to set it aside and alleged exceptions.

F. A. Wilson & C. F. Woodard, for the defendants.

J. Varney, for the plaintiffs.

DANFORTH, J. The exceptions in this case involve the construction of a written contract, entered into by the parties November 24, 1869. For the purpose of ascertaining its meaning, it is not only competent but highly proper to consider the circumstances under which the contract was made and the objects to be accomplished by it.

It seems that prior to the date of the writing the defendants had taken a permit for the cutting of lumber on townships Nos. 7 and 8, on Pleasant brook, and had agreed with John H. Neal to cut and haul for them at the rate of five dollars for each thousand feet. Under this arrangement Neal had cut and hauled 62,010 feet, or thereabouts, when the bargain was made with these plaintiffs to cut, haul and drive into the Mattawamkeag stream, pine logs for $7.50, and other kinds of lumber for $6.50 per M feet. The question raised is whether, under the plaintiffs' contract, the logs already cut and hauled by Neal were included in and to be paid for, as the logs cut, hauled and driven by them.

One of the provisions of the writing is that the plaintiffs shall "carry out the trade that White & Hodgdon have made with John H. Neal to cut and haul logs on Pleasant brook." It is sufficiently clear from this that, in Neal's agreement the plaintiffs assumed the obligation resting upon the defendants, and that, as between these parties, the former contract was merged in the latter. As Neal's contract was one, the merger must apply to the logs previously cut as well as those cut subsequently. So the obligation of payment assumed by the plaintiffs applied equally to both classes of lumber.

It is noticeable that in the written contract there is no provision for the repayment of the amount paid to Neal, or for the payment of any sum for driving the Neal logs, unless it is found in the provision for the payment upon all the logs, of $7.50 and $6.50 per thousand feet; and unless there is a merger of these logs with the others, no agreement can be found to drive them. Hence, if the separation contended for by the plaintiffs is to be made, they have performed a service in driving the Neal logs outside of this or, so far as appears, any contract, and for which there is no promise on the part of the defendants, express or implied, to pay; certainly no ground on which they can recover for that service under this contract; therefore the instruction that, for the driving the plaintiffs should recover a reasonable compensation, must be erroneous.

But this would seem to be satisfactorily settled by the provision further along, relating to the quantity and ownership of the logs to be hauled. The language used is this: "Bishop & Muzzey agree to cut, haul and drive into the Mattawamkeag one million feet or more, with what John H. Neal hauls. One-half of said logs are to be hauled by the thousand for said White & Hodgdon; the other half Bishop & Muzzey are to pay stumpage on and own." Here then we find an agreement on the part of the plaintiffs to drive the Neal logs with, and as a part of, those cut by themselves, and evidently in consideration of the payment before provided for. They are also to drive one-half by the thousand and to own one-half of said logs. The words "said logs" can only refer to those mentioned in the previous sentence, and those included the Neal logs; consequently the plaintiffs must own one-half of the Neal logs in the same way as one-half of those cut by themselves.

The conduct of the parties in carrying out the provisions of the contract, may throw some light upon their understanding of it, but it cannot control its construction. Were it so, it would be necessary to submit the question of its meaning to the jury, as the testimony upon this might be conflicting, or the inferences to be drawn from it uncertain.

Nor is there any question of election arising from "inconsistent

positions" by way of estoppel involved. If any such could have arisen, it is now too late to invoke it. The plaintiffs have for their remedy resorted to an action upon the contract, and by its provisions fairly construed they must abide. If, by any course of conduct on the part of the defendants, or by any construction they have given the contract, they have induced the plaintiffs to adopt a course of conduct they otherwise would not have done, the matter of estoppel may apply. But that would be a question for the jury, and does not arise under these exceptions.

Our conclusion is, that all the logs cut by Neal under the agreement referred to in the contract in question, are to be included in and treated in all respects as the logs cut by the plaintiffs.

Exceptions sustained.

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

JOSEPH O. B. DARLING *vs.* CITY OF BANGOR.

Penobscot. Decided March 27, 1878.

Town. Drains.

To determine a plan of drainage and what drains shall connect in the streets of a city, is a judicial act of the officers for which the city are under no common law liability; though if the connection be unskillfully made, it is a ministerial act for which the city is liable in damages to a party injured thereby.

ON REPORT.

TRESPASS on the case declaring on a common law liability for the flowage of the cellar of the plaintiff's store on the easterly side of Exchange street, in May and June, 1874, and setting out, among other things, that he had and maintained a private drain from the cellar through and across Exchange street and into Kenduskeag stream which well and effectually drained the premises; that the defendants built Exchange street sewer and cut off and blocked the plaintiff's drain, so that he was obliged to connect with the defendants' sewer; that the defendants turned into and

connected with Exchange street sewer, two others, the York street and State street sewers, by means of which connections, the defendants poured vast streams of water, impregnated with filth, in seasons of heavy rain, into Exchange street sewer beyond its capacity to carry off, and through the plaintiff's private drain into his cellar, and alleging damage.

The case finds, in substance, these facts, and that the Exchange street sewer was built by the municipal officers in 1869; that in building it the plaintiff's drain was necessarily cut off; that it was connected with the sewer, no one objecting; no written application was made nor written permit granted to enter the sewer until long after the damage complained of, nor until November 13, 1874; that the State and York street sewers were made and connected with Exchange street sewer by the concurrent action of the two branches of the city government and not by the municipal officers alone; that until after their connection, the Exchange street sewer never overflowed; that the rains which caused the overflow were extraordinarily severe, and were the same stated in *Blood* v. *Bangor*, 66 Maine, 154, to which reference was made. Soon after the last overflowing of the Exchange street sewer into plaintiff's cellar, as alleged in the writ, the York street sewer was extended through York street slip into Kenduskeag stream, and the Exchange street sewer was also turned, so that the contents of Exchange street sewer, received above York street, flow down through York street slip sewer. Since then there have been no overflowings of the Exchange street sewer.

The full court to draw such inferences as a jury might, and to order judgment.

F. A. Wilson & C. F. Woodard, for the plaintiff.

T. W. Vose, city solicitor, for the defendants.

DANFORTH, J. The legal liabilities of cities and towns growing out of facts similar to those involved in this case, have of late years been much discussed, and the principles of law applicable thereto have become well settled, though their application may at times be a matter of some difficulty. Municipal corporations are endowed with certain judicial or *quasi* judicial powers, to be exercised, not

for their own private convenience or profit, but as a part of their public duty, for the furtherance of those things necessary or convenient to the community at large. The performance of these duties, involving as they do the exercise of judgment as to the time and manner of accomplishment, as a general rule impose no liability to an action for private injury resulting from acts within their jurisdiction. When these acts cease to be judicial and become ministerial only, then for negligence or omission, an action may be maintained by a person suffering injury thereby.

Thus the maintenance of sewers and drains, as they are necessary to the public health, or to keep the roads in a safe condition, comes within these judicial powers; the manner of building and keeping them in repair, are usually considered as ministerial duties. *Mills* v. *Brooklyn*, 5 Law Register, N. S. 33 and note. *Mersey Docks* v. *Gibbs*, 11 H. L. 713. *Flagg* v. *Worcester*, 13 Gray, 601.

In this case, under the authority to draw such inferences as a jury might, we understand that Exchange street drain, having been laid out and caused to be built by the municipal officers, was a statute drain with all the privileges and liabilities attached to such. For the location or construction of this no complaint is made.

The connection of the York and State street drains was not made by the municipal officers, but by the city government. It is true, as contended, that the municipal officers are a part of the government, and as such assented to the building of the drains. But to act as a distinct and separate body is one thing; for the same persons to act in connection with and as a part of another body, is another and a very different thing. A drain cannot have the sanction of the statute, unless it is built by the authority and under the sole responsibility of the body therein provided and in pursuance of the provisions therein prescribed.

These latter drains and their connections with that in Exchange street were not, therefore, built under the statute. Nevertheless they were within the legislative or judicial jurisdiction of the city. It appears that they were built partly to remove one or more nuisances, and partly for the improvement of the streets through

which they passed. Both of these objects are for public purposes, and as such are recognized by the law as matters upon which the city is required to act. The building of these drains, then, would impose no other or greater responsibilities upon the city than would arise in relation to matters generally within the judicial jurisdiction of the city. The location of these drains, being so far as appears wholly within the street and no private property taken for that purpose, can impose no liability upon the city for any incidental damage which may accrue. All liability, if any rests upon the city, must result from the negligent or unskillful manner in which they are built, or a neglect to keep them in repair. But no complaint is made of negligence, either in building or repairing. The allegation in the writ in substance is, that these drains "were wrongfully and without right" connected with the Exchange street drain, whereby a larger quantity of water was turned into the latter than could be vented through it, by reason of which it ran through the plaintiff's private drain into his cellar and caused the damage complained of.

Under the statement of facts we have no doubt the injury complained of was the result, more or less remote, of the connection of the drains. The wrong, however, was not in the connection, for that the city had a right to make, but in making the connection with a drain too small to carry off the additional water. This was the view of the court in *Blood* v. *Bangor*, 66 Maine, 154, an action founded upon the same alleged wrong. That case, however, rested upon the statute liability which makes the city an insurer, and not upon the principles of the common law as must this one.

Here would seem to be an error of judgment rather than any intentional or even negligent wrong or want of skill, and it would seem to be difficult under the common law to hold the defendants without one or the other.

In *Child* v. *Boston*, 4 Allen, 41, on page 51, it is said: "Upon mature deliberation, we are all of the opinion that the defendants are not responsible for any defect or want of efficiency in the plan of drainage adopted, although it might expose the plaintiff to incidental inconvenience." See, also, *Flagg* v. *Worcester*, above cited.

It is, however, claimed that the defendants' act had the direct effect to throw the water upon the plaintiff's premises. If the facts were such as would sustain this theory, undoubtedly the defendants would be liable. It is unnecessary to cite authorites to show that to abate one nuisance it is not allowable to make another. But the facts are otherwise. The water is turned into a sewer within the street, which continues in the street and the outlet of which does not turn the water in the direction of the plaintiff's cellar. It gets there by overflowing, as already seen, by the insufficient size of the sewer.

But however this may be, there is one ground fatal to the plaintiff's action. The plaintiff's own drain is the proximate cause of the difficulty. But for this, there is no reason for supposing there would be any such injury as is complained of from the water of any or all of the defendants' drains. They might overflow but it would not be that for which damages are claimed. The allegation in the writ places the damage upon the water running through plaintiff's private drain. If this drain were rightfully there the result might be different. But it is not. Its opening into the defendants' drain is without authority, or at least, it was made under such circumstances as to impose no duty upon the defendants in regard to it. The plaintiff has no rights under the statute for its connection; none of the statute provisions were pursued. There are no rights resulting at common law, for nothing was paid, no contract entered into with regard to it. The connection was made for the plaintiff's private convenience, without objection to the same, but also without any such stipulation as would impose any duty in regard to it upon the defendants. *Barry* v. *Lowell*, 8 Allen, 127.

The subsequent payment could not affect its previous condition. That would have effect only from its date. The connection was not made under any assumed agency in behalf of the city, and therefore the act is one to which ratification does not apply. The law in relation to this subject matter is well and we think correctly stated in *Ashley* v. *Port Huron*, cited in the argument from 9 Chicago Legal News, No. 24, and were the facts in this case the same, the action might be maintained. There the claim is

founded upon the cutting of the plaintiff's sewer, by which the water was collected and thrown upon his premises. Here the sewer was cut, and for that the plaintiff, or his lessor had, and perhaps still has, a remedy under the statute by virtue of which it was done, or otherwise. But that is a wrong for which he does not claim a remedy here. His action rests upon a very different foundation, and as we have seen, upon one which fails him.

Judgment for defendants.

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

SARAH A. INGALLS *vs.* THOMAS F. CHASE *et al.*

Somerset. Decided March 28, 1878.

Amendment.

One memorandum of recognizance returned by a magistrate allowing an appeal may be filed by the clerk of the court to which the appeal is taken without special authority from the judge, and it will thereby become of record in the appellate court, so that the appellee who has had final judgment in that court in his favor may maintain an action on it.

With the permission of a judge of the court, such magistrate may amend the recognizance returned, or make a new return, so as to set forth more fully and correctly the contract into which the parties entered; and thereafterwards the party entitled may maintain an action on such amended recognizance.

But where a second return has been made by the magistrate on his own motion or at the suggestion of the party's attorney, and there is nothing but the clerk's memorandum of filing upon the paper to show that it has been recognized as the true record by the appellate court, it is not entitled to be so regarded, and no action can be maintained upon it.

ON REPORT.

DEBT, on a recognizance taken by a trial justice, in a case of forcible entry and detainer, entered before him and removed to S. J. Court under R. S., c. 94, § 6, each party recognizing to the other. The recognizance of the defendants, as first returned to S. J. C. and filed with the clerk, omitted the following words, which were afterwards inserted in a manner to raise the legal question: "And whereas said action has been removed by me, the said jus-

tice, to the supreme judicial court next to be holden at Skowhegan, [etc.] on the third Tuesday of September, 1874."

The trial justice in the recognizance as first returned, undertook to adjudge the reasonable rent under § 8, but left the sum blank, which was afterwards inserted at "three dollars a month."

At nisi prius the defendant pleaded *nul tiel record*, with a brief statement that "the recognizance originally returned to and made a record in said supreme judicial court in the original action, was taken from the files of court without leave of court, and the recognizance now in suit was substituted therefor by the plaintiff's counsel, and so the records of said court have been tampered with."

The replication affirmed such record.

The evidence, admitted against plaintiff's objection, tended to show that, after the entry of the recognizance and the filing by the clerk, it was taken by the plaintiff's attorney, a few days before the date of the writ, February 5, 1876, and when returned to the files was in the changed form hereinbefore stated.

The facts are summarized in the opinion.

A. H. Ware, for the plaintiff.

The memorandum of recognizance should be full and complete. If the magistrate discovers that the first one is deficient or erroneous, it is proper for him to certify and send up a full and correct one, either upon his own motion or upon the suggestion or request of the plaintiff's attorney. *Cook* v. *Berth*, 108 Mass. 73. *Commonwealth* v. *McNeill*, 19 Pick. 127.

To the points that the recognizance might be filed after the first term or after final judgment, either in court by leave, or in the clerk's office; that the clerk's certificate of the filing is the regular and sufficient evidence of the fact, and that neither oral testimony nor a copy is admissible to contradict an original or show it defective, counsel cited some of the cases found in opinion, also *Commonwealth* v. *Field*, 11 Allen, 488. *Commonwealth* v. *Merriam*, 7 Allen, 356. *Hawkes* v. *Davenport*, 5 Allen, 390. *Benedict* v. *Cutting*, 13 Met. 181.

J. J. Parlin with *J. H. Webster*, for the defendants.

BARROWS, J. The action is debt upon a recognizance to the plaintiff, alleged to have been entered into by the defendants before a trial justice, May 22, 1874, in pursuance of an order of said justice, for the removal to the then next September term of this court, of a process of forcible entry and detainer then pending before said justice, in which the plaintiff was complainant, and Chase, one of these defendants, was the respondent, and had filed a brief statement, claiming that the title of the premises described in said process was in certain third persons whose tenant he was. Final judgment against said Chase in that process was rendered in this court at the September term, 1875. The recognizance here sued was filed February 1, 1876, and this action upon it was commenced February 5. It is defended on two grounds.

I. The defendants claim by their brief statement, and offer evidence tending to show, that the recognizance declared on and produced by the plaintiff is not the one originally returned to this court and here entered of record in the original suit, but has been substituted for it without leave of court.

The plaintiff contends, in substance, that the memorandum of recognizance returned to the court above should be full and correct, in accordance with the facts, setting forth the actual contract into which the parties entered, and that a magistrate, after certifying and sending up one memorandum of recognizance, if he discovers that it is deficient or erroneous, has the right to certify and send up a full and correct one, either upon his own motion, or at the suggestion of counsel; that the certificate of the clerk upon the recognizance declared on showing that it was filed and when, is a sufficient and conclusive recognition of it as a record of this court, and that no oral testimony or copy of another paper is admissible to impeach it. The evidence produced by defendants to impeach the recognizance offered by plaintiff, consists of the testimony of the clerk of the court who produced the papers in the original suit, *Ingalls* v. *Chase*, and testified that there was a recognizance on file at the September term, 1875; that the recognizance declared on is not that one; that he made a copy of that recognizance and sent it to Chase's attorney; and he identifies the copy produced as one which he made, and it is

offered in evidence by the defendants as a copy of the original recognizance.

In support of his objection to this evidence the plaintiff's counsel cites *Stetson* v. *Corinna*, 44 Maine, 29, and *Leathers* v. *Cooley*, 49 Maine, 337. In neither of these cases was the question here presented directly before the court for determination. *Stetson* v. *Corinna* was an action between two towns, originally commenced before a justice of the peace, and brought into this court by appeal taken by the defendants; and the main question for decision was whether, after many continuances and a trial and verdict for the defendants, the plaintiff's motion to dismiss the appeal for want of a proper recognizance, first made after the overruling of various motions for a new trial by them filed, ought to be sustained, on the ground that the court had no jurisdiction of the case by reason of the insufficiency of the recognizance.

Several valid and sufficient reasons were urged by different members of the court for holding that the court had jurisdiction and that the motion to dismiss could not be sustained, and among other things it was said that a copy is not admissible to contradict an original record or to show it defective; but the remark was made of a copy which had been originally sent up instead of the original with the appeal papers by the justice, and the original record which was referred to as not liable to be thus contradicted was the amended recognizance, filed by leave of court after the motion to dismiss the appeal. The court properly held that a recognizance filed by leave of court became a part of the records of the court; that it might be so filed at any time, and it was of such a recognizance that it was said that "no case had been cited to show that it could be contradicted or impeached by what purported to be a copy."

In *Leathers* v. *Cooley*, 49 Maine, 337, the principal question was whether the clerk's minutes upon the docket of the court, showing the amount of debt and costs recovered, was, in the absence of an extended record, sufficient and conclusive proof, in an action upon the recognizance, of the rendition of a final judgment for the plaintiff, so as to preclude evidence from the clerk

of a non-compliance with the rule of court, requiring papers to be filed within a certain time, to authorize the clerk to extend and complete the record. In view of the well known practice of clerks to make such entries on their dockets, in the presence and under the authority of the court, and the established presumption that they are so made, and the consequent decisions in *Longley* v. *Vose*, 27 Maine, 179, and *Read* v. *Sutton*, 2 Cush. 115, that this presumption cannot be controlled by the testimony of the clerk or judge, the court held in *Leathers* v. *Cooley* that there was sufficient and conclusive proof of final judgment in favor of the plaintiff in the original suit to enable him to maintain an action upon the recognizance. This was the matter to which the attention of the court was mainly directed, and this the extent of their decision upon the conclusiveness of memoranda made by the clerk. They held also that the fact that the recognizance was not entered at large upon the record before suit brought upon it would not defeat the action, that it was sufficient that it had been returned to and placed on the files of the court, as the clerk's memorandum upon the back of it showed; but their attention was not called to the question which we have here to pass upon, whether the presumption arising from such filing by the clerk is, like that, from the entry by him upon the docket of the rendition of judgment for a party for a certain sum for debt or costs, conclusive, and not subject to be controlled by the testimony of clerk or judge that it was made without the permission of the court.

That the memorandum of the clerk upon the recognizance here sued is thus conclusive, the plaintiff's counsel contends, upon the authority of *Cook* v. *Berth*, 108 Mass. 73, where in a suit upon an amended recognizance, sent in by a justice of the peace about the time of the rendition of judgment in the superior court upon the appealed case, and filed by the clerk of the superior court, the supreme court of Massachusetts held, after verdict for the plaintiff in the superior court, that, notwithstanding the first recognizance sent in by the magistrate was differently conditioned, the amended recognizance was properly filed; that the amendment must be taken to have been allowed by the superior

court; that no oral evidence was receivable to contradict the recognizance as finally certified by the magistrate and entered of record in the superior court, and that the plaintiff was entitled to judgment upon the recognizance as amended. The case as reported seems to go far to sustain the doctrine for which the plaintiff's counsel here contends. But we are left by the opinion somewhat uncertain how far the action of the superior court in permitting the amended recognizance to go as evidence to the jury and instructing them to return a verdict for plaintiff thereon, was regarded as equivalent to a previous permission to make the amendment. Some of the remarks in the opinion seem to indicate that it was this subsequent recognition by the court, rather than the clerk's minutes of filing, which the supreme court deemed conclusive as to the character of the recognizance as a record.

However this may be, when we find ourselves called upon to settle the question whether the clerk's filing upon a document of this description will, *ipso facto*, make it a record of this court, from a simple inspection of which the rights of the parties are to be determined, we feel bound to say that we cannot give that effect to this act of the clerk when a second recognizance has been returned, differing from the first, unless it is made to appear that the act of filing and entering it of record has been either authorized or ratified by a judge of the court. These memoranda and loose papers are managed and cared for very differently from the entries made by the clerk upon his docket. They are less vigilantly inspected, both by the clerks and the members of the bar.

We believe it to be a common practice with our clerks to file papers upon the request of counsel with little or no previous examination beyond what is necessary to ascertain the name of the case to which they relate, leaving the character and purport of them to be learned subsequently as occasion may require. We owe it to the purity and verity of our records to hold that where one recognizance has been returned by the magistrate, allowing an appeal, and duly entered upon our records, another shall not be permitted to take its place so as to have the effect of another

and different record, without the sanction of some judge of the court who is satisfied that truth and justice require it, and that the proposed amendment is in accordance with the actual facts, and truly sets forth the contract into which the parties entered. Where uncertainty has been produced as to which is the true record by the return of more than one memorandum, we do not think we can safely lay it down as a universal rule, that the clerk's filing upon the last one, *ex vi facti*, establishes that as the record of the court or the contract of the parties. We cannot admit that after having returned one memorandum of recognizance, which has regularly become of record with us, the magistrate who allowed the appeal may, of his own motion or at the instance of the attorney of one of the parties, without the permission of some member of the court, substitute another, which shall supersede the first and be entitled to superior faith and credit merely because it is the last version of the matter which he has chosen to give. Such a proceeding amounts to a correction of the records of this court, which only the court itself has the right to make.

In *Commonwealth* v. *McNeill*, 19 Pick. 127, it appears (p. 129) that the amended recognizance was ordered to be filed and recorded in the court to which it was transmitted. We readily agree that, in the absence of anything to indicate that there has been an interpolation or substitution, the clerk's filing of the recognizance is a sufficient entry of it upon our records to entitle the party interested to maintain an action upon it when final judgment in the original suit has been rendered in his favor, that it is not indispensable to the maintenance of a suit on the recognizance that it should be returned to the court at the term to which the appeal is taken, or even during the pendency of the original suit; and that no special authority from the judge is necessary to justify the filing of one such memorandum from the magistrate allowing the appeal.

So it was held in *Leathers* v. *Cooley*, 49 Maine, 337, and that is as far as the decision goes on that point. In *Stetson* v. *Corinna*, *ubi supra*, leave of court was asked and granted for the filing of the amended record and recognizance. It may be assumed that such leave will always be granted when it is made

to appear to a judge of the court that truth and justice require it. The necessity for such amendments when they can be truthfully made is adverted to in *State* v. *Young*, 56 Maine, 219. But the better practice is to have them made, as amendments of officer's returns are, after application to the court, setting out the nature of the amendment proposed, and giving opportunity for inquiry, and upon the consent of the judge thus procured.

In the absence of such consent or of a subsequent recognition and ratification of the amended record by some act more formal than the ordinary indorsement made by the clerk upon the filing of any paper, we cannot give effect to the questionable and equivocal return, as to a record of this court.

While we see no cause to attribute any willful breach of good practice or morals to the attorney or the magistrate in the present case, it is clear that the practice is one which would open an easy way to great abuses, and that it cannot be allowed. The plaintiff is not entitled to judgment on such a record as this.

II. Such being the conclusion, we have no occasion now to consider the other objection to the maintenance of the suit, except as it illustrates the truth of Gibson, C. J.'s remarks respecting "the remarkable inaptitude of magistrates in these matters," and the perverse propensity of most people to try how far they can deviate from the requirements of a statute without forfeiting the benefit of its provisions.

The original process was transferred by the magistrate to this court without trial because the defendant by his pleadings claimed that the title to the premises was in his lessors. The recognizance should have been conditioned simply as prescribed in R. S., c. 94, § 6, for the payment of "all intervening damages and costs and a reasonable rent for the premises." But the recognizance sued is conditioned for the payment of "all intervening costs and damages and a reasonable rent for said premises, which I, the said justice, adjudge to be at the rate of three dollars a month "—thus apparently superadding in a mutilated condition a portion of the condition of the recognizance required by § 8 to be given by a defendant in such a process upon appeal, after trial before the justice.

What the effect of inserting in these recognizances conditions other than those which are called for by the statute has been held to be, may be seen by referring to *Lane* v. *Crosby*, 42 Maine, 327. *Dennison* v. *Mason*, 36 Maine, 431. *French* v. *Snell*, 37 Maine, 100. *Owen* v. *Daniels*, 21 Maine, 180.

Whether the superfluous matter here introduced necessarily vitiates the recognizance, or might properly be rejected as surplusage, it would be useless now to inquire.

Judgment for defendants.

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

FREDERICK FOX, administrator, with the will annexed, of the estate of Samuel Rumery, *vs.* WILLIAM RUMERY *et als.*

Cumberland. Decided April 1, 1878.

Will. Acceleration of remainders.

A remainder taking effect after a life estate is accelerated by any cause which removes the prior life estate out of the way.

The testator by will gave his wife, in lieu of dower, one-half of his property, real and personal, for her life, with power to sell and make such reinvestments as she deemed expedient, with a devise over to his adopted son. *Held*, a gift to the wife of only a life estate with power of alienation for reinvestment only, and a valid devise over both as to real and personal estate.

Where, in the same case, the wife waived the provisions in the will and accepted dower and allowance instead, *Held*, that the devise over was not thereby abrogated; that the effect as to the surplus was the extinction of the widow's life estate therein and the acceleration of the rights of the second taker.

BILL IN EQUITY, asking the construction of the will of Samuel Rumery, of Westbrook, who died March 12, 1873, without issue, leaving property, real and personal, amounting to $248,236.25, disposed of by will dated May 7, 1867, containing six items.

The first provides for payment of debts and funeral expenses.

The second gives $10,000, in five shares of $2000 each, to his father, brother, sister and representatives of deceased sisters, each

share in case of no surviving representative to be divided among the others, conditioned substantially on his leaving an estate of $40,000.

The third gives to his wife, Rachel Ann Rumery, in lieu of dower, one-half of his remaining estate, real, personal or mixed, for and during her life, and closes thus: "Granting her full power and authority to sell, transfer, assign and convey each and every part and parcel of said half part, whether real or personal, by sufficient deeds and guaranties, according to her own judgment, will or pleasure, and with the right to select from my estate, after a just and lawful appraisal, the half part in value, whether real, personal or mixed, which she may choose and prefer, and make such reinvestments of the proceeds of any such sales or transfers as she may deem expedient; and after her decease, should my adopted son, Samuel Dayton Rumery, survive her, I give, bequeath and devise all the then existing remainder of said half part, to the trustee hereinafter provided, for the uses and trusts, intents and purposes, and to be disposed of in precisely the same manner as is hereinafter provided in the fourth or immediately succeeding article or paragraph."

The fourth names William Henry Dennett, a relative by marriage, trustee of the property left, after his wife's selection, for the use of his adopted son, Samuel Dayton Rumery, with specific and particular directions; on his death with children, they to represent him; if without children, then his share to go to the widow of the testator.

The fifth, in the event of the death of his wife and adopted son without issue, gives the remainder to his lawful heirs.

The sixth names his wife executrix.

The widow waived her rights under the will, received her dower in real estate inventoried at $31,875, and an allowance of $100,000 from the personal estate. She declined to act as executrix and the plaintiff was appointed administrator with the will annexed. Dennett declined to act as trustee, and Edward A. Noyes was appointed in his stead.

The administrator submitted several questions to the law court, but the answer to the first renders it unnecessary to state the

others. The first relates to the disposition of the overplus of the estate after the payment of the $10,000 legacy, one-half of the residue to the trustee for the adopted son, the allowance to the widow, the debts and the expenses of administration. The inquiry is, whether it should go to the heirs or to the trustee.

N. Webb, for the trustee and *cestui que trust*, contended that it was the manifest intention of the testator to dispose of his whole estate by will, and that he had done so.

B. Bradbury, for the heirs, admitting that such was his intention, contended that the devise and bequest of real and personal property to the wife with power to sell amounted to a gift of the personal and of the fee in the real estate, but that her unforeseen action in waiving the provision of a life interest of about one-half the estate under the will and in accepting dower in one-third of the realty and an allowance of $100,000 of the personal had left a portion of both real and personal estate undisposed of, which by law should go to the heirs; and that, even if his first position was not tenable, they were entitled to a life interest. [Reporter's note. See *Blatchford* v. *Newberry*. The Reporter, vol. 6, p. 265.]

N. Webb, in reply. The power to sell and reinvest is not in law a right-out gift. True, the widow has waived provisions under the will so far as they are in her favor; she has no power to waive provisions in favor of the other legatee and devisee. In case of her death before his, the property was all to be his; her waiver extinguished her rights, and accelerated his in so much of it as was not included in her allowance.

BARROWS, J. What was the testator's intention? Are the terms of his will such that we can give effect to that intention consistently with the rules of law? These are the fundamental inquiries, upon the answers to which the rights and duties of these parties depend.

His heirs at law claim that, by reason of his widow's refusal to accept the provision made for her by the will, that portion of the estate given to her therein in lieu of dower remains undis-

posed of by the testator, and what is left of it, after deducting the sum allowed her by the probate judge, under R. S., c. 65, § 21, descends to them subject to her right of dower in the realty, and that the trustee for the adopted son can take nothing under the will except the moiety devised to him by the fourth item; in other words, that by reason of the widow's election to take her dower and allowance, the third item of the will becomes entirely inoperative, and so much of the estate as the testator therein attempts to dispose of must descend in the same manner and to the same persons as if the estate were intestate.

To reach this result it is claimed, in behalf of the heirs, that the entire interest and estate in that moiety of the property, devised in the third item to the wife of the testator, was vested in her by the terms used, and nothing remained to pass under that item to the trustee in any event, whether the wife accepted or rejected the provision in the will. In brief, the claim is, that upon a proper construction of the third item, one-half of the property, real and personal, not previously disposed of, to be selected by her, in value according to the appraisal, was given absolutely to the wife, and not being accepted by her, is left to be disposed of according to law under the statutes regulating the descent and distribution of intestate estates.

It is unquestionably true that if the devise of an estate be rejected by the devisee, and there be no other disposition of the estate in the will, it will descend to the heirs at law. *Bugbee* v. *Sargent*, 23 Maine, 269.

That this result would be contrary to the intention of the testator here is obvious, and is substantially admitted by the learned counsel for the heirs when he claims that the testator "did not imagine that his wife would renounce the provisions of the will, and so made no provision for that contingency."

It would indeed be difficult to imagine why she should renounce the provisions made for her in the will if the construction which the counsel seeks to give it could prevail. Is it the true construction?

Judge Redfield, in his treatise on Wills, Part II, c. 13, Sect. 6, § 48, remarks: "The courts have for a long time inclined very

decidedly against adopting any construction of wills which would result in partial intestacy, unless absolutely forced upon them. This has been done partly as a rule of policy, perhaps, but mainly as one calculated to carry into effect the presumed intention of the testator."

In the interpretation of any particular clause in a will, we are to give effect to the intention of the testator as manifest from an examination of the whole will, when not inconsistent with the rules of law. The clause is to be considered in connection with all the others, and with the main design of the testator, and such a construction adopted if possible, as will give effect to the whole and to the general intent, although thereby some departure from a literal construction of the clause in question may be necessary. *Morton* v. *Barrett*, 22 Maine, 257. We observe, in the first place, that by the second item in his will the testator makes a certain provision for his heirs at law, coupled with certain conditions, limited in amount "not to exceed in any event the sum of ten thousand dollars," carefully divided, with elaborate directions for distribution among the survivors in case of the decease of any of the beneficiaries named in the item.

It is plain that this was the extent of the intended bounty in that quarter, except in a certain contingency to be hereafter noticed. If the heirs at law are entitled to more, it is in opposition to the purpose of the testator expressly declared. The bulk of his fortune was to go for the use and benefit of his wife and adopted son, under certain limitations and restrictions.

And what was thus given to the wife and adopted son respectively, in case of the death of either, was to enure to the benefit of the other. Only "in the event of the decease of my wife Rachel Ann, and adopted son Samuel, without lawful issue, and the termination of the estates herein created," was the remainder to go to his lawful heirs.

That the courts have carefully refrained from permitting the wife's election to affect the testamentary dispositions made by the husband, beyond what necessarily results from the wife's exercise of her paramount right, may be seen by a reference to *Perkins* v. *Little*, 1 Maine, 148, 152, where the wife's right under the stat-

utes then existing was confined to her dower in the realty, and to personalty not disposed of by the will. It was enlarged by giving the judge of probate discretionary power over the personalty generally, by c. 180, laws of 1835. But the idea still lingered that the amount of property undisposed of by the will was a matter to be considered in the exercise of the probate judge's discretionary power. See remarks of Wells, J., in *Hastings* v. *Clifford*, 32 Maine, 132, 136.

It is certain that her election cannot be held to affect the disposition of any actual subsisting remainder of the property devised to her, beyond what results from the exercise of the discretionary power now confided to the judge of probate to make her an allowance as if the husband had died intestate. The claim made by the heirs can prevail only by establishing the proposition that the third item of the will must be construed as passing to the wife the entire property and control of the moiety therein devised to her. Otherwise, the wife's election of dower and allowance cannot defeat the remainder therein given to the trustee for the adopted son.

To support his construction, the counsel for the heirs calls attention to the right given her in this third item, to select the half of the estate, after an appraisal, "whether real, personal or mixed, which she may choose and prefer," and the "full power and authority to sell, transfer, assign and convey each and every part or parcel of said half part, whether real or personal, by sufficient deeds and guaranties according to her own judgment, will and pleasure;" and he relies upon the cases of *Ramsdell* v. *Ramsdell*, 21 Maine, 288, 293, and *Pickering* v. *Langdon*, 22 Maine, 413, as clearly establishing the doctrine that such absolute power of disposal in the first taker will render the devise over inoperative. This is true; but to reach the conclusion which he seeks, we must overlook the equally clear provisions in this item that the property is given to her "for her use, benefit and advantage, for and during her life," and that the power of disposal is apparently for the limited purpose of enabling her to "make such reinvestments of the proceeds of any such sales or transfers as she may deem expedient."

Taking all the provisions together, as we are bound to do, we think that under this item the wife would take only the use and income during her life of the moiety which she might select at the appraisal, and that the power of disposal was given to her for the limited purpose of reinvestment in that which might promise an increase of income without exposing herself or her estate to liability for any loss that might accrue from an unwise or unfortunate change of the investment. The authority to "make such reinvestments of the proceeds of any such sales or transfers as she may deem expedient" was needless if the fee in the realty and the absolute dominion of the personalty had been given, and the existence of such a provision is not reconcilable with such a design on the part of the testator. Coupled as it is with the power of disposal, it gives emphasis to the limitation to her of the "use, benefit and advantage, for and during her life," and goes far to make it certain that, while he designed she should control the management of her moiety during her life, free from liability for the consequences of mistake in such management, it was the use and income only which was to be hers, and the rest was to go at her decease to the trustee for the adopted son.

Nor does it make any practical difference with regard to the construction that a large part of this moiety was in personal estate. While it is true, as stated by Chancellor Kent, vol. II, p. 352, 4th Ed., that formerly, at common law, the doctrine was that there could be no limitation over of a chattel but a gift for life carried the absolute interest, it was long ago settled that a gift of a chattel for life was a gift of the use only, and the remainder over was good as an executory devise. Kent's Com. *ubi supra*, and cases there cited in notes. *Field* v. *Hitchcock*, 17 Pick. 182. *Homer* v. *Shelton*, 2 Met. 194.

It is to be regretted that the courts ever thought it necessary to transfer the terms "remainder and executory devise" from their original application to real property to provisions respecting personal property. Owing to the different nature of the subject, the analogy will seldom if ever be perfect, and in some respects will always be absolutely defective. Yet the transmutation has encumbered the attempts of judges to give a reasonable operation

to testamentary dispositions respecting the personalty to an inconvenient extent, and we admire their ingenious efforts to give effect to the testator's intentions consistently with the technicalities thus needlessly imported, much as we should the labored performance of a dancer in fetters—for the agility displayed, rather than for the grace of the movement.

And sometimes, while they recognize a legitimate intention of the testator, their best efforts fail to extricate it from an entanglement of technicalities which have no proper application, so as to give it its just effect. It would be much simpler to recognize the essential distinction between a remainder in real estate and a remainder of personal property, and to determine where and to what extent a bequest of an interest *in futuro* in the latter could be regarded as lawful and protected, if we were untrammeled by the refinements and subtleties which have grown up about the ownership and tenure of real estate.

But perhaps at this day it would be too sweeping a change to discard the terms so long used, and it may be that if we keep the cardinal object of inquiry, the legitimate intention of the testator, carefully in view, the obstacles to a satisfactory conclusion will commonly be found fewer than might be anticipated.

Suffice it, in the present case, to say that, giving their due force to all the clauses and provisions of the third item, the interest given to the wife in her moiety was for life only, with special power of alienation for the purpose of changing the investment only, and that this is consistent with a valid devise and bequest over to the trustee for the adopted son, and brings the case within the exception to the general rule, which is expressly recognized in *Ramsdell* v. *Ramsdell*, 21 Maine, 288, 295, as follows: "Where a life estate only is clearly given to the first taker, with an express power, on a certain event or for a certain purpose, to dispose of the property, the life estate is not by such a power enlarged to a fee, or absolute right; and the devise over will be good." See, also, *McLellan* v. *Turner*, 15 Maine, 436. *Shaw* v. *Hussey*, 41 Maine, 495. *Willing* v. *Baine*, 3 Peere Williams, 113. *Walker* v. *Main*, 1 Jac. & Walker, 1. *Humphreys* v. *Howes*, 1 Russ. & Mylne, 639. *Morris* v. *Belyea*, 13 N. Y. 273.

The devise over to the trustee, being valid and effective, cannot be treated as expunged by the wife's rejection of the life estate given her in the third item, so as to leave any portion of her moiety undisposed of by the will. The effect thereby produced is that the wife takes her dower in the realty, and one hundred thousand dollars allowed her by the judge of probate, leaving the remainder of that moiety to pass, under the provisions of the will, to the trustee for the adopted son. That remainder is, to all practical intents and purposes, what is spoken of by the testator in the third item as being at the decease of his wife "the then existing remainder of said half part."

All the wife's interest in it is at an end as much as if she were dead. The rule is that the extinction of the first interest carved out of the estate only accelerates the right of the second taker. *Taylor* v. *Wendel*, 4 Bradford Sur. Rep. 325. This is the only disposition of this surplus of the wife's moiety which is consistent with the testator's declared will. He could not control his wife's right to prefer her dower and allowance to the life estate which he gave her, nor could she by exercising that right abrogate the disposition which he had made of any surplus of the estate after satisfying her legal claims.

Thus, in *Adams* v. *Gillespie*, 2 Jones Eq., N. C. 244, where a testator gave personal property to his wife for her life, and after her decease to his daughter for her life, and then to the daughter's children, and the wife rejected the provision for her in the will, it was held that the bequest to the daughter took effect immediately.

In *Firth* v. *Denny*, 2 Allen, 468, 470, Merrick, J., speaking of the renunciation by the wife of testamentary provisions in her favor, says: "But this renunciation annulled only those provisions in the will in which she had a personal interest. It could not revoke or invalidate the bequests to other legatees, nor in any way affect them except by causing a diminution of the remaining part of the estate out of which they were to be paid."

In *Plympton* v. *Plympton*, 6 Allen, 178, also, the obvious propriety of giving full effect to bequests to other legatees in case of renunciation by the widow, so far as any estate remains from which such bequests can be paid, is recognized.

One unavoidable result of the election of dower and allowance by the widow in the present case is to take from the trustee for the adopted son absolutely the remainder devised to him in the third item to the extent of the allowance, which by force of law and the action of the judge of probate has now become the property of Rachel Ann Rumery. Due regard for the testator's disposition of his property requires that, so far as this loss can be made up by an earlier reception of the surplus remaining after setting out the dower and paying the allowance, (her life estate in which surplus the widow rejects) the partial compensation for the ultimate diminution shall be afforded. It is this remainder alone which is impaired by the widow's election. The legacies to the testator's kindred are not diminished by the substitution of dower and allowance for the life estate given to the widow, but are paid in full. Thus, they, experiencing no loss, have no claim for reimbursement out of what is left from the estate renounced. Nor is their contingent interest under item five, which is there made dependent upon the death of the widow and adopted son without lawful issue, in any manner endangered or impaired if we allow this surplus to pass at once to the trustee, for it is to be held by him upon the specific trusts declared, and in case of the death of the adopted son without lawful issue before he arrives at the age of thirty-five years, they would be entitled to all that may have been added to the trust fund by making over to it what the wife has renounced. And it is only in that contingency that the testator intended they should receive any benefit from the estate beyond the specific legacies in the second item.

Holding as we do, that the waiver by the wife of the provisions of the will in her favor, and the subsequent reception of her dower and allowance, operates upon the excess of that half of the estate as her death would have done in case she had accepted what was given her by the will, and that these proceedings exactly define the existing remainder, which under the third item was to go to the trustee, we give effect to all the provisions of the will as nearly as may be under the new condition of things brought about by the wife's election.

We accordingly answer the first question propounded in the

bill as follows: Edward A. Noyes, as trustee under the will, is entitled to the entire realty, subject to the dower set out to the widow, and he is also entitled to the balance of the personal property which may remain in the hands of the administrator, after the payment of the balance of the allowance and all legal debts and expenses of administration, to be disposed of upon and according to the trusts declared in the will, and the heirs at law are entitled to no part thereof; and this answer necessarily disposes of all the remaining questions.

Decree accordingly.

Costs and reasonable expenses of all parties, for counsel fees or otherwise, in this proceeding to be paid out of the estate, and charged by the administrator in his account.

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

PITMAN MORGAN, appellant, *vs.* J. CHARLES HEFLER.

Cumberland. Decided April 2, 1878.

Set-off. Measure of damages.

In an action on account annexed, where a set-off was filed by defendant and a counter set-off by plaintiff, the presiding justice instructed the jury, "If, upon the whole account, you find as much due the defendant as there is due the plaintiff, your verdict will be for the defendant." *Held*, erroneous, and that the verdict should be, "nothing due either party." R. S., c. 82, § 60.

When A has been wrongfully prevented by B from completing his contract, the measure of damages is the difference between the price agreed and what it would cost A to complete it.

ON EXCEPTIONS from the superior court.

ACCOUNT ANNEXED.

M. P. Frank, for the plaintiff.

P. Bonney, for the defendant.

APPLETON, C. J. This is an action of assumpsit upon an account annexed, to which the defendant filed an account in set-off, for labor done on plaintiff's stable in the spring of 1871, under a contract to do all the work necessary to build the stable for $80. The plaintiff filed, in set-off, an account for certain articles, which he claimed were in payment of the labor done by defendant upon his stable.

The presiding justice instructed the jury as follows: "You will determine how much is due on this account in set-off, and allow what is justly due from the plaintiff to the defendant. You will then determine how much is due upon the counter account in set-off, filed by the plaintiff, and deduct it from the other. If, upon the whole accounts, you find as much due the defendant as there is due the plaintiff, your verdict will be for the defendant."

This instruction was erroneous; as, if the verdict is to stand, the plaintiff will be liable for costs, when by the statute he should not be so liable.

By R. S., c. 82, § 60, "When no balance is found due to either party, no costs are recoverable. The party recovering a balance recovers costs."

The plaintiff's requested instruction was in accordance with the statute, and should have been given, otherwise the defendant would be entitled to recover costs as the prevailing party, by § 104.

The account in set-off was for labor done under a contract which the defendant claimed he was prevented from performing by the wrongful act of the plaintiff.

Upon the question of damages the plaintiff requested the following instruction: "If the contract was broken by the act of the plaintiff, the defendant would be entitled to a reasonable compensation for the work done under the contract, having reference, however, in the estimation of such compensation, to the contract price."

This was not given, reference in the estimation of such compensation to the contract price being eliminated from the rule given as to damages, and the jury were directed to allow for the work done under the contract whatever it was reasonably worth.

The contract was an element proper to be considered by the jury in their assessment of damages, and it was withdrawn from their consideration. It was the estimate made by the parties of the price to be paid for the work to be done. It was evidence, which with other proofs, should have been submitted to the jury.

The true rule seems to be this: When a plaintiff has been wrongfully prevented by the defendant from completing his contract, the measure of damages is the difference between the price agreed upon to be paid for its performance and what it would cost the plaintiff to complete it. *Myers* v. *York & Cumberland Railroad*, 2 Curtis, C. C. 28. *Philadelphia & W. & B. Railroad* v. *Howard*, 13 How. 307, 310. The defendant was entitled to have this rule given.

Exceptions sustained.

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

THOMAS WARREN *et als.* administrators of the estate of Samuel Whitmore, *vs.* SETH WEBB *et al.*

Hancock. Decided April 2, 1878.

Will. Words—use and benefit.

The testator by will gave to his wife for and during her life, all his estate real and personal, to have and to hold to her and her assigns for the term aforesaid for her proper use, benefit and support and maintenance, and after her decease said estate or the residue and remainder thereof to his children. *Held*, 1. Not to be an absolute gift to the wife of the real or personal estate but that she took a life estate with an implied power to sell the real estate upon the happening of the contingency and to effectuate the purpose mentioned in the will. 2. That the personal estate she might, at her discretion, convert into money or other property, reduce the effects and credits to cash or exchange them for other property, invest or change the investment of the money, and in all respects manage the property as a prudent owner would to facilitate proper use and benefit therefrom. 3. That where she applied money and an unpaid note to the part payment of a vessel built by the maker of the note, that the executor could not recover of the maker either for the note or the money,

Words, "use and benefit," and "support and maintenance," see opinion.

ON REPORT.

ASSUMPSIT, on a promissory note of defendants for $666.66, dated February 6, 1864; also for $1,545, cash received by them of testator's widow.

The defense was that, although the note and the money were the property of the testator, yet they were given to her by will; and having been applied by her in payment to the maker of the note for one-quarter of the schooner "A. H. Whitmore," built by him, the executor could not rightfully recover for the note or the money.

The plaintiff's position was that the will did not authorize such an appropriation.

The facts, sufficient to raise the legal points, are stated in the opinion.

C. J. Abbot, for the plaintiffs.

A. Wiswell & A. P. Wiswell with *C. A. Spofford*, for the defendants.

DICKERSON, J. This case is presented on report, and involves a construction of the will of Samuel Whitmore, late of Deer Isle, deceased. The principal questions arise under the second item in the will, which is as follows: "I give, bequeath and devise to my beloved wife, Abigail H. Whitmore, for and during her natural life, all my estate and property, real, personal and mixed, wherever found and however situated, to have and to hold the same to her and her assigns, for and during the term aforesaid, for her proper use, benefit and support and maintenance; and after her decease, said estate and property, or the residue and remainder thereof, to be legally divided to and among my children, namely," etc. The first item of the will provides for the payment of the testator's debts and funeral charges by his executors, Seth Whitmore and William Whitmore, who returned an inventory of the estate in June, 1867. One of the executors, William Whitmore, died before any account was filed by the executors in the probate court. Seth Whitmore, the surviving executor, filed the first and only account in the probate court, in June, 1870, charging himself with the personal estate, and giving credit to the estate for debts paid, including the sum of $2,747.56

paid to the widow. That account shows a balance, due the estate from the executors, of $121.27. Subsequently to filing this account, Seth Whitmore resigned his trust as executor, whereupon the present plaintiffs, Thomas Warren and Franklin Closson, were appointed administrators *de bonis non;* they filed an inventory in the probate court, December term, 1871, consisting of real estate appraised at $230.00, and personal property, mostly household furniture, amounting to $208.00. No question arises with regard to the payment of the debts or funeral charges of the testator, who died April 3, A. D. 1864.

The intention of the testator, as deduced from the language of the instrument, is the criterion for the interpretation of wills. When ascertained, such intention is to have effect, unless it is inconsistent with the rules of law. The disposing words of the will, "give, bequeath and devise" to the testator's wife all his property, real and personal, "during her natural life," with remainder over to his children, creates a life estate only, unless the subsequent language enlarges, limits or qualifies their meaning. But for the limitation of the habendum, "during the term aforesaid," that would seem to enlarge the estate created; but with that limitation it does not admit of that construction. It is, however, clear that the subsequent words, "for her proper use" and "benefit," are not synonymous with the phrase, "for her support and maintenance," but have a more enlarged signification, and imply that the devisee was not only to have simply "her support and maintenance" out of the estate, but, also, a right to employ it for her advantage, gain and profit. Her right of "use" and "benefit" was superadded to her right of "support" and "maintenance;" otherwise those prior words are meaningless. Consequently the devisee had such power over and control of the estate devised as was reasonably necessary, not only to secure her "support" and "main tenance," but, also, to facilitate her "proper use" and "benefit" thereof.

The subsequent clause, providing for the division, among the testator's children, of "said estate and property, or the residue and remainder thereof," after the devisee's decease, has the same implication. This language necessarily implies the liability of the

estate to be diminished while in the hands of the devisee, and as there is no provision in the will for its diminution except through her agency, her right of control and even of disposal, at least upon the happening of one or more of the contingencies contemplated in the will, is inescapable. Something more must have been intended by this phraseology than "the residue and remainder," after the ordinary wear and tear of the property, natural decay and loss by inevitable accident, else the rights of the remainder-man would have been expressly qualified by such contingencies. Besides, the law would take notice of such considerations in determining the rights of parties, whether mentioned in the will or not.

In *Harris* v. *Knapp*, 21 Pick. 412, 416, a case strongly analogous to the one at bar, the testatrix devised one-half of what remained of her real and personal estate to her daughter, "for her use and disposal during her life," and whatever should remain at her death she gave to other relatives. The court gave great force and effect to the phrase, "whatever shall remain at her death," deducing from it the conclusive implication that the devisee had the right to dispose of the property. The use of the word "disposal" in the will, however, undoubtedly contributed to the conclusion arrived at by the court.

In *Stevens* v. *Winship*, 1 Pick. 318, the court held that the wife took only a life estate with a contingent power to sell, under a will devising a messuage to her for life and giving her full power to sell all his real and personal estate for her comfortable support, in case she should stand in need. In that case, it was decided that the wife took only a life estate with a contingent power to sell, and that the burden is on those claiming under the wife to show that the power was well executed, and that the contingency had happened; and that the jury were to determine whether the contingency existed. See, also, *Larned* v. *Bridge*, 17 Pick. 339.

In *Scott* v. *Perkins*, 28 Maine, 22, 35, the bequest was of the estate and income, to be disposed of for the devisee's comfort and convenience during life, and the court held that she had a right to sell and dispose of the personal estate when that was necessary

for her comfort and convenience, and that it was for the jury to determine whether such contingency had arisen, in a controversy between the vendee of the personal estate, who purchased it of the devisee, and a third party, having received delivery of it from the administrator. The jury found for the vendee of the devisee, and the court sustained their verdict.

The principal case is obviously no stronger in support of the devisee's unqualified power of disposal than the last two cases cited, where the word "disposal" was used in the will and the court substantially denied such power. It is more like *Downing* v. *Johnson*, 5 Coldw. (Tenn.) 229, where the bequest was to the wife "of the whole estate, both real and personal, for and during her natural life, to be by her freely possessed and enjoyed. . . the balance of the property, money or other effects that might be on hand at her decease," to go to others. In that case the court held that the wife was entitled to the possession, use and enjoyment, during her life, of all the property belonging to the testator at the time of his death, and that if her support and maintenance, in her discretion, required it, she could consume the *corpus* of the entire estate except the land.

The court are of opinion that it was not the intention of the testator to empower his widow to sell the estate bequeathed to her, in any event, at her will and pleasure, but that she took a life estate, with an implied power to sell upon the happening of the contingency or contingencies, and to effectuate the purposes mentioned in the will; her power to sell depended upon these; if they did not require a disposal of the property the widow had only a life estate. The court are also of opinion that, in order to give full scope and effect to the testator's words, "for her proper use" and "benefit," he must have intended to give his widow the possession, management and control of all the bequeathed estate, both real and personal, and that, in respect to the personal estate at least, she might, at her discretion, convert it into money or other property, reduce the effects and credits to cash or exchange them for other property, invest or change the investment of the money, and, in all respects, manage the property as a prudent owner would in order to facilitate his proper use and benefit therefrom.

It follows that this action cannot be maintained. The testimony on both sides conclusively shows that the proceeds of the note of $666.66, bequeathed to Mrs. Whitmore and payable by the defendants to the testator, and also the sum of $1,545,—amounting in all to $2,319.36—sought to be recovered in this action, were appropriated for the payment of one-quarter of the schooner "A. H. Whitmore," with her knowledge and consent, and at her instance, and with the concurrence of the then executors, for her benefit. Seth Whitmore, one of the executors, introduced by the plaintiffs, testified that, according to his best recollection, the note was paid by Webb & Whitmore at the request of his mother, the devisee; that he paid the $1,545 to the same parties, and that he understood those funds were paid in towards a quarter of the schooner "A. H. Whitmore;" "the note," he adds, "was reckoned in on the fixing up of the sum that was due for this part of the vessel. . . Mother had no money but what was left her by father in his will. . . I paid that money to Webb & Whitmore because my mother requested me to."

The evidence shows that the "A. H. Whitmore" was built by Jeremiah Burnham; that the devisee, Mrs. Abigail H. Whitmore, agreed in writing to take one-quarter, and that Seth Webb, one of the defendants, finally took the remaining three-quarters. Seth Webb testified that the devisee paid for one-quarter of the vessel through Seth Whitmore, one of the executors, and that he paid about $2,319 for Mrs. Whitmore. The books of Webb & Whitmore, in their account with the estate of Samuel Whitmore, show a charge against the estate of $2,319.36, for one-fourth of schooner "A. H. Whitmore," on July 9, 1867; and C. H. L. Webb, their book-keeper, testified that "the charge of $2,319.36 was cash for one-quarter of the 'A. H. Whitmore,' paid out by Webb & Whitmore."

Although Seth Webb appears as sole owner of the schooner "A. H. Whitmore" in the temporary register issued upon the master carpenter's certificate, and also in the enrollments of the vessel subsequently issued, and although, owing to a disagreement of the parties, no bill of sale was ever issued to the devisee or the executors, of one-quarter of the schooner, yet these considera-

tions are by no means conclusive that Seth Webb was in fact sole owner. On the contrary, the evidence conclusively shows that Seth Webb paid for three-fourths of the vessel only in his own right, and that the proceeds of the note in question, and the other sum of $1,545, received from Seth Whitmore, executor, by direction of the devisee, were appropriated for the payment of one-quarter of the "A. H. Whitmore," by direction and for the benefit of the testator's widow. In doing this, as we have seen, the devisee exercised the power given her under the will, to convert the choses in action bequeathed to her into money or personal property, and also to invest the money thus received in personal property. The proceeds of the note and the other money sued for, having been lawfully appropriated in accordance with the intention and direction of the devisee, cannot be recovered of the defendants in this action.

Judgment for defendants.

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

EVERETT E. READ, petitioner for partition, *vs.* WILLIAM F. HILTON *et al.*

Androscoggin. Decided April 3, 1878.

Deed. Married woman. Estoppel.

J R conveyed his one hundred acre farm to his daughter M for her life, with remainder to her heirs. In the lifetime of M, her daughter (M J R) joined in a warranty deed of thirty-nine acres of it to C. *Held*, that the death of the mother in the lifetime of the daughter confirmed C's title to M J R's share of the thirty-nine acres. *Held*, also, that the fact that M J R was married at the time she joined her husband in the deed did not raise the vexed question whether a married woman is estopped by the covenants in her deed from setting up an after acquired title against her grantee. The source of her title was the deed of her grandfather made long before hers.

ON REPORT.

PETITION FOR PARTITION.

A. M. Pulsifer, W. W. Bolster & J. R. Hosley, for the petitioner.

N. Morrill, for the respondents.

BARROWS, J. The farm, of which the petitioner claims to own an undivided half and prays to have the same set off to him in severalty, consists of one hundred acres or thereabouts, and was conveyed March 20, 1845, by John Randall to Margaret Read, wife of Ammi C. Read, and grandmother of the petitioner "for her use and benefit during her lifetime, and after her decease to her legal heirs, to them and their heirs and assigns forever."

Margaret Read had two children, Alvah J. Read, the father of the petitioner, and Margaret J., who intermarried with Oliver E. Randall in 1856. The respondents have whatever title to a part and parcel of this farm passed by a deed to John Carville, dated February 11, 1861, and executed by Margaret Read and her husband, her daughter Margaret J. Randall and her husband, and by Alvah J. Read and his wife, the parents of the petitioner, in which they assume to convey some thirty-nine acres by metes and bounds with general covenants of warranty.

Alvah J. Read died in 1861, and Margaret Read in 1866. Under this deed the case finds that the grantor of the respondents went into possession of the thirty-nine acres and he and they have had the exclusive possession thereof, with the consent of the co-tenants in the farm, for more than six years prior to the date of the petition for partition, and have made improvements thereon, and therefore they claim that these matters should be considered in making the partition in accordance with R. S., c. 88, § 16.

The petitioner denies that the respondents have any interest or estate in the premises, and, consequently, their right to the benefit of their possession and improvements under said section.

He claims that all the estate which passed to John Carville by virtue of the deed of February 11, 1861, from Margaret Read and her children, was the life estate of Margaret Read.

This claim is so obviously subversive of the intent and expectation of all the parties to that deed that it cannot be allowed, unless we find that some rule of law imperatively requires it.

We think that without touching the vexed question, whether the after acquired estate of a married woman enures to her grantee by way of estoppel, we may well hold that the respondents' grantor acquired Margaret J. Randall's interest in the premises con-

veyed. The foundation of the petitioner's title, as well as that of the respondents', is the deed first mentioned from John Randall to Margaret Read, which gave a life estate to Margaret herself, with remainder in fee to her heirs in accordance with statute provisions then and ever since in force in this state. R. S., 1841, c. 91, § 12. R. S., 1857 and 1871, c. 73, § 6. The most favorable view for the petitioner which can be taken is that it was a contingent remainder or an estate in expectancy in them during the life of Margaret Read. In other words, as by the deed of John Randall the estate was ultimately to vest in the heirs of Margaret Read, and as so long as she was living it was uncertain who her heirs would be, the titles of Alvah J. Read and Margaret J. Randall, respectively, to one-half of the farm when they joined with their mother in conveying the thirty-nine acres to Carville, were subject to the contingency of the death of Margaret Read in their life time.

They each had a contingent remainder, or estate in expectancy, of one-half the farm, which was to go to their respective heirs in the event of their death during the life of Margaret Read.

By R. S., c. 73, § 3, "when a contingent remainder, executory devise, or estate in expectancy is so limited to a person that it will, in case of his death before the happening of such contingency, descend in fee simple to his heirs, he may before it happens convey or devise it subject to the contingency."

While, upon a strict technical and grammatical construction the case before us is not within the letter of this law, it is within its spirit and within the mischief which the statute was designed to remedy. It was intended to prevent the injustice which would follow if the heir after indirectly profiting through the reception by his ancestor's estate of the purchase money of the property could avail himself of a technical defect in the conveyance, and reclaim the property itself, notwithstanding the ancestor's right to it had become perfected after the execution of his deed.

Applying the rule thus furnished to the case before us, Alvah J. Read's deed would pass his interest in the farm subject to the contingency of his surviving his mother, which he did not do, and hence, his heir, the petitioner, takes his half directly under John Randall's deed, and the only remedy of the grantee is upon

the covenants of Alvah J. But the estate of Margaret J. Randall was perfected by the happening of the contingency, and the respondents are entitled to her rights which by force of the statute she might lawfully convey when she did convey them, subject only to the contingency which in her case fell out favorably for her grantee.

Even if this petitioner is in a position to assert a technical defect in his adversary's title, which may well be doubted, seeing that his right to all to which he can make any show of title in himself is conceded, neither of the positions which he takes to defeat the respondents' title can be sustained.

Not only did Margaret J. Randall have a contingent remainder or an expectant estate in the premises which she might lawfully convey subject to the contingency, by force of the statute, but the title in her which the petitioner seeks to set up is in no proper sense a subsequently acquired title. It exists only by force of John Randall's deed. She can claim nothing as heir of Margaret Read whose interest passed to Carville by the same deed in which Margaret J. Randall joined. When what was before a contingent remainder became not merely a vested remainder but an estate in fee simple in Margaret J. Randall or her assigns on the death of her mother, the source of her title to it was not changed. All the title she ever had was acquired by virtue of John Randall's deed long before her deed to Carville. That the contingent future interest ripened in the lapse of time to an absolute estate does not affect the time of its acquisition. That is determined only by its source.

The case of *Jackson* v. *Vanderheyden*, 17 Johns. 167, much relied on by the petitioner, recognizes the right of a married woman to convey not only an existing but a contingent future interest in real estate, while it denies only the doctrine that her deed with covenants of warranty will operate as an estoppel against her assertion of a subsequently acquired interest.

The interest of Margaret J. Randall cannot be so regarded, and it is not necessary to the proper decision of this case to settle a question upon which such jurists as Spencer, C. J., and Parsons, C. J., seem to have entertained different ideas.

The respondent, Hilton, shows a warranty deed to himself from S. L. Hill, prior deeds which give him a good title to a portion of the land embraced in the petition as tenant in common with the petitioner, possession in himself and his grantors in accordance with these conveyances for sixteen years and improvements which entitle him to have the setting off of the petitioner's half of the farm made in accordance with R. S., c. 88, § 16.

The petitioner's counsel does not undertake to deny this, provided the respondents' seizin and title to some portion of the premises are established.

Judgment for partition. The petitioner's undivided half of the premises described in his petition to be set off, subject to and in accordance with R. S., c. 88, §16, *as claimed by respondents.*

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

ALPHEUS E. DURGIN *vs.* JOHN W. DYER.

Androscoggin. Decided April 3, 1878.

Hoops.

No action can be maintained for the price of hoops, sold in contravention of the provision of R. S., c. 41, § 21.

Sale and delivery before being culled, etc., as therein provided, is in contravention thereof.

ON EXCEPTIONS.

ACCOUNT ANNEXED, for 7150 hoops, at $35 per M, $250.25; 1000 barrel hoops at $16; in all,	$266.25
Credit, by cash, $200; hoops returned, $19; paid for freight, $1; in all,	220.00
Balance due,	$46.25

Plea, general issue.

It appeared at the trial that the hoops were sold by the plaintiff to the defendant before they had been culled and branded by the proper officer, and a certificate given by him specifying the

number, quality and quantity thereof, as required by R. S., c. 41, § 21; but the presiding justice, to enable the jury to pass upon other grounds of defense, instructed them that the action might be maintained, notwithstanding the non-compliance with the statute. The verdict was for the plaintiff for the balance claimed; and the defendant alleged exceptions.

M. M. Butler & C. F. Libby, for the defendant, relied upon R. S., c. 41, § 21.

M. T. Ludden, for the plaintiff, contended that the statute phrase, "delivered on sale," was technical, and did not apply to a case where the owner sold his own hoops; that it was not like the case of selling coal without a certificate of weight.

VIRGIN, J. The rule is well established that contracts for the sale of chattels entered into in contravention of the terms and policy of a statute, cannot be enforced; and it is immaterial whether the sale is expressly prohibited, or a penalty imposed therefor, because the imposition of a penalty in such case implies a prohibition. *Cundell* v. *Dawson*, 4 C. B. 376, 399. *Buxton* v. *Hamblen*, 32 Maine, 448. *Foye* v. *Southard*, 54 Maine, 147. S. C. 64 Maine, 389. *Miller* v. *Post*, 1 Allen 434. *Libbey* v. *Downey*, 5 Allen, 299

By R. S., c. 41, § 21, no person shall deliver on sale any hoops, before they have been culled and branded by the proper officer, and a certificate thereof given by him specifying the number, quality and quantity thereof, under a penalty of two dollars a thousand.

It is admitted that the hoops in question were sold and delivered without any compliance with the foregoing provisions of the statute. The sale was, therefore, in plain contravention of its salutary provisions and cannot be enforced.

The decision in *Abbott* v. *Goodwin*, 37 Maine, 203, is not inconsistent with the rule adopted in the case at bar. The language of the statute then before the court was materially different from the one now construed; and that decision will be confined to the facts there found. *Exceptions sustained.*

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

INHABITANTS OF FRYEBURG *vs.* INHABITANTS OF BROWNFIELD.

Oxford. Decided April 3, 1878.

Pauper. Pleading. Demurrer. Declaration. Trial.

In a declaration for pauper supplies furnished a married woman, it is not necessary to aver that the husband's settlement was in the defendant town, or that he was unable to support her. It is sufficient to aver that the settlement of the person receiving the supplies was in the defendant town, and that, at the time the supplies were furnished, she was destitute and needed the relief.

The plaintiffs "aver that within three months next after the second day of June aforesaid, to wit: on the fourth day of June, in the year eighteen hundred and seventy-five, the overseers of the poor of said Fryeburg sent a written notice signed by them, stating the facts aforesaid respecting the said Georgiana Booth, to the overseers of the poor of the said town of Brownfield, and requesting them to remove the said Georgiana Booth." *Held,* a sufficient averment of notice.

Judgment upon a demurrer, not filed at the first term, is final. The defendant cannot withdraw his demurrer and plead anew. His right to do so is limited by statute to demurrers filed at the first term.

A form of declaration held good on demurrer. See statement of case.

ON EXCEPTIONS to the overruling of the defendants' demurrer to the declaration, and of their motion for leave to withdraw their demurrer, and plead anew.

CASE, for pauper supplies.

Declaration, for that heretofore, to wit: On the second day of June, in the year of our Lord one thousand eight hundred and seventy-five, Georgiana Booth, who was then and there and still is the lawful wife of Frank Booth of said Brownfield, had and for a long time prior thereto and ever since has had her lawful settlement in said town of Brownfield, by reason whereof, the said town of Brownfield, during all of said time was and still is liable for her support, and on said second day of June aforesaid, the said Georgiana Booth, so having her lawful settlement in said town of Brownfield, was found in said town of Fryeburg destitute and on account of poverty in need of relief; wherefore being so found, the overseers of the poor of said town of Fryeburg relieved the said Georgiana Booth, by then and there in said town of Fryeburg furnishing and providing for her, proper, neces-

sary and sufficient food, lodging and medical supplies mentioned in the schedule hereto annexed. And the plaintiffs aver that all the expenses in relieving the said Georgiana Booth, mentioned in said schedule, remaining unpaid and amounting to the sum of forty dollars and fifty cents, were necessary and reasonable. And the plaintiffs further aver that within three months next after the said second day of June aforesaid, to wit: on the fourth day of June, in the year eighteen hundred and seventy-five, the overseers of the poor of said Fryeburg sent a written notice signed by them, stating the facts aforesaid respecting the said Georgiana Booth, to the overseers of the poor of the said town of Brownfield, and requesting them to remove the said Georgiana Booth; but they refused and neglected so to do. Whereby and by reason whereof, the said inhabitants of Brownfield became liable, and in consideration thereof, then and there promised the plaintiffs to pay them the sum of forty dollars and fifty cents on demand."

The action was entered at the March term, 1876, and continued to the December term, and on the first day put on the trial docket. On the sixth day the defendants filed a special demurrer, which was joined by the plaintiffs and overruled by the presiding justice; whereupon and before exceptions filed and allowed, the defendants moved for leave to plead anew *instanter* and proceed to trial to the jury; but the presiding justice overruled the motion, on the ground that the ruling on the demurrer precluded the defendants' right to trial; whereupon the defendants moved for leave to withdraw the demurrer; but the presiding justice overruled the motion, and the defendants alleged exceptions.

J. B. Eaton, for the defendants.

D. R. Hastings, for the plaintiffs.

WALTON, J. This is an action to recover for pauper supplies furnished one Georgiana Booth, wife of Frank Booth. The defendants demurred to the declaration.

I. The first reason assigned for the demurrer is that the declaration does not aver that the pauper's husband was not able to support her. Such an averment is not necessary. It is sufficient to aver that, at the time the supplies were furnished, the person

receiving them was destitute and needed relief. This is averred.

II. The second reason assigned for the demurrer is that the declaration does not aver that the husband's settlement was in the defendant town. Such an averment is not necessary. It is sufficient to aver that the settlement of the person receiving the supplies was in the defendant town. The settlement of the wife may or may not be in the same town as that of her husband. A married woman has the settlement of her husband if he has any in the state; if he has not, her own settlement is not affected by the marriage. R. S., c. 24, § 1. The wife's settlement is averred to be in the defendant town. As she was the only person helped, no other averment upon this point was necessary.

III. The third objection made to the declaration is that it does not contain a sufficient averment of notice to the defendant town. We think it does. Upon this point the declaration is very full and explicit, and contains all which, in our judgment, such a declaration should contain.

IV. The defendants complain because they were not allowed to withdraw their demurrer and plead anew, after it had been joined by the plaintiffs and ruled upon by the presiding judge. This complaint is groundless. A demurrer, not filed at the first term, cannot be withdrawn without leave of the court and of the opposite party. "If the demurrer is filed at the first term and overruled, the defendant may plead anew on payment of costs from the time it was filed, unless it is adjudged frivolous and intended for delay, in which case judgment shall be entered." But when, as in this case, the demurrer is not filed at the first term, and leave of the court and of the opposite party to withdraw it is not obtained, no such right exists. The judgment in such a case is final. R. S., c. 82, § 19. *Winthrop Savings Bank* v. *Blake*, 66 Maine, 285. *State* v. *Peck*, 60 Maine, 498.

Exceptions overruled.

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

JOHN E. MOORE *vs.* OBADIAH DURGIN.

York. Decided April 3, 1878.

False imprisonment.

D had a contract with the city made while he was a member of the city government for renewing a bridge which necessitated the removal of the old structure, and had collected his materials at the point where they were to be used. A controversy arose between D and the city authorities as to the suitableness of the materials; and the defendant, who was city marshal, by direction of the city authorities, for this reason, notified D and his men not to remove the old bridge or proceed with the work. The defendant knew that the plaintiff was in the employ of D, but on his refusal to desist from the work, arrested him without a warrant, committed him to jail until a warrant could be procured, and took him before the municipal court on a charge of obstructing the highway by removing the planking from the bridge. *Held*, that, inasmuch as the city authorities at the time of the arrest had not claimed that the contract was void because D was a member of the city government, or given any notice to that effect, but were insisting on its performance, the contract could not be regarded as an absolute nullity, and that although the use of so much force as might be necessary to prevent the plaintiff from proceeding with the work might be justified, the arrest and imprisonment of the plaintiff without legal process was not justifiable. But *Held*, further, that under all the circumstances of the case, the damages assessed ($500) were grossly excessive.

ON EXCEPTIONS and MOTION.

TRESPASS.

I. T. Drew with *H. H. Burbank & F. W. Guptill*, for the defendant.

E. Eastman & G. C. Yeaton, for the plaintiff.

BARROWS, J. Plaintiff declares for an assault and false imprisonment which defendant claims to justify under the following circumstances: One Deering had a contract with the city of Saco for the rebuilding of a bridge. Plaintiff was in his employ and engaged under his orders in removing the old structure. Defendant was city marshal, and, acting under the orders of the mayor and the committee on streets who had a controversy with Deering as to the fitness of the materials which he had procured to answer his contract, notified the contractor not to remove the old bridge,

ordered the plaintiff to desist from his work, and on his refusal arrested him without a warrant, put him in jail until a warrant could be procured and took him before the municipal court on a charge of obstructing the highway by removing the planking of the bridge. Defendant knew that Deering had such a contract and that the plaintiff was in Deering's employ; but he claims that under the city ordinances his official duty required him to protect the city property and to remove all impediments and obstructions in the streets, and that he might rightfully obey the order of the mayor to prevent the contractor and his men from tearing up the old bridge, and for this purpose might lawfully arrest the plaintiff and hold him until a warrant could be procured.

At the trial it appeared that Deering was an alderman of the city when he made the contract aforesaid, and defendant further contended that the contract was void under the provisions of R. S., c. 3, § 29, and afforded no justification to the contractor or his men, and that they were mere trespassers in removing the old bridge, and that he might properly deal with them as he did, under the provisions of R. S., c. 133, § 4, which authorizes city marshals and certain other officers to arrest and detain persons found violating any law of the state or any legal ordinance or by-law of a town until a legal warrant can be obtained. It did not appear however that at the time of the arrest, any question as to the validity of the contract with Deering had arisen; but, on the contrary, that the only ground for the interference by the mayor and the committee on streets was the claim that the timber procured by him was not what the contract called for.

Hereupon the presiding judge instructed the jury in substance that, had the city repudiated the contract on the ground of its being in violation of R. S., c. 3, § 29, then Deering and his men might have been regarded as trespassers, violating the law, and defendant as justified in making the arrest; but if the city officers were attempting to stop the work on the ground that the timber procured by the contractor was not suitable, and were not designing to annul or repudiate the contract itself, but only contesting the mode in which it should be carried out as to the materials, claiming no advantage and giving no notice that the contract was

forbidden by the statute, then, in such case, the plaintiff was at work under at least an apparent authority or license and color of right, and he would not be engaged in committing a breach of the peace, or violating any law of the state, for which his arrest without a warrant could be justified; and this would be so, although the contractor had promised the city officials the day before that he would desist from the work until the question as to the suitableness of the materials could be settled; that perhaps the use of so much force as might have been necessary to prevent the plaintiff from going on with the work on the bridge might have been justified, but not his arrest and imprisonment without a warrant. Of these instructions the defendant complains, and plausibly insists in argument that when the contractor was forbidden to proceed with the work under a contract which the statute declares void, there was an end of any justification for him or his men, and they were all trespassers destroying the city property, and liable to arrest without legal process.

But we think that so long as the city authorities recognized the contract as valid and subsisting, and were disputing with the contractor only as to the manner in which he proposed to perform it, it could not be regarded as an absolute nullity, nor the workmen employed in executing it as engaged in a breach of the peace, or in the violation of any law of the state, or by-law of the city so as to subject them to an arrest and imprisonment without a warrant.

Instances are numerous where, both in statutes and decisions, the words void and voidable are used indifferently; the word void being often employed where it is plain that voidable would convey more accurately the signification intended. *Van Shaack* v. *Robbins*, 36 Iowa, 201. *Brown* v. *Brown*, 50 N. H. 538, 552. *Kearney* v. *Vaughan*, 50 Mo. 284. *Pearsoll* v. *Chapin*, 44 Pa. St. 9. *Seylar* v. *Carson*, 69 Pa. St. 81, 87, 88.

It would be contrary to reason and justice to subject the contractor's employees to summary arrest and imprisonment upon the verbal order of the city authorities, when there was nothing inherently wrong in the nature or terms of the contract they were engaged in executing, but solely on account of the personal inca-

pacity of one of the contracting parties, (a fact not then recognized by either) so long as both parties were proceeding under the contract as if it were valid and binding, and insisting upon its performance accordingly.

The instructions given placed the case upon the right footing before the jury. So much force as was necessary to prevent the plaintiff and the other employees of the contractor from proceeding, until the question as to the materials was settled, was justified. But, as observed by Patterson, J., in *Wheeler* v. *Whiting*, 9 Car. & P. 262, the taking into custody without a warrant is a different thing. See, also, *Howell* v. *Jackson*, 6 Car. & P. 723, as to what will justify an arrest without process as for a breach of the peace.

But, while the defendant's act was not technically justifiable, and the instructions of the presiding judge rightly held him responsible therefor, the damages assessed were exorbitant. The testimony indicates no injury to the plaintiff except a very brief detention. The defendant courteously, distinctly and repeatedly warned him to desist before the arrest, nor were his acts apparently dictated by any feeling of ill will or disposition wantonly to oppress the plaintiff; nor would it seem that the plaintiff's character or feelings could have suffered much. In such a controversy among the city authorities, he was even more likely to be regarded as the hero of the occasion than as an offender against the law. The defendant might naturally believe it to be his duty to obey the orders of the municipal authorities where the interests of the city were concerned; and where, through mistake, without malice he oversteps the line of his duty, he is not responsible beyond the amount necessary to compensate the injured party. The aim of the plaintiff seems to have been vengeance, and not redress. We think the entry should be,

Exceptions overruled. Motion sustained, unless the plaintiff remits all over $100. *If he so remits, Motion overruled and Judgment for plaintiff for* $100 *and costs.*

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

MARGARET PERKINS *vs.* INHABITANTS OF FAYETTE.

Kennebec. Decided April 3, 1878.

Way—defective.

A town is not required to render its roads passable for traveling for the entire width of their located limits, but only to keep a width thereof in a smooth condition, sufficient to render the passing over them safe and convenient.

A town has the right, in making or repairing a road, to remove stones and stumps onto, and leave natural obstructions upon, the sides of a way; provided the same are situated so far from the traveled track that persons with teams may pass without danger of coming in collision with them.

A town is not liable for damage sustained by a traveler from the fright of his horse at meeting cows in the road with boards on their horns, and also from a defect in the way, the combined action of both causes operating to produce the accident. *Moulton* v. *Sanford*, 51 Maine, 127, re-affirmed.

ON EXCEPTIONS.

CASE for personal injuries from defective highway, received May 27, 1873.

Writ dated January 9, 1875. The alleged obstruction was a large stone, which the plaintiff claimed, and there was evidence tending to show, had been blasted and was lying within the located limits of the road and outside the wrought part. The side of the stone next the wrought part was on a line with the outside of the ditch and about two feet from the wrought part, which at this point was in good condition. The defendants claimed, and introduced evidence tending to show, that the rock was naturally there. The plaintiff was riding in a single horse wagon with her son, who was driving, and after passing several rods beyond the rock, some cows with boards on their horns came to the top of a hill from an opposite direction, when the horse became suddenly frightened and attempted to turn about in the road. The driver jumped from the wagon, and seizing the rein near the bit, prevented the horse from turning short about, but could not control him. The horse turned out of the wrought part onto the side, between the ditch and the fence, and after going some four or five rods, in returning into the wrought part of the road, the driver still holding by the rein, one of the forward

wheels struck the rock, by which the wagon was upset and the plaintiff thrown out and severely hurt.

The plaintiff's counsel after the charge requested the following instructions:

"If the plaintiff's horse was uncontrollable and was running, without any fault of the driver, and not in consequence of any deficiency of the carriage or harness, or any vicious habits of the horse, and the highway was defective, the town having notice of the defect, and the injury resulted from such defect, the defendants would be liable."

"Public rights of travel are not restricted to the prepared and usually traveled path, but citizens have a right to travel over the whole width of the way as laid out, without being subjected to other or greater dangers than may be presented by natural obstacles, or those necessarily occasioned by making and repairing the traveled path."

"Stones, timbers or other obstacles unnecessarily placed within the limits of the road, outside of the traveled path, are as unlawfully there as they would be in the traveled path."

The requested instructions were refused, the presiding justice having covered the points by contrary instructions, or such as were less favorable to the plaintiff. The instructions specially objected to in the argument appear in the opinion. The verdict was for the defendants; and the plaintiff alleged exceptions.

E. O. Bean, for the plaintiff, asked the court to review the decision in *Moulton* v. *Sanford*, 51 Maine, 127.

D. C. Robinson, for the defendants.

PETERS, J. A question arose at the trial as to what extent towns were responsible for injuries to travelers, occasioned by their teams coming in collision with obstructions on the side of the road beyond the traveled way. The judge instructed the jury that towns were not required to render the road passable for the entire width of the whole located limits, and that the duty of the town was accomplished by making a sufficient width of the road in a smooth condition so that it would be safe and convenient for travelers. He also directed the jury that the town had the right,

in making or repairing a road, to remove stones and stumps onto the sides of the way and leave natural obstructions there, provided the same were situated so far from the traveled track that persons passing over the road with teams might pass without danger of coming in collision with them. We think it would be utterly impossible for towns, as a general rule, to do more than that. No doubt there is a chance that the team of a traveler, in the dark or from fright of the horse or some other mishap, might strike against a rock on the side of the way. So, if the rock was not there, it might get into a ditch or bog or against a railing or fence, or encounter some other disaster. It is enough that the way is safe and convenient in view of such casualties as might reasonably be expected to happen to travelers. All possible accidents cannot be provided against by anybody. The judge did not give the requested instructions, but in his own words covered the grounds assumed by them, defining the municipal liability clearly and correctly. *Johnson* v. *Whitefield*, 18 Maine, 286. *Dickey* v. *Maine Tel. Co.*, 46 Maine, 483.

It seems that the plaintiff's horse became frightened at cows in the road having boards on their horns, and, being beyond the control of the driver, turned out of the traveled way and ran around between the ditch and the fence until the wagon brought up against a rock on the side of the road, causing the injury complained of. The instruction to the jury was that, if the accident was produced by the fright at the cows and also by a defect in the way, by the combined action of both causes, the plaintiff could not recover. This was in accordance with the doctrine established in the leading and (in our own state) important case of *Moulton* v. *Sanford*, 51 Maine, 127. The plaintiff, by the learned argument of her counsel, claims that this case should be directly and positively overruled. We are not convinced that it would be wise to do so. We know the opposite view is taken by several other courts. It is to be admitted, also, that we do not ordinarily apply the same rule, in this respect, in cases of this kind that we do in other classes of cases. The remedy sought for here is statutory and not at common law. The early cases in this state construed the statute somewhat strictly. The plaintiff con-

tends that a town should be liable, even if the defective way is not the sole cause of the injury, provided that the co-operating and contributing cause is nothing for which the person injured is at all in fault and over which he could exercise no agency or control. This view was taken by a minority of the court in the case alluded to, but the case was decided otherwise, upon the ground that the positive terms of the statute, as interpreted by previous adjudications, would not admit of such a construction. Now that the principle has been so deliberately affirmed and established, we have no hesitation in declaring that it should be firmly maintained. Its restraining influence, in view of the inconsiderateness of juries in too many of this class of cases, cannot but be productive of good. In this particular case, it would be difficult to see that, in any just and proper sense, any defect in the way was even one of a combination of causes producing the accident.

Exceptions overruled.

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

EMILY A. MOODY *vs.* RUFUS MOODY.

Kennebec. Decided April 3, 1878.

Mortgage.

Husband and wife gave a note and secured it by a mortgage on her furniture. The husband, with money borrowed of his father, paid the note, receiving the papers into his possession. Immediately afterwards and before separation, by arrangement between all parties except the wife, (who was not present) the note and mortgage were assigned by the mortgagee to the father. *Held*, that the wife would hold the property clear of the incumbrance by mortgage.

The father would have no right in the mortgage by subrogation, being under no obligation to pay it, and having no interest in it when it was paid.

ON EXCEPTIONS.

REPLEVIN by plaintiff, after the death of her husband, against his father, the defendant, of household furniture taken by him, on the ground that he was assignee of a mortgage to one Jacob

Robie, joined in by her and her husband, Frank G. Moody, to secure payment of their note of $118.05, given for an express wagon.

Robie received payment by the same wagon returned and a harness and note of $10, signed by the defendant, who testified: "I proposed to Robie what I would do; to give him such property and such money and he make the transfer to me, and he agreed so to do and did so."

Robie testified: "After the trade was all driven and I had passed the papers into Frank's hands, it was agreed that an assignment should be made to the defendant."

The presiding justice instructed the jury; "If the settlement between Robie, Frank Moody and his father had been perfected by the payments of the wagon, harness and the $10.00 note, as stated by Robie, and the note and bill of sale were given up by Robie to Frank Moody without any agreement between the parties that the note and bill of sale were to be assigned to the defendant, such settlement and delivery of the note and bill of sale would constitute a payment of the note and a discharge of the bill of sale."

The verdict was for the plaintiff; and the defendant alleged exceptions.

W. P. Whitehouse, for the defendant.

J. H. Potter, for the plaintiff.

PETERS, J. The plaintiff and her husband gave a note to one Robie, and secured it by a mortgage or written pledge of the furniture in question in this suit. The defendant advanced to the husband, who was his son, money, in whole or part, to pay the note. Thereupon the note and mortgage were surrendered to the husband in the presence of the defendant, the plaintiff not appearing to be present at the time. Before the parties separated, upon re-consideration, it was determined that Robie should assign the note and mortgage to the defendant, and he did so. It was ruled at the trial that, as against this plaintiff, the defendant could not receive the title in that way, if the note had been previously paid and the note and mortgage given up to one of the

makers. The defendant contends that the retraction so immediately followed the fact of payment that all that was done at the time would be but parts of one transaction, and that it amounts to no more than the correction of the result of a negotiation according to the understanding of parties. Undoubtedly, if the papers had been given up by some mistake, and not in accordance with the intention of the parties, the error could have been rectified. The fact, however, that the attempted recantation so immediately followed the surrender of the note and mortgage would amount to nothing, provided all the other elements existed to constitute it a distinct and independent thing. It would make no legal difference whether one minute or one year separated the two acts. The mortgage had become *functus officio*. For somewhat analogous cases, see *Whittier* v. *Heminway*, 22 Maine 238. *Larrabee* v. *Fairbanks*, 24 Maine, 363. *Patten* v. *Pearson*, 57 Maine, 428. *Hodgskins* v. *Dennett*, 55 Maine, 559.

In such a case as this, the law does not extend any right to the defendant by subrogation or substitution. He was under no obligation to pay, and had no interest in the contract personally. The verdict finds that he advanced his money, not to uphold the mortgage, but to extinguish it.

Exceptions overruled.

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

MOSES CALL *et al.*, in equity, *vs.* WILLIAM J. PERKINS *et als.*

Lincoln. Decided April 4, 1878.

Deposition. Trial. Evidence.

In the absence of the caption prescribed by chancery Rule XIV, which provides that the only caption required of the commissioner shall state that he "had this rule before him, when he executed the commission, and that he in all respects complied with its provisions," the caption must show that the witness was sworn according to law, or the deposition will not be admissible in evidence.

A recital in the caption that the deponent was sworn "to testifiy the truth and nothing but the truth" is fatally defective.

Testimony taken after publication is not admissible.

ON EXCEPTIONS.

BILL IN EQUITY, stated in 65 Maine, 439.

J. Baker, for the plaintiffs.

A. P. Gould & J. E. Moore, for the defendant, Tukey.

VIRGIN, J. This is a bill in equity, brought to complete the plaintiffs' title to certain real estate, conveyed on May 10, 1862, by James Perkins to Elizabeth A. Perkins, on which the plaintiffs had levied an execution in their favor against William J. Perkins, claiming that the land in question was paid for, in part at least, by their execution debtor, W. J. Perkins, but was conveyed, by his direction, to his wife Elizabeth.

At the hearing on bill, answer and proofs, the main controverted fact was whether any, and if any, how much of the consideration of the deed was paid from the property of the grantee's husband. After due consideration, this court decided that, on account of the nature of the controversy, the conflicting character of the testimony and the manner in which some of it was taken, it was a proper issue to be submitted to a jury. The issue was accordingly sent down for trial, with a specific order directing at what term the trial should take place, etc. Among other things, it was ordered: "That the parties, at such trial, may read in evidence such and so much as is admissible, and no other, of the depositions taken before the publication of testimony on February

19, 1872," etc. One of the objects of this clause in the order was to enable the parties to retake such depositions as were open to objections; and therefore ample time was given therefor, should the parties prefer the retaking of depositions to *viva voce* testimony of former deponents.

At the trial, the deposition of W. J. Perkins and the first deposition of his wife, taken in New York, on December 6, 1871, by Edwin F. Corey, commissioner of Maine, were offered by the plaintiffs and excluded by the presiding justice. To this ruling the plaintiffs allege exceptions; and the question is, were the depositions "admissible." Our opinion is clear that they were not. The taking was attempted under Rule XIV; but it in no wise conformed with its provisions. (1) The order did not authorize the clerk to issue a commission to take the depositions of these deponents; (2) The commission was not directed to "an attorney at law, or to a person specially appointed by a member of the court, or agreed upon in writing by the counsel;" (3) The deponents were not "sworn according to law," as required by the rule, but "to testify the truth and nothing but the truth," etc.; (4) Neither did the deponents finally "make oath to the truth of the facts by them stated." We do not mean to be understood as deciding that it should appear affirmatively and in detail that every requirement of the rule has been complied with. The regulations of the rule are not so many conditions precedent, a compliance with which must be shown by the caption; for the rule itself provides that "the only caption required of the commissioner shall state that he had the rule before him when he executed the commission, and that he in all respects complied with its provisions." But they are to be regarded as instructions to guide and regulate the commissioner in the execution of his trust; and a copy of the rule should always accompany the commission. It should appear, however, that the deponent was at least sworn according to law; and if it does not so appear it is fatal. *Reed* v. *Boardman*, 20 Pick. 441, 444. We are of the opinion, therefore, that these depositions were rightfully excluded.

The second deposition of Elizabeth A. Perkins, and likewise that of Alvin F. Perkins, were excluded on the ground that they

were taken after February 19, 1872, which was the date of the publication of the testimony. This ruling was exactly in accordance with the order and with the express provisions of Rule XIII.

The exception alleged, for the exclusion of answers to the immaterial questions on pages three and four of the report, is not pressed.

This suit has been pending since September, 1869. The plaintiffs have had ample opportunity to satisfy a jury of their vicinity that W. J. Perkins paid some portion of the consideration of the deed; but, for some cause, they have not availed themselves of this privilege. The burden is on them. We do not think we are warranted in delaying the decision of the suit another year, for the purpose of affording them a renewed chance, with no more assurance of progress than before. *Interest reipublicae*, etc.

Exceptions overruled.

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

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

INHABITANTS OF BOOTHBAY *vs.* BENJAMIN P. GILES *et als.*

Lincoln. Decided April 3, 1878.

Tax. Bond.

Generally the term "bond" implies an instrument under seal.

The official bond required of a collector of taxes must be a sealed instrument.

The words "witness our hands and seals," when no seal is attached, will not make the instrument, though otherwise in proper form, a bond.

An instrument, in form a bond, but containing no seal, voluntarily executed and delivered in lieu of of a bond and accepted therefor, is valid.

Its acceptance is a sufficient consideration to cover all official delinquencies in not paying over money actually collected after such acceptance.

ON REPORT.

ASSUMPSIT, against the defendant Giles, and two other defendants with him as co-promisors, for the faithful performance of his duties as collector of taxes for the year 1869. The instrument declared on was in form a statute bond but unsealed.

It was admitted that Giles collected, of the taxes of 1869, $9,295.45, and paid into the state, county and town treasury $7,386.32 prior to the date of the writ, and that he paid in no more on the tax of that year.

J. Baker with *H. Ingalls*, for the plaintiffs.

A. P. Gould & J. E. Moore, for the defendants.

VIRGIN, J. At the annual meeting of the plaintiffs, held on March 8, 1869, the defendant, Benj. P. Giles, under a sufficient article in the warrant calling the meeting, (*Deane* v. *Washburn*, 17 Maine, 100. *Spear* v. *Robinson*, 29 Maine, 531) having been duly elected (*Mussey* v. *White*, 3 Maine, 290) collector of taxes; and sworn (*Bennett* v. *Treat*, 41 Maine, 226); and never having "refused to serve or give the requisite bond" (Stat. 1865, c. 318, incorporated into R. S., c. 6, § 97. *Morrell* v. *Sylvester*, 1 Maine, 248); was an officer of the town, duly qualified to execute any legal warrant for the collection of taxes duly committed to him. The giving of an official bond by a collector is not, in the absence of a demand therefor, a condition precedent to his assuming the duties of his office, R. S. of 1857, c. 6, § 85, being only directory. Stat. 1821, c. 116, § 23. *Morrell* v. *Sylvester*, *supra*. *Scarborough* v. *Parker*, 53 Maine, 252.

The warrant accompanying the tax lists, directed and delivered to Giles, was not, "in substance," the one prescribed by R. S. of 1857, c. 6, § 79, in that it exempted from distress "animals" and "other goods and chattels" exempted from attachment for debt in addition to those exempted in § 79. And it being thus defective, the collector was excusable for not proceeding under it, and he could not be held liable for non-collection of the taxes. For it is well settled that a collector cannot be regarded as in fault for not enforcing the collection of taxes committed to him, when his warrant confers no authority to distrain (*Frankfort* v. *White*, 41 Maine, 537); or too little. *Orneville* v. *Pearson*, 61 Maine, 552. *Boothbay* v. *Giles*, 64 Maine, 403.

But while the collector was under no obligation to execute a warrant irregular on its face, the tax-payers may waive any formal defects and pay their taxes to the collector; and if he

receives them, the defective warrant is no defense against the claim of the town for the money thus actually received. *Trescott* v. *Moan*, 50 Maine, 347, and cases.

In August, 1869, the defendants executed and delivered to the plaintiffs a written instrument, expressed in the precise terms of a collector's official bond, wherein Giles "as principal," and the other defendants "as sureties," affirm that their "hands and seals" "witness" that they "are held and firmly bound" unto the plaintiffs "in the sum of $25.000," to the payment of which they "bind" themselves, etc. The condition of this "obligation" is in the terms of the statute. R. S. of 1857, c. 6, § 85. The only respect wherein this instrument differs from a complete, formal bond of a collector is that it has no seals affixed to the signatures. Generally the term "bond" implies an instrument under seal; but it does not, necessarily, one under seal, with a penalty or forfeiture. *Stone* v. *Bradbury*, 14 Maine, 185. But the official bond required by statute must be sealed; and such an instrument was evidently intended to be executed by these parties, but they accidentally omitted to affix their seals. If they had even affixed one, it might suffice, for all the defendants might adopt that one. *Bank of Cumb.* v. *Bugbee*, 19 Maine, 27. This instrument, however, contained none; and the fact that it contained the words "witness our hands and seals," when there is no seal attached, does not make it a bond or sealed instrument. *Chilton* v. *People*, 66 Ill. 501. The plaintiffs, therefore, did not consider it a sealed instrument, but a simple contract, and have brought assumpsit instead of debt.

What are the force and effect of this simple contract having the precise terms of a bond?

A bond conditioned for "the faithful performance of the duties of collector" will hold him and his sureties to pay over money which he has actually collected after the delivery of the bond. *Trescott* v. *Moan*, 50 Maine, 347. *Scarborough* v. *Parker*, 53 Maine, 252. Why should this contract receive any different construction? The contract was voluntarily and deliberately made and delivered in lieu of a sealed instrument containing the same terms. Its acceptance by the assessors in lieu of a statute bond

is a sufficient consideration to cover all official delinquencies, so far as not paying over money actually collected after such acceptance is concerned.

No question is made as to the legality of the tax. The defendants admit that from July, 1869, (when he received the list) down to May 5, 1874, (date of the writ) Giles collected $9,295.45 of the tax of 1869, and during the same time had paid over to the several treasurers only $7,386.32. It does not appear when he made any part of these collections or payments. It is in nowise likely that he collected the whole during the "three or four weeks," which he testifies intervened between the time of receiving the lists and that of delivery of the contract; for he testifies simply that he had "commenced" to collect when "that paper was executed." Whatever sum he had collected, the payments made by him, in the absence of any express appropriation thereof, the law would apply to the oldest deficiency. The statute (R. S. of 1857, c. 6, 102) made it his "duty" to exhibit once in two months a true account of all moneys received on the taxes committed to him, and produce the vouchers for money by him paid. For some reason his sureties were warned July 1, 1871. We think the evidence warrants the conclusion that the whole deficiency arose after the delivery of the contract in suit, and that the plaintiffs are entitled to judgment. If any part of the deficiency had occurred before that date, Giles would have so testified when upon the stand. The plaintiffs should have judgment for amount collected, less $176.61, and interest on the balance from the date of the writ.

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

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

HENRY W. SIMONTON *et al. vs.* FRANCIS LORING *et al.*

Cumberland. Decided April 4, 1878.

Master and servant.

The servant of the occupants of an upper tenement accidentally left open a faucet, thereby causing the water to overflow and flood the tenement below. *Held*, that the occupants of the upper tenement were liable for the damage thereby done.

ON REPORT from the superior court.

CASE stated in the opinion.

A. A. Strout & G. F. Holmes, for the plaintiffs.

M. M. Butler & C. F. Libby, for the defendants.

VIRGIN, J. In June, 1875, the plaintiffs with their stock of goods occupied the first floor of the Stewart block, 565 Congress street, Portland, and the defendants the hall in the third story, together with the appurtenances thereto, including a urinal supplied with Sebago water. In the night of June 20, the faucet in the closet regulating the flow of the water into the urinal having been left wide open, and the efflux, from some cause, not being equal to the influx, the water overflowed the bowl and flooded the plaintiffs' store and injured their stock.

The defendants had possession, control and management of the hall and its appurtenances; and if anybody is liable for the injury caused by the overflow, they are; unless the faucet was left open or the efflux obstructed; or, in other words, unless the overflow was caused by some stranger and without the consent of the defendants. *Lowell* v. *Spaulding*, 4 Cush. 277. *Kirby* v. *Boylston Association*, 14 Gray, 249. *Leonard* v. *Storer*, 115 Mass. 86. *Shipley* v. *Fifty Associates*, 101 Mass. 251. S. C. 106 Mass. 194. *Gray* v. *Boston Gas Light Co.*, 114 Mass. 149, 153.

What is the rule regulating the liability of persons having the possession, control and management of tenements supplied with water as this was? The plaintiffs contend, *inter alia*, that the

defendants were bound at their peril absolutely to prevent injury to others by the escape of the water, upon the principles enunciated by the English courts in *Fletcher* v. *Rylands*, 1 Exch. 265. S. C. Ho. L. 330. *Smith* v. *Fletcher*, 7 Exch. 305. *Nichols* v. *Marsland*, L. R. 2 Exch. Div. (C. A.) 1. This doctrine has received a *quasi* approval in *Ball* v. *Nye*, 99 Mass. 582. *Wilson* v. *New Bedford*, 108 Mass. 261, 266. While it has been criticised in *Swett* v. *Cutts*, 50 N. H. 437; *Brown* v. *Collins*, 53 N. H. 442; and utterly denied in *Losee* v. *Buchanan*, 51 N. Y. 476, 486. Whether the same principles will be applied by this court to similar circumstances we need not stop to inquire until such an occasion presents itself.

The cases holding that such a dangerous thing as fire may be lawfully used on one's premises are too numerous to need citation; and the person using it is only charged with ordinary care in its use. By the ancient common law, the owner of a house on fire was liable to one injured thereby, on the ground that the fire originated through some presumed negligence of the owner, not susceptible of proof. The hardship of this rule was corrected by St. 6 Anne, c. 31. Every person has a right to kindle a fire on his premises for the purposes of husbandry, and the law imposes upon him the exercise of ordinary care, negligence being the gist of the action for an injury occasioned by the spreading of such a fire. *Bachelder* v. *Heagan*, 18 Maine, 32. *Hewey* v. *Nourse*, 54 Maine, 256.

The same may be said in relation to the use of gas. See, among other cases, *Holly* v. *Boston Gas Light Co.*, 8 Gray, 123. *Hunt* v. *Lowell Gas Light Co.*, 1 Allen, 343. Thus it is said in *Holly* v. *Boston Gas Light Co.*: It is the duty of gas companies "to conduct their whole business, in all its branches, and in every particular, with ordinary prudence and care."

The rule of ordinary care affords reasonable freedom in the use, as well as reasonable security in the protection of property. For the degree of care which this rule imposes must be in proportion to the extent of injury which will be likely to result should it prove insufficient. In other words, ordinary care depends wholly upon the particular facts of each case—the degree of caution and

diligence rising, conforming to and being commensurate with the exigencies which call for its exercise. It must be equal to the occasion on which it is to be used, and is always to be judged of according to the subject matter, the force and dangerous nature of the material under one's charge. *Holly* v. *Boston Gas Light Co.*, *supra*.

Negligence, which is the want or absence of ordinary care, seems to have been the gist of all the actions, like the one at bar, which have come under our observation. Shearman and Redf. on Negl., §§ 512, 513, and notes. Thus in *Moore* v. *Goedel*, 34 N. Y. 527, 530, for an injury caused by an overflow of water, the court say: "In such a case, where the occupation and right to use the water fixtures are exclusive, the party is responsible for their proper use and proper care; and liability attaches on proof that negligence has occurred and damage has ensued."

Applying this principle to the facts as we believe them to be from a careful examination of the testimony, our conclusion is that the plaintiffs are entitled to judgment and should be compensated for their loss. For, although the pipe which supplied the water was only one-third as large as the waste pipe, the amount of water which passed through it at any time depended upon the head and consequent pressure. The plumber testified that "if no cigar-stump, tobacco-quid or other obstruction got into the bowl, with an ordinary pressure of water, it would not run over;" but "you could get pressure enough to run it over;" that the greatest pressure came nights, and we might add Saturday nights when all the stores and other places of business were closed. And if the self-acting stop-cock had been put in just before, instead of soon after the time of the overflow, there would have been no occasion for this action.

But, even if ordinary care did not require a self-acting cock, we believe the overflow was caused by the negligence of the janitor. To be sure, he testifies that when he used the urinal Friday night he turned off the water and locked the door; that he was there again Saturday in the forenoon, when he supposed there was no water running, although he made no particular examination. And, while he may be sincere, we think he was mistaken.

He had the only key to the closet. So far as the testimony discloses, he was the last person to use it, and was the last person who saw it. We cannot escape the conviction that he accidentally left the cock open.

Judgment for the plaintiffs, for $520 *and interest from June* 20, 1875.

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

HENRY HALEY *vs.* JOSEPH HOBSON.

York. Decided April 4, 1878.

Amendment.

The declaration in the writ is the criterion for determining what is recoverable in an action. If the declaration is broad enough to cover a particular claim, it may be proved and recovered, though it was not specified nor contemplated by the plaintiff when the writ was drawn.

The filing of a bill of particulars, either upon the motion of the plaintiff or the defendant, is not objectionable as introducing a new cause of action, even though the plaintiff had no such cause in his mind as the bill states when he commenced the action.

ON EXCEPTIONS AND MOTION.

ASSUMPSIT on account annexed to the writ, dated October 25, 1871, and returnable at the January term, 1872:

To sawing 150 cords of wood at $2 per cord, delivered in 1870 and 1871,	$300 00
To lot of saws and belts, delivered August 17, 1871,	75 00
	$375 00

At the January term, 1874, the plaintiff, on the defendant's motion for a statement of claim, under the second (omnibus) count for work and labor done and the various money counts joined, filed a specification of claim:

"To extra pay for working lumber which had been soiled and graveled by the freshet, at rate of one-half cent per pair of headings made from said lumber,	$120 00
Cr. by cash on account of above,	30 00
	$90.00."

This claim the defendant resisted, contending that it had been fully and satisfactorily adjusted long before action brought. Upon cross-examination, the plaintiff testified that the action was commenced by T. H. Hubbard, as his attorney; that he never told Hubbard he had any claim against the defendant for sawing dirty boards; that he employed Mr. Tapley, his present counsel, a year ago; that he had never mentioned to him the existence of any such claim till within a week of the trial; that the reason of his omission to speak of this matter to them was that it had escaped his mind entirely. The defendant requested the instruction that the plaintiff could not recover upon any cause of action which he did not contemplate as embraced in his declaration at the time it was made.

The presiding justice declined to give the requested instruction, but instructed the jury that the general count would cover this bill of particulars; that the fact that it was not in his mind was of no legal effect, except as an item of evidence upon the question whether he had any just claim or not; that if it was a just claim, even if he did not have it in his mind till a week ago when consulting Mr. Tapley, he was entitled to recover.

The jury returned a verdict for the plaintiff, and found specially in his favor upon the claim in the specification under the second count; and the defendant alleged exceptions.

H. H. Burbank & J. S. Derby, with *E. B. Smith*, for the defendant.

R. P. Tapley, for the plaintiff.

DICKERSON, J. The declaration in the writ is the criterion for determining what is recoverable in the suit. The law defines and limits the nature of the claims that are provable under the count or counts in the writ, and if these are broad enough to cover a particular claim, it may be proved and recovered, though it may not have been specified when the writ was drawn. When the writ does not contain a specification of all the items claimed, it is competent for the plaintiff, on leave of court, to supply the omission, and if he does not, the court will order him to do so upon motion of the defendant. The court looks to the

declaration to ascertain what causes of action are provable under it, and not to the mind of the plaintiff when he commenced his action ; the intention of the plaintiff at that time to recover upon an item not embraced within the purview of the declaration will not avail him, nor will his want of an intention to maintain a particular claim prevent his recovery for that, if it is recoverable under the declaration. The rule of law was correctly stated by the presiding justice to be, " that it does not make any odds, so far as the law is concerned, whether the plaintiff had this claim in his mind when he had the writ made out, or not, if there was an absolute just claim, and his writ is broad enough to cover it."

There can be no doubt but the second count in the writ is sufficient to include the disputed item for extra pay in working soiled lumber, if it had been originally specified in the writ. As we have seen, the due filing of that item before the cause proceeded to trial is equivalent to its original specification in the writ, and therefore introduces no new cause of action. The position of the counsel for the defendant, that the item in question would not be recoverable if it was not in the mind of the plaintiff when the writ was drawn, is at variance with the uniform practice of courts of common law as well as with reason and authority.

We perceive no sufficient ground for our interposition upon the motion. It was a question of the weight of evidence, and that is to be determined oftentimes by the quality rather than the quantity of evidence. The jury saw and heard the witnesses, and thus had a better opportunity to judge of the quality and general weight of the evidence than the court has ; and we are not prepared to say that they so far erred in their conclusions as to authorize us to set aside their verdict.

Exceptions and motion overruled.

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

JOHN A. RODICK *et al. vs.* JOSIAH G. COBURN.

Androscoggin. Decided April 4, 1878.

Trover. Sale. Principal and agent.

If the owner of an article of personal property delivers it to another to sell, the latter has no right to deliver it to his creditor in payment of his own pre-existing debt; and if he does so, the owner may maintain trover against the creditor without a previous demand.

ON EXCEPTIONS.

TROVER for a watch.

John W. McDuffee, once the undisputed owner of the watch, delivered it, with five others, to the plaintiffs, in pursuance of a sale or as security. They afterwards replaced it in McDuffee's hands, and took from him the following writing: "Lewiston, December 23, 1874. Received of J. A. Rodick & Co. one Nordman, freres, stem winder, No. 21,549. Money or watch to be returned Saturday next. Value, $200. J. W. McDuffee."

The watch was not returned to the plaintiffs, nor was the money paid; there was evidence having a tendency to show that the plaintiffs agreed that McDuffee should retain the watch a longer time, and that he did so retain it; that the watch was afterwards injured, and that McDuffee agreed to repair it; but the defendant claimed that there was no rescission of the agreement under which McDuffee held the watch. The defendant had no knowledge of the terms upon which McDuffee held the watch or that the plaintiffs had any interest in it. He purchased it of McDuffee in good faith, and paid him therefor by crediting the amount of the purchase money upon an indebtedness of McDuffee to him. The defendant took and used the watch as his own. No demand was made upon the defendant, nor was there any refusal on his part, till after the writ was placed in the officer's hands for service; but there was such a demand and refusal before service of the writ.

The defendant contended, among other things, that even if there was an absolute sale of the watch to the plaintiffs, still,

McDuffee so held the watch as to entitle him to it, and, as against the plaintiffs, give a good title to the purchaser; and that the defendant's possession was lawful, whether he could resist a suit by the plaintiffs for payment therefor or not; and that, under such circumstances, a demand and refusal were necessary to be shown before the commencement of the suit.

Among other things not objected to, the presiding justice charged the jury that under the evidence no demand was necessary; and upon the question of agency, as follows: "The plaintiffs aver that they did not leave the watch with McDuffee for sale, the last time it was delivered to him. They admit that they had previously let him take it into his possession for the purpose of selling it to Mr. Pilsbury, but they say the time within which he was to sell it had passed, and not having sold it he returned it to them, actually put it into the hands of one of them, and it was returned to McDuffee merely for the purpose of repairs. The defendant, on the contrary, claims, and McDuffee their witness testifies, that it was left with him for sale, and that his authority to sell it continued. I instruct you that if the watch was left with McDuffee to dispose of as he pleased, as if he was the owner of the watch, he would have the right to sell it to pay his own debt; but if it was left with McDuffee to sell for the plaintiffs, and his authority went no further than that, it would not justify him in turning it out to Mr. Coburn in payment of his own debt, and such a disposition of it would constitute no defense to the action."

The verdict was for the plaintiffs; and the defendant alleged exceptions.

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

L. H. Hutchinson & A. R. Savage, for the plaintiffs.

WALTON, J. If the owner of an article of personal property delivers it to another to sell, the latter has no right to deliver it to his creditor in payment of his own pre-existing debt; and if he does so, the owner may maintain trover against the creditor without a previous demand.

To the point that such a disposition of the property is unauthor-

ized. *Parsons* v. *Webb*, 8 Maine, 38. *Holton* v. *Smith*, 7 N. H. 446.

To the point that no previous demand is necessary. *Galvin* v. *Bacon*, 11 Maine, 28. *Whipple* v. *Gilpatrick*, 19 Maine, 427. *Badlam* v. *Tucker*, 1 Pick. 389, 397. *Woodbury* v. *Long*, 8 Pick. 543. *Hunt* v. *Holton*, 13 Pick. 216.

The instructions to the jury were in accordance with these well established rules of law.

Exceptions overruled. Judgment on the verdict.

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

ALBERT JEWETT *vs.* MARTHA A. HAMLIN.

Oxford. Decided April 4, 1878.

Mortgage. Real action. Action.

The mortgagor cannot maintain a writ of entry against the mortgagee, or his assignees, without showing a satisfaction of the mortgage.

Suing the notes secured by a mortgage, and procuring judgment upon them, without satisfaction, in no way affects the validity of the mortgage.

A writ of entry by the mortgagor, against the mortgagee or his assignee, is not an appropriate action in which to determine the validity of an attempted foreclosure.

ON REPORT.

WRIT OF ENTRY. Plea, *nul disseizin*, with a brief statement of seizin of the defendant in her own right and in fee simple by virtue of a mortgage to her father (under whom she claims as devisee) and a legal foreclosure thereof.

Jeremiah Woodward and wife conveyed the premises to the plaintiff, August 27, 1857, and took back a mortgage from him, May 11, 1858, to secure the payment of notes for $350; and his interest came to the defendant by devise.

The defendant put in the record of an attempted foreclosure by

her devisor. The plaintiff put in the record of a judgment on the notes, on which it was admitted nothing had been paid.

S. F. Gibson, for the plaintiff.

A. S. Kimball, for the defendant.

Per Curiam. Suing the notes secured by a mortgage, and procuring judgment upon them, without satisfaction, in no way affects the validity of the mortgage.

The tenant is in possession of the demanded premises, as devisee of Jeremiah Woodward, claiming under mortgage made by the demandant to him, dated May 11, 1858. The mortgage is a valid subsisting mortgage. The mortgagor cannot maintain a writ of entry against the mortgagee, or his assignees, without showing a satisfaction of the mortgage.

A writ of entry by mortgagor against the mortgagee, or his assignee, is not an appropriate action in which to determine the validity of an attempted foreclosure.

Demandant nonsuit.

OCTAVIUS D. DOLLIFF *et al. vs.* BOSTON & MAINE RAILROAD.

York. Decided April 4, 1878.

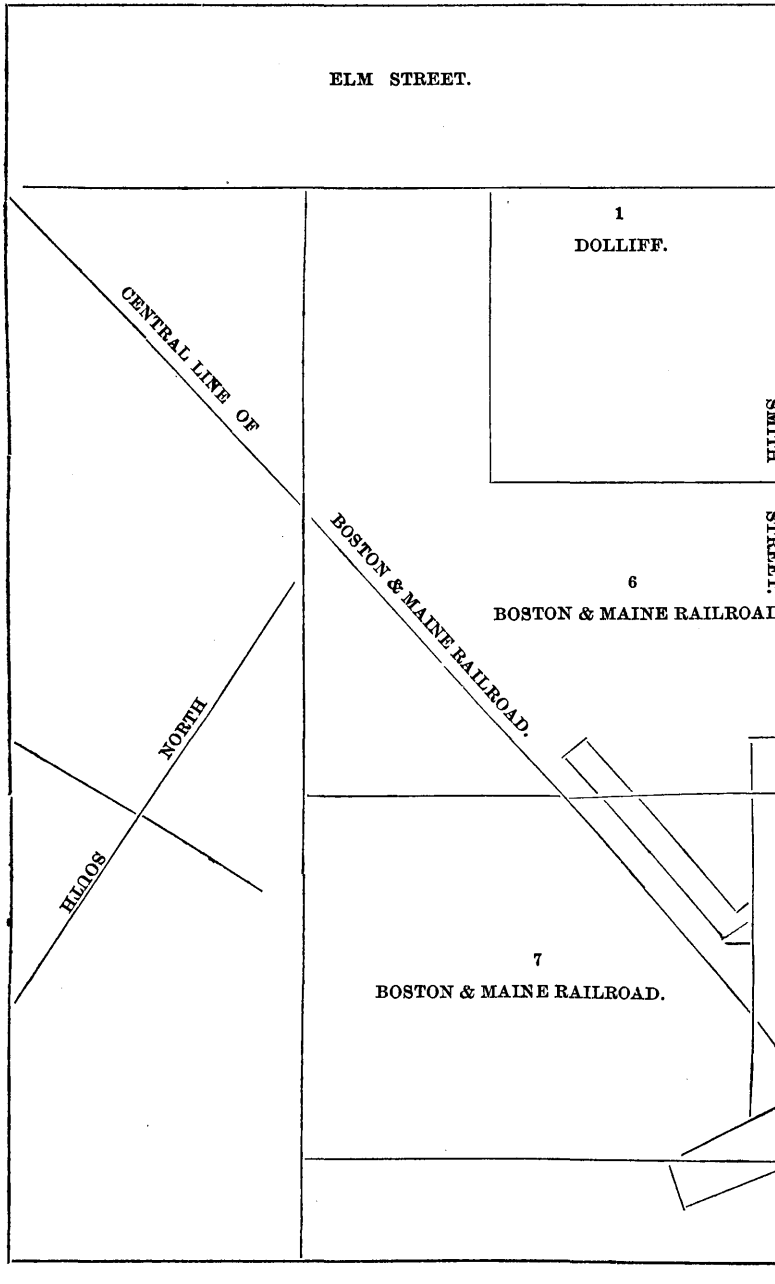
Deed. Drain. Easement.

Implied grants are not to be favored, and will not be held to exist except in cases of clear necessity. Thus, a right of drainage through the grantor's adjoining land will not pass by implication, (the deed being silent upon the subject) unless such right is clearly necessary to the beneficial enjoyment of the estate conveyed, though a drain has already been constructed through the adjoining land, and is in use at the time of the conveyance.

ON REPORT.

This is an action for an alleged interruption of plaintiffs' drain, by the erection of an abutment which prevents the use of the drain as before. The case was referred to the presiding justice to determine the facts, the law court to decide the questions of law arising thereon.

The facts found are as follows: "Prior to the year 1847, one


ELM STREET.
1
DOLLIFF.
SMITH
STREET.
CENTRAL LINE OF
BOSTON & MAINE RAILROAD.
6
BOSTON & MAINE RAILROAD
NORTH
SOUTH
7
BOSTON & MAINE RAILROAD.

Wm. Smith was the owner of all the land lotted upon the plan, bounded northerly by Smith street, and westerly by Main (now Elm) street, in the city of Biddeford, and he was also at the same time owner of all the land opposite these lots, between Smith street and Saco river, both running in the same general direction and near each other. In 1847 Smith erected, on what is now lot No. 1, (premises of plaintiffs') at the corner of Smith and Elm streets, a store with a dwelling overhead. In the cellar was a living spring, the overflow of which was carried off by an underground wooden drain, about six inches square in its passage, laid several feet under the surface, and extending out from the cellar in about the center of the lot, and running across what is now lot "six" and the "passage way" and a part of lot "seven," wending northerly, so as to pass out from lot "seven" under Smith street and the territory north of Smith street to the river. The drain was maintained in this situation from 1847 until it was interfered with when the railroad bed was constructed, in the fall of 1871. There was nothing visible upon the face of the earth outside the cellar of the store to indicate that there was any drain through any of the lots, when either the plaintiffs or the defendants purchased the premises hereinafter named as respectively deeded to them.

"In 1854 the administrator of Smith laid his land on the southerly side of Smith street into lots, upon a plan recorded in the registry of deeds, July 29, 1854, and in 1854 sold the different lots, deeding them according to the plan. He first sold lot No. 'one' and buildings thereon, in the usual form of an administrator's deed, to a person under whom the plaintiffs succeeded to their present title (in 1865). The administrator afterwards conveyed by the same form of deed the balance of the lots to one Luke Hill, under whom the defendants succeeded to their present title of lots 'six' and 'seven.'

"The defendants located their road across number 'seven' in October, 1871, and so as to pass over the drain at the easterly corner of lot 'seven,' but no where touching lot 'one.' No statutory proceedings were ever had to settle the damages for crossing lot 'seven;' but the defendants, by deed of October 13,

1871, purchased of Locke and others lot 'seven,' and, by deed of March 1, 1872, purchased of Hardy and others lot 'six.' The drain is not specifically named in any of the deeds of conveyances before enumerated; and lots 'six' and 'seven' were conveyed to the defendants, without any exception or reservation, by deeds of general warranty.

"In September, 1871, the defendants contracted with Andrews & Haynes to do certain stone work on that portion of the road which includes the crossing of lot 'seven.' Under this contract the contractors laid a solid stone abutment on the southerly side of Smith street, for the railroad bridge above the street to rest upon; being upon their lot number 'seven;' the foundations being deeper than the drain and cutting it off at that point. This caused the water to flow back upon the plaintiffs' premises, at times filling and injuring the use of their cellar. Thereupon the plaintiffs laid a new drain across Smith street, connecting with the old drain at a point nearer their own premises, and westerly and clear of the stone abutment, at a cost of $113. It would have been practicable, so far as the lay of the land is concerned, to have carried off the water from number 'one' by carrying a drain therefrom directly to Smith street, without crossing number 'six,' and thence down Smith street, so as to connect with the old drain at its passage across Smith street, costing not exceeding the sum of $175. The plaintiffs' damages, if entitled to recover, are $200."

R. P. Tapley, with *S. P. McKenney*, for the plaintiffs.

G. C. Yeaton, for the defendants.

WALTON, J. The plaintiffs are not entitled to recover, for the reason that they have failed to establish a right of drainage through the defendants' land. Undoubtedly such a right may be established by an implied grant as well as by an express grant. But implied grants are not to be favored. They should not be held to exist except in cases of clear necessity. If it is intended that an easement shall pass as one of the appurtenances of an estate, it is very easy to have this intention expressed in the deed. If the deed is silent upon the subject, it is no more than fair to the

grantor to presume that he did not so intend; and, to overcome this presumption, to require of the party claiming the easement clear proof that it is necessary to the beneficial enjoyment of the estate conveyed to him. Such is the doctrine maintained in Massachusetts, and it meets our approbation.

In *Johnson* v. *Jordan*, 2 Met. 234, the court held that where the owner of two adjoining messuages and lots of land constructs a drain through one of them for the drainage of the other, and then sells the lots to different purchasers on the same day, and in the deed of the lot drained does not mention the drain, such purchaser acquires no right to the use of the drain through the other lot, if he, by reasonable labor and expense, can make a drain without going through that lot.

In *Thayer* v. *Payne*, 2 Cush. 327, the court say that the question in such a case is whether the drain is necessary to the beneficial enjoyment of the estate conveyed; that this question involves the inquiry whether or not a drain can be conveniently constructed at a reasonable expense without going through the grantor's land; because, if the grantee can thus furnish his premises with a drain, it cannot be necessary to the enjoyment of his estate that he should have a drain through the grantor's land.

Upon this point the plaintiffs' case fails. The burden of proof is upon them to show, not only that a drain to their premises is necessary, but that it is necessary that it should go through the defendants' land. In other words, that they could not, at a reasonable expense, provide their premises with a drain without going through the defendants' land. This they have failed to do. On the contrary, it is stated as a fact in the case that such a drain could be constructed at an expense not exceeding $175.

Judgment for defendants.

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

JOHN LANE *vs.* WILLIAM H. SMITH.

Penobscot. Decided April 10, 1878.

Contract.

The defendant subscribed for shares in a patent right, to be held by him without payment therefor, otherwise than by inducing others to subscribe for shares and give their notes therefor for greatly more than the value of the shares; the notes afterwards came into his hands by purchase, and were by him negotiated for money and paid by the makers. *Held*, that these facts would not entitle the makers to maintain an action against him for money had and received.

ON REPORT.

ASSUMPSIT, for money had and received, and on account annexed, as follows: "1875. September 20. To cash received by you, as proceeds of my note, given for an interest in the Abel Loom Corporation, the note having been obtained by fraud, and discounted by you at Eastern bank, and you having received the money therefor. Also, for cash paid for costs and expenses in defending suit on said note, in favor of Amos M. Roberts, with interest on all said sums to date, $1500."

The case on the note is stated in *Roberts* v. *Lane*, 64 Maine, 108.

The conclusions of fact upon which the decision is based are briefly stated in the opinion.

A. W. Paine, with whom was *A. Sanborn*, for the plaintiff, gives his version of the facts thus: One Shaw, representing the ownership of a patent right of little or no practical value, connived with different persons in Bangor and vicinity, of which the defendant was one, to place it on the market for the purpose of gain. In order to promote the object, an agreement was made between Shaw, the defendant and others named, whereby the property should be put up for sale as stock in an incorporated company to be organized, by the name of the Bangor Abel Loom Company, at the exorbitant price of $50,000, the sum to be actually paid being only about one-half that sum. As an inducement to persons to take stock at that rate, besides the presenta-

tion of the machine under the most favorable circumstances, these promoters agreed to sign the stock subscription liberally, and thus afford false inducement for others under the pretense that they had confidence in the machine; it being understood secretly by all these confederates that these subscriptions should be canceled as soon as the object was accomplished; and they were so, in fact.

In accordance with this plan, a stock subscription was started, and the signatures of the confederates to the amount of $16,000 were made, all of which were to be canceled. Subsequent subscriptions were made, mostly by the same parties, for some $8,000 more, when the plaintiff, relying upon the fairness of the transaction and confiding in the judgment and acts of the subscribers solely, was induced to sign for $1000.

Afterwards the subscription was filled and notes were taken. The last subscriber thus to settle was the plaintiff, to whom was presented the pocket-book full of notes made by the other subscribers, with the assurance that all had thus settled.

The note given by the plaintiff was by the form of sale passed to the defendant, one of the promoters, who sold it to Roberts, and received the cash as for a good note, subject only to the ordinary rate of discount. To this fact attaches the plaintiff's cause of action for money had and received for his note, illegally and by false pretense obtained.

W. H. McCrillis, with whom was *A. L. Simpson*, for the defendant, said, in substance, that the plaintiff subscribed on his own judgment or disposition to take a risk, and was not induced by the plaintiff; he saw the machine in operation, turning out excellent and beautifully woven cloth; there was no evidence of any inducements held out by the defendant to the plaintiff, or of any conversation between them; that, in fact, the defendant was disappointed as well as he; that the machine, though capable under favorable circumstances of doing good work, had not yet been made available in factories; that, even if there were fraudulent representations, the plaintiff was not in a position to recover, not having rescinded or returned the shares.

DICKERSON, J. This is an action of assumpsit to recover of the defendant the proceeds of the plaintiff's promissory note, payable to his order, indorsed by him in blank and given in payment of his subscription for ten shares in the purchase of the patents of the Maine Abel Loom Company, at one hundred dollars a share. The alleged ground of recovery is that the note was obtained by fraud and discounted by the defendant at the Eastern Bank in Bangor.

If the action is maintainable, it is upon the count for money had and received; and we think that it is not maintainable upon that count, as the evidence fails to connect the defendant, either with the plaintiff's subscription for stock, or his giving his note in payment therefor, in such a way as to make him a party to the fraud, if any there was, in either of these respects.

There is not a scintilla of evidence that the plaintiff had any conversation with the defendant in respect to the purchase or payment of stock in the Abel Loom Company; nor does it appear that he requested or authorized any one to confer with or make representations to the plaintiff upon that subject. The plaintiff testifies that all his negotiations were conducted with Shaw, the agent of the loom company. His language is, "I signed the subscription paper from the representation that was made to me by Shaw at the time, and having the list shown me of the subscribers; . . . I should not have signed it if it had not been for Jewett's and Smith's names on it." The defendant is not liable for the representations made by Shaw, as agent of the loom company; and this testimony of the plaintiff, therefore, negatives the defendant's participation in the plaintiff's negotiations for the purchase or payment of the stock in controversy.

But the plaintiff claims to hold the defendant responsible for his original engagement with the Abel Loom Company to pay for his shares in services and influence, and for his pretended conspiracy with others to hold out by the terms of subscription to the subscribers that the price of the patents to be purchased was $50,000, and that the subscribers were to stand upon the same footing, *pro rata;* whereas, the real cost of the purchase was only about half of the sum named, and fifty per cent of the shares was sub-

scribed for fictitiously and in bad faith, upon the express understanding with the vendors that such subscribers should have their shares substantially without charge.

The obvious answer to the first of these alleged grounds of recovery is, that it was perfectly competent for the parties to make the contract complained of; and as it does not appear that the defendant, in fulfilling his part with the loom company, conducted fraudulently or illegally, he cannot be held liable on this ground. Upon the second alleged ground of the defendant's liability, the evidence fails to show the defendant's knowledge or participation in the purpose or transaction therein set forth. It does not appear that he had any knowledge of any agreement between Shaw and Jewett and Leavitt and others, inconsistent with the tenor of the subscription; he, therefore, is not liable on account of any such agreement.

The purchase of the plaintiff's note and other notes given for the patents is relied upon in the argument as a badge of fraud. This argument, however, ceases to have any legitimate force when it is considered that the evidence shows that that purchase had no connection whatever with, and was entirely independent of, the defendant's subscription, or the payment and canceling thereof.

The defendant, as a prior signer of the agreement, whatever may have been his reputed sagacity and wealth, did not thereby guarantee the novelty of the invention or the value of the patents to the subsequent subscribers. The plaintiff had the same opportunity for determining these questions as the defendant. The machine was on public exhibition in Bangor, weaving cloth, several days before the plaintiff subscribed; he repeatedly witnessed its practical operations, and if he chose to subscribe upon the faith of Shaw's representations and Jewett's and Smith's names, rather than upon his own judgment, he alone must abide the consequences; it was a risk of his own seeking, not Smith's.

As now presented, the evidence fails to show that the defendant made any false or fraudulent representations, used any false pretenses, or engaged in any conspiracy, whereby the plaintiff was induced to agree to take stock in the proposed purchase of the Abel Loom patents, or to give his note in payment thereof.

The defendant bought the plaintiff's note in the market, duly indorsed by him, for value, and we do not perceive any valid ground for denying to him the rights and remedies that appertain to a *bona fide* holder of a promissory note for value.

Plaintiff nonsuit.

APPLETON, C. J., DANFORTH, VIRGIN and LIBBEY, JJ., concurred in the result.

DANFORTH, J. I concur in the result of the opinion in this case that this action cannot be maintained. If at all, it can only be for money had and received. But the defendant has had none of the plaintiff's money or its equivalent. Whatever might have been his instrumentality in causing the plaintiff to give his note or his liability, if any, in a proper form of action, the note did not come into his hands as the direct proximate result of his fraud, if there was any. The note was given to another person, who in this transaction was not acting for or as the agent of the defendant. On the other hand, the defendant procured the note and paid for it a fair consideration. Legally, then, he purchased the note by honest purchase and not by fraud. If the note had been sold to another person it would hardly be contended that the defendant would be liable in this form of action.

LIBBEY, J. I concur in the result in this case on two grounds. I. On the ground stated by Judge Danforth in his note. II. The plaintiff, by his subscription to the stock of the association, became owner of an interest in the patent which was conveyed to the use of the subscribers. If he was induced to subscribe and pay his money by fraud, his subscription was not valid, but voidable only by him. He might elect to hold the benefits of his purchase or to rescind the contract. To rescind, he must tender back what he had received. The evidence does not show that it was of no value. He can maintain an action for money had and received only by rescinding the contract.

But I cannot concur in the opinion to the extent to which I understand it to go. I think the evidence authorizes the conclusion that the defendant agreed with Shaw to subscribe for stock,

and to authorize Shaw to hold him out to the public as a subscriber paying into the capital of the company his subscription, for the purpose of inducing others to subscribe, under a secret agreement that he should have his stock without payment therefor. I think such an arrangement, by which the defendant was to act as a decoy, was fraudulent as to parties induced to subscribe by it. He authorized the assertion of a matter as fact, which he knew to be false, to induce others to act.

The fact that he had subscribed in good faith was not immaterial to others subscribing after him. It was an assertion that if others subscribed and became members of the company, they would share the benefits of his subscription, as a part of the capital of the company. By having his stock without payment, the stock of other subscribers was made less valuable than they had a right to expect it to be.

HELEN F. FLINT *vs.* JOSIAH BRUCE.

Lincoln. Decided April 25, 1878.

Evidence.

The plaintiff was assaulted and injured by the defendant, while interfering to protect her father in an affray between them. *Held*, that, while the fact of the affray and an injury to her father may have been admissible in evidence, the detailed account of its subsequent consequences would not be.

ON EXCEPTIONS.

TRESPASS, for assault and battery.

"For that said Josiah Bruce, at said Somerville, on the 27th day of May, 1875, with force and arms assaulted the plaintiff, and then and there, with a large birch stick which he then and there held in his hand, struck the plaintiff with said stick one grievous blow upon, across and over her back, and thereby greatly cut and wounded the plaintiff's said back, which said blow extended from shoulder to shoulder. [And then and there beat, bruised, wrenched and wounded the plaintiff upon her arms, shoulders, back and other parts of her body, whereby they were disabled for

a long time, from which she suffered great pain and inconvenience; and by reason of said wounds and injuries the plaintiff was made sick and faint and her nervous system shocked and enfeebled, and] by means whereof, the plaintiff hath suffered and still does suffer great pain in body and in mind, and hath not only suffered great pain both in body and mind, but hath suffered great humiliation in her feelings, and great degradation and disgrace in the estimation of the good people of this state; and other wrongs and injuries, outrages and enormities, the defendant then and there committed against the peace, and to the damage," &c.

The part in brackets was inserted by way of amendment, against defendant's objection.

This trespass followed an affray between the defendant and the plaintiff's father, for which an action was brought. *Soule* v. *Bruce*, 67 Maine, 584. The plaintiff testified that she and her mother interfered for the protection of her father, when the defendant had him down in the street and was upon him pounding him; that she and her mother pulled him off; that while doing so, the defendant wrenched her arms, tore the skin, and her hand was badly swollen; that she kept her hold till the men came to the relief, and then went to the platform of her father's store, when the defendant came up in front of the platform and, after some aggravating, threatening and profane words, (the witness stating them) struck her across the shoulders with a stick, blistering where it struck, and that severe consequences followed, fainting spells, etc., etc.

The defendant testified in chief: "It is not true that I had Soule down in the street and was striking him when they came up to me. I never struck him at all; neither before, nor then, nor afterwards. All that happened between Mr. Soule and me was before this, and I had left him. When I hit her with the stick she made advances toward me. It was a green gray birch stick about three and one-half feet long, one-half inch at the butt, tapering to the size of a penstock."

The plaintiff, in rebutting, for the purpose of contradicting the defendant, and to show the necessity of the interference on

account of the helpless condition of Soule at the time, offered evidence of his condition afterwards; and this question, "State the condition in which he was two or three days afterwards, when you first saw him stripped and in bed," the witness answered, subject to the defendant's objection. "His left shoulder was broken, his right side black and blue, the skin knocked off of his face. On the day of the accident the blood was running down over his face." The witness testified further, in answer to a question objected to, "On the day he was hurt I and Mr. Morrill assisted him into the house, he could not walk alone, could not have got to the house alone to save the world, in my opinion. I helped put him in bed. In laying him down, he would sing out; his shoulder or side seemed lame all over. Afterwards, he would scream out when he would lie down."

The verdict was for the plaintiff for $550; and the defendant alleged exceptions.

O. D. Baker, for the defendant.

A. P. Gould & J. E. Moore, for the plaintiff.

APPLETON, C. J. This is an action of trespass for an assault and battery upon the plaintiff by the defendant.

The evidence shows an affray between the defendant and A. L. Soule, the father of the plaintiff. The plaintiff interfered for the protection of her father, and to prevent the further continuance of the affray. A child has an unquestioned right to intervene for the protection of a father upon whom an assault is being committed. The defendant committed the assault upon the plaintiff while acting in defense of her father. For this assault and the damages resulting therefrom the defendant is responsible to this plaintiff. For the wrongs and injuries done to and inflicted upon the father, he alone is entitled to remuneration.

The plaintiff, in support of her suit, introduced, not merely evidence of the assault upon herself, but of that upon her father. Nor was that all. Evidence of the effects of the assault on the father, how long he was sick in consequence thereof, and all the details, as fully as though the father had been the plaintiff, were offered in evidence and received, notwithstanding the con-

tinuous objection of counsel and the admonitory suggestions of the court. The fact of the affray may have been admissible, but not a detailed account of its subsequent consequences. *Currier* v. *Swan*, 63 Maine, 323.

The only object of this persistent introduction of evidence not relevant to the cause on trial, must have been to divert attention from the actual injuries sustained by the plaintiff to the greater injuries sustained by the father, and thus, by commingling the wrongs of both, to enhance the damages of the plaintiff. The plaintiff is entitled to damages for injuries she has suffered and for nothing more.

Exceptions sustained.

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

BARROWS, J., dissenting. I am not ready to concur in sustaining the exceptions for the admission of this testimony.

All through the plaintiff's case the judge excluded details of the affray.

Then the defendant came on, and as a substantive part of his defense, testified, himself, that he never struck Soule at all; that he was not on him pounding him when plaintiff interfered, and did not strike him then, nor before, nor afterwards.

The case does not show that the judge notified the counsel that all cumulative testimony would be excluded in rebuttal. If he had done it, I take it, in his discretion, he might admit such testimony, preserving defendant's right to reply with more. And the testimony, on account of which the exceptions are sustained in this opinion, was admitted to rebut the defendant's denial of such a state of things as justified the daughter in interfering. I think defendant brought it upon himself, by his denial of the condition of things which the plaintiff had asserted, to account for her intermeddling, and that defendant has no good ground of exception on that account.

VIRGIN, J., concurred in the dissenting note.

STATE *vs.* INTOXICATING LIQUORS, city of Belfast, claimant.

Waldo. Decided May 8, 1878.

Intoxicating liquors.

The municipal officers of a city, town or plantation are authorized by R. S., c. 27, to purchase intoxicating liquors, only of the state commissioner, or of such municipal officers as have purchased intoxicating liquors of him, or of a manufacturer in the state who has complied with the requirements of § 23.

Intoxicating liquors purchased by municipal officers, without authority and in contravention of the statute, are liable to seizure and forfeiture, and the officers so purchasing to indictment.

Intoxicating liquors, purchased by the municipal officers of a city, town or plantation, and kept by the town agent for sale, are liable to seizure and forfeiture, if the casks and vessels in which the same are contained are not at the time of seizure plainly and conspicuously marked with the name of such city, town or plantation, and of its agent.

ON EXCEPTIONS.

SEARCH AND SEIZURE PROCESS.

September 27, 1875, the judge of the police court of Belfast, on complaint of one Sanborn, issued his warrant, in accordance with R. S., c. 27, § 35, against the store of Andrew D. Bean in that city. The warrant was served by the sheriff, and a large stock and assortment of intoxicating liquors were seized by him. At the hearing on the libel, the city, by its municipal officers, appeared and claimed the liquors, on the ground that the city owned them and that they were intended for sale by the agent of the city according to law. The police judge declared them forfeited, and the claimants appealed.

At the trial at the October term, 1875, for the purpose of presenting the legal questions, the attorney for the state and the counsel for the claimants agreed on the facts. On the first Monday of May, 1875, the municipal officers of the city of Belfast duly established an agency, and appointed Andrew D. Bean agent for the sale of intoxicating liquors in said city, under R. S., c. 27, and Bean was duly qualified as such agent. All of the liquors described in the defendants' claim were intended for sale in this state by said city, through its agent. That portion of

said liquors contained in schedule marked "A" was not purchased of the state commissioner, named in Sec. 14 of said chapter, nor of such municipal officers as had purchased said liquors of him, nor of any manufacturer of liquors manufactured in this state, but of dealers out of the state.

The presiding justice instructed the jury as follows: "To show that the liquors named in the libel are subject to forfeiture, it is incumbent upon the state to prove beyond a reasonable doubt that the liquors were intended for sale in this state, in violation of law, by the owner, his agent or servant.

"That, to be entitled to a return of said liquors, the defendants must prove that they were the owners thereof at the time of seizure, and entitled to their possession.

"That, assuming the facts admitted, as proved, the liquors described in schedule 'A' were purchased by said municipal officers in violation of law, and that the intent to sell the same in this state through said agent was in violation of law.

"That, to protect said liquors from seizure and forfeiture, if kept by said agent for the purpose of sale, all the casks and vessels in which the same were contained must have been at the time of seizure plainly and conspicuously marked with the name of said city and of its agent.

"That if any of such vessels or casks containing said liquors were not so marked, then the same are not prohibited from forfeiture by reason of ownership by the claimant, and the claimant is not entitled to return thereof."

The jury returned their verdict as follows: "The jury find that the intoxicating liquors contained in schedule marked 'A,' and described in said libel and claim, were at the time of the seizure thereof intended for unlawful sale by said claimants in this state.

"They further find that the casks and vessels containing the intoxicating liquors contained in schedule marked 'B,' and described in said libel and claim, were not at the time of the seizure thereof plainly and conspicuously marked with the name of said city and its agent thereon; that the same are subject to forfeiture, and that the claimants are not entitled to a return thereof.

"And they further find that all of such intoxicating liquors described in the defendants' claim, not embraced in said schedules 'A' and 'B,' were not at the time of the seizure thereof intended for unlawful sale in this state, and that the claimants were the owners and entitled to the possession thereof."

The counsel for the claimants filed exceptions.

J. Williamson, for the claimants, submitted without argument.

L. A. Emery, attorney general, *& W. H. Fogler*, county attorney, for the state.

APPLETON, C. J. By R. S., c. 27, § 15, the governor, with the advice and consent of the council, is authorized to "appoint a commissioner to furnish municipal officers of towns in this state, and duly authorized agents of other states, with pure, unadulterated intoxicating liquors, to be kept and sold for medicinal, mechanical and manufacturing purposes." The commissioner is prohibited from selling "any spirituous, intoxicating or fermented liquors to any municipal officers of this state, except such as have been tested by a competent assayist and found to be pure."

By § 15, the governor is required to "issue to the municipal officers of the towns of this state a notice of the name and place of business of said commissioner, and such municipal officers shall purchase such intoxicating liquors as they may keep on sale for the purpose specified herein, of such commissioner, or of such other municipal officers as have purchased such intoxicating liquors of him, and of no other person or persons, except as provided in section twenty-three." By § 23, the manufacturer having given the required bonds is authorized, in certain cases, to sell to the municipal officers of towns in this state.

By § 16, "If any municipal officer or officers shall purchase any intoxicating liquors, to be sold according to the provisions of the laws of this state, of any other person or persons except those specified in the preceding section, . . they shall forfeit for such offense . . a sum not less than twenty nor more than one hundred dollars, to be recovered by indictment."

By § 26, the municipal officers may "purchase such quantity of intoxicating liquors as may be necessary to be sold under the provisions of this chapter."

The liquors in schedule "A" were purchased in a state other than Maine. They were not purchased from the state commissioner, nor from municipal officers who had purchased from such commissioner, nor from a manufacturer in this state as provided by § 23. The purchase was in direct violation of § 16. Having made a purchase in direct contravention of the law of this state, the defendants are not to be protected from the consequences of violating the law, by virtue of which they were authorized to purchase, in certain cases, intoxicating liquors. The liquors were not tested and found to be pure. They were not manufactured by a manufacturer who had given bond as required by § 23. The instruction that, "assuming the facts admitted, as proved, the liquors described in schedule 'A' were purchased by said municipal officers in violation of law, and that the intent to sell them in this state through said agent was in violation of law," was correct.

It is provided by § 51 that no "liquors owned by any city, town or plantation, or kept by any agent of any city, town or plantation, as is provided by law, shall be protected against seizure and forfeiture, under the provisions hereof, by reason of such ownership, unless all the casks and vessels in which they are contained shall be at all times plainly and conspicuously marked with the name of such city, town or plantation, and of its agent." The instruction on this branch of the case was in strict accordance with the statute.

Exceptions overruled.

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

DICKERSON, J., did not sit.

SEWALL A. DINSMORE *et al*, in equity, *vs.* ELBRIDGE G. SAVAGE *et al.*

Somerset. Decided May 8, 1878.

Mortgage. Deed. Costs. Covenants.

The fact that a mortgagee in possession first conveyed the land with a covenant against incumbrances, and then took the mortgage, under which he holds possession, as security for a portion of the purchase money, will not render him chargeable with rent, or for damages equal to rent, for a period of time during which a third party held possession of the land without right and without the consent of the mortgagee, such possession not constituting an incumbrance within the meaning of the law, or a breach of the covenant against incumbrances.

When a mortgagee has, upon demand, rendered a true account of the amount due upon the mortgage, a bill in equity to redeem cannot be maintained, unless the plaintiff first tenders to the mortgagee the amount due, or is prevented from so doing through the fault of the mortgagee.

If the plaintiff prevails in a suit in equity to redeem land under mortgage, he recovers costs as a legal right, the law in this respect having been changed since the decision in *Bourne* v. *Littlefield*, 29 Maine, 302.

BILL IN EQUITY, to redeem land mortgaged, alleging that, August 17, 1872, the plaintiffs demanded of the defendants a true account of the sum due on the mortgage, and of the rents and profits, and the money expended by them in repairs and improvements, to the end that the plaintiffs might redeem the premises from the mortgage, and that the defendants neglected and refused to render such an account. The defendants in their answer state that, August 29, 1872, they gave to the plaintiffs a statement in writing, according to their best knowledge and belief, of the amount then due after deducting the rents and income received after May 7, 1869, and allowing what they had necessarily expended in repairs and improvements, which amount was $849.43. The master's report finds $394.22 due on the mortgage, June 6, 1873, unless the court should be of opinion that no rent from March 6, 1862 to May 7, 1869 should be allowed to reduce the mortgage debt, in which case the amount due June 6, 1873, was $908.11.

The disallowance of the rent in reduction of the amount due

on the mortgage notes, and the reasons therefor, are stated in the opinion.

J. H. Webster, with *S. D. Lindsey*, for the plaintiffs.

D. D. Stewart, for the defendants.

WALTON, J. This is a bill in equity to redeem land mortgaged. The suit was commenced without a tender of the amount due upon the mortgage; and, to support it, the plaintiffs have averred, and the burden is upon them to prove, that the account which the defendants rendered of the sum due upon the mortgage was not a true account. This they have failed to do.

The only objection made to the account is that the defendants did not charge themselves with rent for a period of about seven years, during which time the land was held and occupied by one Thomas F. Chase.

The facts out of which this controversy arises, briefly stated, are these:

In 1862, one of the defendants (Savage) conveyed the land in question, by deed of warranty, to Charles Bean and Joseph Bean, taking back the mortgage, from which the plaintiffs claim to redeem, to secure the greater part of the purchase money. At the time of this conveyance, Thomas F. Chase was in possession of the land, claiming that he had an existing right to redeem it from a former mortgage given by him to Savage. This claim was unfounded, the mortgage having been legally foreclosed, as this court decided in *Chase* v. *Savage*, 55 Maine, 543. But Chase refused to surrender the land to either Savage or his grantees, and held it, in spite of all efforts to remove him, for more than seven years.

The plaintiffs contend that, under these circumstances, the defendants are chargeable with rent during the seven years that Chase occupied. They claim that Chase's possession at the time of the conveyance from Savage to the Beans was a breach of the covenant against incumbrances, and that they, (the plaintiffs) being now the owners of the right to redeem, by virtue of a title derived from the Beans, are entitled to have the defendants charged with rent or damages equal to the income of the land for

the seven years that Chase occupied, and to have that amount deducted from what would otherwise be due upon the mortgage.

The court is of opinion that there are several fatal objections to such a claim. First, if Chase's possession was a breach of the covenant against incumbrances, the plaintiffs have failed to aver or prove that they are entitled to the damages. True, an assignee may, under certain circumstances, recover such damages as the first grantee might. R. S., c. 82, § 15. But the plaintiffs fail to bring their case within the operation of this statute. Second, we fail to perceive why Smith, one of the defendants, is in any way responsible for the breach of the covenants in Savage's deed to the Beans. He is an assignee of one-half of the interest conveyed by the mortgage deed from them, but he was not a party to the deed to them. And, lastly, we do not think Chase's possession was a breach of the covenant against incumbrances. He was in possession without right. A naked possession without right is not an incumbrance within the meaning of the law. To create an incumbrance, the estate must be burdened with some right, or title, or interest, which the law will recognize and protect. The possession of a mortgagor, after foreclosure of the mortgage, is not such a right, or title, or interest. His possession is, at most, but a tenancy at sufferance, and may be terminated at any moment without a previous notice to quit.

To support a bill in equity to redeem real estate under mortgage, without first making a tender of the amount due upon the mortgage, the plaintiff must aver and prove that he has been prevented from making the tender by the default of the defendant. This default may consist in refusing or neglecting to render an account of the sum due upon the mortgage, when requested so to do; or in rendering a false account. But when the defendant is guilty of neither, and has in no other way, by his default, prevented the plaintiff from performing or tendering performance of the conditions of the mortgage, a suit against him to redeem cannot be maintained. He cannot be mulcted in cost, and have the foreclosure of his mortgage indefinitely postponed, at the mere will and pleasure of the mortgagor, or those claiming under him, when he is himself in no fault. R. S., c. 90, § 13. *Willard* v. *Fiske*, 2 Pick. 540.

Formerly the court possessed a discretionary power in relation to costs in this class of suits. *Bourne* v. *Littlefield*, 29 Maine, 302. The law is now otherwise. It was changed in the revision of 1857. In fact, the whole law in relation to this class of suits was then materially changed; and the former decisions of the court can no longer be relied upon in ascertaining the present rights and liabilities of the parties. Compare R. S. of 1841, c. 125, § 16, with R. S. of 1857, c. 90, § 13, and R. S. of 1871, c. 90, § 13.

As the law now stands, no suit can be maintained without a tender, unless the defendant is in default in preventing such a tender. And if the bill is sustained, the present statute declares that the plaintiff "shall be entitled to judgment for redemption and costs." His right to costs is no longer discretionary—it is a strict legal right.

The conclusion to which we have arrived upon the merits renders it unnecessary to decide whether the suit was or was not seasonably commenced. The service of the writ in which the bill was inserted was after dark on the last day of the three years which would complete the foreclosure. It was then undoubtedly too late to make a tender. Whether it was too late to make service of the writ, it is unnecessary to decide.

Bill dismissed with costs for defendants.
One bill of costs only.

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

LYDIA HARDY, administratrix of Warren Hardy, *vs.* JOSIAH TILTON.

Somerset. Decided May 8, 1878.

Execution. Attachment. Sheriff.

Money collected by an officer on legal process, while it remains in his hands, is to be regarded as *in custodia legis* and not the subject of levy or attachment in any form. *Thus*, an officer, who has collected money on an execution, cannot apply it in satisfaction of another execution, although the latter is against the party for whom the money was collected, and both executions are in the officer's hands for collection at the same time.

ON EXCEPTIONS.

CASE against the sheriff for the misfeasance of his deputy, Jeremiah J. Walker, in not paying over money collected on an execution.

The defendant pleaded the general issue, with a brief statement that his deputy, Walker, paid over to the plaintiff the money collected on the execution with the exception of $39.63, which said money, then in his hands as deputy sheriff, he, in his said capacity, had taken as the property of the estate of the said Warren Hardy, deceased, on an execution then in his hands for collection, in favor of Micah W. Norton, and against the plaintiff, to satisfy said execution and his fees thereon; and that Walker applied the $39.63 to the satisfaction of said execution, and his fees, and returned the execution fully satisfied. The parties introduced documentary evidence in support of their respective allegations; upon which the presiding justice ruled that the defense was not made out; and the defendant alleged exceptions.

A. H. Ware, for the defendant.

S. J. & L. L. Walton, for the plaintiff.

WALTON, J. The question is whether an officer, who has collected money on an execution, can apply it in satisfaction of another execution against the person for whom it was collected, both executions being in his hands for collection at the same time.

We think not. The attempt has often been made to attach or levy upon money thus situated; but it has uniformly been held

that money, while in the hands of an officer, who has collected it under legal process, is *in custodia legis*, and not the subject of attachment or levy.

The leading case in this country was decided by the supreme court of the United States, as long ago as 1801. A sheriff having collected money on an execution, levied thereon an execution which he held against the person for whom the money was collected. The court held that the levy could not legally be made. *Turner* v. *Fendall*, 1 Cranch. 117.

Many similar decisions have been made by the state courts. *Willes* v. *Pitkin*, 1 Root, (Conn.) 47. *Prentiss* v. *Bliss*, 4 Vermont, 513. *First* v. *Miller*, 4 Bibb, (Kentucky) 311. *Dubois* v. *Dubois*, 6 Cow. 494. *Reddick* v. *Smith*, 4 Illinois, 451. *Dawson* v. *Holbrook*, 1 Ohio, 135. *Crane* v. *Freese*, 1 Harrison, (N. J.) 305. *Conant* v. *Bicknell*, 1 D. Chipman, (Vt.) 50. *Farmers' Bank* v. *Beaston*, 7 Gill & Johnson, (Md.) 421. *Jones* v. *Jones*, 1 Bland, (Md.) 443. *Blair* v. *Cantey*, 2 Speers, (S. C.) 34. *Burrell* v. *Letson*, 1 Strob. (S. C.) 239. *Clymer* v. *Willis*, 3 Cal. 363. *Reno* v. *Wilson*, Hemp. (Ark.) 91. *Dawson* v. *Holcomb*, 1 Hammond, (Ohio) 275. *Wilder* v. *Bailey*, 3 Mass. 289. *Thompson* v. *Brown*, 17 Pick. 462.

Some of these cases relate to attempts to attach the money on writs; others to efforts to reach it by trustee process; others, where, as in this case, attempts were made to levy executions upon it; but the same principle runs through them all; namely, that money collected by an officer on legal process, while it remains in his hands, is to be regarded as *in custodia legis*, and not the subject of levy or attachment in any form.

Exceptions overruled.

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

JONES S. KELLEY *vs.* IRA WEYMOUTH *et al.*, and Charles A. Nealley, trustee.

Penobscot. Decided May 8, 1878.

Trustee process.

The statute says: "The answers and statements sworn to by a trustee shall be deemed true, in deciding how far he is chargeable, until the contrary is proved." R. S., c. 86, § 29. *Held*, that the question, whether the trustee is chargeable, is to be decided on the rule of the preponderance of evidence applicable in civil actions; and in deciding that question, the answers of the trustee are to be weighed and their effect determined by the general principles on which conclusions are to be drawn from any other lawful evidence.

ON EXCEPTIONS.

TRUSTEE PROCESS.

The trustee disclosed that, under a contract between him and the principal defendants, for cutting, hauling and driving logs, the defendants had earned the sum of $6,727, towards which he, trustee, had, from time to time before service of the writ, made payments to an amount sufficient to reduce the indebtedness to about or less than $900. To offset this and show a balance due the trustee, he further disclosed that, a few months previous to the contract, the defendants had, without authority and without the knowledge of trustee, taken from the trustee's camp, near Chesuncook, a large lot of camp and logging utensils; that, upon learning the fact, he called defendants' attention to it, and it was thereupon agreed that the sum of $1,000 in gross should be allowed by them for the same, towards the contract then at the same time made for cutting and hauling the logs.

The sum of $1,000 being charged, a balance would be due trustee, and for that reason he claimed to be discharged.

Allegations of facts being filed against the propriety of the allowance of the whole sum of $1,000, evidence was offered on both sides, tending to disprove the propriety of the charge in full, and also to support it. The principal defendants affirmed the agreement, and no other direct testimony was offered to that

point, no other person being present when the alleged agreement was made.

It was not denied, however, that the actual value of the things taken was, in fact, less than the sum charged, trustee claiming that a higher price for the work was assented to because of the enhanced value agreed upon for the articles taken.

The evidence, however, it was contended, tended to prove that no such agreement was made; the declarations of both parties being testified to, which, it was contended, contradicted such agreement, and were alleged to be inconsistent therewith. Much impeaching testimony was offered on the one side and the other, and received by the presiding justice.

Counsel for trustee contended that the disclosure of the trustee, of the fact that there was such an agreement, must be taken to be true and conclusive until disproved; that impeaching testimony alone was not sufficient to disprove it, and that, unlike the ascertainment of facts in the usual mode of trial by jury in civil cases, the verdict or result was not to be arrived at by a balancing of the testimony, but depended upon the fact alone that the agreement disclosed by the trustee should be disproved.

The presiding justice overruled the point, and allowed only what the articles were reasonably worth, and charged the trustee for the balance with interest; and the trustee alleged exceptions.

A. W. Paine, for the trustee.

F. A. Wilson & C. F. Woodard, for the plaintiff.

Appleton, C. J. The trustee in this case disclosed a contract between him and the principal defendants, for cutting, hauling and driving logs, on which was due about nine hundred dollars. He further disclosed that the principal defendants took, without his knowledge or permission, a quantity of camp and logging utensils; that, learning this fact, he called the defendants' attention to it, and the matter was arranged between them, by the defendants allowing him for the utensils so taken the sum of one thousand dollars towards the contract for hauling the logs aforesaid.

It is obvious that the trustee's liability depended upon the

truth of the alleged settlement for the camp and logging utensils tortiously taken, and whether the same, if made, was made in good faith.

The principal defendants testified to the settlement as set forth in the disclosure of the trustee.

Allegations were filed against the allowance of this sum of a thousand dollars, in pursuance of R. S., c. 86, § 29.

The questions of fact arising under such allegations were by mutual consent submitted to the presiding justice, by whom they were determined. § 30.

The alleged settlement was impeached by its intrinsic improbability, arising from the trifling value of the camp and logging utensils as compared with the sum said to be allowed by the defendants for the same. It was further impeached by the declarations of the defendants and of the trustee inconsistent with the truth of the statements respectively made by them.

The presiding justice, after weighing the disclosure of the trustee, and all the evidence adduced on the one side and the other, allowed the trustee what these articles were reasonably worth, and charged him for the balance, to all which exceptions were duly alleged.

By R. S., c. 86, § 29, "The answers and statements sworn to by a trustee shall be deemed true, in deciding how far he is chargeable, until the contrary is proved; but the plaintiff, defendant and trustee may allege and prove any facts material in deciding that question."

By § 30, "Any question of fact, arising upon such additional allegations, may, by consent, be decided by the court, or submitted to a jury in such manner as the court directs."

The answer of the trustee, with the facts alleged and proved, are to be decided, by the tribunal to which they are submitted for determination, on the preponderance of testimony.

If the disclosure of the trustee contains a statement of improbable or contradictory facts, such improbability or contradictions are proper subjects for consideration in arriving at a conclusion. If, on the face of the disclosure, the falsehood of a part of the statements therein contained is apparent, upon comparison with

other portions of the disclosure and with facts alleged and proved, the court or jury should act in accordance with their convictions thus derived from such comparison. No statute, no rule of law, requires court or jury to decide adversely to its own conclusions as to the facts in controversy. No statute, no rule of law, is to be found compelling any court or jury to determine that the balance of evidence is in favor of one party, when, on full consideration of the proofs adduced, it is satisfied that the balance is in favor of the other party.

"The unqualified declaration of a trustee, that he has no goods, effects nor credits of the principal defendant in his hand or possession," observes Rice, J., in *Moor* v. *Towle*, 38 Maine, 133, "will discharge him, unless there are such facts stated by him, or proved by other competent evidence, inconsistent with his declarations, as will be found sufficient to overcome them." In that case, as in this, such facts were found and the trustee was charged. In *Porter* v. *Stevens*, 9 Cush. 530, 536, Cushing, J., says: "He (the trustee) is to be charged or not, according as, on a just view of all the facts, the weight of evidence and of conviction shall fairly preponderate. . . He testifies under the ordinary obligations of an oath, in courts of law, and his testimony is to be weighed and its effects determined by the general principles on which conclusions are to be drawn from any other lawful evidence." The presiding justice, giving to the answer of the trustee its just weight, and comparing it with the conflicting facts alleged and proved, and the contradictory statements of the trustee and the principal defendants adjudged the trustee, on the whole, chargeable, and in this there was no error.

Exceptions overruled.

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

HIRAM BLISS, JR., *vs.* GEORGE H. DAY *et als.*

Knox. Decided May 8, 1878.

Poor debtor.

It is not a valid objection to the service of a citation in a poor debtor's disclosure that the constable who made the service had not given the bond required by law, the acts of an officer *de facto*, so far as third persons are concerned, being as valid as the acts of an officer *de jure*.

A constable is a competent officer to serve the citation in a poor debtor's disclosure, although the amount due the creditor is more than a hundred dollars.

The certificate of the justices selected to hear a poor debtor's disclosure, in which it is stated that the debtor had caused the creditor to be notified according to law, is *prima facie* evidence of a legal service, and an objection that the officer's return upon the citation is defective in form cannot prevail, when no copy of the return is furnished the court.

ON REPORT.

DEBT on a poor debtor's bond.

H. Bliss, Jr., pro se.

A. S. Rice & O. G. Hall, for the defendants.

WALTON, J. The only ground on which it is claimed that the action can be maintained is that the service of the citation to the creditor, of the debtor's intention to disclose, was not legal.

I. One objection is that the constable who served the citation had not given the bond required by law for the faithful performance of the duties of his office. The objection is not sustainable. The constable was an officer *de facto;* and, so far as third persons are concerned, the acts of an officer *de facto* are as valid as the acts of an officer *de jure*. Upon this ground, the levy of an execution by a coroner who had not given the bond required by law was held valid. *Nason* v. *Dillingham*, 15 Mass. 170.

II. Another objection is that it is not competent for a constable to serve a citation, when the amount due the creditor exceeds a hundred dollars. This objection is based on the statute which declares that a constable may serve any writ or precept in a personal action, when the damage claimed does not exceed a hundred

dollars. R. S., c. 80, § 43. This statute, it will be noticed, is applicable only to writs and precepts in personal actions, and to writs and precepts in which damages are claimed. A citation is neither. It is not a writ or precept in a personal action; nor is it a writ or precept in which damages are claimed. It is simply a notice to the creditor of what the debtor intends to do. Consequently, the statute does not apply, and the objection is not sustainable.

III. Another objection is that the constable's return is defective in form. The plaintiff, whose duty it was to furnish copies of all papers properly in the case, has not furnished us with a copy of this return. Consequently, this objection fails for want of proof; and the certificate of the justices, in which it is stated that the debtor had caused the creditor to be notified according to law, must prevail. *Dunham* v. *Felt*, 65 Maine, 218.

Judgment for defendants.

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

STATE *vs.* GEORGE HINES.

Penobscot. Decided May 15, 1878.

Intoxicating liquors.

A sentence is no part of a conviction. Docket entries, where the record has not been extended, showing that, in a former trial of the defendant for a violation of the same provision of the statute, a verdict of guilty has been rendered, exceptions filed and subsequently overruled and certified by the law court to the clerk of the county, and no other proceedings pending for the reversal of the verdict, are sufficient proof of a prior conviction, though no sentence has been passed.

ON EXCEPTIONS.

INDICTMENT as a common seller with an allegation of conviction for a prior offense. To make out the former conviction the state put in the prior indictment and docket entries. No judgment had been extended upon the record. The defendant objected to the sufficiency of the proof, because it did not appear that any sen-

tence had been passed, or that judgment had been ordered to be entered up (as by him contended) for the state.

The presiding justice overruled the objection and ruled the proof sufficient; and the defendant alleged exceptions.

A. Knowles, with *James F. Rawson*, for the defendant.

L. A. Emery, attorney general, *& J. Hutchings*, county attorney, for the state.

DANFORTH, J. The only question in this case is, whether the proof offered sustains the allegation in the indictment, of a previous conviction. No record having been extended the docket entries are admissible. *State* v. *Neagle*, 65 Maine, 468.

From these entries, it appears that upon a former trial of the defendant for the violation of the same statute, a verdict of guilty was rendered, exceptions filed and allowed, and subsequently these exceptions were overruled and a certificate to that effect sent from the law court to the clerk of the county where the case was pending. No sentence was passed and no other proceedings were begun by which the verdict might by possibility be set aside.

By R. S., c. 77, § 13, all cases both civil and criminal in which questions of law shall be raised, shall be "marked law on the docket and continued until their determination is certified by the clerk of the district to the clerk of the county." By R. S., as amended by c. 77, of the laws of 1876, when the determination of the court has been certified to the clerk, it is his duty, except in a few instances provided for by statute of which this is not one, to enter judgment. True, the sentence, which may be, though not necessarily, a part of the final judgment is not certified, but all other matters pending are. All has been done that is required to establish the verdict. The defendant has been heard upon all questions raised by him within the time allowed, and they have been determined against him. It only remains to pass the sentence, and the case can be continued for no other purpose. If the words "judgment for the state" had been added to the certificate, no additional force would have been given it. That would not have prescribed the sentence, nor would it in any respect have changed the duty of the clerk. The certificate as sent was a full

determination of the questions raised, and precisely the same effect would follow in one case as in the other. The result would be a judgment of conviction, whatever it may be considered as to the final judgment. That conviction, as used in the statute under which this process was commenced, does not include a sentence, is clear from the fact that by the same statute, R. S., c. 27, § 29, any person must first be convicted before he can be punished. The same rule we think may properly be applied to all criminal cases. The same meaning is given to the term "conviction" in *State* v. *Elden*, 41 Maine, 165.

Exceptions overruled.

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

ANDREW J. CHASE *vs.* GEORGE W. WINGATE.

Piscataquis. Decided May 20, 1878.

Mortgage. Landlord and tenant. Fixtures, manure.

The right of an outgoing mortgagor, after condition broken, to the manure produced upon a farm in the ordinary course of husbandry by him, pending the mortgage and while in possession of the mortgaged premises, is to be determined by the rule of law which prevails between mortgagor and mortgagee, and not that which prevails between landlord and tenant.

The general rule, that manure made upon a farm in the usual course of husbandry is so attached to and connected with the realty that, in the absence of any agreement or stipulation to the contrary, it passes as appurtenant to it, is applicable to a mortgagor in possession. He has no right when vacating the premises to remove or sell such manure, but the title thereto is vested in the mortgagee as the owner of the freehold.

When Carter sold and delivered the manure in controversy to the defendant, he was an outgoing mortgagor, after condition broken. *Held*, that he had no title to the manure, and the defendant acquired no right to it by his purchase, and was liable to the mortgagee, the plaintiff, for its fair market value at the time of the taking.

ON REPORT.

TROVER, for ten cords of manure, valued at $40. Plea, general issue. The defendant claimed title by purchase from one Carter, the mortgagor in possession of the farm, of which the plaintiff was mortgagee, and on which the manure was made.

The plaintiff had obtained a judgment as on mortgage against Carter and, in due course, a writ of possession which he placed in the sheriff's hands for service. The evidence tended to show that, on Carter's solicitation, the plaintiff allowed him to remain a while, and at a time agreed Carter left; that, in the night before leaving, according to previous arrangement with the defendant, he hauled the manure with the defendant's team from the mortgaged land on to the land of the defendant, and received from him pay therefor, both Carter and the defendant knowing that the plaintiff claimed to own it, as mortgagee, and had forbidden its removal.

A. M. Robinson & W. P. Young, for the plaintiff.

A. G. Lebroke, for the defendant, contended that the permission by the plaintiff for Carter to remain constituted the relation of landlord and tenant, and that Carter was his tenant at will, and the manure was liable to be seized on execution and sold for the payment of Carter's debts. *Staples* v. *Emery*, 7 Maine, 201. And that of course he would have a right to sell it. The case of *Lassell* v. *Reed*, 6 Maine, 222, deciding that the outgoing tenant had no right to remove the manure after the tenancy had terminated, was not adverse to his right to sell before the termination of the tenancy. But even that case was placed upon doubtful grounds of public policy for the encouragement of agriculture; for manure was sure to be used, and it did not concern the public which of two adjoining farms it should enrich.

Dickerson, J. The chief question to be determined in this case arises out of the relations of the plaintiff, as mortgagee, and the defendant's vendor, Jonathan Carter, as mortgagor of the farm upon which the manure in controversy was produced. When Carter sold and delivered the manure to the defendant he was an outgoing mortgagor, after condition broken. The case has been somewhat complicated, from the fact that it has been presented as depending mainly upon the law of landlord and tenant, instead of the law applicable to mortgagor and mortgagee.

The case, however, in its facts, belongs to the latter class, and is clearly distinguishable from the former in respect to the law

involved in the question under consideration. At common law, whatever is fixed to the freehold becomes a part of the realty and passes with it. This rule has been relaxed in favor of tenants and others who have made erections and improvements at their own expense and for their own use, upon land in which they had only a temporary interest, because of the hardship they would be subjected to if they could not remove such fixtures at or before the expiration of their term. But this reason does not apply in the case of mortgagors. The mortgagor, for most purposes, is regarded as the owner of the estate, and the improvements made by him while in possession of the mortgaged premises, in contemplation of law, are deemed to be made for himself and to enhance the general value of the estate, and not for its temporary enjoyment. Besides, the mortgagor pays no rent or equivalent for the use and enjoyment of the mortgaged premises, is not compelled to surrender the estate at a fixed period of time, as in case of a lease, and can, by fulfilling his contract of purchase, become the owner of the estate, and enjoy the benefit of all his erections and improvements. Hence, the rule of the common law applicable to actual fixtures has been held to apply to erections and improvements made by the mortgagor in possession without relaxation, and also to articles of a doubtful nature, whether actual fixtures or not, on the ground of the presumed intention of the parties in respect to them. *Winslow* v. *Merchants' Ins. Co.*, 4 Met. 306, 310, 313. *Butler* v. *Page*, 7 Met. 40, 42. *King* v. *Johnson*, 7 Gray, 239, 241.

It was expressly held in *Lynde* v. *Rowe*, 12 Allen, 100, that if fixtures are added by a tenant at will of the mortgagor, his right to remove them must be determined by the rule which prevails as between mortgagor and mortgagee, and not that which prevails as between landlord and tenant.

In general, manure, made in course of husbandry upon a farm, is so attached to and connected with the realty, that, in the absence of any express stipulation or understanding to the contrary, it passes as appurtenant to it. This principle has been applied in the case of manure taken from the barnyard of a homestead and piled upon the land, though not broken up, nor rotten, nor in a

fit state for incorporation with the soil. *Fay* v. *Muzzey*, 13 Gray, 53, 55. The same rule has been held applicable in cases between landlord and tenant. *Lassell* v. *Reed*, 6 Maine, 222, and *Daniels* v. *Pond*, 21 Pick. 367; and also between vendor and vendee. *Kittredge* v. *Woods*, 3 N. H. 503. This doctrine rests upon the ground that it is for the interest of good husbandry, and the encouragement of agriculture, that manure produced on a farm, in the common course of husbandry, should be consumed upon it, and that the farm should not be impoverished by the removal therefrom of the material necessary for its enrichment and the growth of the succeeding crops.

The manure in controversy was produced in the ordinary course of husbandry by the mortgagor, while in possession of the mortgaged premises. In the absence of any agreement or stipulation to the contrary, that manure constituted a part of the realty, whether it is to be regarded in the nature of a fixture or as appurtenant to the freehold; by fulfilling the conditions of the mortgage, the defendant's vendor might have enjoyed the full benefit of this product of his husbandry in the future crops, but by neglecting so to do, and selling it, he forfeited this right and committed a tort upon the plaintiff. The defendant acquired no title to the property by the sale from Carter, but thereby incurred the liability to compensate the plaintiff for its value.

The measure of damages is the fair market value of the manure at the time of the taking, including what would be equivalent to interest on that amount from the date of the writ. Although the evidence is somewhat vague and unsatisfactory upon this point, we think that it warrants the conclusion that there were seven cords of the manure, worth three dollars a cord. If to this estimate there is added the usual allowance for withholding payment from the plaintiff from date of the writ, we have the sum of $22.68, for the amount of damages to be paid by the defendant.

Judgment for plaintiff for twenty-two dollars and sixty-eight cents.

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

FREDERIC M. LAUGHTON *vs.* CUSHMAN E. HARDEN.

Penobscot. Decided May 27, 1878.

Fraudulent conveyance. Equity practice.

Where a creditor levies upon the real estate which his debtor has conveyed to another in fraud of creditors, and then seeks by a bill in equity to obtain from the grantee a release of his title to the premises levied upon, the debtor need not be made a party to the bill. To so much of the bill as may directly affect real estate fraudulently conveyed by the debtor and not levied upon by the creditor, the debtor would be a necessary and indispensable party.

It is a well nigh universal rule in equity, that, if any part of a bill is good and entitles the complainant to relief, a demurrer to the whole bill cannot be sustained.

Where the want of parties to a bill in equity is merely a formal defect, the demurrer must be special, to reach the defect. But where the interests of the omitted parties are such as to be directly affected by granting the relief sought for, the objection may be taken upon general as well as special demurrer, or at the hearing of the arguments, or even when the decree is to be made; and the objection may be started by the court itself, in its caution, whenever the necessities of the case require it.

A voluntary conveyance from father to son, made by the grantor with an intent to defraud his subsequent creditors, is void as to such creditors, without either allegation or proof that the grantee participated in that intent when he received or accepted the deed. In such case the intent of the grantor alone determines the validity of the conveyance.

ON DEMURRER to a bill in equity.

E. Hale & L. A. Emery, for the defendant.

F. M. Laughton, pro se.

PETERS, J. The bill alleges that Eben Harden, owning certain parcels of land, conveyed them to his son, Cushman E. Harden, to defraud his creditors; that the complainant obtained an execution against the grantor, and levied it upon a portion of the land so conveyed; and the complainant prays that the title to the land levied upon shall be released to him by the grantee. The bill is met by a general demurrer.

The first point taken on the demurrer is, that Eben Harden, the grantor, should have been made a defendant to the bill. He is no party to it. This objection must be overruled. Eben

Harden no longer has any interest in the land taken from him by the levy. His grantee is the legal and the complainant is the equitable owner thereof. He is in the position of an assignor whose assignment is absolute and unconditional. This is well settled. *Haskell* v. *Hilton*, 30 Maine, 419. *Miller* v. *Whittier*, 32 Maine, 203. *Moor* v. *Veazie*, Id. 343. *Brown* v. *Johnson*, 53 Maine, 246. The following cases by their force and effect, completely cover this point raised in the case at bar. *Smith* v. *Orton*, 21 How. 241. *Whitmore* v. *Woodward*, 28 Maine, 392. *Dockray* v. *Mason*, 48 Maine, 178. *Richards* v. *Pierce*, 52 Maine, 560. The same cases decide that the grantor could properly have been joined, but that it was not necessary to join him. If joined, the bill would not have been dismissed on that account. To this portion of the bill, therefore, demurrer does not lie for want of parties. To another part of the bill, standing alone, demurrer would lie. Besides the relief prayed for, as already named, the complainant asks relief also in respect to the portion of the land not levied upon, claiming certain rights thereto as merely an attaching creditor. As to this portion of the bill, Eben Harden, the grantor, would be a necessary and indispensable party. He is interested in the result. He is the equitable owner of the land not levied upon. This is clearly shown by the cases cited and many others. *Lawrence* v. *Bank of the Republic*, 35 N. Y. 320. *Beardsley Scythe Co.* v. *Foster*, 36 N. Y. 561.

The complainant contends that the demurrer would reach no part of the bill, because it is general and not special, insisting that a demurrer is not good unless it specify the parties omitted and the names of such parties. This depends upon whether the want of parties is merely a formal defect or not. To all mere formal defects the demurrer must be special. It is true, the authors on equitable proceedings say that the demurrer should supply the names of the persons omitted, and such would be the better practice. But where the parties left out are so inseparably connected with the subject of the suit that a decree could not be made without directly affecting their interests, the objection to the bill may be taken upon general as well as special demurrer, or at the hearing of the arguments, or even when the decree is to be made; and

the objection may be started by the court itself, in its caution, whenever the necessities of the case seem to require an objection to be interposed. *Haughton* v. *Davis*, 23 Maine, 28, 34. *Brown* v. *Johnson*, *ubi*, *supra*. *Sears* v. *Hardy*, 120 Mass. 524. Story Eq. Pl. §§ 26, 153, 236, and notes.

It is a well nigh universal rule in equity, that, if any part of a bill is good and entitles the complainant to relief, a demurrer to the whole bill cannot be sustained. The proper part of the bill can be acted upon independently of that which is faulty. The bill therefore may be maintained, notwithstanding this objection.

Another objection by the respondent is, that the bill is defective because it is no where alleged therein that he (the grantee) participated in the fraudulent intent of the grantor in conveying the land. No doubt, it should in some sufficient form be alleged if it must be proved. We feel sure that the fact need be neither alleged nor proved in the case of a voluntary conveyance, as this is. The bill alleges that the conveyance was made without valuable consideration; that the grantor, at the time of the conveyance, was in debt and insolvent; that he has been in debt ever since; that he has exercised acts of ownership over the property since the conveyance; that his object in making the conveyance was to delay, hinder and defraud his creditors; that the complainant became a creditor after the conveyance, and that the conveyance is void as to the claim of the complainant. This is allegation enough, if the facts alleged be proved.

The exact question presented is this: Is a voluntary conveyance from father to son, made by the grantor with an intent to defraud subsequent creditors, void as to such creditors, when there is no proof that the grantee participated in that intent when he received or accepted the deed? The statute of Elizabeth, c. 5, answers the question in the affirmative. It pronounces every conveyance, made to hinder, delay or defraud creditors, utterly void as against such creditors, unless the estate shall be "upon good consideration, and *bona fide*, lawfully, conveyed to such person," not having at the time "any manner of notice" of such fraud. Can it be said that this estate was *bona fide*, "lawfully" conveyed, or that a grantee who pays no consideration for land fraudulently conveyed

to him has "no manner of notice" of the fraud? But this is not all of the statute. It threatens a penalty against a party to such a conveyance who, being privy and knowing thereto, "shall wittingly and willingly put in use, avow, maintain, justify and defend the same" as true and *bona fide* and upon good consideration." When a grantee in such a deed becomes informed of the grantor's intent, does he not assist in executing that intent by an endeavor to uphold and maintain the deed? Is he not in the eye of the law presumed to be a participator in the fraud? Should not an honest grantee repudiate the deed? The grantee by the fraudulent act of his grantor becomes the trustee or depositary of property which belongs to the grantor's creditors. By attempting to withhold it from the creditors, does not the grantee himself commit a fraud? If innocent in the beginning, does he not become guilty in the end? The governing and acting intent was the grantor's. Does not the grantee endeavor to avail himself of it and adopt it when he holds on to the deed? No other conclusion can be reached. Of course, it will not at this day be questioned that any conveyance may be avoided by subsequent as well as by prior creditors, if fraud was by such conveyance meditated against subsequent creditors. *Wyman* v. *Brown*, 50 Maine, 139. *Bailey* v. *Bailey*, 61 Maine, 361.

Any other view of this question than the one taken by us would permit and encourage most iniquitous frauds upon the part of badly disposed debtors. A man might convey all his property to his wife or minor children upon the eve of an expected bankruptcy, and, on account of his undoubted credit and apparent possession of means and property, be enabled to create a very great amount of subsequent indebtedness. How could a creditor show that the wife, and *a fortiori* that the young minor children knew of the grantor's fraud, unless the knowledge can be imputed to them under such circumstances as a necessary implication of law? It would be unnatural for a debtor's wife and children to believe him to be a dishonest man, and uncommon for them to know much of his business affairs.

It is said sometimes, that a voluntary conveyancy may be good against subsequent and not good against existing creditors. Why?

Merely because the conveyance may operate, or be intended, to defraud the one kind of creditors and not the other. It is void only according as it is fraudulent. If it is fraudulent as against a particular creditor, then as against that creditor it is void. The statute of Elizabeth, referred to, makes no mention of voluntary conveyances nor distinguishes between classes of creditors. Its penalties are aimed against any and all fraudulent conveyances. There is no distinction between a conveyance that is fraudulent in law and one that is fraudulent in fact, so far as their operation in civil suits is concerned. No doubt, a voluntary conveyance is more likely to be fraudulent as against prior creditors, but not always so. See *Bailey* v. *Bailey*, *supra*. A conveyance, whether fraudulent in law or in fact, is after all no more nor less than a fraudulent conveyance. The only difference is in the mode and extent of proof required to substantiate the one or the other. Certain facts may be sufficient to prove the one and not the other. A voluntary conveyance is not *per se* evidence of fraud against even a prior creditor, but *prima facie* only. *French* v. *Holmes*, 67 Maine, 186. As to subsequent creditors it is a fact only, which with other facts and circumstances may prove the fraud as to them. In the one case, the voluntary conveyance is not good, unless the debtor has ample means left after the gift wherewith to pay his existing indebtedness without risk or hazard to his creditors. In the other case, it may not be good, if the debtor is at the time insolvent or deeply indebted and pays off his old debts by contracting new ones. In the one case, the burden is upon the grantee to show that the deed was not fraudulent. In the other case, the burden is upon the subsequent creditors to show that it was.

After considerable research, we find no case that decides such proof to be necessary. Language may be found (in cases) having such a leaning, but not where the facts were as they are here. It must be remembered that the doctrine making any conveyance fraudulent as to subsequent creditors is comparatively new in this country. It was regarded as somewhat a doubtful question in Massachusetts as late as *Damon* v. *Bryant*, 2 Pick. 411. It would be in vain, we presume, to search for such a thing in the

English cases, as it is held in the English courts that the intent of a grantor in a voluntary conveyance is so conclusively the governing intent between the parties, that the grantor may himself control and cancel the conveyance by an after conveyance of the same land to a subsequent purchaser for a valuable consideration, although such purchaser has notice of the prior deed. The doctrine to this extent is not admitted in this country in many courts, if at all. See *Beal* v. *Warren*, 2 Gray, 447. The American cases are many in which it has been assumed that proof of a fraudulent intent on the part of the grantee in a voluntary conveyance was not necessary. In many others it has been so directly held.

The leading case in this country on the effect of a voluntary conveyance upon the rights of subsequent creditors is *Sexton* v. *Wheaton*, 8 Wheat. 229. The court there place stress only upon the intent of the grantor. *Mattingly* v. *Nye*, 8 Wall. 370, sustains the same doctrine. *Parish* v. *Murphree*, 13 How. 92, is to the same effect. In *Hitchcock* v. *Kiely*, 41 Conn. 611, it was decided that "a voluntary conveyance, fraudulent in fact, will be set aside in favor of creditors, whether the grantee participated in the fraud or not." In that case, the contending party was a creditor subsequent to the conveyance. In *Beecher* v. *Clark*, 12 Blatch. 256, a voluntary conveyance was set aside for the benefit of both prior and subsequent creditors. Hunt, J., says: "I cannot assent to the proposition, that it is necessary that the grantee should have known that the intent of the grantor was fraudulent, and that she should have been an intentional party to the fraud. The fact that a wife received a voluntary conveyance of the same, in ignorance of these facts, (showing fraud in fact) will not make the conveyance a valid one." *Savage* v. *Murphy*, 8 Bosw. 75, contains a learned and lengthy review by Hoffman, J., of the earlier decisions by which subsequent purchasers and creditors were permitted to question conveyances as being fraudulent against them, and this proposition is there laid down: "Where a deed is made to defraud creditors, by one at the time in debt, and who subsequently continued to be indebted, it is fraudulent and void, as to all such subsequent, as well as existing creditors." See,

also, *Carpenter* v. *Roe*, 10 N. Y. 227. In *Mohawk Bank* v. *Atwater*, 2 Paige, 54, Chancellor Walworth says: "It is of no consequence in this suit whether the son knew of the extent of his father's indebtedness or not. The grantee without valuable consideration cannot be protected, although he was not privy to the fraud." In *Carter* v. *Grimshaw*, 49 N. H. 100, the intent of minor children upon whom a settlement was made was considered of no consequence at all. *Coolidge* v. *Melvin*, 42 N. H. 510, 534, sustains the same view. In *Savage* v. *Murphy*, 34 N. Y. 508, the same idea is strongly presented by the court. Among other things said about the rights of subsequent creditors against a voluntary deed, this is added: "The indebtedness then existing was merely transferred, not paid, and the fraud is as palpable as it would be if the debts now unpaid were owing to the same creditors who held them at the time of the transfers." In 13 Allen, 257, 260, (*Clark* v. *Chamberlain*) Hoar, J., remarks: "Where the purpose of the grantor is shown to have been actually fraudulent as to creditors, it is sufficient to prove that the grantee takes without consideration, without proving otherwise his participation in the fraudulent intent." *Lee* v. *Figg*, 37 Cal. 328, concludes an opinion thus: "It (allegation) avers that the conveyance to Ogden was without consideration, and this is sufficient to avoid it as to creditors of Lee, (grantor) whether Ogden was aware of the fraudulent purpose of Lee and actively aided it or not." *Lassiter* v. *Davis*, 64 N. C. 498, decides that "a voluntary gift is void, if it was the maker's intent to hinder, delay or defraud creditors, whether the party who takes the gift participated in the fraudulent intent or not." In *Foley* v. *Bitter*, 34 Md. 646, it was held to the same effect, and it is there said: "The innocence of the trustee, or of the creditors named in the deed, will not save it (an assignment) from condemnation under the statute (of Elizabeth) if fraudulent in fact on the part of the grantor." Bump, in his work on Fraudulent Conveyances, makes the following observations: "There is no difference in principle between fraud in fact and fraud in law." "The inquiry is as to the intention of the debtor." P. 71. "An inquiry into the good faith of the grantee is only necessary when there is a valuable consideration for the

transfer." P. 229. "It follows, from the definition of a voluntary conveyance, that the question in regard to its validity or invalidity depends on the intent of the party making it, and not on the motive with which it is received. The proviso at the end of the statute (of Elizabeth) only extends to transfers made upon good consideration, and it has long been settled that the only consideration which is good, within the meaning of the statute, is a valuable consideration." "The only question is *quo animo* the gift or grant is made. It is the motive of the giver, and not the knowledge of the acceptor, that is to determine the validity of the transfer. A donee who sets up a voluntary conveyance, when it would, if established, defeat creditors, participates in and carries out the intent of the donor." PP. 279, 280. See *Tucker* v. *Andrews*, 13 Maine, 124.

Demurrer overruled.

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

LYDIA M. HOLLEY *vs.* JOTHAM D. B. YOUNG, appellant.

Franklin. Decided May 31, 1878.

Evidence. Admission. Practice. Judicial discretion.

An admission made at the first trial, if reduced to writing, or incorporated into a record of the case, will be binding at another trial of the case, unless the presiding justice, in the exercise of his discretion, thinks proper to relieve the party from it.

ON EXCEPTIONS.

FORCIBLE ENTRY AND DETAINER. The case, on a former bill of exceptions, is stated in 65 Maine, 520. At the March term, 1877, the verdict was for the defendant; and the plaintiff alleged exceptions to the exclusion of evidence offered, as in the opinion appears.

H. L. Whitcomb, for the plaintiff.

S. C. Belcher, for the defendant.

WALTON, J. At the first trial of this action, it was admitted

that "the defendant paid his rent, specified in the lease, as it became due." This admission was made in the report of the case then made up for the law court. At the last trial, the plaintiff offered to prove that the rent was not promptly paid when due. The evidence was excluded, upon the ground, it is said, that the admission was obligatory upon the plaintiff for the purposes of the last trial, as well as the first. Assuming such to be the ground of the exclusion, (and no other is suggested) we think the exceptions must be overruled. It would be wiser to adopt some rule by which more admissions could be obtained, than to allow parties, at their own will and pleasure, to withdraw the few now made.

Such was the opinion of Lord Denman. In his report to the commission appointed to inquire into proceedings in actions at law, he says, and says truly, that much time is shamefully wasted in proving facts that ought to be admitted; that there ought always to be a preliminary hearing to settle the issues; and that each party ought to be required to admit every fact not really controverted; and that the suppression of any known material fact should not only be deemed disreputable, but punished with costs; that such a course would save much precious time, now "shamefully wasted." 5 *Lives of the Chief Justices*, 201.

In *Wetherell* v. *Bird*, 7 Car. & P. 6, where an admission had been made at the first trial, which, at the second trial, counsel sought to have excluded upon the same ground taken here, namely, that it was made with a view to the former trial only; the court held that, inasmuch as there was nothing in the admission limiting it to the first trial, it was clearly admissible at the second.

Such is the rule laid down by Professor Greenleaf. He says the admissions of attorneys of record may be given in evidence, "even upon a new trial." 1 Greenl. Ev. § 186. And further on, he says that, if such admissions are made improvidently or by mistake, the court will, in its discretion, relieve the party. § 206.

With such a discretionary power lodged in the court, we think no evil results will follow if we adopt the rule that an admission made at the first trial, if reduced to writing, or incorporated into

a record of the case, will be binding at another trial of the case, unless the presiding judge, in the exercise of his discretion, thinks proper to relieve the party from it.

Exceptions overruled.

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

MOSES CALL *vs.* NATHANIEL M. PIKE.

Lincoln. Decided May 31, 1878.

Justice of the peace. Witness. Evidence.

The mittimus of a justice of the peace, reciting all the acts, facts and circumstances which would amount to a contempt on the part of a witness, duly summoned and refusing to give his deposition before such justice in a pending case, is *prima facie* a justification for his commitment to jail for such contempt, although it is not therein stated that such justice was not interested, nor then nor previously counsel in the cause.

If a party relies upon such personal disqualification of the magistrate, the burden is upon him to establish it by proof, and not upon the magistrate to prove a negative.

Under R. S., c. 107, § 29, which has relation to R. S., c. 82, § 91, a justice of the peace may lawfully fine a recusant witness guilty of such contempt not exceeding twenty dollars, and commit him to the county jail until such fine and costs of commitment are paid.

A party, called as a witness by his opponent to testify to a fact material to the issue, may be asked whether he has ever stated such fact to anybody, although he has, in answer to previous questions, denied his knowledge of its existence. In this respect, a party stands on a different footing, as to the course of examination, from a witness who is not a party. Proof may be given of his admissions, as substantive evidence.

ON EXCEPTIONS.

TRESPASS, for illegal arrest and imprisonment.

Plea: The general issue and brief statement justifying, as a justice of the peace, committing the plaintiff by a mittimus to the jail at Wiscasset, because, in substance, after refusing to appear and being brought before the defendant on a capias to give his deposition in a pending cause, and refusing to answer questions propounded, he was sentenced, for contempt, to pay a fine of $20, and was committed for refusal.

The plaintiff's position was that the defendant had no jurisdiction as a justice, because he was a cousin to Cotton, the plaintiff in the action in which the deposition was to be used.

At the trial, the plaintiff put in the warrant of commitment, which recited facts and circumstances amounting to a contempt, but did not state that the justice was not interested, nor then nor previously counsel, in the cause in which the deposition was to be used. The presiding justice instructed the jury that the warrant of commitment made out a justification, because the papers put in showed that it was done by the defendant's authority as a justice of the peace, and upon ground within his jurisdiction and in which he had a right to act, and that the papers being all right showed that he had jurisdiction, unless there was some fact outside negativing jurisdiction.

Pike, the defendant, was called by the plaintiff to prove the relationship, and asked by him this question: Have you ever stated to anybody that he, Henry P. Cotton, was your cousin; and the question was excluded.

The verdict was for the defendant; and the plaintiff alleged exceptions.

O. D. Baker, with *B. F. Smith*, for the plaintiff.

A. P. Gould & J. E. Moore, for the defendant.

BARROWS, J. To prove the trespass alleged against the defendant, the plaintiff offered in evidence a mittimus, signed by the defendant as a justice of the peace, reciting all the acts and circumstances, which, if the justice was authorized by law to take the deposition therein mentioned, would amount to a contempt on the part of the plaintiff in refusing, though duly summoned, to give his deposition before said justice in a cause pending in the S. J. court.

But the plaintiff insists that the defendant's mittimus does not make a *prima facie* justification for the defendant, because it is not therein alleged that the defendant was not interested in said cause. Based upon the decisions that nothing is to be presumed in favor of the jurisdiction of inferior courts, plaintiff's counsel make an elaborate and ingenious argument that, in the absence of this

negative averment as to interest in the cause, the mittimus is not *prima facie* a justification for the justice who issued it, and that the ruling of the presiding judge, that the burden of proving affirmatively that the justice was interested was upon the plaintiff, was erroneous. But if this were so, it would seem to follow that in every certificate of caption of a deposition the magistrate should aver, in the language of R. S., c. 107, § 2, that he was not interested, nor then nor previously counsel in the cause in which it is taken, in order to make the deposition admissible. But this is not required. R. S., c. 107, § 15.

Indeed, whenever a justice of the peace or trial justice acts judicially, he must be disinterested, within the meaning of R. S., c. 1 § 4, Rule XXII; and yet we should not regard his judgments as erroneous, because the record fails to assert that he was not connected with either of the parties, by consanguinity or affinity within the sixth degree, and that he had no pecuniary interest in the suit.

We think that, where a party relies upon a personal disqualification of the magistrate to invalidate his official acts, the burden is upon such party to establish it by proof, and not upon the magistrate to prove a negative.

The plaintiff has no just cause of complaint as to this matter. The mittimus shows the imposition of a fine of twenty dollars for the contempt, and a commitment, "until the fine and costs of commitment are paid." A question has been made, whether this mode of proceeding is authorized by the statute, R. S., c. 107, § 29, which says that the magistrate may "commit him (the recusant witness) to the prison of the county for contempt, as the supreme judicial court may commit a witness for refusing to testify."

R. S., c. 82, § 91, provides that, "when a witness in court refuses to answer such questions as the court allows to be put, he may be fined not exceeding twenty dollars, and committed until the fine and costs of commitment are paid."

The magistrate's action, in this respect, seems to have been conformable to law. See, in addition to the sections above quoted, their source in laws of 1847, c. 9, § 2.

The defendant was called as a witness by the plaintiff, to prove the relationship between himself and one of the parties to the suit in which the plaintiff's deposition was to be taken; and, after testifying that he did not know whether he was a cousin of the party, was asked whether he had ever stated to anybody that said party was his cousin. The question was objected to and excluded.

The presiding judge must have forgotten that the question was addressed to a witness who was also a party to the suit, and was not excused as well as not excluded from giving testimony.

The question called for evidence of admissions made by him as a party out of court, competent substantive evidence, irrespective of any tendency it might have to contradict the testimony he had just given respecting his knowledge of the relationship.

The opposite party, upon the stand, in this respect occupies a different position from a witness who is not a party.

The force and value of the admissions he may have made elsewhere are subjects for the consideration of the jury, and may depend upon his means of knowledge and the circumstances under which his admissions, if he has made any, were obtained. But it was clearly competent for the plaintiff to prove such admissions if he could, by the defendant or by any other witness, even against the defendant's denial or professions of ignorance. For this cause, the entry must be,

Exceptions sustained.

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

IDDO B. TURNER, complainant, *vs.* JOHN R. WHITEHOUSE *et als.*

Kennebec. Decided May 31, 1878.

Mills.

A complaint to recover damages caused by flowage, under R. S., c. 92, may be sustained by one who has been the owner of the land described, at any time within three years previous to the institution of the complaint.

All the owners of the dam must be joined in the complaint, and an omission in this respect need not be taken advantage of by plea in abatement, but may be by any proper plea filed as plea in bar.

Where all the defendants have joined in raising a distinct issue, and one of the respondents subsequently files a brief statement raising the same issue, a special demurrer to the latter, on the ground that the pleader was bound by the former, was properly sustained.

ON EXCEPTIONS.

COMPLAINT FOR FLOWAGE, dated July 18, 1871, and tried at the October term, 1876, when the verdict was for the complainant; and the respondents alleged exceptions, stated in the opinion.

W. P. & E. W. Whitehouse, for the respondents.

O. D. Baker, for the complainant.

DANFORTH, J. This is a complaint for flowage inserted in a writ. A verdict was rendered for the complainant and exceptions filed.

The first exception relates to the sufficiency of the complainant's title. The case shows that he had an absolute title from March 18, 1867, to November 2, 1870. At this last date he conveyed the premises by deed to N. B. Turner and William R. Hisler, taking from them a contract, not under seal, for a reconveyance upon certain conditions, with a proviso that "said Iddo is to hold a tenancy by the year on said real estate until condition broken; but when broken, a tenancy only at will." At the end of the first year the condition appears to have been broken; and on the fourth day of August, 1874, he assigned all his interest in the contract to another party. The writ is dated July 18, 1871, and the trial was at the October term, 1876. Thus it appears that within three years of the date of the writ the com-

plainant was the owner in fee of the land described ; at the date of the writ he was a tenant by the year, and at the trial had parted with all his interest.

Under this state of the facts, the presiding justice was requested to instruct the jury "that the complainant had not shown a sufficient title to the premises to enable him to maintain his process."

This request was properly refused. It may be conceded that, as this is a statute proceeding, it can be sustained only in accordance with the provisions of the statute. But many of these provisions are independent of each other, and may be so separated that one or more may have its full force without aid from, or interference with another. The commissioners when appointed are to appraise the yearly damages, if any, done to the complainant, determine how far the flowing is necessary, and what portion of the year such lands ought not to be flowed. Either one of these several duties may be performed without the other. If the complainant within the three years has suffered damages, they may be appraised by the commissioners. At the same time, if the facts of the case show no occasion for regulating the extent or duration of the flowage, if the complainant has parted with his title so that an adjudication upon these matters would not be binding upon the then owner, such an adjudication may be omitted without affecting the question of damages.

It is clear that the statute gives this remedy, and no other, to one who has suffered damage by lawful flowage. Shall, then, the party who has suffered past damage, but has no interest in such as may arise in the future, or in the extent and duration of the flowing, or who at the beginning of his process has parted with his title, so that an adjudication will not be binding upon his successor, be without a remedy for his injury? We think the law is not open to that objection. If we adopt such a conclusion, we nullify one of the provisions of the statute, when not required to do so by any other. The complainant alleges that he has suffered damage, and seeks to recover for it. Under one of the provisions of the statute he may do so ; surely it can be no reason for refusing him this remedy, simply because the statute provides for the set-

tlement of future damages and the extent of flowage, matters upon which he makes no claim, and about which, in his case, no questions can arise.

Nor do the respondents have any reason to complain. The law gives them the right to flow upon conditions. One of these conditions is that they shall pay the damages caused by the flowing. They are called upon to pay the damages caused to this complainant, and nothing more. The other liabilities are to be settled with such persons as may have the legal interest in the matters to be adjusted.

It is, however, contended that the complainant, having before the trial parted with his interest in the subject matter of the suit, can no longer maintain his action. If such were the fact, the legal consequence claimed would undoubtedly follow. But it is not. The land he has parted with. That, however, is not the subject of the suit. He is not seeking to recover possession of that, or of any interest in it. He is seeking to recover for the damage which accrued while he was the owner. That is the subject matter of the suit, and that he has not parted with. The sale of the land does not carry with it prior accruing damages. *Sargent* v. *Machias*, 65 Maine, 591.

This question is so satisfactorily discussed and settled in *Walker* v. *Oxford Woolen Mfg. Co.*, 10 Met. 203, that any further consideration of it is unnecessary.

Another question raised is whether the complainant can recover damages for the time during which he was a tenant by the year, or a tenant at will. Whether the owner of such an interest may not recover his damages in a process of this kind, we have no occasion now to inquire. The complaint and pleadings put in issue the title to the fee alone. In the writ there is no such description as would apply to any tenancy of any kind, nor do we find anything in the brief statement, or reply to it, that would raise any issue as to such an interest. Therefore no question upon this point has been or could be submitted to the jury in this case, and the verdict has settled only the title to the fee. It follows that the commissioners can appraise only such damages as have been done to the fee while owned by the complainant.

It is objected that damages are claimed for the whole time, and cannot be apportioned. It is, however, only a case of common occurrence, where a party claims a larger amount than his proof sustains. He recovers the same in kind, but only so much as he proves. But a different rule must be applied, where the claim is for an injury to the fee and the proof shows an injury to a less estate; for, in such case, the measure of damages is not the same. Hence, upon this point, the issue presents one question and, for a portion of the time covered, the proof presents another and a very different question. Perhaps the verdict should have found the time for which the complainant was the owner and entitled to have his damages appraised, but, upon this point, the case leaves no doubt, and the warrant to the commissioners can be so framed as to state definitely the time for which the damages are to be appraised.

It thus appears that, under the pleadings in this case, the contract for a reconveyance of the land was not admissible. But upon this point there is no occasion to sustain the exceptions. The complainant, as seen, is entitled to his damages only while he was the owner of the fee, and, as there is no question as to the time during which he was such owner, the respondents are not aggrieved by the admission of the paper.

A question, growing out of the pleading, is raised by the exceptions filed by the respondent (Bridge) alone. It relates to the title of the respondents. Bridge, with some others, had been summoned in, subsequent to the entry of the complaint in court, upon a plea of non-joinder filed by the original respondents.

After entering his appearance, he joined with all the other respondents in another plea of non-joinder, naming certain persons as co-tenants who had not been summoned in, and alleging that there were still others whose names were unknown. To this there was a reply that those named had been already summoned, and that those unknown were not part owners. Subsequently, the respondent, Bridge, alone filed a plea of non-joinder, in which four persons are named as co-tenants and not joined in the complaint. This last plea is demurred to specially, on the ground that he had before pleaded, and assumed to set forth all the per-

sons not joined. This demurrer was sustained, and to this ruling exceptions were filed.

It is undoubtedly true that, upon proper pleading, it must appear that all the part owners are joined in a process like this. *Hill* v. *Baker*, 28 Maine, 9. *Moor* v. *Shaw*, 47 Id. 88. Nor is it necessary to take advantage of an omission in this respect by plea in abatement, but the issue may be raised by the proper pleading at any time. Hence, where an issue is made upon this point, it is not necessary that the plea should state the names of the part owners omitted. The allegation that they are unknown is sufficient.

In this case, all the respondents, including Mr. Bridge, join in the general issue and a brief statement alleging that other owners known and unknown were not joined; thus distinctly raising the question as to their title to the whole dam. This issue was joined by the complainant. Upon this issue it was competent for either party to introduce testimony, and thus the rights of all the parties, in this respect, were in a condition to be fully protected. The subsequent plea of Bridge presented no new issue, nor the one to be tried, in any better form. It was unnecessary, as the prior plea had sufficiently raised the issue to be tried. It was objectionable, because a multiplicity of pleas upon the same subject matter tends to confusion.

Nor is it any less objectionable if, perchance, persons were named in the last as co-tenants who were not in the first. Though these pleas need not be filed within the time allowed for pleas in abatement, they are in the nature of such pleas, and, as they do not necessarily defeat the action, they tend to delay. For this reason, it is not allowable for a party who has once filed a plea of this kind to put in another subsequently, thus bringing in numerous co-tenants from time to time, in small companies.

Exceptions overruled.

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

CALEB HODGDON, petitioner for certiorari, *vs.* COUNTY COMMISSIONERS of Lincoln County.

Lincoln. Decided May 30, 1878.

Certiorari.

While an appeal is pending from the decision of the county commissioners locating or discontinuing a way, a writ of certiorari to quash the record of the county commissioners will not be granted. The objections that might be made on the petition may be taken on the appeal.

ON EXCEPTIONS.

PETITION FOR CERTIORARI.

A petition for laying out a highway from Wiscasset to Hodgdon's Mills, in Boothbay, was denied by the county commissioners at the September term, 1872. On appeal to the S. J. court, a committee was appointed, who reported at the October term, 1873, "that as to that part of the road named in said original petition, described as beginning at or near Luther Emerson's, in said Boothbay, running east and south by Benjamin P. Giles's to Hodgdon's Mills, said judgment be reversed, and that common convenience and necessity required the location and establishment of the road, as prayed for in said original petition." The report of the committee was accepted and certified to the county commissioners, and continued to the November term, 1874, when they laid out and established the road, ordering it to be built within two years from that time. A new petition was afterwards presented to the commissioners to discontinue the road so established, and was granted by them, against the remonstrance of the petitioners for certiorari; and the commissioners adjudged and determined that common convenience and necessity did not require the road, and declared the same to be discontinued, no part of the road having been built.

On the hearing of the petition for certiorari, at the April term, 1877, it appeared that the parties remonstrant had taken appeal then pending without waiving other remedies; and the presiding justice ruled that the petition was insufficient to warrant the

issue of the writ as prayed for; and the petitioner alleged exceptions.

R. K. Sewall, for the petitioner.

A. P. Gould & J. E. Moore, for the respondents.

WALTON, J. While an appeal is pending from the decision of county commissioners locating or discontinuing a way, there can be no use or propriety in petitioning the supreme court for a writ of certiorari to quash the record of the commissioners. Until the proceedings are closed, it cannot be known that there will be any error in the record requiring it to be quashed. What may appear to be an error in the earlier proceedings may be corrected in the later proceedings, so that ultimately there will be no error in the record. Besides, every objection that may be made on the petition for writ of certiorari, may be taken on the appeal, and there can be no possible benefit in prosecuting the former while the latter is pending. *Goodwin* v. *County Commissioners*, 60 Maine, 328.

Exceptions overruled.
Petition dismissed.

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

GEORGE N. BLACK *vs.* JEREMIAH O. NICHOLS.

Hancock. Decided June 1, 1878.

Limitations, statute of.

In an action of account, the statute of limitations is pleadable in bar before the interlocutory judgment of *quod computet*, and not afterwards.

Where, in an action of account, no issue is raised before the auditor and reported by him, his report is conclusive.

ON REPORT.

ACTION OF ACCOUNT, stated in the opinion.

E. Hale & L. A. Emery, for the plaintiff.

A. & A. P. Wiswell, for the defendant.

LIBBEY, J. This is an action of account, and comes before this court on report, by which it appears that at the October term, 1874, the defendant was ordered to account, and an auditor was appointed, and at the October term, 1876, the auditor's report was offered for acceptance. The defendant then offered a plea of the statute of limitations, and claimed a trial by jury. By the terms of the report, if the defendant had the right to then plead the statute of limitations and was entitled to a jury trial, the action is to stand for trial; otherwise, the court is to render judgment on the auditor's report.

The questions involved in this case were before this court in *Closson* v. *Means*, 40 Maine, 337, and were there carefully considered; and it was decided, 1, That whatever would constitute a bar to the action must be pleaded in bar, before the interlocutory judgment to account, and that no such matter can be pleaded before the auditor; 2, When no issue is raised before the auditor and reported by him, his report is conclusive, and the defendant has no right to trial by jury. That case is decisive of this. The statute of limitations was pleadable in bar. It goes to the right of the plaintiff to require the defendant to account, and can be pleaded only before the interlocutory judgment. That judgment determines the defendant's liability to account.

No issue was made before the auditor and reported by him. There is no suggestion of misconduct or mistake on his part. His report is conclusive. There must be judgment for the plaintiff for the amount reported by the auditor.

Auditor's report accepted. Judgment for plaintiff for $671.46 *and interest from date of the writ.*

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

PETERS, J., being related to one of the parties, did not sit.

UNION INSURANCE COMPANY *vs.* HENRY H. GRANT *et als.*, administrators of William McGilvery.

Penobscot. Decided May 31, 1878.

Insurance. Promissory notes. Payment.

As a general rule, the premium note of an insurance broker, received by the insurers in payment of a policy for his principal, discharges the principal from liability to the insurers on account of the premium.

But if the policy contain a provision that, in case of loss, the amount of the premium note shall be deducted from the insurance, the insured must submit to the deduction, although he has before paid the amount of the premium to the broker.

In case of the death and insolvency of a broker, a court of equity will not compel his administrators to sequester for the benefit of the insurers any sum received by them from the insured on account of premiums, if the company hold the broker's note therefor.

BILL IN EQUITY.

F. A. Wilson & C. F. Woodard, for the plaintiffs.

J. Williamson, for the defendants.

VIRGIN, J. For several years prior to March 9, 1876, one McGilvery effected numerous policies of insurance upon hulls, cargoes and freights in his own name, for whom it might concern, loss payable to himself. Some of the policies were effected upon his own property, but many of them upon that of others. But for whosesoever benefit they were insured, he gave to the plaintiffs his individual promissory note for each respective premium; and, on delivery of the policies to his principal, he sometimes received the premiums in cash, and charged others to the assured on his private account.

At the above mentioned date, McGilvery died, leaving unpaid his premium notes to an amount exceeding $9,000, and having due to him on account from his principals a large sum, as premiums on unexpired policies, some of which has since his death been paid to the defendants—administrators on his estate.

The plaintiffs claim that, in equity and good conscience, they are entitled from the assured to such of the premiums on unexpired policies as had not been paid to McGilvery at the time of his

decease; that the names of his principals are unknown to them, and the policies give no clue thereto; and that the defendants decline to give them any information in the premises. Wherefore they pray for a discovery of what was due to McGilvery, at the time of his decease, on outstanding policies, together with the names of the parties, classes, etc.; how much has since been paid, and that these sums may not be commingled with the general property of the estate; and for an injunction of sequestration, etc.

The policies issued by the plaintiffs contain the clause generally found in American policies—that in case of loss, such loss shall be paid in sixty days after proof of adjustment thereof, "the amount of the premium note, without discount, if unpaid, and all sums due to the company from the insured, when such loss becomes due, being first deducted," etc.

This clause compels the assured to submit to the deduction of the premium note at all events, if unpaid, by whomsoever it may have been given. *Hurlbert* v. *Pacif. Ins. Co.* 2 Sumn. 471, 478. This provision was inserted for the benefit of the insurer, and obviously to meet the hazard of the dishonesty or insolvency of the broker, by entitling the underwriter to deduct the premium, whether the action on the policy be brought in the name of the principal or of the agent. While this protects the insurer, it subjects the assured to the hazard of a double payment of the premium, which he can avoid by proper care and diligence in selecting honest and solvent persons for agents.

But this provision of the policy is applicable only in cases of loss. And there being no analogous clause for the protection of the underwriter, in the absence of loss, against the insolvency of the broker, whose individual notes have been received for premiums on policies issued for the benefit of others, their only reliance is that derived from the principles of the common law.

It is well settled in this country that the acknowledgment clause, whereby, as in these policies, the insurers "confess themselves paid the consideration due unto them, for the insurance, by the insured," is not conclusive evidence of the payment of the premium; but it has simply the same force and effect as the analogous clause in deeds of conveyance; which is *prima facie* evi-

dence only of payment, and estops the grantor from alleging that the deed was executed without consideration; while, for every other purpose, it may be explained, varied or contradicted by parol evidence. *Goodspeed* v. *Fuller*, 46 Maine, 141. *Bassett* v. *Bassett*, 55 Maine, 127. 1 Phill. Ins. (5th Ed.) § 515, and notes.

Morever, the general rule of law in England would seem to be that the broker is the debtor of the underwriter for premiums, and the underwriter the debtor of the assured as to losses. 1 Arnould Ins. § 61. 2 Duer Ins. 297, 298. We do not understand, however, that what practically in very many instances comes to the same result has ripened into an established rule here. Though some of the authorities hold that the practice has become so nearly universal, for the person who effects an insurance to give a promissory note for the premium, or, if a note is not given, to hold himself and to be considered as the debtor to the underwriter for the amount, that, by the common understanding and usage, the remedy of the underwriter is confined to the party liable on the note, or to whom the credit is given. 1 Arnould Ins. 113, Perkin's note. While it is said that, in such cases, the assured is discharged from liability to the underwriter only when the person giving the note is known to the writer to be only an agent at the time the insurance is effected. 2 Duer Ins. 301, note *a*. 1 Pars. Mar. Ins. 503, 504, notes. This is founded upon the principle in agency, that when a party is informed that the person with whom he is dealing is merely the agent of another, and prefers to deal with the agent personally on his own credit, he will not be allowed afterwards to charge the principal. *Patapsco Ins. Co.* v. *Smith*, 6 Har. & J. 166. *Ford* v. *Williams*, 21 How. 287. *Chandler* v. *Coe*, 54 N. H. 561.

But, without expressing any opinion upon this point, we think the bill must be dismissed for another reason. The bill alleges that, "when policies were forwarded to said McGilvery the plaintiffs charged the premiums to him, and afterwards invariably procured from him a note for each premium by itself." We of course understand that the "note" mentioned means McGilvery's negotiable promissory note—commercial paper. And it is well

sett led in this state and Massachusetts, that a negotiable promissory note taken for an account is *prima facie* payment thereof. *Milliken* v. *Whitehouse*, 49 Maine, 527. *French* v. *Price*, 24 Pick. 13. The plaintiffs accepted these notes knowing all the facts. That is to say, though they did not know the names of the persons for whose benefit their policies were issued, the very form of the policies implied agency on the part of McGilvery. If the plaintiffs would have had it otherwise, they should not have taken the notes in payment, or should have inserted a clause in their policies for their protection, in relation to the payment of premiums generally, as they have in cases of loss.

The bill does not present a case involving a consideration of the continuation clause.

Demurrer sustained. Bill dismissed with costs.

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

RICHARD ALLUM *vs.* THOMAS M. PERRY.

Penobscot. Decided June 1, 1878.

Promissory notes. Assignment. Estoppel.

The assignment and delivery of a promissory note payable to order, before maturity, without indorsement, gives to the assignee only the rights of the payee, though it may have been taken in good faith and for value.

One is not estopped by casual answers to inquiries made by a party who has no interest in the subject matter of such inquiries.

To create an estoppel by the statements and declarations of a party, it must appear that the one making the inquiry had an interest in the subject matter of his inquiry, and that such fact was known to the party against whom the estoppel is sought to be enforced.

It must further appear that the action of the party enforcing the estoppel was changed, to his detriment, in consequence of his reliance upon the statements and declarations made.

ON EXCEPTIONS.

ASSUMPSIT, on a negotiable promissory note signed by the defendant, payable to the order of the plaintiff three months after date, and not indorsed.

The defendant testified that the note was given in part payment for a horse sold and warranted sound, which turned out to be worthless, and that the consideration had failed.

Daniel Page testified that he bought the note of the plaintiff, before its maturity, for value; that, before he bought it, he went to the defendant and asked him if the note was good, and the defendant told him he intended to pay it when it was due. Page then took the note.

Samuel D. Hurd testified that he purchased the note of Page for value, and before maturity, and that similar statements were made by the defendant to him before he bought it.

The defendant then testified that at the time he told Page and Hurd that he intended to pay the note, it was directly after it was given, and that he then had no knowledge or means of knowledge that the consideration was wanting, or that the horse was worthless; and that he had no intention of deceiving or misleading either of them. He also offered the testimony of witnesses as to the failure of consideration, but the presiding justice excluded the evidence, saying that he should instruct the jury that, if they believed either the plaintiff or the defendant, they must find a verdict for the plaintiff; that it would make no difference whether the defendant had knowledge of the failure of consideration at the time he said he intended to pay or not; but that he would in either case be estopped from setting up any defense against the present holder; also, that it would make no difference whether the note, payable to the order of Allum, had been indorsed by him or not.

The verdict was for the plaintiff; and the defendant alleged exceptions.

F. M. Laughton, for the defendant.

K. P. Forbes, for the plaintiff.

APPLETON, C. J. It was in proof from both parties, and without contradiction, that the note in suit was given in part payment of a horse, sold by the defendant to the plaintiff; that, shortly after it was given, the plaintiff sold the same to Daniel Page for value; that, before the sale, Page called on defendant to inquire about

the note, who said it was good and would be paid; that, before its maturity, Page sold the note to Samuel D. Hurd, for whose benefit this suit is prosecuted; that Hurd, before purchasing, called on the defendant, who reiterated his previous assurances that the note was good and would be paid, and that thereafter he purchased the same.

The defendant offered to show there was fraud in the sale of the horse, which the court excluded, ruling that the defendant, by his acts and declarations, was estopped from setting up the defense of fraud.

The assignment and delivery of a promissory note before maturity, without indorsement, gives to the assignee only the rights of the payee. *Haskell* v. *Mitchell*, 53 Maine, 468. It is so, though taken in good faith and for value. *Lancaster National Bank* v. *Taylor*, 100 Mass. 18.

The only ground upon which the plaintiff in interest can recover is that the defendant, by his acts and declarations, is estopped to set up that there was fraud in the inception of the note. Upon this branch of the case, the instructions given were too broad.

It does not appear that the defendant knew that the plaintiff in interest, or his assignor, had any intention of purchasing the note in suit, or would be likely to act upon any statements he might make. He is not to be estopped by casual answers made to persons who have no interest in the subject matter of their inquiries. "Certainly," remarks Metcalf, J., in *Pierce* v. *Andrews*, 6 Cush. 4, "no one can be estopped by a deceptive answer to a question, which he may rightfully deem impertinent and propounded by a meddling intruder."

It does not appear that the plaintiff in interest was induced to purchase in consequence of what the defendant said; and if not, there would be no estoppel. To create an estoppel *in pais*, the declarations or acts relied upon must have induced the party seeking to enforce an estoppel to do what resulted to his detriment, and what he would not otherwise have done. If his action was not changed by what was said he has no cause of complaint.

Exceptions sustained.

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

MARGARET NOWLAN *vs.* JOHN GRIFFIN.

Cumberland. Decided June 4, 1878.

Action.

By the law of this state, the civil remedy of a person injured by a felonious assault and battery is not suspended till the offender has been prosecuted criminally.

ON EXCEPTIONS from the superior court.

TRESPASS, wherein the plaintiff, in writ dated October 10, 1875, alleged that the defendant, on May 16, 1875, assaulted her, threw her down violently, and by force and against her will had carnal intercourse with her, and testified at the trial to all the facts constituting the crime of rape; and there was no other evidence. The presiding justice, on the defendant's motion, ordered a nonsuit; and the plaintiff alleged exceptions.

M. P. Frank, with *W. Purves*, for the plaintiff.

F. N. Dow, with whom was *J. D. Fessenden*, for the defendant.

WALTON, J. The only question is whether it is the law of this state that the civil remedy of a person injured by a felonious assault and battery is suspended till the offender has been prosecuted criminally. Clearly not.

In *Boody* v. *Keating*, 4 Maine, 164, and again in *Crowell* v. *Merrick*, 19 Maine, 392, the court say that the rule that a civil action in behalf of the party injured is suspended until a criminal prosecution has been commenced and disposed of, "is limited to larcenies and robberies."

The same opinion had before been expressed in *Boardman* v. *Gore*, 15 Mass. 331, 336.

In *Boston & Worcester R. R. Co.* v. *Dana*, 1 Gray, 83, where the defendant had made himself comparatively rich by stealing from the railroad company, the question was fully examined, and the court held that, while it is undoubtedly the law in England that the civil remedy of the party injured by a felony is sus-

pended till after the termination of a criminal prosecution against the offender, such had never been the law here.

And such is the prevailing opinion in this country. *B. & W. R. R. Co.* v. *Dana*, 1 Gray, 83. *Pettingill* v. *Rideout*, 6 N. H. 454. *Piscat. Bank* v. *Turnley*, 1 Miles, 312. *Foster* v. *Commonwealth*, 8 W. & S. 77. *Cross* v. *Guthery*, 2 Root, 90. *Patton* v. *Freeman*, Coxe, 113. *Hepburn's case*, 3 Bland, 114. *Allison* v. *Farmers' Bank*, 6 Rand. 223. *White* v. *Fort*, 3 Hawks, 251. *Robinson* v. *Culph*, 1 Const. 231. *Story* v. *Hammond*, 4 Ohio, 376. *Ballew* v. *Alexander*, 6 B. Mon. 38. *Lofton* v. *Vogles*, 17 Ind. 105. *Boardman* v. *Gore*, 15 Mass. 331, 338. *Hawk* v. *Minnick*, 19 Ohio St. 462. *Same case*, 2 American R. 413.

Our bill of rights declares that "every person, for an injury done him in his person, reputation, property, or immunities, shall have remedy by due course of law; and that right and justice shall be administered freely and without sale, completely and without denial, promptly and without delay." Art. 1, § 19. To require an injured party to await the action of the grand jury and the county attorney, (persons over whom he has no control) before allowing him to prosecute a civil suit, would certainly conflict with the spirit, if not the very letter, of this provision. The rule has never been acted upon in this state except in cases of larceny; and the legislature abrogated its application to such cases more than thirty years ago. Act 1844, c. 102. R. S., c. 120, § 12. We think the plaintiff may maintain her action, if the proof is in other respects sufficient, notwithstanding her injury may have been the result of a felonious assault and battery, for which the offender has not yet been prosecuted criminally.

Exceptions sustained.
New trial granted.

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

AURILLA A. JOHNSON *vs.* ALBERT G. LEONARDS.

Kennebec. Decided June 5, 1878.

Mortgage. Deed.

A quitclaim deed will operate as a conveyance of the mortgagee's interest in the premises without a transfer of the mortgage note, when such is the intention of the parties.

A mortgaged a lot of land to B and then sold an undivided half of same lot to C. B quitclaimed to C his interest as mortgagee in the premises described in the deed from A to C. *Held*, that the quitclaim covered B's interest in all the lot and was not restricted to an undivided half.

ON REPORT.

WRIT OF ENTRY, to recover an undivided half interest in sixteen and three-fourths acres of land.

John A. Tinkham, September 25, 1854, mortgaged to one Moore 25 acres and 20 rods of land, of which the demanded premises in possession of the defendant was a part, to secure payment of a note for $653.

March 1, 1856, John A. Tinkham conveyed by warranty to plaintiff's husband one acre; and July 9, 1859, to Amasa A. Tinkham eight and one-half acres, also an undivided half of sixteen and three-fourths acres of the land so mortgaged.

October 9, 1860, Amasa conveyed to one Stockin, subject to the Moore mortgage, by separate deeds, eight and one-half acres for the consideration of $800, and the undivided half of the sixteen and three-fourths acres for the consideration of $200.

July 8, 1862, Moore, in consideration of $626, gave to Stockin a quitclaim deed of a certain parcel of land, [etc.] "viz: All the tract of land described in warrantee deeds given by Amasa A. Tinkham to said Stockin, dated October 9, 1860, . . meaning and intending to relinquish and quitclaim all my right and interest to said premises which I possess by reason of a mortgage deed given to me by John A. Tinkham, dated September 27, 1854.

On July 24, 1862, Stockin conveyed to Simpson, by warranty, both of the last mentioned lots, embracing the whole sixteen and

three-fourths acres, and not limited to the undivided half. Simpson's interest passed by mesne conveyances to the defendant.

December 29, 1863, Moore assigned his mortgage to the plaintiff, and indorsed and delivered to her the note thereby secured, for which the plaintiff paid him $132.77, the sum then due thereon.

W. P. Frye, J. B. Cotton & W. H. White, for the plaintiff, admitting that the quitclaim from Moore to Stockin operated as a legal and equitable assignment of the mortgage, contended that the assignment or release did not extend to the whole sixteen and three-fourths acres, but to an undivided half only; that the term "premises," in the deed of July 8, 1862, meant only the interest conveyed by the deed referred to, and covered the undivided half of the sixteen and three-fourths acres and not the whole; that Stockin had an interest to clear his half from the incumbrance, but not the other half; that he, being in possession of only one-half, a quitclaim from the mortgagee would not convey the other half, unless accompanied by assignment or other legal transfer of the mortgage.

E. F. Pillsbury, for the defendant, contended that Moore intended to and did apportion his mortgage on the lands of the plaintiff and defendant, on the rule stated in *Carll* v. *Butman,* 7 Maine, 102; that his deed conveyed to Stockin all the land "described" in the deed referred to, and was not limited to that conveyed therein.

DICKERSON, J. This is a writ of entry, in which the plaintiff seeks to recover of the defendant an undivided half interest in sixteen and three-fourths acres of land, situate in Winthrop and Monmouth in the county of Kennebec. Both parties claim title to the demanded premises under sundry mesne conveyances from the same grantor, John A. Tinkham, who mortgaged them to Robert R. Moore, September 27, 1854. The plaintiff claims title as assignee of Moore's mortgage of December 29, 1863, and the defendant under a certain quitclaim deed from Moore, dated July 8, 1862, to one Benjamin Stockin, who had previously acquired the interest of John A. Tinkham, the mortgagor, in eight and

one-half acres, and also one undivided half of said Tinkham's interest in sixteen and three-fourths acres thereof.

As the defendant's claim is prior in time, it is incumbent on the plaintiff to impeach its validity before proceeding to establish the legality of his own. This he seeks to do, in the first place, upon the ground that Moore's quitclaim deed to Stockin, without a delivery to the latter of the mortgage note, was insufficient to convey his interest in the mortgaged estate. There is no doubt but a deed or other instrument in writing under seal is necessary in this state to convey the mortgagee's interest in the mortgaged premises. *Vose* v. *Handy*, 2 Maine, 322. *Smith* v. *Kelley*, 27 Maine, 237. According to the authorities a quitclaim deed of the mortgagee to a stranger is sufficient to assign the mortgage and all his interest under it, when no separate obligation is given for payment of the consideration of the mortgage. *Dorkray* v. *Noble*, 8 Maine, 278, 284. Or when it is accompanied by a delivery of the mortgage notes. *Dixfield* v. *Newton*, 41 Maine, 221. Or when it is executed by the executrix of the mortgagee. *Crooker* v. *Jewell*, 31 Maine, 306. Or when the mortgagee is in possession. *Conner* v. *Whitmore*, 52 Maine, 185. And, in general, when it is the intention of the parties that the quitclaim deed shall be effectual to carry the mortgagee's interest in the estate. *Freeman* v. *McGaw*, 15 Pick. 82, 87. *Hunt* v. *Hunt*, 14 Pick. 374, 385, and *Ruggles* v. *Barton*, 13 Gray, 506.

In the principal case the quitclaim deed was given for a pecuniary consideration, to take effect immediately for the benefit of the bargainee, who was at the time of the conveyance an owner of an undivided half interest in said sixteen and three-fourths acres, and who received from the bargainor only a qualified warranty in consideration of the sum of $626 paid by him for the deed of release. It is obvious that Stockin intended to acquire the mortgagee's interest in the land; and the mortgagee expressly declares, in the concluding paragraph of the premises of the quitclaim deed itself, it to be his meaning and intention to relinquish and quitclaim all his right and interest to the premises which he acquired under the Tinkham mortgage. We cannot doubt, therefore, that it was the intention of both of the parties to the quit-

claim deed that it should operate to convey Moore's interest in the mortgaged premises, and, as there is nothing in the rules of law inconsistent with this conclusion, such must be its legal effect.

The relation of the parties to the subject matter of the mortgage and the several conveyances, as well as the language of the quitclaim deed itself, confirm this view of the case. When Stockin received the quitclaim deed, he held eight and three-fourths acres, and an undivided half of sixteen and three-fourths acres, (subject to the mortgage to Moore) for the consideration of one thousand dollars. It is not reasonable to conclude that he would have paid six hundred and twenty-six dollars, very nearly the amount of the consideration of the mortgage—$653—for a release of the mortgagee's claim upon his interest, and sell the whole twenty-five and one-fourth acres, in less than two years, for twelve hundred dollars by deed of warranty. By the terms of the quitclaim deed, moreover, the mortgagee releases all his interest, not simply in the aforesaid eight and three-fourths acres, and an undivided half of sixteen and three-fourths acres, but "all the tract of land described in warrantee deeds given by Amasa A. Tinkham to said Stockin, October 9, 1860, . . meaning and intending to relinquish and quitclaim all his right and interest to said mortgaged premises," as herein before cited. "The tract of land described" in those deeds includes, not only the eight and three-fourths acres, but also the whole of the sixteen and three-fourths acres. It will be observed that the quitclaim deed purports to cover, not simply the lands conveyed, but "all the tract described" in Tinkham's deeds to Stockin, thereby showing that the quitclaim deed was intended as an assignment of the mortgagee's interest in the parcels then held by Stockin, and also of his interest in the other half of the sixteen and three-fourths acres.

The point made by the learned counsel for the plaintiff, that the word "premises" in the clause of the deed next preceding the habendum relates exclusively to the quantum of interest conveyed by Tinkham's deeds to Stockin, is not well taken. That word rather signifies the subject matter conveyed than the quantity of the interest, and, in connexion with the context,

serves to identify the land described in those deeds as the land embraced in the mortgage; in a case of ambiguity in the description of the subject matter conveyed, it might thus materially aid in ascertaining the intention of the parties. But in this case such reliance is scarcely necessary, as the Tinkham deeds are made a part of the quitclaim deed, which releases all the mortgagee's interest in "all the tract of land described in" those deeds to Stockin; and such description, as we have seen, covers the eight and three-fourths acres, and also the sixteen and three-fourths acres. The mortgagee, therefore, having conveyed all his interest in the mortgaged premises to Stockin by his quitclaim deed of July 8, A. D. 1862, had no remaining estate therein to pass to the plaintiff by his assignment of December 29, A. D. 1863.

Judgment for defendant.

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

GEORGE A. HOLDEN *vs.* JOSEPH W. FRENCH.

Lincoln. Decided June 5, 1878.

Seamen. Shipping.

When a fishing vessel is let to the master on shares, and he mans her, and victuals her, and has the possession and control of her, he is *pro hac vice* her owner, and liable, as such, to the seamen for their wages.

Although the amount which a seaman is to receive for his labor is made to depend upon the amount of fish caught, still, he is not on that account a partner in the enterprise, and need not join any of the crew with him as plaintiffs in an action to recover his share of the proceeds.

ON REPORT.

ASSUMPSIT to recover a balance claimed to be due as wages for labor as a seaman on board the steamer "Grace Darling," in 1874.

The evidence tended to show that the Maine Oil Company, (a company engaged in the manufacture of porgee oil,) was the owner of a fishing steamer, called the "Grace Darling;" that they let her to the defendant, (Capt. French) for the season of 1874, on

shares; that he was to man and victual her, and have the possession and control of her; that the fish, when caught, were to be sold and delivered to the oil company, at a price agreed upon for each month's catch; that the defendant contracted with the plaintiff to go on the steamer as one of the crew, and to act as mate; that for his labor and services he was to have one-sixteenth of the value of the fish caught, and, in addition thereto, one and one-half cents per barrel if the catch was a good one; that the catch was a good one; that the fish were sold by the defendant to the oil company; that he collected most of the pay, and took a negotiable note payable to himself for the balance; that at the time of the hiring of the plaintiff nothing was said as to whom he should look for his pay.

O. D. Baker, for the plaintiff, contended that the facts established by the evidence made the defendant personally liable for the plaintiff's wages.

A. P. Gould & J. E. Moore, for the defendant, contended that the facts established by the evidence, created a partnership, of which the plaintiff was a member, and that his remedy, if any, was by a bill in equity, and not an action at law; and further that, in hiring the plaintiff, the defendant acted as agent, and was not personally liable for his wages.

WALTON, J. The evidence shows a balance due the plaintiff of $242.21.

Is the defendant liable to pay it? Undoubtedly.

When a fishing vessel is let to the master on shares, and he mans her, and victuals her, and has the possession and control of her, he is *pro hac vice* her owner, and liable as such to the seamen for their wages. *Thompson* v. *Snow*, 4 Maine, 264. *Winsor* v. *Cutts*, 7 Maine, 261. *Cutler* v. *Thurlo*, 20 Maine, 213. *Sproat* v. *Donnell*, 26 Maine, 185. *McLellan* v. *Reed*, 35 Maine, 172. *Swanton* v. *Reed*, 35 Maine, 176.

"The same principle must apply to seamen's wages; they contract with the owner *pro hac vice*, while the general owner has made no contract with them." *Giles* v. *Vigoreux*, 35 Maine, 300.

The owner *pro hac vice*, is liable to the seamen for their wages "on a personal implied contract." *Wait* v. *Gibbs*, 4 Pick. 298. *Same case*, 7 Pick. 146.

Although the amount which a seaman is to receive for his labor is made to depend upon the amount of fish caught, still, he is not on that account a partner in the enterprise, and need not join any of the crew with him as plaintiffs in an action to recover his share of the proceeds. *Baxter* v. *Rodman*, 3 Pick. 435. *Grozier* v. *Atwood*, 4 Pick. 234. *Bishop* v. *Shepherd*, 23 Pick. 492. *Lewis* v. *Chadbourne*, 54 Maine, 484. *Bridges* v. *Sprague*, 57 Maine, 543.

And for a full examination of the authorities bearing upon the relative rights and liabilities of the parties where a vessel is run on shares, and for the reasons why the master, who is owner, *pro hac vice*, is liable, and the general owners not, see *Somes* v. *White*, 65 Maine, 542.

These well settled rules of law are decisive of the case before us. The fishing steamer "Grace Darling," was let to the defendant on shares. The evidence satisfies us as matters of fact that he was to man and victual her, and have the possession and control of her. He has sold the fish, collected most of the pay and taken a negotiable note for the balance. His liability to the plaintiff for the balance of his wages is, in the opinion of the court, unquestionable.

Judgment for plaintiff for $242.21, *and interest from date of the writ.*

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

HARRIET WOODCOCK *vs.* CITY OF CALAIS.

Washington. Decided June 6, 1878.

Exceptions. Evidence,—burden of proof. Admissions. Damages.

Where, in a trial, objection is made to the exclusion of a record as evidence, and the bill of exceptions does not show what the record is, the objection will be treated by the law court as waived.

Where, in a trial of the general issue in an action of trespass, the plaintiff has made out a *prima facie* case, the "burden of proof" still remains upon him in that issue, although the defendant will fail unless he introduce sufficient evidence to overcome the plaintiff's *prima facie* case, and, in that sense, it is not error to say there is a burden also upon the defendant.

Semble. An admission made and of record in one trial of a case is binding in a subsequent trial. See *Holley* v. *Young*, *ante*, 215.

Where the street commissioner, under the direction of the city to remove the plaintiff's fence, erroneously supposed to be within the street limits, removed a stone wall with a wooden fence upon it and a filling of earth behind it, *Held*, that damage was recoverable of the city for the removal of the stones and earth, as well as of the wooden fence.

ON EXCEPTIONS AND MOTION by the defendants, to set aside a verdict for the plaintiff of $150.

TRESPASS by the defendants, for removing the plaintiff's bank wall, fence and earth. The case is stated in 66 Maine, 234.

At the trial the defendants offered certain records of the town of Calais in the year 1822, in regard to a location of a highway, which was excluded on the plaintiff's motion, but the exceptions do not show what the records were.

The presiding justice instructed the jury thus: "Upon a careful examination of the records introduced, and the law as it existed in 1822, at the time the acts were done, I am satisfied that the records do not show a compliance with the requirements of law; and no person's land is to be taken for public use without such compliance. Having become satisfied that the law was not complied with by that record, I deem it my duty to exclude it, and I instruct you to exclude it entirely from the consideration of this case."

Also, "If you are satisfied that the plaintiff was in possession

of the premises upon which the acts were done at the time, by having them inclosed by her fence as a part of her lot, and Mr. Smith, acting for the city, entered upon the premises in her possession, I instruct you that the burden is upon the defendants to show that they had a justification to enter in that manner and do the acts complained of."

Also, "In this action the measure of damages is what damage she suffered by reason of the acts complained of up to the time of the commencement of the action, September 4, 1875; and it is said that the entry by the defendants was in the last of June of the same year. For any damage she has sustained since that time by reason of having the erection continue there by the city, she may have the right of another action, if they were unlawfully placed there. Now, if the injury was unlawful, one of the elements of damage is the taking of the earth and the stone and carrying them away. What damage did the plaintiff sustain by reason of that? Another element of damage is the loss of the use of that portion of her premises from the time the acts were done to the date of the writ. And these are the material elements of damages to be considered in this suit."

The verdict was for the plaintiff; and the defendants filed a motion to set it aside, and also alleged exceptions.

G. A. Curran, city solicitor, with *J. Granger*, for the defendants.

E. B. Harvey, with *A. McNichol*, for the plaintiff.

VIRGIN, J. This action was before this court last year on report, which stipulated that, "if the city is liable for the trespass,"—the removal of the fence, etc.,—"the action to stand for trial." The court then determined that the commissioner who removed the plaintiff's fence was acting as the agent of the city, by its directions, and that the rule of *respondeat superior* was applicable. *Woodcock* v. *Calais*, 66 Maine, 234.

The case went back to trial, the jury returned a verdict for the plaintiff, assessing the damages at $150; and now the defendants bring the case before us on motion and exceptions.

I. The defendants contend that the exclusion of the record of

an attempted location was erroneous. Whether it was admissible or not we have no means of knowing, for the case contains no copy thereof. We conclude, therefore, that the defendants do not rely upon that point.

II. The instruction was not, as contended by the defendants, that the burden of proof was upon the defendants to justify the acts of the commissioner; but a fair construction of the instruction is that the plaintiff, having made out a *prima facie* case by possession, that evidence, if not rebutted by the defendants, would be sufficient to maintain the plaintiff's case; and not that the burden of proof changed. *Small* v. *Clewley*, 62 Maine, 155.

We think the instruction complained of, relating to damages, whereby the jury were allowed to consider the taking and carrying away the stone and earth an element, was correct. As already seen, the commissioner was the agent of the city, acting under its express directions, and for acts done by him in the course of his employment and within the scope of his authority, the city is liable. *P. & R. R. R. Co.* v. *Derby*, 14 How. 468, 486.

The case shows that the plaintiff built her fence by first erecting a wall of split stone, some two and one-half feet high on the side next to the street but filled with earth on the side next to the lot, and upon the wall placed a light wooden fence. The wall thus constituted a part of the fence within a fair construction of the special order under which the commissioner was acting; and his removing the wall, earth and wooden fence, was done in the course of his employment and the city must respond.

Motion: It is urged that the verdict is against evidence because it is alleged that Smith was not sworn. The answer is that the defendants admitted, in the reported case of last year, that he was "duly elected and qualified." *Woodcock* v. *Calais, supra. Holley* v. *Young, ante*, 215. Again he testified he was sworn, which testimony was legitimate in the absence of any record evidence. But whether sworn or not is immaterial in this case; for if not sworn he was the commissioner *de facto*, and that is sufficient.

The testimony is conflicting in relation to the line of the street. The jury saw and heard the witnesses and viewed the locus. From what they saw and heard they rendered a verdict for the

plaintiff, which is founded on evidence and the law applicable thereto. The facilities of the jury for ascertaining the truth were superior to ours and we cannot say that the verdict is wrong.

Motion and exceptions overruled.

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

JOHN G. ALLEN *vs.* JAMES M. SOMERS, appellant.

Cumberland. Decided June 6, 1878.

Jurisdiction. Municipal court of Portland.

The municipal court of Portland has jurisdiction over all such matters and things as justices of the peace, at the time of its establishment, might exercise, irrespective of the residence of the parties litigant within the county.

ON EXCEPTIONS from the superior court.

ASSUMPSIT on account annexed; *ad damnum*, $20.

F. C. Nash, for the plaintiff.

T. T. Snow, for the defendant.

APPLETON, C. J. In this action which was made returnable to the municipal court of the city of Portland, the plaintiff and defendant were described as inhabitants of Cape Elizabeth in the county of Cumberland. The general issue was pleaded and judgment was rendered in the municipal court in favor of the plaintiff, from which the defendant appealed and entered his appeal.

The justice presiding ruled that the jurisdiction of the municipal court did not affirmatively appear, as neither of the parties was an inhabitant of Portland, and dismissed the appeal with costs for the defendant. This ruling was erroneous.

By the act of 1856, establishing the municipal court of Portland, c. 204, §2, it is provided that the judge "shall, except when interested, exercise jurisdiction over all such matters and things within the county of Cumberland, as justices of the peace may exercise, and under similar restrictions and limitations; and concurrent jurisdiction with justices of the peace and quorum in case

of forcible entry and detainer in said county; and exclusive jurisdiction when both parties interested, or the plaintiff and a person sued as trustee, are inhabitants of Portland."

When this act was passed a justice of the peace had jurisdiction over the county in which he resided, irrespective of the residence of the parties litigant within the county.

In 1866, c. 27, § 1, it was enacted that "all actions between parties residing in the same county, returnable before any trial justice, shall be commenced before some such disinterested justice, residing or holding his court in the town where one of the parties or his attorney or person summoned as trustee in such action, has his residence, and if there is no such justice in, or holding his court in such town, then before such justice, if any, in an adjoining town; otherwise before any such justice in the county." This act is found in the revision of 1871, c. 83, § 7.

But the act of 1866 in no way affects or restricts the jurisdiction of the municipal court of Portland. The jurisdiction of the municipal court remains unaffected by subsequent legislation and as it was when the court was established.

But were it otherwise, the defendant has pleaded the general issue and has neither by plea nor motion negatived the existence of these facts, which would give the court jurisdiction. *Webb* v. *Goddard*, 46 Maine, 505.

Exceptions sustained.

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

TICONIC NATIONAL BANK *vs.* EDWARD E. BAGLEY.

Kennebec. Decided June 6, 1878.

Promissory notes. Pleading.

It is no defense to a suit against the maker of a negotiable promissory note by a national bank which had discounted the note for an indorser, that since the commencement of the suit the indorser has paid the bank and taken up the note and taken an assignment of the suit and is prosecuting it for his own benefit.

Such bank has power to free itself from litigation and realize its money on a protested note by such an arrangement.

Where there is no evidence of fraud or oppression, or any corrupt or improper motive, the owner of indorsed negotiable paper may maintain suit upon it against prior parties in the name of any person or party capable of giving the defendant a discharge, who will consent to the use of his name for that purpose. It is not essential that a suit upon such paper should be brought or prosecuted in the name of one who has a personal interest in the enforcement of the promise.

Pleading the general issue in such suit admits the corporate existence of the bank and its capacity to sue.

While the right of the defendant to assert such legal and equitable defenses in a suit brought in the name of a nominal plaintiff, as he could maintain were the suit in the name of the real owner, will always be preserved, there being nothing in the case to show that the indorser or his executor, had he taken up the note at its maturity, could not have maintained an action upon it in his own name, *Held*, that he may lawfully get the benefit of any attachment made by the bank by procuring their consent to the prosecution of the suit in the name of the bank.

ON REPORT.

ASSUMPSIT.

E. F. Webb, for the plaintiffs.

W. P. Whitehouse, for the defendant.

BARROWS, J. The case is presented to us for such judgment as the law and facts require upon a report consisting mainly of a statement of facts admitted, from which it appears that the suit is against defendant as promisor upon a note for $272, signed by him, dated September 1, 1874, and payable in one year after date to the order of one Mahan, who sold it to one Heath, for whom on the 19th of April, 1875, it was discounted by the plaintiffs,

being indorsed by Mahan and Heath, and being protested at maturity was passed to plaintiffs' attorney by their cashier, and this suit was commenced October 2, 1875, entered at the October term, answered to and continued, and defendant pleads the general issue. The second indorser, Heath, died and his executor, at the request of the plaintiffs, on the 17th of February, 1876, paid the plaintiffs $283 and took up the note, but this suit was still continued in court, and on March 24, 1877, the plaintiffs by an assignment under seal, subscribed by their president, made over all their interest in the note and suit to Heath's executor, "with full power to prosecute said suit in the name of said bank, and to collect and discharge the same in the name of said bank, at his own pleasure, expense and risk."

This is all there is of the case, and it discloses no tenable defense. It has long been settled in this state that the promisor upon negotiable paper cannot avoid judgment against him in a suit upon his broken contract merely upon the ground that the person or party in whose name the suit is brought or prosecuted has no interest in the enforcement of the promise.

Provided the promisor is not thereby deprived of any just and legal defense or in any way defrauded or oppressed, he has no cause of complaint because his promise is construed, as it runs, to pay to the order of any person into whose hands it may lawfully fall. Our decisions fully authorize the maintenance of a suit for the benefit of the owner and by his order in the name of any person competent to give the debtor a discharge who consents to the use of his name as plaintiff in the action; and this even in cases where the owner or his agent has instituted the suit in the name of a nominal plaintiff without first getting his consent, provided the party whose name is thus used ratifies the act.

The point has been so often discussed and decided that anything beyond a citation of the authorities must needs be regarded as useless and repetitious. *Marr* v. *Plummer*, 3 Maine, 73. *Fisher* v. *Bradford*, 7 Maine, 28. *Golder* v. *Foss*, 43 Maine, 364. *Granite Bank* v. *Ellis*, *id.* 367. *Patten* v. *Moses*, 49 Maine, 255. *Demuth* v. *Cutler*, 50 Maine, 298. *Lime Rock Bank* v. *Macomber*, 29 Maine, 564. The defendant objects that no certificate of

organization of the bank under U. S. Laws or other evidence of its corporate existence or of its right to sue has been produced. None was necessary. The defendant pleaded the general issue, and that is such an admission of the plaintiffs' corporate existence and power to sue as precludes him from contesting them. *Inhts. of Orono* v. *Wedgewood*, 44 Maine, 49. *O. & L. R. R. Co.* v. *Veazie*, 39 Maine, 571. *P. & K. R. R. Co.* v. *Dunn*, *id.* 587. *Putnam Free School* v. *Fisher*, 30 Maine, 523. *Savage Man. Co.* v. *Armstrong*, 17 Maine, 34.

The suggestion of counsel, that the bank never had any interest in the note and that Heath or his executor procured the suit to be brought in the name of the bank because of fraud in the inception of the note, is not only unsupported by proof, but is in conflict with the admitted facts.

According to the doctrine and practice in the cases first herein cited, a suit brought or prosecuted in the name of a nominal plaintiff would be subject to the same legal and equitable defenses (mere technicalities perhaps excepted) as if brought in the name of the real owner. But it is no defense to an action on a promissory note that the property in it is in a third person, unless the possession of the plaintiff is *mala fide ;* (*Guernsey* v. *Burns*, 25 Wend. 411) or, in the words of our own court, unless there is evidence of fraud or oppression, or some corrupt or improper motive to take the case out of the general rule, which is declared in the cases first above cited. Now there is not a scintilla of evidence that this action could not have been maintained by Heath, or his executor, if he had taken up the note and withdrawn it from the bank prior to its commencement. It was competent for him to take it afterwards and get himself subrogated to whatever rights by attachment the bank may have secured, provided they would consent. *Brewer* v. *Franklin Mill*, 42 N. H. 292. *Norton* v. *Soule*, 2 Maine, 341.

The admission that the bank discounted the note for Heath deprives the suggestion, that their subsequent action in retransferring the note and suit to his executor was *ultra vires*, of all semblance of force. Whatever a natural person might lawfully do in closing up a transaction respecting an overdue and protested note,

the bank might do. *First Nat. Bank of Charlotte* v. *Nat. Exchange Bank of Baltimore*, 92 U. S. 122. It was competent for them to avoid the burden of this litigation, and secure for their stockholders the money due upon the note from any party who was liable to them upon it by just such a negotiation as this appears to have been. Nor does the payment by Heath's executor to the bank operate in any manner to discharge the contract or liability of the defendant.

Where suits are brought against the maker and indorser of a promissory note, and the indorser pays the amount, and it is agreed between the holder and the indorser that the suit against the maker shall be prosecuted for the benefit of the indorser, the maker cannot avail himself of the payment by the indorser as a defense in the suit against him. *Mechanics' Bank* v. *Hazard*, 13 Johns. 353.

There is no reason why the indorser should not make the same arrangement before suit commenced against himself with like effect. See, also, on this point *Jones* v. *Broadhurst*, 67 E. C. L. R. 173 (9 M. G. & Scott). *Randall* v. *Moon*, 74 E. C. L. R. 260 (12 C. B.) *Clason* v. *Morris*, 10 Johns. 524. And upon other matters incidentally arising in the case and not herein more particularly noticed, *Stevens* v. *Hill*, 29 Maine, 133, 135. *Folger* v. *Chase*, 18 Pick. 63.

Defendant defaulted.

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

BENJAMIN BACHELLER *vs.* CHARLES V. PINKHAM *et al.*

Franklin. Decided June 6, 1878.

Exceptions. Master and servant.

An exception to a whole charge, or the most of it, in gross, will not be sustained, unless all the legal propositions therein stated are erroneous.

In an action against the defendants for trespasses upon the plaintiff, while they were acting for the town, the one as an officer and the other as their servant, directing and assisting in the repairs of the stone work of a bridge, a public highway, one of the alleged trespasses was that one Smith, while hauling stone with plaintiff's team from plaintiff's pasture to the bridge, improperly took a short cut across plaintiff's clover patch, the town having hired of plaintiff his team and Smith and paid him therefor. *Held*, that Smith was the servant of the town, and that the defendants were not liable for his trespasses while performing the service, unless they directed or authorized them.

ON EXCEPTIONS AND MOTION of plaintiff, to set aside the verdict, which was for the defendants.

TRESPASS, for breaking and entering two closes of the plaintiff, in Chesterville, October 11, 1871, one a mill privilege on Stony brook, the other a clover patch near by, set out in two counts.

The defense was a justification of the acts done by the defendants, the one as a town officer, (selectman) the other as a servant of the town, in repairing a bridge, part of the public highway, legally located in 1802; and as to the second count, a permission to enter the plaintiff's pasture for the purpose of procuring stone to repair the bridge, and a denial that they, or any one by their authority or direction, trespassed upon the clover patch.

The reply was that the bridge was not built on the location, and a claim that the town were limited to a width by user, and that the defendants had widened it two feet, and, in so doing, had injured the plaintiff's dam and flume; and that as to the second count, the defendants having given Smith the general direction to haul the stones from the plaintiff's pasture, as a matter of fact, they improperly gave him the special direction to haul them across the clover patch; and even if they did not, yet, as matter of law, they were liable, because of the general order and direction.

The case had been before tried with a disagreement, and the evidence at the final trial was voluminous and conflicting. The bill of exceptions would cover five printed pages of this size, made up of extracts from the charge, under one general exception.

P. H. Stubbs, with whom was *E. F. Pillsbury*, for the plaintiff.

S. Belcher, with whom was *H. L. Whitcomb*, for the defendants.

LIBBEY, J. This case comes before us on exceptions and motion to set aside the verdict as against evidence.

The exceptions recite the most of the charge of the judge to the jury, to which exception is taken in gross. This court has held that exceptions taken in this manner cannot be sustained unless all the legal propositions contained in the charge, or the portion excepted to, are erroneous. *Macintosh* v. *Bartlett*, 67 Maine, 130. *Harriman* v. *Sanger*, 67 Id. 442.

It is not claimed that all the legal propositions contained in that part of the charge recited in the exceptions are erroneous. For this reason the exceptions must be overruled.

But on a careful examination of the portions of the charge to which our attention is called by the learned counsel for the plaintiff, we see no error. The rules of law upon the points raised were very fully, clearly and correctly given to the jury.

We think the evidence does not so preponderate against the verdict as to authorize the court to set it aside. Under the first count in the writ, for acts done by the defendants in entering upon the locus and rebuilding the bridge, the evidence is clearly sufficient to sustain the verdict, either upon the ground of a way by location, or by prescription.

Under the second count, as the case was presented to the jury, we do not feel so clear as to the correctness of the verdict; still, there was evidence on the part of the defendants which, if believed by the jury, was sufficient to authorize the verdict. The issue presented to the jury was whether Smith, the plaintiff's hired man, who drove his team to haul some stones for the founda-

tion of the abutment of the bridge, and in so doing did the alleged acts of trespass, was at the time the servant of the plaintiff or defendants. The defendants introduced evidence tending to prove that the plaintiff requested them to put in some wide, flat stones for the foundation of the abutment, in such a manner that they would project beyond the surface of the abutment so that he could rest his mill slip upon them, and offered, if they would do so, to furnish the stones and his man and team to haul them, and assist in laying them; and that they assented to his proposition. The evidence, if believed, was sufficient to authorize the jury to so find. Upon this issue, however, there was a conflict of evidence. The credibility of the witnesses, and the weight to be given to their evidence, were for the jury.

But there is another ground, not presented to the jury, upon which we think the verdict on this part of the case can be sustained. One of the defendants was acting in his official capacity as selectman, and the other as servant of the town. The plaintiff testified that he let his man and team to haul the stones to the town, and that the town paid him for the service. If so, Smith was the servant of the town in performing the labor, and not of the defendants; and they would not be liable for his trespasses while performing the service, unless they directed or authorized them. The evidence tends to prove that they did not direct or authorize the alleged acts of trespass, but that they were done in violation of their orders.

Exceptions and motion overruled.

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

WILLIAM R. PROCTOR *vs.* SULLIVAN LOTHROP *et al.*

Somerset. Decided June 6, 1878.

Poor debtor.

The certificate of the creditor's oath upon a writ, to authorize the arrest of the debtor, must state clearly all the facts required by the statute.

The statement that the property about to be taken by the debtor is more than is required for "immediate support" is not sufficient. It should appear by apt words that it is the debtor's support referred to, and not that of any other person or persons.

ON EXCEPTIONS.

TRESPASS for illegal arrest. The defendants justified under a writ, *Sullivan Lothrop* v. *William R. Proctor*, on which was an affidavit, dated November 2, 1875, sworn to before Enoch E. Brown, a justice of the peace, and of the following tenor:

"Then personally appeared Sullivan Lothrop, within named, and on oath says that he has good reason to believe, and does believe, that William R. Proctor, the debtor within named, is about to depart and reside beyond the limits of this state, and take with him property or means of his own, exceeding the amount required for immediate support. And that the sum sued for in this writ is justly due him, at the least ten dollars of it."

The presiding justice ruled the affidavit insufficient to justify the arrest; and the defendants alleged exceptions.

J. H. Webster with *S. D. Lindsey*, for the defendants, contended that the affidavit was a substantial compliance with R. S., c. 113, § 2, authorizing the arrest "when" the debtor "is about to depart, [etc.] with property or means of his own exceeding the amount required for his immediate support, if the creditor, his agent or attorney, makes oath [etc.] that he has reason to believe, and does believe, that such debtor is about so to depart, reside and take with him property or means as aforesaid;" that the words in the certificate, "on oath says," are equivalent to the statute phrase "makes oath," and that "immediate support" is here equivalent to "his immediate support."

D. D. Stewart, for the plaintiff.

DANFORTH, J. By the repeated decisions of this court it has been held that, to authorize the arrest of a contract debtor, the certificate of a magistrate upon the writ must show that all the facts required by the statute were sworn to by the creditor, or some one in his behalf; not necessarily in the language of the statute, but if not, in its equivalent, so that nothing shall be left to inference. *Sargent* v. *Roberts*, 52 Maine, 590, and cases cited. *Bailey* v. *Carville*, 62 Maine, 524.

In this case it appears from the certificate that the creditor on oath says that the debtor is about to depart and take with him property exceeding the amount required "for immediate support." The statute requires that it should appear that the property taken should exceed the amount required "for *his* immediate support." These two phrases do not necessarily mean the same thing. That in the certificate is indefinite. It may apply to the debtor, or some other person, or more than one person. That in the statute applies necessarily to the debtor and to him alone. Nor does the connection in which the phrase is used in the certificate limit its application to the debtor. True, we may infer, and probably most persons would infer, that the support intended was that of the debtor. But this would be a matter of inference. The certificate does not so state. Besides, the inference would be drawn from the fact that the law requires it, rather than from the reading of the certificate. We may, too, feel quite certain that the word "his" was omitted by mistake, yet it is none the less an omission.

The test furnished in the argument of the defendants' counsel is undoubtedly the true one. "If the certificate may all be true, and the statute not complied with, there is no evidence of authority to arrest." This certificate may all be true, and yet nothing stated in it as to the "immediate support" of the debtor.

Exceptions overruled.

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

STATE *vs.* JAMES R. CLELAND.

Washington. Decided June 7, 1878.

Statutes,—construction of.

Where the legislature by special act grants to A the privilege or license to do a certain act, as to erect a weir in certain tide waters, and afterwards by a general act gives all others the same right under certain conditions precedent, *Held*, that the general act does not operate as a repeal or modification of the special act.

Thus, by a special act of the legislature, approved January 24, 1876, Matthew Cleland, his heirs and assigns, were authorized to "erect fish weirs in tide waters below low water mark . . in front of his lands in Robbinston; provided such weirs so erected shall not obstruct or interfere with navigation." By a general act, approved February 11, 1876, it was enacted that "any person intending to build . . a fish weir in tide waters, within the limits of any city or town in this state, may make application in writing to the municipal officers thereof," etc. If, after proper proceedings, "said officers shall decide that such erection would not be an obstruction to navigation, or an injury to the rights of others, and shall determine to allow the same, they shall issue a license under their hands to the applicant, authorizing him to make said erection." Both acts took effect upon their approval. *Held*, that the first act was not defeated or modified by the second.

ON REPORT.

INDICTMENT, charging the defendant with building a fish weir in the tide waters of Passamaquoddy bay, within the limits of the town of Robbinston, contrary to the statute of 1876, c. 78, approved February 11, 1876. Plea, not guilty.

It was admitted that the defendant, without a license from the municipal officers of Robbinston, was engaged in building a fish weir at the time and place charged in the indictment, when he was arrested on the warrant in this prosecution, acting under the authority of Matthew Cleland, in Robbinston; and offered in his justification c. 201 of the special laws of 1876, approved January 24, 1876, taking effect from the date of its approval, and of the following tenor: "Matthew Cleland, his heirs and assigns, are hereby authorized to erect and maintain wharves and fish weirs below low water mark, in tide waters, at Mill cove and Passamaquoddy or St. Andrew's bay, in front of his land in Robbinston;

provided the wharves and fish weirs so erected shall not obstruct or interfere with navigation."

If the right granted to Matthew Cleland was defeated by the act of February 11, 1876, the case to stand for trial, otherwise a *nolle prosequi* to be entered.

L. A. Emery, attorney general, with *C. B. Rounds*, county attorney, for the state.

F. A. Pike & J. H. French, for the defendant.

DANFORTH, J. By a special act of the legislature, approved January 24, 1876, "Matthew Cleland, his heirs and assigns, were authorized to erect fish weirs below low water mark, in tide waters . . in front of his land in Robbinston; provided such weirs so erected shall not obstruct or interfere with navigation."

On the eleventh day of February of the same year, the legislature passed a general act, c. 78, providing that any person intending to build a fish weir in tide waters, within the limits of any city or town in this state, may make application in writing to the municipal officers thereof, who, after proper proceedings, "shall issue a license under their hands to the applicant, authorizing him to make said erection, . . if said officers, after a hearing, shall decide that such erection would not be an obstruction to navigation, or an injury to the rights of others, and shall determine to allow the same."

The respondent is charged with a violation of the latter act. He produces no license, but, acting under the authority of Matthew Cleland, he justifies under the former. This presents the question which is, by the report of the case, submitted to the court, whether the special act was defeated by the general one. Both acts took effect upon their approval. The first act, therefore, was in full force when the second was passed. The first was a specific grant, acting upon a particular thing, enuring to the benefit of a single individual, his heirs and assigns. The second was a general act upon the same subject matter, and affecting the rights of persons generally. There is no allusion to the first act in the second, nor is there any repealing clause in the latter. The general act does not in terms refer to any past acts, but

relates to and provides only for the future. The right of Matthew had become complete and perfect, and without reference to the authority of the legislature to repeal such a grant, we cannot infer an intention to do so without the use of apt and sufficient words showing that purpose. As seen, no such words are used, nor is there any repugnance or inconsistency between the acts.

This right of building fish weirs is undoubtedly within the control of the legislature, and it is competent for that body to dispose of it by direct grant, or by such tribunal as may be constituted for that purpose, and upon such terms and conditions as may be prescribed. It is equally competent to dispose of a part of it in one way and a part in the other. The legislature has availed itself of this power in this case. To Matthew Cleland it conveyed by direct grant a special right, which became fixed and vested by the special law and which was undisturbed by the subsequent one.

As provided in the report,

A nolle prosequi is to be entered.

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

APPLETON, C. J., dissenting. By an act approved January 24, 1876, c. 202 of the special acts, authority was given to Thomas Cleland (under whom the defendant claims to do the acts complained of) "to erect and maintain wharves and fish weirs . . below low water mark, in front of his land in Robbinston, Maine; provided these wharves and fish weirs shall not obstruct or interfere with navigation."

This was a license and nothing more. The legislature had the right the next day to revoke or modify it. Had the act been general, giving authority to all persons to do what Thomas Cleland was specially empowered to do, there would be no doubt of the right of the legislature to limit, modify or repeal it. Because the act is specially limited to one person, the power of the legislature is not therefore lost or surrendered.

The remarks of Campbell, J., in *Christ Church* v. *Philadelphia County*, 24 How. 300, 302, are peculiarly applicable. When referring to an act of the legislature exempting the

property of the plaintiff corporation from taxation, he says: "This concession of the legislature was spontaneous, and no service or duty or other remunerative condition was imposed on the corporation. It belongs to the class of laws denominated *privilegia favorabilia*. . . It is in the nature of such a privilege as the act of 1833 confers, (granting the exceptions) that it exists *bene placitum*, and may be revoked at the pleasure of the sovereign."

On February 11, 1876, c. 78, an act was approved, by which "any person intending to build any wharf or fish weir in tide waters, within the limits of any city or town in this state," is to make application in writing to the municipal officers of the town or city where such intended erection is desired, who are to give notice to all parties interested to appear at a designated day, and if, on examination and hearing of all parties, they shall decide that such erection "would not be an obstruction to navigation, or to the injury of the rights of others," they shall issue a license authorizing the applicant to make such erection.

The defendant is indicted for acting in disobedience to the provisions of this act.

The defendant claims exemption from its operation. Is he thus exempt?

When the act of February 11, 1876, c. 78, went into effect there were no fish weirs erected by Thomas Cleland or his assigns. The act is general. It embraces all fish weirs thereafter to be erected. There is no restriction upon, there is no limitation to, its all-embracing generality. It includes "any person intending," that is, all persons intending, and it matters not how long they may have so intended. It exempts neither person nor place from its operation. It requires that all persons who might intend to build wharves or weirs should be subject to certain restrictions.

Both acts were passed in the same session of the legislature. When two acts, repugnant and contradictory to each other, are passed in the same session, the last will have the effect of repealing wholly or *pro tanto* the previous statute. 22 E. C. L. 190. Brown's Legal Maxims, 33. This law in its generality embraces

all erections to be made after its passage. The special act, c. 212, belongs to that class of acts to be construed most strictly. Thomas Cleland is included in the term "any person." His land is equally subject to the law as that of every other citizen. If the act is a wise one, it should be applied to him and the wharves and weirs he may intend to build as well as to other citizens. Wise or not, he shows no reason why he should be exempted from its operation. The statute does not exempt him; but, on the contrary, includes him alike within the language and equity of its provisions.

WALTON, J., added the following concurring note, which was also signed by DICKERSON, J.:

I concur in holding that the second act repealed the unconditional license granted by the first; that it was the duty of the defendant to comply with the conditions of the second act.

GEORGE A. HUNT *et al. vs.* FRANKLIN S. BREWER *et al.*

Androscoggin. Decided June 8, 1878.

Evidence. Payment.

The defendant was indebted to the plaintiffs, first as he was member of a firm and afterwards individually, and gave his note in payment, taking back this receipt: "Received from F. S. Brewer his 90 day note for $300, to be paid at either bank in Portland." There was a contention as to whether there was an actual appropriation, by the parties, of the note on the joint account of the defendants or on the several account of Brewer. *Held*, that upon this issue, it was not error to instruct the jury that the receipt was silent and could have no legitimate bearing one way or the other.

ON EXCEPTIONS.

ASSUMPSIT, on account annexed.

The defendants dissolved as copartners in the grocery business, September 27, 1875, when there was a balance due from them to the plaintiffs. Subsequently to the dissolution the defendant Brewer continued to purchase of the plaintiffs, and October 22, 1875, gave their agent his personal note, taking back the receipt

in the head note stated, of the same date and signed "George A. Hunt & Co. Starbird." The defendants claimed, and introduced evidence to show, an appropriation of the note by Brewer to the copartnership debt. The plaintiffs claimed that no appropriation was in fact made by Brewer, and that they made the appropriation to Brewer's account, and introduced the original entry on their day book, under date of October 22, 1875, thus: "Notes Receivable, Dr. to F. S. Brewer, 90 day note for $300.00, $300.00."

The presiding justice instructed the jury that on the question, on which of the two accounts the note was to be applied, the receipt was silent and could have no legitimate bearing, as in the opinion more fully appears; and the plaintiffs alleged exceptions.

S. M. Carter, with whom were *Frye, Cotton & White*, for the plaintiffs.

L. H. Hutchinson, A. R. Savage & W. W. Sanborn, for the defendants.

LIBBEY, J. Prior to September 27, 1875, the defendants were copartners, and on that day they dissolved their copartnership. Prior to the dissolution the defendants had traded with the plaintiffs, and there was an admitted balance due the plaintiffs unless it had been paid. Subsequent to the dissolution, Brewer had traded with plaintiffs and was indebted to them individually. On the 22nd of October, 1875, Brewer gave to the plaintiffs his personal note for $300 on ninety days, and took their receipt therefor, which did not specify for what it was received. The question of fact was presented to the jury whether there was an actual appropriation, by the parties, of the note on the joint account of defendants, or on the several account of Brewer. There was evidence both ways. In presenting the case to the jury, the judge instructed them upon this point as follows: "There is only one piece of evidence to which I feel it my duty to call your attention bearing upon that point, and that is the receipt which was given at the time the note was delivered, which is before you and has been the subject of comment by counsel. With respect to that receipt, I deem it my duty to give you a specific instruction,

and that is that the receipt for the note does not show, upon the face of it, whether the note was or was not given in discharge of the joint indebtedness of Brewer and Lothrop, or the individual indebtedness of Brewer alone. It shows from whom it was received, but not upon which of the two accounts it was to be applied. Upon the latter point it is silent and can have no legitimate bearing one way or the other." To this instruction exception is taken. The exceptions do not show what instruction was given as to the legal rule of appropriation, in case no actual appropriation of the payment was made by the parties. In such case the law would appropriate the payment in discharge of the several debt of Brewer. We must assume that this rule was given.

From the statement in the exceptions, of the issue presented to the jury and the language used by the judge, we must assume that the portion of the charge excepted to related to the issue of fact upon which the jury was to pass, whether there was an actual appropriation by the parties of the three hundred dollar note in payment of the joint indebtedness, or the several indebtedness of Brewer. Upon this issue the instruction was correct, for the receipt is entirely silent as to what the note was received for, and hence contained no evidence upon the issue of actual appropriation.

Exceptions overruled.

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

APPLETON, C. J., dissenting. The plaintiffs had an account against Brewer & Lothrop, and one against Brewer. The defendant Brewer gave his note to the plaintiffs, for which they gave him a receipt in the following words: "Lewiston, October 22, 1875. Received from F. S. Brewer his ninety day note for three hundred dollars, to be paid at either bank in Portland. Geo. A. Hunt & Co. Starbird."

This receipt is undoubtedly open to explanation, but unexplained it has in and of itself an obvious meaning. It is a receipt from the plaintiffs to the defendant Brewer alone. On its face the plaintiffs are to account for its amount to the defendant

Brewer, and to no one else. It being Brewer's individual note, the payment, presumptively, is to be made from his funds, and he alone has the right to call upon the plaintiffs to account for the amount paid.

The fact that Brewer may be indebted as a member of the firm of Brewer & Lothrop, as well as on his own account, does not alter or change the natural meaning of the language. If Brewer had been indebted only as an individual, no one would hesitate as to the meaning of the words. But the *prima facie* meaning of the words must be the same, whether Brewer owed individually or as a member of one or more firms.

In *Livermore* v. *Claridge*, 33 Maine, 428, 429, Shepley, J., uses this language: "When a payment is made by one who is under a several and also under a joint liability to the same party, and the money is not shown to have been derived from the fund from which the joint liability was to be met, the law applies it to discharge the several liability, as being the appropriation most favorable to the creditor." The note being that of Brewer, the presumption is that it was to be and was paid from his funds, in the absence of any proof to the contrary.

The instruction given was "that the receipt for the note does not show upon the face of it whether the note was or was not given in discharge of the joint indebtedness of Brewer & Lothrop, or the individual indebtedness of Brewer alone. It shows from whom it was received, but not upon which of two accounts it was to be applied."

The receipt contains no reference to Brewer & Lothrop. It does not purport to affect them or their interests. The question is as to the meaning of the receipt itself, without reference to anything outside its words. The court erred in the construction of the receipt. It on its face relates only to dealings between the parties to it and can only be construed by its own terms; and they have no relation to the firm of Brewer & Lothrop.

It is urged that proper instructions were given as to the law of appropriation of payment. Assuming them to have been so given, that does not change the effect of the instruction of which complaint is made.

The law of appropriation depends upon the facts to which it is to be applied. The primary inquiry is what are the facts. The complaint is that the jury were erroneously instructed as to the facts to which the law of appropriation applied. However correctly the law of appropriation might have been stated, if an erroneous ruling was given as to the facts or the *prima facie* construction and effect of an instrument, then the very basis of appropriation would or might be erroneous.

The fact to be determined was, to whom and for what purpose the receipt in evidence was given, and what did it mean. The plaintiffs had claims against Brewer, and Brewer & Lothrop. If a receipt of a note or a sum of money from the plaintiffs to Brewer means the same thing as a receipt from the plaintiffs to Brewer & Lothrop, if an entry to F. S. Brewer means the same thing as one to Brewer & Lothrop, then the ruling was right; but if a receipt from the plaintiffs to Brewer & Lothrop differs from a receipt from the plaintiffs to Brewer, then the ruling was erroneous. The importance of this ruling consists in this, that it negatives the *prima facie* presumption that it was a receipt between the parties thereto and not a receipt between other parties. The defendant was entitled to this presumption in the ascertainment of the facts, and the ruling that he was not so entitled was clearly wrong.

Evidence may undoubtedly be received to explain the meaning of a receipt; but the question is not as to the reception of evidence, but as to the construction of certain language in the absence of all evidence affecting its meaning.

The instructions given other than those to which exceptions are alleged are not reported. What they were must be matter of conjecture. Our action must be based entirely on what is before us, not upon what may or may not have been. The instructions given were clearly erroneous, and the exceptions should be sustained.

DICKERSON and PETERS, JJ., concurred in this dissenting opinion.

ENOS D. WASS *vs.* BRYCE T. PLUMMER.

Washington. Decided June 7, 1878.

Trespass, qu. cl. Husband and wife.

Trespass *qu. cl.* may be maintained by the husband for an injury to the real estate of the wife, he being in possession of the same, irrespective of any right acquired by virtue of the marriage relation.

ON MOTION.

TRESPASS, *quare clausum*, on the Letter B, or Cape Split, lot of about 100 acres in Addison, bounded on three sides by the waters of Eastern harbor, the ocean and Pleasant river and on the north by the William Wass lot.

There was evidence tending to show that the plaintiff owning and occupying the premises conveyed them to Loring B. Wass, June 23, 1852, as security for money lent, but by a right out deed; that Wass conveyed to plaintiff's wife, October 7, 1864; that the occupancy of the plaintiff was continuous and uninterrupted before and after each conveyance.

The defendant among other grounds of defense, unnecessary to state, contended that the plaintiff had no possession such as could entitle him to maintain the action; that with the title in his wife, and she on the premises, there was no proof that he was her tenant; that his testimony, "Julia Wass is my wife and I have had entire management of the place," implied that he was merely her servant.

The verdict was for the plaintiff; and the defendant moved to set it aside as against law, evidence and the charge of the presiding justice.

F. C. Nash, for the defendant.

Wm. Freeman, jr., for the plaintiff.

APPLETON, C. J. This is an action of trespass *quare clausum*. It comes before us on a motion to set aside the verdict as against law and evidence.

It appears that the legal title under which the plaintiff claims is in his wife. The jury have found by their verdict that the plaintiff was in the actual possession of the *locus in quo*.

The objection is taken, that notwithstanding the possession was in the husband, inasmuch as the legal title was in the wife, this action cannot be maintained. But this objection cannot be sustained.

Trespass *quare clausum* is a possessory action. To maintain it, it is only necessary to show the act done and the plaintiff in possession. The action lies, however temporary the plaintiff's interest may be, even though it be merely in the profits of the soil as *vestura terræ*, if it be in exclusion of others. The wife can transfer her title by deed. She can give a valid lease to her husband, (*Freeman* v. *Underwood*, 66 Maine, 229); and he can maintain trespass for an invasion of his possessory right. Neither can it matter how such right may be acquired, whether by written or verbal agreement.

The jury have found by their verdict that the plaintiff was in possession of the premises in controversy irrespective of any rights acquired by virtue of the marriage relation, and he is equally entitled to vindicate his possessory right when illegally interfered with, whether title to the soil be in his wife or in anybody else.

No exceptions are taken to the charge of the presiding justice, which was clear, full and sufficiently favorable to the defendant. There was much conflicting evidence as to numerous questions at issue, but there was no such preponderance of proof on the part of the defendant as would require or justify our interference with the decision of the jury.

Motion overruled.

DICKERSON, DANFORTH, PETERS and LIBBEY, JJ., concurred.
VIRGIN, J., concurred in the result.

GEORGE R. SMITH *vs.* JAMES CAMPBELL.

Penobscot. Decided June 7, 1878.

Coal.

Per curiam. R. S., c. 41, § 13, providing that the seller of coal shall not maintain a suit for the price thereof, unless he has caused the same to be weighed by a sworn weigher and a certificate of the weight delivered to the buyer, is not complied with when the weigher is either the owner of the coal or sells it on commission.

SAMUEL BLAISDELL *et al.*, petitioners for partition, *vs.* HENRY E. PRAY *et als.*

Kennebec. Decided June 7, 1878.

Partition. Parties. Abatement. Process.

A recital, in the record of a judgment of this court, that notice has been given to defendants out of the state, where there is an attachment of their property on the writ, is so far conclusive that the judgment cannot be set aside as a nullity when collaterally attacked.

Whether the fact, that two copartnerships having a common member are interested as tenants in common in the estate to be divided, would be a bar to the prosecution of a petition for partition by one of the firms on the ground that no one can be both plaintiff and defendant in a suit at law *quaere.*

An objection on that score is in the nature of a plea to the ability of the petitioners to prosecute, and if taken at all it must be by plea in abatement, and where the firm named in the petition as co-tenants are defaulted, other tenants in common cannot set it up under a plea denying the title, and seizin of both firms and alleging sole seizin in themselves. With the issue made up by such pleadings it has nothing to do and cannot be considered.

The rule that two creditors attaching their debtors' property at the same moment take in moieties, has no application to a case where the judgment in favor of one of them can be satisfied in full with less than half the property attached. The fact that the whole estate is subject to a right of dower hitherto unassigned, is no bar to partition.

ON REPORT.

PETITION FOR PARTITION.

G. T. Stevens, for the petitioners.

E. F. Webb, for the respondents.

BARROWS, J. The petitioners, Blaisdell & Hallett, levied an execution, issued upon a judgment recovered by them against Motley & Pray, upon 307–720ths of an undivided fifth of a farm formerly owned by the father of the judgment debtor, Pray, and here claim partition of the same, alleging that the tenants in common are the late firm of Leonard & Hallett jointly seized of 413–720ths of an undivided fifth, and the respondents, brothers and sisters of said Pray, each seized of one undivided fifth, the whole

being subject to the dower hitherto unassigned of one Emeline Pray, widow of said Pray's father, from whom the estate descended to his five children. The respondents in their plea deny the seizin of the petitioners and their interest as tenants in common, alleging that they themselves and the said judgment debtor are sole seized, and denying the seizin of Leonard & Hallett as tenants in common, as well as that of the petitioners.

The papers in the case indicate that the petitioner, Hallett, is the same person who, as member of the firm of Leonard & Hallett, is named as a tenant in common, and the facts and documents reported show that Blaisdell & Hallett and Leonard & Hallett, the levying creditors, attached Pray's interest in real estate at the same moment, and preserved their attachment by levies made at the same time upon the respective portions of his undivided fifth above stated. No question is made as to the regularity of the levies ; and Pray's interest in the estate in common with the respondents at the time of the attachment is admitted as alleged. But the respondents resist partition upon these grounds, viz:

I. They claim that the record of the plaintiffs' judgment does not show legal notice to Pray, the judgment debtor, who was out of the state; and hence they claim that the judgment is void, and that the plaintiffs acquired no interest in the premises by virtue of their levy.

II. Because, they say, the process cannot be maintained, when the same person (Hallett) is named both as a petitioner and also as a possible respondent.

III. Because the two creditor firms, attaching at the same moment, took moieties of the estate, and thus the petitioners' interest is not correctly described.

There is no force in the third objection. The doctrine of *Shove* v. *Dow*, 13 Mass. 529, obviously is not applicable to cases where, as here, one of the several creditors attaching at the same moment can be and is fully paid with less than the proportion to which he would be entitled in a case of deficiency.

As to the second objection, we remark that Leonard & Hallett do not resist the proposed petition and are defaulted. The

respondents seek to defeat the petitioners upon the technical ground that according to their own showing two copartnerships, having a common member, are interested as tenants in common in the estate to be divided, and they invoke the principle that one and the same person cannot be both plaintiff and defendant in an action at law. No doubt this is true where there is a contract to be enforced or a wrong redressed by suit. *Denny* v. *Metcalf*, 28 Maine, 389.

But it may well be doubted whether it can properly be applied to this statute process for the division of property among tenants in common. This is not necessarily in any proper sense an adversary proceeding. Petitioners may join or sever, and have their shares set out to them in severalty, or to be held as between themselves in common. *Upham* v. *Bradley*, 17 Maine, 423, 427. It is often resorted to where there is no difference between the parties as to their rights in the premises, and simply as a means of procuring a judicial confirmation and record of a partition that they in fact make between themselves by the agency of commissioners upon whom they agree. Would the assent of Leonard & Hallett to this proceeding appear any more conclusively if they had joined in this petition than it now does by a default after notice served upon them?

But, however these things may be, under the pleadings in the case before us the objection is not open.

The respondents plead sole seizin in themselves and the judgment debtor, denying the title and seizin of the petitioners and of Leonard & Hallett. The objection that they here propose to set up has nothing to do with either of those matters, but is rather one in the nature of a plea to the ability of the petitioners to prosecute, which should have been taken by plea in abatement, if at all, and cannot now be entertained. *Upham* v. *Bradley*, 17 Maine, 423, 426.

The fact that Emeline Pray has a right of dower in the whole estate is not a valid objection to the maintenance of the petition. *Ward* v. *Gardner*, 112 Mass. 42. But the respondents chiefly rely upon their denial of the petitioners' seizin and title, claiming that the judgment debtor Pray is still tenant in common with

them, notwithstanding the levies, on account of the alleged defect in the notice to him to appear and answer to the suit in which the property was attached.

If the judgment of this court in the suit of these petitioners against Pray is void for want of jurisdiction apparent upon its face, the petitioners cannot prevail, because upon their pleadings the burden is upon them to establish their title and interest in the estate, and they must prevail if at all by the strength of their own title and not by the weakness of their adversary. *Gilman* v. *Stetson*, 16 Maine, 124. *Marr* v. *Hobson*, 22 Maine, 321.

But it is equally well settled that in the case of a court of general jurisdiction, unless the want of jurisdiction appears by the record itself, the judgment is regarded as valid and binding until reversed, and not liable to be impeached when collaterally attacked; and that for errors arising in the exercise of the jurisdiction, a stranger to the judgment can neither sustain a writ of error nor take advantage of their regularity. *Banister* v. *Higginson*, 15 Maine, 73, 78. *Granger* v. *Clark*, 22 Maine, 128, 130. *Smith* v. *Keen*, 26 Maine, 411, 423.

The judgment debtor of these petitioners, although, if he was not legally divested of his interest in the premises by their proceedings, he might under the provisions of R. S., c. 88, § 5, have been heard in this case, does not present himself to assert any interest therein. Apparently he is satisfied either that there is no error, or he is content to waive errors and allow his debt to stand paid by the levy. His former co-tenants, who assert his continuing interest and deny the validity of the judgment obtained against him by these petitioners, have little occasion to intercede in his behalf, and no right to do it, unless they can maintain that the judgment is absolutely void, and not merely that it might be reversible on error. It appears here that Pray's estate was duly attached, that the action was entered, and the court had jurisdiction under R. S., c. 81, § 12, to proceed as directed in § 19 of the same chapter; and here the respondents claim that error crept in—that the only notice given was the publication of an order entered under the action entitled "*Samuel Blaisdell et al.* v. *John L. Motley et al.*," in which order the name of Pray does

not appear. But the record of the judgment, after reciting that at the August term, 1873, notice was ordered on the defendants by newspaper publication, runs thus: "Thence the action was continued to this term. And now at this term it is found to the satisfaction of the court that said order has been complied with;" and thereupon ensues the record of the default. With such a record before us of a finding by the court that notice was given to the defendants, we think that the judgment rendered in pursuance thereof cannot be treated as a nullity or collaterally attacked; but must be regarded as to all intents and purposes valid until reversed.

The true doctrine applicable to such a case is stated by Mr. Freeman in his useful and convenient treatise on judgments, thus: "It may happen, when that part of the record containing the evidence of service shows an insufficient service, that other parts of the record and especially the judgment disclose the fact that the matter of jurisdiction has been considered and determined by the court. The conclusion or finding upon this subject may appear by recitals stating that defendant has been cited to appear, or that he has entered his appearance, or that his default for not appearing has been duly entered. These findings are as conclusive upon the parties in all collateral proceedings as any adjudication of the court can be. It must be presumed that they were supported by sufficient testimony not set forth in the record. Thus though the record upon a summons against A B certifies a service of such summons upon C D, and the judgment states that A B has been summoned, the record is not necessarily contradictory. The error in the service of process may have been corrected by service of the summons on the proper person. And, since the statement to this effect is made by the court, it will be conclusively presumed that it acted upon ample evidence and with due deliberation before making such statement, and the judgment will be impregnable to any collateral assault." Freeman on Judgments, § 130, p. 102. *Hahn* v. *Kelly*, 34 Cal. 391. *Callen* v. *Ellison*, 13 Ohio St. (N. S.) 446. *Galpin* v. *Page*, 1 Sawyer, 309. See also respecting defects in obtaining jurisdiction, Freeman on Judgments, § 126, pp. 98, 99. *Paine* v. *Mooreland*, 15 Ohio,

435. Drake on Attachment, §§ 437, 447, 448; and as to the rule prohibiting the collateral impeachment of domestic judgments of courts of general jurisdiction, *Coit* v. *Haven*, 30 Conn. 190, 199. *Cole* v. *Butler*, 43 Maine, 401. 1 Smith's Lead. Cas. 6th Am. Ed. pt. 2, p. 1022.

Nor is there any inconsistency between these doctrines and the case of *Penobscot Railroad* v. *Weeks*, 52 Maine, 456, cited by respondents. See remarks of Walton, J., in that case upon the last half of page 463.

The trouble with the judgment in the case of *Buffum* v. *Ramsdell*, 55 Maine, 252, was that no property of Locke was attached, and the foundation to acquire jurisdiction as to him by publication seems to have been wanting.

As this case is presented, the judgment in favor of the petitioners against Motley & Pray must be regarded as valid. The title of the petitioners to the share of the estate claimed by them is established.

Judgment for partition.

DICKERSON and DANFORTH, JJ., concurred.

PETERS, J., added the following note, concurred in by WALTON, J.

I concur in the result in this case, seeing no injurious consequences to result from having a person represented on both sides of the case as a member of different copartnerships. Under our statutes, this is not much of a common law proceeding. But I do not think the result is maintainable merely because there was no plea in abatement. The objection, that one person cannot sue himself and another, has often been admitted and, I think, never rejected, under the general issue. See 1 Chitt. Pl. p. 47, 16 Am. Ed. and numer ous cases cited in the note thereto.

APPLETON, C. J., dissenting. Alonzo J. Hallett is a member of the firm of Blaisdell & Hallett and of Leonard & Hallett. As a member of the first named firm he petitions for a partition of certain premises against himself as member of the second named firm.

All litigation presupposes opposing parties. Hence, it is well settled in equity, at common law, in admiralty, and generally in all

judicial proceedings, that one cannot be both plaintiff and defendant—cannot prosecute and defend at one and the same time and in one and the same process.

Further, Alonzo J. Hallett, by virtue of the levy made by Blaisdell & Hallett, is seized of a certain number of acres in fee. He is seized of an additional number by virtue of the levy made by Leonard & Hallett. Now the petitioners cannot have a part of the land which they own set off to them. They must ask for partition of all of which they are seized in fee. If it were otherwise, a party might ask partition of his interest, in installments. But this cannot be. I think this process cannot be maintained without amendments.

JOHN B. NORTON *vs.* JOHN P. CRAIG.

Kennebec. Decided June 7, 1878.

Fixtures,—manure. Trespass. Husband and wife.

Manure, accumulated in the course of husbandry from the occupation of a farm belonging to a wife, as between her and her husband, is a part of the land belonging to her, although his stock and his hay, brought upon the place while occupied by them, in part produced the accumulation.

Where husband and wife live upon a farm belonging to her, without any contract between them, he carrying on the place for their common support, such joint occupation constitutes but one possession, his possession being her possession, and an action against a third person could be maintained by her for the protection of the farm and its crops.

If a person having lawful authority to enter the land of another for one purpose, forcibly enters, for a different purpose, or to enter one part of it, enters another part of it, he thereby becomes a trespasser.

ON MOTION AND EXCEPTIONS.

TRESPASS, *quare clausum.*

E. O. Bean, for the defendant.

S. & L. Titcomb, for the plaintiff.

PETERS, J. The following facts are disclosed by the testimony in this case: The farm in question belonged to the defendant's wife. A portion of the stock and farming tools upon it belonged

to her, and a portion to him. He carried on the farm for several years for his and her support, without any agreement whatever between them, in the same manner as if his own. Disagreements and dislikes growing up between them, she conveyed the farm to the plaintiff (her son) by an absolute deed. During the summer after the conveyance, the plaintiff exercised acts of possession over the property, and so did the defendant. The disputed ownership of the crops of the season of 1874 was settled by arbitration. Before the 7th of September, the defendant had removed all his personal property from the farm, unless he had something remaining in the house thereon, a portion of which he occupied separately from his wife until September the tenth. On the 7th September, he removed and carried away, against the protestation of the plaintiff, the principal part of the manure on the place, for which act he is sued in this action of *quare clausum.*

The defendant contends that the manure was his property, because made while he was in possession of the place. The jury were correctly instructed, that so far as the manure accumulated in the course of husbandry from the occupation of the farm, it would be the property of the farm and belong to the grantee, although the defendant's own stock and his own hay brought upon the place might have added to and increased its accumulation. As between the husband and wife, it would be a part of the land; and as between her and her grantee, it would pass as a part of the realty under her deed. This instruction was in accordance with decisions here and the current of decisions and authority elsewhere. *Lassell* v. *Reed*, 6 Maine, 222. *Fay* v. *Muzzey*, 13 Gray, 53. *Middlebrook* v. *Corwin*, 15 Wend. 169. *Plumer* v. *Plumer*, 30 N. H. 558. *Needham* v. *Allison*, 24 N. H. 355. *Perry* v. *Carr*, 44 N. H. 118. *Lewis* v. *Jones*, 17 Pa. St. 262. *Wetherbee* v. *Ellison*, 19 Vt. 379.

The judge instructed the jury, that, whether the husband was a servant of his wife in carrying on the place or a tenant at will under her, his rights there were terminated by the deed. This was, at all events in effect, a correct instruction.

It is not now necessary to inquire whether a tenancy at will becomes, *ipso facto*, terminated by a conveyance of land by the

landlord or not. In our judgment the defendant was not a tenant at will under his wife. He undoubtedly possessed some of the rights of ingress and egress and of removal which would belong to a tenant at will. So does a person who is licensed or permitted to go upon land. It may be a practical question of some importance, what the relation was between the husband and wife as occupiers of the land in question. We think it may correctly be said that the husband was the agent and assistant of his wife in carrying on the farm. She was really in possession as an owner. There was a joint occupation, but that constituted but one possession, she having the control. His possession was her possession. The case of *Russell* v. *Scott*, 9 Cow. 279, is analogous to this case in its facts. There, "the plaintiff was an old man, of more than 90 years of age; and lived with his sons, who worked his farm and took care of him and his wife; but the title remained in the old man, and there does not appear to have been any contract between him and his sons by which the exclusive right of possession was vested in them." The court determined that the possession of the farm, as well as the title, was as a matter of law in the old man, in whose name an action was brought against parties for overflowing the land, by means of a dam, to the injury of the possession. In the case at bar there was no contract between the parties. If the wife had released her control to her husband, she could have countermanded the agency at any time. Last clause, § 2, c. 61, R. S. If the control had been released to him, an action for an injury to the farm must have been in her name, and could not be in his name alone. Sec. 5, same ch. *Collen* v. *Kelsey*, 39 Maine, 298. The statute seems to cautiously provide against usurpations of the wife's property by the husband. This court decided in *Hanson* v. *Millett*, 55 Maine, 184, that the wife should be regarded as in possession of her own stock, kept upon her husband's farm, in the same manner that the husband is of his property kept in the same way. We do not see why in the present case the crops would not belong to the wife. It was virtually so held in *McIntyre* v. *Knowlton*, 6 Allen, 565. True, his own labor and some means of his own may be represented in the crops. But by his own labor and means, the law requires him to support

himself and her, without regard to her property, unless she voluntarily contributes out of it to the common support. The rights of creditors might present another question. *Sampson* v. *Alexander*, 66 Maine, 182. Our conclusion is, that the possession of the farm was in the wife; that, after the conveyance by her, the husband was a mere occupant of or licensee upon portions of the premises necessary for him to have some possession of in order to get his own property away; that the general possession of the farm remained in her grantee, and that for this unnecessary and unjustifiable act of the defendant, an action against him for an injury to the close can be maintained. The following cases more or less strongly support and illustrate this view. *Merriam* v. *Willis*, 10 Allen, 118. *Cutting* v. *Cox*, 19 Vt. 517. *Curtis* v. *Hoyt*, 19 Conn. 154. *Clap* v. *Draper*, 4 Mass. 266. *Abbott* v. *Wood*, 13 Maine, 115. *Goodwin* v. *Hubbard*, 47 Maine, 595. *White* v. *Elwell*, 48 Maine, 360. *Abbott* v. *Abbott*, 51 Maine, 575. *Loweth* v. *Smith*, 12 Mee. & W. 582.

It is insisted by the defendant, under the motion to set aside the verdict as against evidence, that the defendant was in possession, until after the manure was removed, with the permission and consent of the plaintiff. But this position, if true, only goes to defeat the form of the action. If trespass *quare clausum fregit* was not the proper action, an action on the case was, and the same damages would have been rendered. *Files* v. *Magoon*, 41 Maine, 104. The value of the manure was all that was allowed for by the verdict, the breaking of the close being only a nominal matter. But the position of counsel for the defense is not the correct one. If the defendant was upon the premises, so was the plaintiff at the same time. The defendant had removed his stock away. He had no occasion to intermeddle with the manure nor with that portion of the premises where the manure was. He removed it in defiance of the plaintiff and before his eyes. The cases already cited establish the principle, that, if a person, having lawful authority to enter the land of another for one purpose, forcibly enters for a different purpose, or, to enter one part of it, enters another part of it, he thereby becomes a trespasser. See *Wheelden* v. *Lowell*, 50 Maine, 499.

Other rulings were objected to, but the objections do not appear to be much relied upon, and it is too obvious that the rulings were correct to require discussion as to them.

Motion and exceptions overruled.

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

GEORGE G. STACY *vs.* PORTLAND PUBLISHING COMPANY.

Sagadahoc. Decided June 7, 1878.

Evidence. Libel. Damages.

A witness testifying to threats made by a person in his presence, may be allowed to state whether he apprehended the words to have been spoken in earnest or not; but not, ordinarily, to state what he understood the speaker to mean by the w ords spoken by him. The words speak for themselves.

A witness may testify that a person was intoxicated at a time when such person came under his personal observation. Such testimony is not the statement of an opinion in the objectionable sense, and is admissible from necessity.

A defendant in a libel suit may justify as to a part of the libel without justifying all of it, for the purpose of reducing the damages recoverable against him.

A statement in a libelous article, that the plaintiff was "arrested for drunkenness," is not an assertion that he was in fact drunk, but only that he was arrested upon a charge of drunkenness.

Punitive damages are not recoverable in a libel suit where a jury decides that all the actual damages sustained are merely nominal.

ON EXCEPTIONS AND MOTION by plaintiff to set aside, for inadequacy, a verdict in his favor for one dollar.

CASE, for libel of and concerning the plaintiff, personally; professionally, as a lawyer; and officially, as secretary of state, published in the Portland Daily Press, September 24, 1875, under the head of "Personal," in these words:

"A responsible gentleman of Hallowell informs us that Secretary of State Stacy, was recently arrested in that city for drunkenness and disturbance. A ten dollar note quieted the affair."

The plea was not guilty, with a brief statement of the truth of the matter published and that it was proper for public information.

There was evidence tending to show that the plaintiff was admitted to practice law in 1858, practiced a year or more, was then elected member of the legislature, and remained at Augusta ever after, first as engrossing clerk in the office of the secretary of state, then as state librarian, then four years as deputy secretary of state; was elected secretary of state first in January, 1872, and held the office till October 1, 1875.

Charles E. Nash testified to a conversation at the Kennebec Journal office, in June, 1875, with Col. Z. A. Smith, associate editor of the Press, who inserted the item alleged to be libelous. "The subject of the conversation was the removal of the Col.'s brother, Joseph O. Smith, from the office of the secretary of state."

"The Col. was excited; I tried to quiet him, bantered him somewhat. He was very much displeased at the removal of his brother; said it was made by Stacy. He wanted me to go and see Stacy with him, to see if it could not be reconsidered. He said among other things, that he was going to impeach Stacy at the next session of the governor and council. I laughed at him; told him he was foolish. Think I calmed him some. He said 'I am going to ruin that man.' I told him he had better not attempt to make any war upon Stacy. I was a friend to both; he asked me if I would go with him to Stacy's house. He said, if I go I shall do something foolish while there."

William P. Whitehouse testified to a conversation at his office with Z. A. Smith, on the same subject, June 19, 1875. "He asked me to intercede with Stacy for the reinstatement of his brother. He complained in somewhat extravagant language of Stacy's treatment, and in a cool manner, which excited my laughter, said that he thought a very proper thing was to shoot him. I agreed to see Mr. Stacy that afternoon but did not, and called at the depot to explain why. Smith said he had seen Stacy himself, that afternoon. I said, I thought perhaps the matter could be satisfactorily arranged between them; would see him if possible next day. He said he didn't think it was of any use; that he should bide his time and knife him the first chance he got. I laughed at him and told him he had better keep cool. In his tones and manner, there was an assumption of coolness; I don't remember that he laughed any; he was very angry.

"I think he said, he thought the only proper thing to do, was to shoot him; I don't remember precisely what his language was; he seemed to be revolving the propriety of doing it. Of course I laughed and ridiculed the idea."

On cross-examination: Ques. Did he have an exaggerated way of talking? Obj. to and admitted. Ans. I think he had. Ques. You did not apprehend that he was going to shoot Mr. Stacy? Obj. to and admitted. Ans. I did not really think that he intended to or would shoot him.

Re-direct: Ques. You was asked whether you apprehended from his conversation, that he was going to shoot Mr. Stacy; and that he would bide his time and knife him the first chance he got. What did you understand him to mean? Obj. to and excluded.

The defendants offered to put the truth of the alleged libel in evidence. The plaintiff objected because the pleadings did not assert the truth of the whole libel, or that ten dollars was paid to quiet the affair and in confession of guilt; there could not be a justification *pro tanto*. The court admitted the evidence, which tended to prove that defendant, on the evening of August 31, 1875, was driving alone in a high top buggy from Augusta to Hallowell; that the wheels of his carriage came in collision with the carriage wheel of one Trask, who had stopped by the road side to water his horse; that an altercation ensued; that the parties proceeded to Factory lane in Hallowell, where the plaintiff was confronted by Trask and city marshal Young with the charge of running into Trask's carriage; that he refused at first to give his name till threatened with arrest; that he was very angry, used much profane and abusive language, and in the opinion of witnesses, admitted against plaintiff's objection, was intoxicated; that he was ordered by the city marshal to appear at the judge's office the next morning to answer for drunkenness and disorderly conduct; that he there appeared and requested Mr. Snow to see the city marshal, "to settle up the difficulty and have it stopped;" that Snow was informed by the city marshal that it could be settled for $10, and Snow told him not to bring an action or take out a warrant, and that if Stacy did not pay the $10, he, Snow,

would see it paid; that these facts were communicated by Snow to Z. A. Smith.

The plaintiff testified: "The evening was quite dark; I was driving about four miles an hour when I struck Trask's carriage; Trask said, you have injured my carriage and have got to pay damage; I denied I was at fault and laid the blame on Trask; used forcible language, might have used profanity; Trask demanded $10 for springing his axle; went to the city. Marshal Young said this is Trask, he claims $10 for injury to his carriage; I was excited, said I should not pay anything, that Trask was to blame; told them my name, the man doubted it; I don't know but I said he was a damned fool. I told him if he doubted my word to get into my carriage, I would take him to Mr. Bodwell, Mr. Wilson or Maj. Rowell; he said they will not want to see you in the condition you are in; I said I can take care of myself and don't ask any favors. I propose to visit respectable men, so you will be able to determine my condition; he fell back on the damages, said Trask says you must pay ten dollars or he will sue you; told him I should sue Trask; should appear at 9 o'clock in the morning, and left for home; next morning saw the marshal, inquired for Trask; was told he thought he would not press his claim; I never asked Snow to settle the matter or commissioned him to act for me; during that day and evening I had not tasted any intoxicating liquor in any form whatever, that I am aware of; I had not taken a drop of wine or ale, no kind of liquor; I hadn't had access to any; I hadn't been where they kept it, at any store, shop or public place, nor to any private house, except where I boarded; I think, the only places where I was that day—I was ill—was the Western Avenue House, Mr. Harding's and my stable; I was at Maj. Fogler's house, I didn't go in; went there before tea; told him what the matter was, a bowel trouble; the Maj. recommended Jamaica ginger, and brought out a small vial having not more than two teaspoonfuls of Jamaica ginger in it; he gave it to me, and advised me to take it; I don't know whether I took all at one time or twice; it was all taken before tea; after tea went to Hallowell and back; my carriage was not injured."

Among other things not objected to, the presiding justice instructed the jury as follows:

"Was the plaintiff arrested in Hallowell for drunkenness and disturbance? Was he arrested there at all? And, if so, was it for drunkenness and disturbance? Because, you will perceive that the article published, on this branch, contains two statements of fact; one that he was arrested, the other that the arrest was for drunkenness and disturbance.

"I have already stated to you that the burden is upon the defendants to prove strictly and fully the truth of the facts set out in the publication. . . .

"Have the defendants proved that the officer, Mr. Young, arrested the plaintiff on the night in question within this rule of law? Did he inform the plaintiff, in substance, that he arrested him? Did the plaintiff so understand it and yield himself to the authority of the officer, thus asserted? If so was he arrested for drunkenness and disturbance? Or was it for the purpose of compelling the plaintiff to pay damages to Mr. Trask? You have heard the evidence upon this branch of the case. . . .

"If arrested was it for drunkenness and disturbance? If so, upon this branch of the case, I instruct you that this defense is made out so far as these two facts are concerned, although the plaintiff was not in fact drunk. Because, you will perceive that the charge in the article is not that the plaintiff was drunk; it is that he was arrested for drunkenness and disturbance. You will determine whether the defendants, having the burden of proof upon them, have satisfied you that that assertion in the article was true.

"Then pass to the other portion of this article—'A ten dollar note quieted the affair.' . . .

"The elements of damage which you are authorized to consider are, the damage to his character as a man, as a citizen, pain, mental pain and suffering, anguish, mortification, loss of the benefits of public confidence and social intercourse, which are the natural and necessary results of the publication.

"Then there are elements which you may consider in determining the amount of damages—elements of aggravation if you find them to exist. It is claimed here that there was express malice. If you find there was express malice you are authorized to consider it as aggravating the damages."

The plaintiff's counsel requested the instruction that if the jury found the article complained of was published with express malice, they might give exemplary damages. This instruction the presiding justice refused. The verdict was for plaintiff; damages one dollar.

O. D. Baker, for the plaintiff, contended, among other things, that the libel should be taken as a whole, and not each part considered by itself as in the instructions; that, as a whole, it speaks not merely of an arrest, but fastens upon the plaintiff one charge, that of being turbulently and disgracefully drunk in the public streets, bolstered by two proofs, the arrest by a policeman to show the scandal, and the cowardly confession of guilt to show the truth of the charge; that if the publication was with express malice it was not enough to consider that as aggravating the damages; it should have carried exemplary damages.

T. B. Reed, for the defendants.

PETERS, J. A witness for the plaintiff testified thus: "He (the author of the publication complained of) in a cool manner, which excited my laughter, remarked that he thought a very proper thing was to shoot him" (plaintiff). The plaintiff finds fault with the court in allowing the witness to be asked on cross examination whether he really apprehended the speaker was going to shoot Mr. Stacy. This did not transcend the discretionary power of the presiding judge. The statement of the witness naturally enough called for the question. At the same time, it was unimportant and immaterial. It is evident enough that no one apprehended such a thing. The expression was rhetorically extravagant, merely. Besides, a witness could be asked whether words were spoken angrily or not, or earnestly or not, which would have been tantamount to the question put. *Haynes* v. *Haynes*, 29 Maine, 247.

Upon re-examination, the witness was not permitted to state what he did understand Mr. Smith to mean by the threats of knifing and shooting the plaintiff. The plaintiff contends that this inquiry was rendered permissible by the admission of the previous question and answer. We think otherwise. The plain-

tiff could have shown the condition of feeling that the speaker was in, and any extrinsic facts and circumstances, in order to elucidate what was meant. Anything more was needless, as the words speak for themselves. *Snell* v. *Snow*, 13 Met. 278. Where the speaker's meaning is conveyed, not in direct terms, but by incomplete expressions, or by signs or gestures or tones of voice, it might be competent in some cases for witnesses to testify what they understood by them. It was so held in *Leonard* v. *Allen*, 11 Cush. 241. This rule, however, was construed quite strictly in *White* v. *Sayward*, 33 Maine, 322.

A witness was allowed to state that at a certain time—the fact being material—the plaintiff was intoxicated. This was objected to as being the expression of the opinion of a witness. Such testimony was directly decided to have been admissible in *People* v. *Eastwood*, 14 N. Y. 562. In a certain sense, a vast deal of testimony is but statements of opinion. But it is not opinion in an objectionable sense. It is every day practice for witnesses to swear to such facts as the quantity, weight, size, and dimension of a thing, to heat and cold, age, sickness and health, and many other matters of the kind. In such cases, witnesses do not express an opinion founded on hearsay or the judgment of other men. It is not an opinion based upon facts recited and sworn to by other witnesses. It is their own judgment, based upon facts within their own observation. It is, so far as such a thing can be, knowledge of their own. It is an opinion which combines many facts without specifying them. It has been described as "an abbreviation of facts," a "short-hand rendering of facts." It is an inference equivalent to a specification of the facts. Whar. Ev. § 510. The witness in effect describes the facts when he gives his opinion. It is his way of stating them. Such testimony is admitted from necessity. A witness can seldom give in detail all the points and particles which go to make up his belief, but he can characterize them. Practically, the rule admitting such *quasi* opinion is convenient and safe. Trials would be almost endlessly protracted without it. Of course it must be applied with discrimination. *Vide* Whar. Ev., section cited *supra*, and following sections; and notes. *State* v. *Pike*, 49 N. H. 399, 408. *Hardy*

v. *Merrill*, 56 N. H. 227. *Commonwealth* v. *Sturtivant*, 117 Mass. 122. *Dunham's probate appeal*, 27 Conn. 192, 193. *Robinson* v. *Adams*, 62 Maine, 369, 410, 411.

The plaintiff contends that it was error for the judge to rule that the defendants could justify as to a part of the libel without justifying all of it. This was too obviously correct to require more than a word of comment. It might with as much force be asserted that a plaintiff cannot prevail unless he proves all he alleges, as that a defendant cannot defend against a part of the charges against him. A justification in part does not, of course, exculpate a defendant, but would have a tendency to reduce the damages.

The libel declared that the writer had been informed that the plaintiff some time before "was arrested for drunkenness and disturbance." The plaintiff's counsel contends that this was an assertion that the plaintiff was in fact drunk, making a disturbance, and was arrested for it. The ruling was, that the language did not amount to saying that the plaintiff was in fact drunk, but that it meant that he was arrested upon a charge of drunkenness. This to our minds was exactly the true interpretation of the words used. The writer does not say that the plaintiff was drunk, but he declares that somebody else says so. He does not make the charge, but he informs the public that some one has made such a charge; or, more accurately, he states that a gentleman informed him that such a charge was made. The item does not assert the charge to be true. It asserts that an accusation of drunkenness was made against the plaintiff. To say that a man was arrested for an assault is not a declaration that he committed an assault. To say that a man was arrested for murder and indicted for murder and tried for murder, would not be saying nor be equivalent to saying that he was in fact guilty of such a charge. If it were so, the newspaper press would be sorely perplexed for publishing the current news. Stress is put by the plaintiff upon the additional words of the article: "A ten dollar note quieted the affair." This, at most, was a statement that the charge subsided or the arrest was abandoned for the sum named. We think the article is not susceptible of the meaning ascribed to it

by the plaintiff. The case of *Haynes* v. *Leland*, 29 Maine, 233, recognizes a distinction between the positive assertion of a fact and a statement of information as to such fact, in an action of slander.

The plaintiff's counsel earnestly insists that it was error on the part of the court to omit (after request) to direct the jury that punitive damages might be recovered in such a case as this. Taking the case as it resulted, we are satisfied that the plaintiff has sustained no injury in this respect. Without overruling former decisions, this court cannot deny that punitive damages may be recovered against a corporation for the malicious conduct of its servants and agents, by a person injured by it. To the facts and findings, however, presented in the case at bar, our judgment is that the doctrine contended for has no reasonable application. The charge against the plaintiff was of a serious nature, calculated to wound his sensibilities and to degrade him in his personal character. A substantial, but not a full and complete, justification of the charge was pleaded by the defendants. The plaintiff was allowed to recover damages for the injury "to his character as a man, a citizen; for mental pain and suffering, anguish, mortification, and for loss of the benefits of public confidence and social intercourse," resulting from the publication. The jury were permitted to add, as actual damages, for any aggravation of these elements of injury occasioned by the express malice of the person who published the article complained of. The jury assessed nominal damages only, the verdict being for one dollar. The legal signification of the verdict is, either that there was no actual and express malice entertained towards the plaintiff by the defendants' agent, or that, if there was, it did the plaintiff no injury. There is no room for punitive damages here. There is no foundation for them to attach to or rest upon. It is said, in vindication of the theory of punitive damages, that the interests of the individual injured and of society are blended. Here the interests of society have virtually nothing to blend with. If the individual has but a nominal interest, society can have none. Such damages are to be awarded against a defendant for punishment. But, if all the individual injury is merely technical

and theoretical, what is the punishment to be inflicted for? If a plaintiff, upon all such elements of injury as were open to him, is entitled to recover but nominal damages, shall he be the recipient of penalties awarded on account of an injury or a supposed injury to others beside himself? If there was enough in the defense to mitigate the damages to the individual, so did it mitigate the damages to the public as well. Punitive damages are the last to be assessed, in the elements of injury to be considered by a jury, and should be the first to be rejected by facts in mitigation. We think the irresistible inference is, that, if the instruction had been given as it was requested, the verdict would not have been increased thereby to the extent of a cent. There may be cases, no doubt, where the actual damages would be but small and the punitive damages large. But this case is not of such a kind. It would have been proper in this case for the presiding justice to have informed the jury, that, if the actual damages were nominal and no more, they need not award punitive damages. Any error in the ruling was cured by the verdict. *Gilmore* v. *Mathews*, 67 Maine, 517.

Some other points appear to have been raised at the trial, which are not discussed in the very full and able brief of the plaintiff's counsel, and we may very well regard them as now waived. A motion is made against the verdict as too small. The court rarely interferes with a verdict in a case of this kind, whether moved against as too large or too small. We do not allow the motion.

Motion and exceptions overruled.

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

ALVAH PARLIN *et al. vs.* LEVI SMALL.

Sagadahoc. Decided June 7, 1878.

Evidence. Deed.

Oral evidence of fraud, in order to vacate a deed, should not only amount to a preponderance of proof, but such preponderance should be based upon testimony that is clear and strong, satisfactory and convincing; and the party complaining must be reasonably free from fault or negligence himself.

This rule should be especially enforced in a case where the oral evidence comes mainly from parties to the suit, and where a plaintiff seeks to recover damages for the fraud imposed upon him, instead of rescinding and repudiating the deed.

ON MOTION.

CASE for deceit in the sale of a farm.

The declaration states in substance that, July 6, 1875, the defendant sold the plaintiffs his farm in Bowdoinham for $3,100; that before the sale he took them over it and showed them the boundaries, representing it as a rectangle, when in fact an eight acre wood lot of that shape had been sold from the northwest corner to one Robert Small; that he pointed out the northwest corner and the north and west boundaries of the wood lot as a corner and a part of the north and west bounds of his farm; that he told the plaintiffs they could have the wood already cut and piled on the Robert Small wood lot; that he pointed out the land from which it was cut, saying it was nice land and could be cleared at small expense.

The plaintiffs, at the trial, testified to the truth of the allegations. The defendant testified to the contrary, and that the deed was carefully read to them by Mr. Hall before signing, which described the farm in such a way as to show that this eight acre rectangle was excluded from its bounds.

The verdict was for the plaintiffs for $271.41; and the defendant moved to set it aside as against law, evidence and the charge of the presiding justice.

W. T. Hall, for the defendant.

J. W. Spaulding, for the plaintiffs.

PETERS, J. The claim set up by the plaintiffs was, that, in purchasing a farm, they were defrauded by the defendant conveying a less amount of land than was bargained and paid for by them when they took their deed. The plaintiffs getting the verdict, the defendant moves to set it aside. The plaintiffs did not rescind the bargain, but seek to maintain the deed with a parol variation that will make it as good as it would have been but for the alleged fraud, claiming damages for the deceit imposed upon them. They undertake to establish the alleged fraud entirely by their own testimony.

Under these circumstances, what weight shall the oral testimony of parties to a suit have, to relieve themselves from the presumption of correctness that ordinarily attaches to a written instrument of such solemn and important nature as a deed? No doubt, oral evidence from parties alone may be sufficient to establish a fraud that will upset a deed. But what shall the quantum and quality of it be?

In Wharton's Ev. § 932, it is said: "The evidence of fraud, in order to vacate a solemnly executed instrument, must be, it need scarcely be added, clear and strong; and this rule is the more important since the passage of the statute enabling parties to testify in their own cases." In a note to the section cited, the author quotes from a Pennsylvania case as follows: "Sharswood, J., said: 'It has more than once been decided that it is error to submit a question of fraud upon slight parol evidence to overturn a written instrument. The evidence of fraud must be clear, precise and indubitable, otherwise it should be withdrawn from the jury. Since parties are allowed to testify in their own behalf, it has become still more necessary that this important rule should be adhered to and enforced.'" The same views are expressed in as forcible terms by other authors and authorities.

We concur in the doctrine thus strongly stated. Not that it is new. Our own decisions, in equity cases, have been to the same effect. *Baker* v. *Vining*, 30 Maine, 121. *Peterson* v. *Grover*, 20 Maine, 363. But, in view of the fact that questions of this kind are being more frequently agitated than they were before parties to the record were allowed to be witnesses, we think it well that

the policy of the law upon the subject should be again emphatically affirmed. A deed seen and read as this was is a wall of evidence against oral assaults, to begin with. It should not be battered down for alleged deceits or misunderstandings, unless the proof of them is clearly and abundantly established. The plaintiff must prevail, not only upon a preponderance of evidence, but such preponderance must be based upon testimony that is clear and strong, satisfactory and convincing. *Burleigh* v. *White*, 64 Maine, 23, 27.

Another thing must be shown by the plaintiff, to enable him to recover. It must appear that he was reasonably free from fault or negligence himself. A person neglecting his own duty should not be benefitted by his own neglect. For, in this way, he could often make a bargain to be bound by or not as he chose. Where objection is taken at the right moment, trouble to both parties may be avoided. A man has no right to neglect to examine a matter because he deems it of trifling or no importance to do so, and magnify it into importance afterwards, according as disappointment, resentment or caprice may instigate him. Especially is this so, where the dissatisfied party does not rescind a contract, but maintains it with all its profits and advantages, seeking to recover damages in addition thereto if he can. In such case, a plaintiff does not run much risk to try his luck in a speculative action. He may gain. He can lose nothing but his costs. This principle is illustrated in a great variety of cases wherein a person cannot recover for an injury if his own fault or negligence directly and materially contributes thereto.

We are of opinion that the case should go to a jury again. Although the law was accurately stated by the learned judge at the trial, we are not satisfied that it was sufficiently regarded by the jury.

New trial granted.

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

SAMUEL J. ESTEN *et al. vs.* JOHN H. JACKSON.

Knox. Decided June 7, 1878.

Equity.

A court of equity will not compel the debtor or his grantee to convey to the creditor land levied upon in order to make available a levy which is not conformable to the statute.

BILL IN EQUITY, alleging that the defendant brought a writ of entry to recover certain premises in Knox county against the plaintiffs, now pending; that the premises formerly belonged to Brown, now deceased; that Brown conveyed them to Tolman, October 12, 1855, from whom the defendant derived his title; that Sidelinger, Hammond, Wood & Son, Harrington, and Burpee, having claims against Brown, brought suits and each recovered judgment against him, October term, 1856, upon which executions were issued and levied upon these premises; that the creditors conveyed to Sleeper and he to the plaintiffs, June 13, 1868, who then took possession and retained it; that action was commenced by one Morse, in 1865, against Sleeper, in which it was decided that the levies of Wood & Son, Harrington, and Burpee were invalid, because no reason was assigned for levying upon undivided shares, and Hammond's share was invalid because it did not appear by whom one of the appraisers was chosen; that the original executions of Wood & Son, Harrington, and Burpee cannot be found, so that plaintiffs are unable to have an amendment of these levies made, but that Hammond's levy is on file; that the officer who made the levies is ready to amend them so as to make them all valid, but that in the case of the three levies where the executions are lost, they cannot be amended, and that the plaintiffs are therefore unable to perfect their title.

The plaintiffs further alleged that the deed from Brown to Tolman was without consideration and void as to Brown's creditors; that Joseph Jackson had knowledge of it when he received his deed from Tolman, and that the defendant had knowledge of the same fact when he received his deed.

The prayer was that the defendant be restrained from prosecut-

ing his action at law, and that he be compelled to convey the premises to the plaintiffs.

The defendant demurred; and the plaintiffs joined in the demurrer.

A. S. Rice & O. G. Hall, for the plaintiffs, argued from the following brief:

I. Jurisdiction. R. S., c. 77, § 5. Acts of 1874, c. 175. *McLarren* v. *Brewer*, 51 Maine, 402.

II. The possessory and equitable title of plaintiffs is good against the fraudulent title of defendant. *Morse* v. *Sleeper*, 58 Maine, 329. *Low* v. *Marco*, 53 Maine, 45. Same parties reversed, *Marco* v. *Low*, 55 Maine, 549. The loss of the executions alone prevents the perfecting of title of defendants; and plaintiffs ought not to be allowed to take fraudulent advantage of that casualty. Earl of Oxford's Case, embodied in 2 Leading Cases in Equity, pt. 2, p. 76. And editor's notes on same, pp. 85, 86, 87, 97, 101, 109.

III. Plaintiffs are entitled to a release from defendant, and to the remedies specifically enumerated in the prayer of their bill.

IV. And equity is the only adequate, complete and appropriate process for their relief. See cases above cited. *Devoll* v. *Scales*, 49 Maine, 320. *Heath* v. *Nutter*, 50 Maine, 378. *McLarren* v. *Brewer*, above cited. 3 Dan. Ch. Pl. Prac. 1725 *et seq.*

A. P. Gould & J. E. Moore, for the defendant.

I. As to the share levied on by Sidelinger, no defect in the plaintiffs' title is alleged in the bill; as to the share levied on by Hammond, the bill alleges that the only defect in it is amendable, and that the levy is on file and the officer ready to amend it. As to these two shares, the plaintiffs having a plain defense at law to the defendant's writ of entry, a court of equity has no authority to interfere. High on Injunctions, § 63.

II. As to the other three shares, the bill has no equity. The plaintiffs mistake in assuming that a deed by one indebted, without a valuable consideration, is absolutely void as against creditors, not voidable merely. It is good against the grantor, and against his creditors unless avoided by a subsequent levy or con-

veyance. A void levy conveys nothing. A court of equity will not interfere to help a man acquire title under a void levy, even by amendment. Much less will they compel the owner of the legal title to convey the premises to a party holding a void levy without amendment. *Young* v. *McGown*, 62 Maine, 56.

The distinction between a defective deed and a defective levy, in respect to the right which the levying creditor will acquire as compared with the right acquired by the grantee, is pointed out in *Jewett* v. *Whitney*, 51 Maine, 233, 244, 245.

WALTON, J. If the court should once hold that a void levy upon real estate may be made available by compelling the debtor or his grantee to convey the land levied upon to the creditor or his grantee, we cannot doubt that the inconvenience that would result from the rule thus established would be far greater than any possible good that could ever result from it. The public statutes of the state declare how levies shall be made. To hold that these provisions may be disregarded, and yet a good title be obtained in equity, and one which, by a decree of this court, may be converted into a good title in law, would be an evasion of the statute, and so unsettle the title to real estate thus situated that its market value would be very much impaired if not destroyed. We cannot consent to establish such a precedent. The power to grant relief in such cases was virtually denied in *Young* v. *McGown*, 62 Maine, 56.

Bill dismissed with costs for defendant.

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

DAVIS TILLSON *vs.* LEVI M. ROBBINS.

Knox. Decided June 7, 1878.

Libel.

There is a well settled distinction between written or printed and mere verbal slander in respect to its actionable character. Much, which if spoken would not be actionable without averment of extrinsic facts or allegation and proof of special damage, when written or printed is in itself a substantial cause of action.

In a suit for libel in a newspaper, though no special damage is alleged, and no averment of such extrinsic facts as might be requisite to make the article published import a charge of crime against the plaintiff are made, the action is nevertheless maintainable if the published matter is such as, if believed, would naturally tend to expose the plaintiff to public hatred, contempt or ridicule, or deprive him of the benefits of public confidence and social intercourse.

The defendant published in a newspaper the following words: "The Hurricane Vote. Again we have to chronicle most atrocious corruption, intimidation and fraud in the Hurricane island vote, for which Davis Tillson is without doubt responsible, as he was last year." *Held*, that the publication was actionable without extrinsic averments to communicate its precise import, and without any allegation of special damage.

ON EXCEPTIONS by the defendant to the overruling of his demurrer to the declaration.

LIBEL, in two counts, for words printed in a newspaper, the Rockland Opinion, September 15, 1876. The first count declares for a libel against the plaintiff as an individual, in these words: "The Hurricane Vote. Again we have to chronicle most atrocious corruption, intimidation and fraud in the Hurricane island vote, for which Davis Tillson is without doubt responsible, as he was last year."

The second count declares for a "libel of and concerning the plaintiff in his business" of merchant and contractor in the same words with these added: "Hurricane island is all owned by Davis Tillson, an intense partisan and unscrupulous politician. It is leased to government and contains quarries from which is taken granite for public buildings. This granite is bought by government of Tillson, and is there cut by men who receive about $3.50 per day. On all expenditures Tillson has a gratuity of 15 per

cent, for which he renders no equivalent, unless the lease of the island and its facilities be deemed such."

The declaration, omitting the first and formal part, alleges the publication in the "Rockland Opinion, containing therein the false, scandalous, defamatory and opprobrious matter following of and concerning the said Davis Tillson; that is to say," and proceeds as follows:

"'The Hurricane Vote. Again we have to chronicle most atrocious corruption, intimidation and fraud in the Hurricane island vote, [meaning the vote given at the election, September 11, 1876] for which Davis Tillson [meaning the plaintiff] is without doubt responsible, as he [meaning the plaintiff] was last year.' Meaning and intending thereby to say and convey to the public mind the impression that the said Davis Tillson had been proved guilty a year ago of the crime of corruption, intimidation and fraud, and further meaning and insinuating thereby that said Davis Tillson, before the time of writing and publishing of the said libel, had been guilty of the base and atrocious crimes of corruption, intimidation and fraud, at the election, held on that island on the eleventh day of September, A. D. 1876, in which the inhabitants of said island, in the town of Vinalhaven, gave their votes for a member of congress, governor, a senator in the state legislature, county officers, and a representative to the legislature. And the said defendant thereafterward on the same day caused to be sent and delivered through the mail and otherwise the libel aforesaid," etc.

The second count is similar, in its innuendoes and in its want of averments and colloquium, to the first count.

The presiding justice overruled the defendant's demurrer to the declaration; and the defendant alleged exceptions.

A. P. Gould & J. E. Moore, for the defendant.

I. Unless the words set out as libelous are in themselves actionable without any reference to other matters, the declaration is bad. In such action there should be averment, colloquium and innuendo: averment, to make certain what is generally or doubtfully expressed; colloquium, to show that the words were in

reference to the matter of the averment; innuendo, as explanatory of the subject matter, sufficiently expressed before, and of such matter only. *Sturtevant* v. *Root*, 27 N. H. 69, 73. *Van Vechten* v. *Hopkins*, 5 Johns, 211, 219. *Patterson* v. *Wilkinson*, 55 Maine, 42. *Carter* v. *Andrews*, 16 Pick. 1. *York* v. *Johnson*, 116 Mass. 482, 485, 486. *Emery* v. *Prescott*, 54 Maine, 389, 392, and cases. *Small* v. *Clewley*, 60 Maine, 262. *Brown* v. *Brown*, 14 Maine, 317. *Snell* v. *Snow*, 13 Met. 278, 282.

The recital by way of innuendo that the defendant intended to charge the plaintiff with the crime of intimidating voters at a state or national election is *nil*, the declaration containing no averment of such election, nor that Hurricane island is a voting precinct, or within the jurisdiction of the United States.

Nor is there any colloquium that the words were used in reference to any such vote or election, if any had been averred.

The second count says the defendant did write and publish a certain "libel of and concerning the plaintiff, in his business aforesaid," but does not say that the words set out are of that character, but that the paper in which the libel was published "contained therein this false [etc.] matter, following," etc. It not being alleged that the words were spoken of and concerning the plaintiff's business, no innuendo can supply the defect. *Clement* v. *Fisher*, 7 Barn. & Cress. 459. 14 E. C. L. 209. *Barnes* v. *Trundy*, 31 Maine, 321, 323, 324. *Bloss* v. *Tobey*, 2 Pick. 320, 321.

If words are actionable by reason of special damage, such damage must be averred and proved as laid. *Barnes* v. *Trundy*, 31 Maine, 321, 324.

II. The words are not in themselves actionable. Those in the first count imply that the plaintiff was not guilty of corruption, intimidation and fraud, but that somebody else was, and that the plaintiff might have prevented it.

D. N. Mortland & O. P. Hicks, for the plaintiff.

BARROWS, J. The defendant's criticisms upon the writ to which he has demurred would be pertinent if the case were one

of mere verbal slander. But, in respect to the supposed requirement that, in order to maintain an action for damages where no crime is imputed, special damage must be alleged and proved, a distinction has been long and uniformly maintained between mere words and written or printed slander. Holt's Law of Libel, First Am. Ed. 218–223. Much, which if only spoken might be passed by as idle blackguardism doing no discredit save to him who utters it, when invested with the dignity and malignity of print, is capable by reason of its permanent character and wide dissemination of inflicting serious injury.

The cases, ancient and modern, where this distinction has been regarded are numerous. A reference to a few of them will serve all the purposes of a more elaborate discussion.

Lord Holt says "scandalous matter is not necessary to make a libel. It is enough if the defendant induce an ill opinion to be had of the plaintiff, or to make him contemptible and ridiculous." *Cropp* v. *Tilney*, 3 Salk. 226.

To say of a man "he is a dishonest man," is not actionable without special damage alleged and proved; but to publish so, or to put it upon posts, is actionable. *Austin* v. *Culpepper*, Skin. 124.

In *Villars* v. *Monsley*, 2 Wils. 403, the court say: "There is a distinction between libels and words; a libel is punishable both criminally and by action, when speaking the words would not be punishable either way. For speaking the words rogue and rascal of any one an action will not lie; but if those words were written and published of any one an action will lie. If one man should say of another that he has the itch, without more, an action would not lie; but if he should write those words of another and publish them maliciously, as in the present case, no doubt but the action well lies."

In another case, where the defendant had applied the epithet "villain" to the plaintiff, in a letter to a third person, and the plaintiff, though alleging, failed to prove any special damage, the court ordered judgment for the plaintiff, expressing the opinion that "any words written and published, throwing contumely on the party, are actionable." *Bell* v. *Stone*, 1 Bos. & Pul. 331.

In one of Christian's notes to Blackstone mention is made of a case where a young lady recovered £4000 damages for reflections upon her chastity published in a newspaper, though she could not under English laws, without alleging special damage, such as loss of marriage or the like, have maintained an action for verbal slander containing the grossest aspersions upon her honor.

In *Janson* v. *Stewart*, it was held that to print of any person that he is a swindler is a libel and actionable; for it is not necessary, in order to maintain an action for libel, that the imputation should be one which, if spoken, would be actionable as a slander.

In *Thornley* v. *Lord Kerry*, 4 Taun. 355, the words of the alleged libel as declared on were, "I pity the man (meaning the plaintiff) who can so far forget what is due to himself and others as, under the cloak of religion, to deal out envy, hatred, malice, uncharitableness and falsehood." Mansfield, chief justice of the common pleas, pronouncing judgment for the plaintiff in the exchequer chamber at Easter term, 1812, while he declared himself personally disposed to repudiate the distinction between written and unwritten scandal, says: "I do not now recapitulate the cases, but we cannot, in opposition to them, venture to lay down at this day that no action can be maintained for any words written, for which an action could not be maintained if spoken."

For later English cases maintaining the same doctrine see *McGregor* v. *Thwaites*, 3 Barn & Cress. 24, E. C. L. R. vol. 10. *Clement* v. *Chivis*, 9 Barn. & Cress. 172, E. C. L. R. vol. 17. *Woodard* v. *Dowsing*, 2 Man. & R. 74, E. C. L. R. vol. 17. *Shipley* v. *Todhunter*, 7 Car. & P. 680, E. C. L. R. vol. 32, p. 690. *Parmiter* v. *Coupland*, 6 Mee. & W. 105.

The American cases on this point follow in the same line with the English. *Runkle* v. *Meyer*, 3 Yeates, 518. *McCorkle* v. *Binns*, 5 Binn. 354. *McClurg* v. *Ross id.* 218. *Dexter et ux.* v. *Spear*, 4 Mas. 115. *Dunn* v. *Winters*, 2 Humph. 512. *Clark* v. *Binney*, 2 Pick. 113, 116. *Stow* v. *Converse*, 3 Conn. 325. *Hillhouse* v. *Dunning*, 6 Conn. 391. *Shelton* v. *Nance*, 7 B. Mon. 128. *Mayrant* v. *Richardson*, 1 Nott & M. (S. C.) 210. *Colby* v. *Reynolds*, 6 Vt. 489.

It is true that some able jurists agree with Mansfield, C. J., in

doubting whether this distinction between verbal and written or printed slander is well founded in principle, while they recognize the force of the authorities which sustain it. Others maintain it upon reason as well as authority. The subject is discussed with numerous references to cases, old and new, English and American, in a note to *Steele* v. *Southwick*, in 1 Hare & Wallace's American Leading Cases, 5th Ed. 123.

Steele v. *Southwick*, was an early case in New York, decided in 1812 and reported, 9 Johns. 214. It was there held that the published words complained of, if they did not import a charge of perjury in the legal sense, were nevertheless libelous as holding the plaintiff up to contempt and ridicule, as regardless of his obligations as a witness and unworthy of credit, and that they were consequently actionable. We concur entirely in the remarks of the court that, "to allow the press to be the vehicle of malicious ridicule of private character would soon deprave the moral taste of the community and render the state of society miserable and barbarous. It is true that such publications are also indictable as leading to a breach of the peace; but the civil remedy is equally fit and appropriate." We do not mean to say that every indictable libel would be a good foundation for a civil action.

Attention is called in *Stone* v. *Cooper*, 2 Denio, 293, 294, to one class, libels upon the dead, as being one where no private injury would probably result from the publication.

It may perhaps be fairly held, as in that case, that where no special damage is averred or proved, "the nature of the charge itself must be such that the court can legally presume he has been degraded in the estimation of his acquaintance or of the public, or has suffered some loss either in his property, character or business, or in his domestic or social relations, in consequence of the publication."

Whether a mere injury to the feelings resulting from the publication of an indictable libel would of itself furnish ground for the maintenance of a civil action we need not now inquire.

It is sufficient to dispose of this demurrer to hold that in an action for written or printed slander, though no special damage is alleged, and no averments of such extrinsic facts as might be

requisite to make the publication in question import a charge of crime are made, the action is nevertheless maintainable if the published charge is such as, if believed, would naturally tend to expose the plaintiff to public hatred, contempt or ridicule, or deprive him of the benefits of public confidence and social intercourse.

It cannot be successfully contended that the statements alleged in this writ to have been published by the defendant in his newspaper of and concerning the plaintiff would not, if believed, tend strongly to deprive him of public confidence and expose him to public hatred and contempt. It is not necessary to inquire whether the pleader has not carelessly undertaken to convey by innuendo what should have been made the subject of distinct averments if the publication was to be regarded as importing a charge of a criminal offense against the plaintiff.

Exceptions overruled.

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

INHABITANTS OF WELD *vs.* INHABITANTS OF FARMINGTON.

Franklin. Decided June 7, 1878.

Pauper. Evidence.

A record of town orders, given by a town for the support of a pauper on the ground that he had a settlement therein, is admissible in evidence on the question of his settlement, not conclusive as an estoppel, but for the jury to weigh.

ON EXCEPTIONS AND MOTION of the defendants to set aside the verdict which was for the plaintiffs and for a new trial on the ground of newly discovered evidence.

ASSUMPSIT, for supplies furnished to Abner B. Crocker and family as paupers of the defendant town.

The only issue raised and tried was the settlement of the pauper, Abner B., in the defendant town. It was not claimed by the plaintiffs that Abner B. ever gained a settlement there in his own

right or that Hiram Crocker, the father of Abner B., ever did, but it was claimed that Jabez B. Crocker, the father of Hiram and grandfather of Abner B., gained a settlement in the defendant town by living and having his home therein March 21, 1821; and that Hiram was a minor then and derived his settlement from Jabez, and that Abner derived his settlement from Hiram.

The defendants besides controverting the above issue presented by the plaintiffs, offered evidence tending to show that Hiram, the father of Abner, gained a settlement in New Vineyard by living and having his home there continuously from 1853 to 1861; and the plaintiffs, not denying the residence during that time, offered evidence tending to show that Hiram was in need and received supplies from the town of New Vineyard, in 1857.

The defendants requested the presiding justice to instruct the jury as follows:

"I. That even if they find that Jabez B. Crocker had his home in Farmington, March 21, 1821, they would not be authorized to find a verdict for the plaintiffs without sufficient evidence that neither Hiram Crocker, the son of Jabez, nor Abner, the pauper named in the writ, ever gained a settlement in his own right.

"II. That no presumption of either law or fact will authorize the jury to find that they (Hiram and Abner) did not gain a settlement in their own right in the fifty-four years that elapsed between 1821 and the time the supplies sued for were furnished.

"III. That unless it is proved by a preponderance of evidence that Hiram Crocker was a minor and having his home in the family of Jabez, his father, on March 21, 1821; or being of age, had his home in Farmington on that day, the plaintiffs cannot recover, even if they find that Jabez had his home in Farmington on that day.

"IV. The overseers of the poor or selectmen have no authority by their mere acts or declarations to change the settlement of a pauper from one town to another, and confess away the rights of a town and subject it to liabilities and burdens by any of their managements. This is no part of their duties."

These requests were not given except as appears in the charge, which made part of the exceptions; and to the refusal to give

them and to so much of the charge as relates to the points contained in the requests, and to the admission of town orders given by the selectmen of Farmington from time to time from 1839 to 1851, and to so much of the charge as relates to them and to their effect and weight as evidence, the defendants alleged exceptions.

The instruction given on the point raised by the fourth request appears in the opinion.

J. Baker with *S. C. Belcher*, for the defendants.

There were but two issues of fact to the jury: 1. Did the grandfather have his home in the Rowen house in the defendant town, March 21, 1821; 2. Were supplies furnished Hiram in 1857, so as to prevent his settlement in New Vineyard. The town orders from 1839 to 1851 could have no bearing on these issues.

We contend these orders are not admissible to affect the settlement of a pauper in any case. The liability of towns to support paupers is created by statute. The statute establishes eight rules for fixing the settlement of paupers, depending upon certain facts as to the residence of the pauper or his ancestors, and none of them provides for admissions by towns or town officers. If admitted at all, the jury may render a verdict solely on the force of the orders, and a town be made liable for the support of a pauper outside of statute rules,—by a sort of judicial legislation.

But it may be said that a town having by its officers admitted the settlement of a pauper to be therein and rendered him support, is estopped to deny his settlement. This, too, would be a new mode not found in the statute; the statute itself has specified the instances in which a town may be estopped to deny a settlement. 1. When a judgment has been recovered between the same towns for the support of the same pauper. R. S., c. 24, § 25. 2. When a town has failed to return an answer within two months. § 28. These are the only estoppels recognized by the statute, and the expression of these is the exclusion of others. *Bridgewater* v. *Dartmouth*, 4 Mass. 273-5.

But it is said that the acts of the overseers within the scope of their authority bind the town, and that when they relieve persons

destitute in their town, they are within their duty as imposed by statute, and the town must pay. That may be admitted. The acts of the overseers in drawing orders are binding between the parties to the orders. A contract for supplies to support paupers may be enforced in law against the town by the other contracting party, but by no one else. The other parties to the orders were not in court. It is denied that they were admissible for the collateral purpose to affect the settlement.

The court, by refusing to give the instructions requested and negativing the claim of the defendants, gave the jury to understand that the request was not good law, and that they might consider not only the acts of the overseers, but their declarations also.

Not only are the declarations and admissions of the overseers inadmissible to affect the settlement of a pauper, but the action and contracts of the town itself are equally futile and void. *Peru* v. *Turner*, 10 Maine, 185. *Turner* v. *Brunswick*, 5 Maine, 31. *New Vineyard* v. *Harpswell*, 33 Maine, 193. *Veazie* v. *Howland*, 47 Maine, 127. *Bridgewater* v. *Dartmouth*, 4 Mass. 273. *Brewster* v. *Harwich*, 4 Mass. 278. *Boylston* v. *Boylston*, 15 Mass. 261. *Norton* v. *Mansfield*, 16 Mass. 48. *Northfield* v. *Taunton*, 4 Met. 433. *Dartmouth* v. *Lakeville*, 7 Allen, 284. *New Bedford* v. *Taunton*, 9 Allen, 207. *Dartmouth* v. *Lakeville*, 9 Allen, 211.

H. L. Whitcomb with *E. Field*, for the plaintiffs.

VIRGIN, J. The principal issue submitted to the jury was, whether Abner B. Crocker, at the time of receiving the supplies sued for, had his settlement in the defendant town. The plaintiffs did not pretend that he gained one there in his own right, but claimed that he derived it from his father, Hiram Crocker. Neither did they claim that Hiram ever gained a settlement in Farmington in his own right, but that he, too, had a derivative settlement there from his father, Jabez B. Crocker, who, as they alleged, acquired his by "having his home therein, on March 21, 1821, without having received supplies as a pauper within one year before that date." R. S., c. 24, § 1. VII.

To sustain their respective sides of this issue and the questions bearing thereon, the parties introduced a large number of witnesses, together with considerable documentary evidence, comprising records of assessments, voting lists, etc. Among other things, the plaintiffs were permitted, against the seasonable objection of the defendants, to read to the jury from the order book of Farmington, the record of thirty-six orders, of various amounts and dates from September 25, 1839 to May 10, 1851, all drawn to pay the expenses of Hiram Crocker and family, not only while he was residing in Farmington, but for expenses incurred elsewhere, and for moving them back to Farmington.

The defendants presented four requests for instructions, none of which were given in terms, but all in substance so far as they were applicable. The defendants now contend that the fourth should have been given in terms. The jury were instructed in substance that the acts of town officers bind their town only when they are acting within the scope of their duty; that the statute requires overseers of the poor to relieve a person found destitute in their town at the town's expense; and that when thus acting their acts bind the town; that is, that the town is bound to pay the bills, and having paid, cannot recover back. The presiding justice then submitted to the jury these acts as matters of evidence; and after suggesting the liability of officers to make mistakes; that they may not have thoroughly investigated before acting, proceeded as follows: "What weight will you give these acts of the overseers on the subject as to where the pauper settlement of Hiram Crocker was. Because they only pertain to Hiram Crocker. Not that they will conclude the town. They are not conclusive as to where Hiram Crocker's real settlement was. They paid the bills on the ground that his settlement was in this town; but it may not have been. They are simply evidence for you to weigh with all the other evidence in the case," etc.

Forgetting their first request for instructions, the defendants contended at the argument of these exceptions that there was no question for the jury as to where Hiram Crocker's settlement was during the twelve years covered by the orders. There was no affirmative evidence that he acquired a settlement out of Farming-

ton, unless while living in New Vineyard, from 1853 to 1861. And the plaintiffs introduced this record as evidence tending to show that, for twelve years prior to 1853 at least, he was supported both in and out of Farmington by that town. Not that the town was bound by any admission, or by the recital of any incidental fact contained in the orders, (as was contended by the plaintiffs in *New Bedford* v. *Taunton*, 9 Allen, 207) but that these orders drawn by the officers and paid by the town constituted a course of action or conduct in times past tending to show that Hiram's settlement, during the period covered by the orders, was in Farmington. When the first order was drawn the facts with which they were dealing, and which it seems they supposed justified their action, were thirty-eight years younger than when the town was contesting their force at the trial. We have no doubt that they were legally admissible. In fact, the question is *res adjudicata* in this state.

In *Harpswell* v. *Phipsburg*, 29 Maine, 313, an action to recover for pauper supplies, evidence of a former suit by *Harpswell* v. *Phipsburg*, and a settlement of what was claimed therein for the support of the same pauper, was held to have been properly admitted. Wells, J., speaking for the court said: "What is done by the officers of a town, within the scope of their authority must necessarily affect the town in the same sense as if done by the town itself. As where a person is taxed, or his name is entered on the list of voters and he is allowed to vote, it is evidence of residence where he is so taxed or votes, not conclusive, but its weight and effect are to be determined by the jury. *Westbrook* v. *Bowdoinham*, 7 Maine, 363." After illustrating the rule in various ways, the opinion proceeds: "It [the settlement of former suit] was not a mere declaration made by an overseer, as was the case in *Corinna* v. *Exeter*, 13 Maine, 321, but an act done by two of the overseers. And all that was decided in *Peru* v. *Turner*, 10 Maine, 185, (cited by the defendants in the case at bar) was, that the note signed by overseers of Peru, and which contained an admission that the pauper was chargeable to Peru, was not conclusive by way of estoppel. The question made in that case was upon the effect, and not upon the admissibility of the evidence."

So in *New Vineyard* v. *Harpswell*, 33 Maine, 193, (also cited by the defendants) where it was contended that the defendants were estopped to deny the pauper's settlement to be in Harpswell, by reason of supplies having been furnished for the support of the pauper, for the six years next preceding the date of those sued for, by her brother, under a contract in writing with their overseers. But the court held that the town was not estopped, using the following language: "It is not within the official authority or duty of overseers of the poor to create or change the settlement of paupers, and neither their acts nor their admissions to that extent can bind or estop towns. Nor will a town be estopped to contest the settlement, by the mere fact that it has furnished supplies and support for the pauper. *Peru* v. *Turner*, 10 Maine, 185. *Harpswell* v. *Phipsburg*, 29 Maine, 313."

There is nothing in *Veazie* v. *Howland*, 47 Maine, 127, or in the Massachusetts cases cited by the defendants, inconsistent with the cases mentioned in this state.

The question has been before the court in New Hampshire several times and with the same result. While it is held there, as in this state and Massachusetts, that the settlement of paupers is settled by the statute, and cannot be changed by the acts of towns or their officers, otherwise than in accordance with the statutes, it is also held that the acts of the selectmen in paying bills incurred by other towns for the support of a pauper, may be shown in evidence, as tending to prove any fact necessary to establish the settlement of such pauper in that town. *Thornton* v. *Campton*, 18 N. H. 20, and cases cited. Also *Leach* v. *Tilton*, 40 N. H. 473.

We do not perceive the force of the proposition that, by refusing to give the fourth requested instruction, the charge "gave the jury to understand that the request was not good law, and that they might consider not only the acts of the overseers, but their declarations also;" for the requests were put into the hands of the presiding justice before the arguments to the jury, who never saw or heard that there were any requests.

So far as the motion is concerned, we see no sufficient cause for disturbing the verdict. There were many witnesses, all of whom

the jury saw, and most of whom, being residents of the vicinage, they must have known. The evidence is conflicting. We cannot say the verdict is wrong; for there is ample testimony, if true, to sustain it, and its truthfulness the jury have deliberately passed upon. The motion based on newly discovered evidence is not prosecuted.

Motion and exceptions overruled.

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

FREEMAN F. GOODENOW *et al. vs.* DANIEL ALLEN *et al.*

Androscoggin. Decided June 11, 1878.

Landlord and tenant.

The plaintiffs, being tenants at will of a store owned by the defendants as real estate, mortgaged to the defendants a building, annexed to and connected with the store, which was owned by the plaintiffs as personal property; *Held*, that a description of the mortgaged property as "a building and appurtenances," would not have the effect to surrender or transfer to the defendants the right which the plaintiffs had to occupy the store.

The letting of real estate to a person on a verbal agreement that he shall pay rent while he remains in possession, constitutes a tenancy at will.

Whether a tenancy at will, under a verbal lease, can be determined in this state after a time fixed and limited by agreement or upon the happening of a certain event, the statute providing that tenancies at will may be determined by thirty days notice "and not otherwise," *quære.*

ON EXCEPTIONS.

TRESPASS, for breaking and entering the plaintiffs' store in Lewiston and holding them out from September 11, 1876, to December 27, 1876, and breaking up their business. Plea, general issue.

The defendants were lessees of a lot of twenty-five feet front by one hundred feet, with store thereon fronting on Lisbon street, and extending back about one-half the length of the lot, the lease running from April 1, 1872, to April 1, 1877, at a quarterly rental of $87.50. The defendants, while occupying under their lease, erected another building in the rear of the store of the

same width, covering the rest of the lot, and joined and nailed it to the store, and occupied the two buildings thus united for a furniture manufactory and sale store, with an upholstery room, paint and carpenter shops connected; and there was evidence that the buildings could not be used separately, there being no way of entering the rear building except through the one in front.

The defendants, in November, 1875, sold their stock in trade in the two buildings, together with the rear building erected by them, to the plaintiffs for $8,822, calling the rear building $1,000 and the stock $7,822, and gave the plaintiffs leave to occupy both buildings while they remained. In payment of $4,750, the plaintiffs gave their notes to the defendants, secured by mortgage on the stock and rear building with appurtenances, with a provision therein "that, if the said stock shall at any time be reduced in value to a less amount than $6,500, the said Allen & Maxwell may enter and take possession of same without notice. Provided, also, that it shall and may be lawful for said Freeman F. and Frank to continue in possession of said property without denial or interruption by said Allen & Maxwell until condition broken."

September 11, 1876, after condition broken, a $500 note due August 17, 1876, not being paid, the defendants entered and took the stock of goods upon a replevin writ, then amounting to only $4,400, and took possession of the store, the front and rear buildings, under their mortgage, and held the plaintiffs out, the alleged trespass. The plaintiffs had the permission of the defendants, November 15, 1875, to occupy the store by paying rent while they remained, and the plaintiffs paid the rent to the first lessor, Whitman, to July 1, 1876, only, and after that the defendants paid it.

The defendants justified under their mortgage and claimed the right to enter and take possession of both buildings, and that the plaintiffs were tenants at sufferance after breach.

The presiding justice ruled that the mortgage to the defendants gave them no right to enter and take possession of the real estate, and hold the plaintiffs out; that the word "appurtenances" in the mortgage could give no such right, because real estate would not pass as appurtenant to personal property; that in his opinion the relation of plaintiffs to defendants was that of tenants at will,

it being admitted that the plaintiffs took possession of the premises under an oral agreement with the defendants, and occupied in subordination to their title. The defendants then claimed that under the relation of tenants at will there was evidence by the mortgage, the conduct of the parties, the subject matter of the transaction, the nature and value of the furniture and necessity of keeping it in this store, which after breach of condition of mortgage might amount to mutual consent to terminate the tenancy at will, and plaintiffs would be tenants at sufferance and defendants would have the right to enter and occupy the buildings and dispossess the plaintiffs; but the presiding justice ruled otherwise, and instructed the jury that there was no evidence in the case which would justify them in finding that the tenancy at will was terminated by mutual consent. Verdict for plaintiffs $350; and the defendants alleged exceptions.

M. T. Ludden, for the defendants.

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

PETERS, J. The plaintiffs were tenants at will under the defendants (lessees under others) of a lot of land with a store upon it. They were themselves the owners of another building (personal property) situated on the same land, affixed to the rear of the store in such a manner that the two buildings could be used as one. They mortgaged their own building to the defendants, describing it as personal property and as a "building and appurtenances."

A question arose at the trial, whether the word "appurtenances" carried with the title of the building such rights as the plaintiffs had as tenants at will of the store adjoining. The defendants do not set up that the store itself, being real property, could be regarded as appurtenant to the building mortgaged to them, but they contend that the plaintiffs' right of occupancy as tenants at will of the store could be so regarded. We think not. Suppose that the plaintiffs had been the owners of the fee of all the land and the erections upon it, and had sold the building to the defendants outright as personal property, describing it as here described. What would have passed to the defendants under the

words "building and appurtenances" in that case? We do not see why in the case supposed the defendants would not have the same legal right to use and occupy the real estate that they would have here. How long in such case would they be entitled to the use of the store as an appurtenance to the building in its rear, and for what consideration? It is evident that no consideration would have to be paid for it, because the "appurtenances," whatever they are, were bought and paid for in the purchase of the building. Nor do we see why, if they could claim the exclusive use of the store for three and a half months (as here), they might not have the same right for as many years or for all time. The supposed case demonstrates the fallacy of this point of the defendants more fully than the real case does, but in legal effect the two cases are the same. The cases referred to by the counsel for the defendants, where property has been sold under a general description as "a house" or "farm" or "mill" or "wharf" or the like, do not apply in this case, because the property here was sold as personal and in those cases as real estate.

What does the word "appurtenances" mean as used in the mortgage? The defendants say it must mean something. It may mean that the defendants (mortgagees) should for a reasonable time have reasonable modes of access to the building; or it may have been designed to cover fixtures within it; or it may be a word, as is sometimes so, used without any definite purpose or meaning whatever. It would probably puzzle the person who drafted the instrument to decide what was intended by it. It is not required to ascertain the meaning of a word which had no meaning in the mind of the person expressing it. Upon this branch of the case see *Warren* v. *Blake*, 54 Maine, 276; and cases there cited.

It was not, however, admitted that the plaintiffs were tenants at will of the store. We have no doubt that they were. They were let into possession upon an agreement to pay rent while they remained. The occupancy was to be for an uncertain and indefinite time. Those elements most perfectly constitute an estate at will at the common law. It was to be a possession during the joint wills of the parties. It could be determined by the will of

either party. Our statute allows such a tenancy to be determined at the will of either party, but after a certain length of notice has been given.

The defendants seek to avoid the result that follows from the relation of a tenancy at will between the parties, upon another ground. They contend that a tenancy at will created by parol may be a conditional estate, to be determined after a time fixed and limited by agreement, or upon the happening of a certain event, so that the tenancy will come to an end without notice at the expiration of the time or the happening of the event. This has been so decided in Massachusetts and elsewhere. See 1 Wash. Real Prop. book 1, c. 11, § 41; and note. But whether it could be so held in this state, where the statute provides that tenancies at will may be determined by thirty days notice, "and not otherwise except by mutual consent," we do not consider ourselves called upon to determine, because the facts of this case cannot present such a question.

Exceptions overruled.

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

BRUNSWICK SAVINGS INSTITUTION *vs.* COMMERCIAL UNION INSURANCE COMPANY.

Cumberland. Decided June 11, 1878.

Insurance.

M was insured on her dwelling house which was already mortgaged to the plaintiffs, the conditions broken and proceedings commenced for foreclosure, of which the defendant insurance company had no notice. By a clause in the policy the insurance was "payable in case of loss to the plaintiffs to the amount of the mortgage held by them." The policy stipulates, "if the property be sold or transferred, or any change take place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance . . . then . . . this policy shall be void." *Held*, 1. That the insurance was upon the property of M, and not upon the interest of the plaintiffs as mortgagees. 2. That the clause making the insurance payable to the plaintiffs was merely a contingent order: that any violation of the conditions and stipulations of the policy which would defeat the right of the assured to recover upon it, would defeat the right of the plaintiffs. 3. That the foreclosure of the mortgage effected a change of title of the assured by legal process within the meaning of the policy, and the policy thereby became void.

ON REPORT.

ASSUMPSIT on a policy of insurance for $5,000, on a house in Deering, held by them at the time of the loss, by foreclosure of a mortgage for $3,500. The house was of the admitted value of $5,000.

The facts appear in the opinion.

W. Thompson, for the plaintiffs.

The policy shows that when it was issued, the defendants had notice that Mrs. Merrill had a mortgagor's title, and the plaintiffs, a mortgagee's title. Since then neither of them has done any act affecting the title. The equity of redemption expired by lapse of time.

If the right of redemption had not expired before the loss occurred, the defendants would have been liable on the policy for $5,000, payable in part to the plaintiffs, and the residue to Mrs. Merrill. They are not prejudiced in being required to pay the whole to one of the parties instead of dividing it.

J. Howard, N. Cleaves & H. B. Cleaves, for the defendants.

LIBBEY, J. On the 11th day of September, 1874, Sophia B. Merrill was insured in the Narraganset Insurance Company in the sum of five thousand dollars on her dwelling house, and on that day surrendered her policy and in lieu thereof took the one in suit, which was a reinsurance procured by the Narraganset Insurance Company. She had before that time mortgaged the house to the plaintiffs to secure the payment of thirty-five hundred dollars. The condition of the mortgage had been broken, and the plaintiffs had commenced proceedings for foreclosure, but the defendant had no knowledge thereof. The foreclosure was perfected and the title became absolute in the plaintiffs, on the 24th of July, 1875, before the loss.

By a clause in the policy the insurance is "payable in case of loss, to the Brunswick Savings Institution to the amount of mortgage held by them."

The first specification of the conditions and stipulations in the policy, which are declared to constitute the basis of the insurance, among other things, contains the following: "Or if the property be sold or transferred, or any change take place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, . . . then . . . this policy shall be void."

Under this policy, by the well settled rule of law, Sophia B. Merrill is the assured. She was the general owner, had an insurable interest in the property and paid the premium. The insurance was upon her property and not upon the interest of the plaintiffs as mortgagees. *Fogg* v. *Middlesex Mut. F. Ins. Co.* 10 Cush. 337. *Sanford* v. *Mechanics' Mut. F. Ins. Co.* 12 Cush. 541. *Jackson* v. *Farmers' Mut. F. Ins. Co.* 5 Gray, 52. *Hale* v. *Mechanics' Mut. F. Ins. Co.* 6 Gray, 169. *Loring* v. *Manufacturers' Ins. Co.* 8 Gray, 28. *Turner* v. *Quincy Ins. Co.* 109 Mass. 568. *Franklin Sav. Institution* v. *Central Mut. F. Ins. Co.* 119 Mass. 240.

The clause in the policy, "payable in case of loss to the Brunswick Savings Institution to the amount of mortgage held by them," is not an insurance of the plaintiffs' interest in the property, nor an assignment of the policy to the plaintiffs. It is merely a contin-

gent order or stipulation, assented to by the defendants, for the payment of the loss of the assured, if any, to the plaintiffs. It gives the plaintiffs the same right to recover that the assured would have if no such clause had been inserted in the policy. Any violation of the conditions and stipulations of the policy which would defeat the right of the assured to recover upon it, will defeat the right of the plaintiffs. *Bates* v. *Equitable Ins. Co.* 10 Wall. 33. *Grosvenor* v. *Atlantic Ins. Co.* 17 N. Y. 391. *State Mut. F. Co.* v. *Roberts*, 31 Pa. St. 438. *Foote* v. *Hartford Ins. Co.* 119 Mass. 259. *Smith* v. *Union Ins. Co.* 120 Mass. 90. *City Five Cents Saving Bank* v. *Penn. Ins. Co.* 122 Mass. 165.

It remains to be determined whether the foreclosure of the plaintiffs' mortgage was a transfer of, or change in the title of the assured, within the meaning of the first condition and stipulation in the policy. Undoubtedly it was. When the policy was issued the assured had the general title. The plaintiffs' mortgage was an incumbrance. The foreclosure by the mortgagees was by "legal process." It was the process provided by law for the foreclosure of mortgages, and the extinguishment of the title of the mortgagors. When the provisions of the statute were complied with and the requisite time had elapsed, the mortgage, which before was an incumbrance, became absolute, and the alienation of the title of the assured became perfected. *Campbell* v. *Hamilton Mut. Ins. Co.* 51 Maine, 69. *Abbott* v. *Hampden Mut. F. Ins. Co.* 30 Maine, 414.

It is not claimed that the defendants ever consented to the transfer of the title. By the foreclosure the assured ceased to have any title to, or insurable interest in the property insured, and the policy thereby became void.

Judgment for defendants.

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

ELIZA A. TOLMAN *vs.* GEORGE M. HOBBS *et als.*

Hancock. Decided June 12, 1878.

Tax.

The proceedings which work a forfeiture of lands to the state for non-payment of taxes and the steps in making a sale by the state are to be construed strictly, in a controversy between a purchaser from the state and the original owner.

A record of the state treasurer that reads thus: "Previous to said sale, I caused notice of the time and place of sale, and lists of said tracts intended for sale, with the amount of said unpaid taxes, interest and costs, on each parcel, to be published three weeks successively as follows, viz: 1. In the Kennebec Journal, the state paper, a list of all said tracts. 2. In the Ellsworth American, a newspaper printed in the county of Hancock, a list of all said tracts which lie in that county," does not show that he published in such papers the amount of such taxes, &c., &c., but only a list of the lands taxed.

ON REPORT.

WRIT OF ENTRY, for Pickering's island, in the county of Hancock, and in Penobscot bay, near Little Deer island westerly of and contiguous to the town of Deer Isle; the declaration not stating whether or not it lies within the limits of any town. The facts are stated in the opinion.

C. A. Spofford & G. S. Peters, for the plaintiff.

R. S. c. 6, § 42. "Lands not exempted, and not liable to be assessed in any town, may be taxed by the legislature for a just proportion of all state and county taxes."

Sect. 46 provides that lands forfeited for non-payment of taxes may be advertised and sold, by the treasurer of the state. The plaintiff has the deed of William Caldwell as state treasurer, dated September 4, 1872, a valid title, the evidence showing all statute requirements complied with.

E. Hale & L. A. Emery, for the defendants.

The plaintiffs should show that Pickering's island was, in the language of the statute, "not liable to be assessed in any town." It is not enough that the legislature assumed to lay a tax thereon.

It is an inhabited island and likely to be one of those to which

Williamson refers in vol. 1, p. 74, of his History of Maine, as being probably included in the town of Deer Isle. "The terms plantation, town and township, seem to be used almost indiscriminately to indicate a cluster or body of persons inhabiting near each other." Shaw, C. J., in *Commonwealth* v. *City of Roxbury*, 9 Gray, 451, 485. Gray, C. J., uses similar language in *Lynn* v. *Nahant*, 113 Mass. 433, 447.

There is good reason in believing that Pickering's island was included in Deer island plantation when the town of Deer Isle was incorporated by the Massachusetts legislature. Act of January 30, 1789.

The court should take nothing for granted to prop up a tax title to a valuable island owned by the defendants and for which the plaintiff has paid but $19.59.

PETERS, J. It is claimed that the land in dispute was forfeited to the state for non-payment of taxes, and then sold by the state to the demandant. The proceedings creating such forfeiture and sale are to be strictly construed.

By § 46, c. 6, R. S., the state treasurer was required to publish in certain newspapers a list of the land to be sold, with the amount of the unpaid taxes, interest and costs, on each parcel, three weeks successively within three months before the time of sale.

The only evidence of his compliance with this requirement, is contained in the record of the treasurer's doings, a copy of which, by § 49 of chapter before named, is made *prima facie* evidence, in any court, of the facts set forth therein. The record declares thus: "Previous to said sale, and within three months therefrom, I caused notice of the time and place of such sale, and lists of said tracts intended for sale, with the amount of such unpaid taxes, interest and cost, on each parcel, to be published three weeks successively, as follows, viz: 1. In the Kennebec Journal, the state paper, a list of all said tracts. 2. In the Ellsworth American, a newspaper printed in the county of Hancock, a list of all said tracts which lie in that county."

This record asserts that a publication was made of the amount of the unpaid taxes, interest and cost, on each parcel; but does

not state where published. It states that the lists were published in the newspapers named, and there the statement stops. There is no positive and certain statement that anything else was advertised in them. This is not enough.

Action to stand for trial.

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

BYRON D. VERRILL, administrator *de bonis non*, with the will annexed, of Isabella W. Bishop, in equity, *vs.*
L. EUGENE WEYMOUTH, administrator, *et als.*

Cumberland. Decided June 21, 1878.

Will.

The will says: "I place in the hands of M bank shares to hold in trust until my son arrives at the age of thirty-five years, when my son comes in full possession of said bank stock." *Held*, that the shares vested in the son on the death of the testatrix to be held in trust for his benefit till he should arrive at the age named.

The will gives M two dollars per week for life and makes B residuary legatee, and says: "Should B die without issue, all my property is to be equally divided between my mother, brothers and sister." B died leaving a wife and only son, who also died before any distribution of the estate. *Held*, that the personal property in the hands of the administrator vested in B on the death of the testatrix, charged with the annuity to M.

The will says: "I give my house to A during her life; after her decease to B during his life; and after his decease to his children, if any he have; otherwise, to my legal representatives." B died leaving a wife and an infant son, who died before any settlement of the estate. *Held*, that the infant son took a vested remainder in fee simple, in the house, and on his death it descended to his mother.

BILL IN EQUITY, asking the construction of a will.

B. D. Verrill, pro se, as administrator *de bonis non.*

F. M. Ray, for L. E. Weymouth, administrator, and Fannie C. Bishop.

J. H. Drummond & J. O. Winship, for the heirs at law.

LIBBEY, J. This is a bill in equity brought to determine the construction of the will of Isabella W. Bishop. The clauses of

the will which are involved, are as follows: "First, I give and bequeath to my dear beloved mother, Sarah Johnson, fifty dollars, and two dollars per week to her during the remainder of her natural life. Second. . . The brig George Amos, . . it is my will to have said vessel sold, and the money received from said brig put into bank shares, or laid in bank, for my son, De Clare Bishop, said De Clare to use and receive the income only until said De Clare Bishop is twenty-five years old.

"And, lastly, I give and bequeath all the rest of my residue and remainder of my personal property, real estate, goods, bonds, bank shares, vessel property, all not before mentioned above, what kind and nature soever, to my son, De Clare Bishop, . . all the household furniture, all houses, to have and to hold. . . Should said De Clare Bishop die without issue, all of my property is to be equally divided between my mother, brothers and sister. I appoint L. Eugene Weymouth executor of this will. I also appoint said L. Eugene guardian of my son, De Clare Bishop, during his minority. I also place in the hands of said L. Eugene Weymouth the bank shares which I have in the First National Bank of Portland, to hold in trust until said De Clare Bishop arrives at the age of twenty five years, when said De Clare Bishop comes in full possession of said bank stock and all other property left by me." The codicil thereto contains the following provisions: "Whereas by my will I gave to my son, De Clare Bishop, certain shares of the First National Bank, Portland, in trust to be delivered to my said son when he should attain the age of twenty-five years, now I hereby revoke the same so far as the time only is concerned, and instead of my said son having full possession and control of said bank stock at the age of twenty-five years, for good and sufficient reasons I now direct that the said bank stock shall be held in trust as aforesaid till my said son shall attain the age of thirty-five years. And my dwelling house, No. 27 Myrtle street, in said Portland, and now occupied by me, with the lot of land therewith connected, I give and bequeath to my sister, Annie B. Weymouth, during her natural life; after her decease to my son, De Clare Bishop, during his lifetime, and after his decease to his children, if any he have; otherwise, to go to my legal representatives."

The testatrix died in March, 1872, leaving her son, De Clare Bishop, her only heir at law. He died August 2, 1876, after arriving at the age of twenty-one, but before arriving at the age of twenty-five years, leaving a widow, Fannie C. Bishop, and one son, Harry Bell Bishop. He died October 16, 1876, leaving his mother, Fannie C. Bishop, his only heir. At the death of De Clare Bishop his son, Harry Bell, was the only heir at law of the testatrix.

At the time of the death of the testatrix, and at the time of the execution of her will, she owned fourteen shares in the First National Bank of Portland, which passed into the hands of the trustee named in the will.

Three questions are propounded to the court: 1. "As to the disposition of the trust fund in the hands of said trustee; to wit, said bank shares." 2. "As to the disposition of the residue in the hand of your orator as administrator *de bonis non*, with the will annexed, after the decease of the said Sarah Johnson." 3. "The disposition by said will of the reversion of the house, No. 27 Myrtle street, in said Portland."

Under the first question propounded the point to be determined is whether the legacy of the bank stock to De Clare Bishop was vested or contingent. The rule applicable to the question has been stated in many elementary books and decided cases. In 3 Wooddeson, 512, the rule is stated as follows: "If the time of payment merely be postponed, and it appears to be the intention of the testator that his bounty should immediately attach, the legacy is of the vested kind; but if the time be annexed to the substance of the gift, as a condition precedent, it is contingent and not transmissible." In 2 Black. Com. 513, it is stated as follows: "If a contingent legacy be left to any one, as when he attains, or, if he attains the age of twenty-one, and he dies before that time, it is a lapsed legacy. But a legacy to one, to be paid when he attains the age of twenty-one years, is a vested legacy, an interest which commences *in praesenti*, although it be *solvendum in futuro*." *Snow* v. *Snow*, 49 Maine, 159. *Furness* v. *Fox*, 1 Cush. 134.

Was it the intention of the testatrix as expressed in her will

and codicil that the legacy of the bank stock should vest in her son at once on her death, to be held in trust for him by the trustee named till he should attain the age of thirty-five years, when he was to come into full possession of it; or was it her intention that the legacy should vest in him upon the contingency of his attaining the age of thirty-five years? The intention of the testatrix as expressed in her will and codicil must be carried out, unless in conflict with some established rule of law. In ascertaining her intention every clause in her will and codicil bearing upon the question must be considered and have its due weight. By the provisions of the will it appears to have been the intention of the testatrix to dispose of her whole estate. Her son appears to have been the special object of her bounty. After making several specific legacies, she devised all the residue and remainder of her estate, both personal and real, specially naming her bank stock, to him. This clause is followed by the provision that the bank stock should be held in trust by the trustee named till her son should attain the age of thirty-five years, when he should come into the full possession of it. It was to go to her mother, brothers and sister as a part of her estate, only upon the contingency of her son dying without issue. There is no provision in the will disposing of it in case her son should die leaving issue, before arriving at the age named. In her codicil she recites that "whereas by my will I gave to my son, De Clare Bishop, certain shares of the First National Bank, Portland, in trust to be delivered to my said son when he should attain the age of twenty-five years." Here we have the clear declaration of the testatrix of her intention, that she gave it to her son in trust, to be delivered to him on his attaining the age named. The time was not annexed to the legacy itself, but to the payment of it only. From these considerations, we think it clear that the legacy of the bank stock in question, held in trust by L. Eugene Weymouth, vested in De Clare Bishop on the death of the testatrix, and on his death was a part of his estate.

But practically the same result follows if the construction claimed by the collateral kindred should be adopted. If the legacy lapsed on the death of De Clare Bishop before he arrived

at the age of thirty-five years, it would not go to the mother, brothers and sister of the testatrix, as De Clare died leaving issue, and his son, Harry Bell Bishop, was then the only heir at law of the testatrix, as well as of his father.

As to the second question propounded, we think it clear that the remainder of the personal estate now in the hands of the administrator, vested in De Clare Bishop on the death of the testatrix, charged with the payment of the annuity to Sarah Johnson. This is admitted by the learned counsel for the respondents.

The question raised in the third interrogatory is determined by *Leighton* v. *Leighton*, 58 Maine, 63. On the birth of Harry Bell Bishop he took a vested remainder in fee simple in the house, No. 27, and on his death it descended to his mother.

The costs of this suit, including counsel fees on both sides, are to be paid out of the assets in the hands of the administrator, as the suit was brought by the administrator for his guidance in the settlement of the estate. If not amicably adjusted they may be determined by a judge at *nisi prius* or in chambers.

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

WILLIAM H. DEERING *vs.* CITY OF SACO.

York. Decided June 25, 1878.

Arbitration.

The submission recited that the parties "do hereby submit all demands, claims and accounts which the said Wm. H. Deering (plaintiff) has against the city of Saco, on account of the construction of said Gooch street bridge, or growing out of, or resulting from the same in any way," etc. *Held*, that the claim was sufficiently specified and signed and being incorporated into the submission was "annexed," in compliance with R. S., c. 108, § 2; and also *Held*, that not having raised the question of specification, signing and annexation of the claim, before the referees, the defendant waived the objection.

The fact that the contract submitted was in contravention of R. S., c. 3, § 29, was raised before the referees. The submission was unconditional. *Held*, that in the absence of any suggestion tending to impugn the integrity of the tribunal selected by the parties, their decision was final.

ON EXCEPTIONS.

ASSUMPSIT against the city for the plaintiff's services in building a bridge.

The plaintiff first presented to the city this bill: "1874. For labor and materials furnished in building Gooch street bridge, between Saco and Biddeford, $2,950." He then brought an action thereon in the S. J. court, after which the parties referred the plaintiff's claim to three referees selected in accordance with a vote of the city council of Saco. The submission was of "all demands, claims and accounts which the said William H. Deering has against the city of Saco, on account of the construction of the Gooch street bridge, so called, in said Saco, or growing out of, or resulting from the same in any way," to referees named ("which claim is hereto annexed); the said Deering hereby agreeing to withdraw his suit now pending in the S. J. court upon this claim submitted to the referees, and that said suit shall be entered neither party."

The referees awarded the plaintiff $3,264.17 and costs, and returned their award to the S. J. court, to the acceptance of which the defendants filed objections.

"I. Because a specific demand only was submitted by the plaintiff to the referees, and the same was not signed by said plaintiff as required by R. S., c. 108, § 2.

"II. Because the plaintiff, at the time of making the contract, and at the time of furnishing the materials and labor, and building the bridge, was a member of the government of the city, duly selected, qualified, and acting as such for the political year commencing March 2d, 1874, which fact of being an alderman was set forth in the brief statement of the defendant, and admitted by the plaintiff on the hearing before the referees. And the contract was made in violation of R. S., c. 3, § 29, and was void, and the plaintiff is not entitled to recover."

The exceptions state: "Upon the hearing of the objections the presiding justice finds, as matters of fact, that Wm. H. Deering was an alderman of the city of Saco, and that while such, he contracted to build and actually built the bridge named in the submission, and that such facts were proven before the referees under the pleas filed by the defendants at the trial before them. The

evidence to show such facts in this court was admitted against the objection of the plaintiff. But notwithstanding the objections of the defendants to the report and such findings by the presiding justice, the report was by him ordered to be accepted and judgment entered up thereon." And the defendants alleged exceptions.

H. H. Burbank, city solicitor, for the defendants.

I. A specific demand only was submitted to the referees by plaintiff, which demand was not signed by the party making it. This is a statute reference, and, to give the tribunal jurisdiction, must be strictly complied with. The statute (c. 108, § 2) contemplates but two classes of demands, viz: "All demands between the parties," and "specific demands." The case at bar evidently does not fall within the former class; it must come within the latter. *Woodsum* v. *Sawyer*, 9 Maine, 15. *Harmon* v. *Jennings*, 22 Maine, 240. *Pierce* v. *Pierce*, 30 Maine, 113. *Wood* v. *Holden*, 45 Maine, 374. *Mansfield* v. *Doughty*, 3 Mass. 398. *Abbott* v. *Dexter*, 6 Cush. 108.

This not being a reference under rule of court, the law of waiver of jurisdiction, or of insufficient pleadings, does not attach.

II. The contract, under which plaintiff claims to recover, was, and is, void, he being an alderman of defendant city at its execution, and party thereto. R. S., c. 3. § 29. *Greene* v. *Godfrey*, 44 Maine, 25. *Hathaway* v. *Moran*, Id. 67. *Andrews* v. *Marshall*, 48 Maine, 26. *Robinson* v. *Barrows*, Id. 186.

R. P. Tapley, for the defendants, admitted that the contract between the alderman and the city was void, but contended that the matter was left as if no contract had been made and the plaintiff could recover on a *quantum meruit*.

VIRGIN, J. The defendants contend that a specific demand only was submitted, and that it was not signed by the plaintiff as required by R. S., c. 108, § 2.

Our opinion is that the demand was specified in the submission itself, wherein the parties declare that, they "do hereby submit all demands, claims and accounts which the said William H. Deering has against said city of Saco, on account of the construction of

said Gooch street bridge, or growing out of or resulting from the same in any way, to," etc.

The "original bill" presented by Deering to the city, Dec. 7, 1874, a "true copy" of which is certified by the city clerk, was not intended by Deering nor understood by the defendants, to be the demand submitted. That was simply "for labor and materials furnished in building the bridge." It came into the case as a part of the record of the city government and not as a demand annexed to the submission. Whereas the claim submitted included much more. And as the demand submitted is specified in the submission and the submission is signed by the plaintiff, the demand is signed.

If this were doubtful, the defendants knew and fully understood at the hearing before the referees that, no specific demand signed by the plaintiff was literally annexed to the submission; and we have the high authority of Whitman, C. J., in *Harmon* v. *Jennings*, 22 Maine, 240, 242, for declaring that the question not having been raised before the referees, it cannot be entertained now. See also the recent case of *Raymond* v. *Co. Commissioners*, 63 Maine, 110, which we think is decisive of the principle involved in this objection.

The second objection is that, the plaintiff having been one of the aldermen of the city of Saco when he made and performed the contract, the award in his favor is in contravention of R. S., c. 3, § 29. This fact was pleaded before the referees. The parties voluntarily dismissed their action from the docket of the court, and selected another tribunal to which they submitted the whole subject matter of contention, both law and fact.

The submission contained no restriction upon the powers of the referees. The referees save no question for the court to decide; but they have done what they were selected by the parties to do, decided the whole case. Whether they have decided the law of the case as it would have been decided by the court, we have no occasion to inquire. It is sufficient for us to know that the parties make no suggestion tending to impugn the integrity of their tribunal, which unanimously arrived at the conclusion promulgated by their award.

This rule is sustained by numerous decisions of this court, among which are *Portland Manf. Co.* v. *Fox*, 18 Maine, 117. *Brown* v. *Clay*, 31 Maine, 518. *Morse* v. *Morse*, 62 Maine, 443. *Mitchell* v. *Dockray*, 63 Maine, 82.

Exceptions overruled.

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

JAMES P. FARRELL *vs.* BENJAMIN L. LOVETT *et al.*

Penobscot. Decided June 29, 1878.

Promissory notes.

The holder of negotiable paper, taking it for good consideration in the usual course of business without knowledge of facts impeaching its validity, holds it by a good title.

It is not enough to defeat his recovery to show that he took it under circumstances that might tend to excite suspicion.

ON REPORT.

ASSUMPSIT on this note.

"Chester, March 25th, 1876. Five months after date, I, or we, promise to pay James Lawler, or order, one hundred and fifty dollars, for value received, negotiable and payable at Eastern Ex. Company, Lincoln, Me., without defalcation or discount, with 6 per cent interest from date until paid. (Signed) B. L. Lovett. Luther L. Lovett. Witness—G. Stetson. Post Office, Lincoln, county Penobscot."

Indorsed, James Lawler, James P. Farrell.

On the back of the note was printed this:

"I own—— acres of land in my own name in the town of—— county of—— and state of—— which is worth at a fair valuation $—— It is not encumbered by mortgage or otherwise, except the amount of $——, and the title is perfect in me in all respects. I have stock and personal property to the amount of $—— over and above my debts and liabilities, not exempt, and subject to levy and execution, stated and signed at the time the within note

was made and for the purpose of procuring the credit now obtained." There was also a stamp showing it had passed through the Schoharie Co. National Bank.

The defense was fraud in the inception of the note. The defendant testified that he gave the note for $150 to Lawler, a peddler, for goods worth $50; that the package contained two shawls, five dresses and five pieces broadcloth, which he called woolen goods, cut into suits; that he said they were English goods manufactured from the best material; that there was a great failure in England; that these goods were brought from there and purchased in New York by Mr. Farrell; that he was Farrell's agent; that the best shawl was Paisley and was worth $75; the other $18; he refused to give a bill of the prices; said that he was ordered not to sell less than $150 in one sale. The plaintiff judged the Paisley shawl worth about $8; had two suits made up for self and son; they were worn out in six weeks.

George M. Granger, the plaintiff's book-keeper, testified that the plaintiff was an importer of cloths, shawls and silks, etc., in New York; that he had dealings with some fifteen peddlers all over the United States; some of the notes he had printed for and charged to them; he had sold goods to Lawler and taken $20,000 of these notes; his sales were a million dollars annually; that the peddlers bought goods in pieces and had them cut up into suits in the store; that Paisley shawls cost all the way from $3.50 to $500; that parties sometimes found fault with the measure or quality of the goods, but never set up any case of fraud before.

F. A. Wilson & C. F. Woodard with *C. P. Brown & A. L. Simpson*, for the plaintiff.

D. F. Davis, with whom were *G. P. Sewall & J. F. Robinson*, for the defendants.

Appleton, C. J. This is an action upon a promissory note of the defendants, payable to James Lawler or order in five months from date, and indorsed to the plaintiff before maturity, for value.

The defense is that Lawler, to whom it was payable, obtained it through fraud. The note was given for cloths and shawls sold

by him to the defendant Lovett. The goods were spread out by the seller for examination, and examined by the purchaser. The alleged fraudulent representations were that the goods "were English goods, manufactured from the best material; that there was a great failure in England, and that these goods were brought from England and purchased in New York by Mr. Farrell, and that he was agent for him," and that the shawls were Paisley shawls.

None of these statements, even if untrue, would form the basis of an action for deceit, or a defense resting on that ground, unless possibly it be the statement that the goods were manufactured from the best materials. Whether there had been a great failure in England, or Farrell had purchased the goods at a great advantage, were not such representations as, if false, would make the seller liable. *Bishop* v. *Small*, 63 Maine, 12. As to the quality of the goods, whether of the best material or not, the purchaser had ample opportunity to and did examine the goods purchased. Now though the defendant was deceived by the statements of Lawler as to the character and value of the goods sold, "yet," observes Morton, J., in *Brown* v. *Leach*, 107 Mass. 364, "the defendant could not maintain an action of deceit, if the goods were open to his observation, and he could by the use of ordinary diligence and prudence ascertain their quality. He should use reasonable diligence to ascertain their quality. The same principle applies when the purchaser seeks to avail himself of deceit in the defense of a suit for the price of the goods or in reduction of damages." To the same effect is the case of *Mooney* v. *Miller*, 102 Mass. 217.

But it is not important to discuss the relations between Lawler and the defendant, inasmuch as the evidence introduced in the defense fully establishes the fact that the plaintiff took the note before its maturity, for a good consideration, in the usual course of business, and ignorant of any fraud on the part of the indorser, if fraud there was.

The proof was, that the plaintiff was a merchant in extensive business in New York; that Lawler was a peddler who made large purchases of him; that his purchases were from one to five

thousand dollars; that the terms were "cash less five per cent discount thirty days;" that Lawler was in the habit of indorsing notes taken by him in payment, or part payment, of his indebtedness, at a discount of ten or fifteen dollars, dependent upon the size of the note and its time of payment; that the note in suit was thus received before maturity and passed to Lawler's credit; that the plaintiff had previously taken notes to the amount of twenty thousand dollars from him; that the defense of fraud had never before been interposed; that Lawler was no agent of the plaintiff; that he carried on business on his own account, purchasing his goods of the plaintiff and of other large retail houses in New York; that the plaintiff did not know the consideration of the notes but presumed they were for goods sold, and that he was ignorant of any fraud in such sale.

The plaintiff has been guilty neither of fraud nor gross negligence. The purchaser of a note before maturity has a right to assume that it is given on good consideration. The defendant, by his signature, gives notice to all the world of that fact, and promises when due that he will pay it to the person who may at the time happen to be the legal holder of the same. The purchaser is not bound to inquire. The maker has absolved him from that duty. Where he has paid full consideration for the note before due, fraud only will prevent his recovery, or gross negligence equivalent to fraud. In *Goodman* v. *Harvey*, 4 Ad. & E. 870, which was an action on a bill of exchange, Lord Denman says: "We are all of opinion that gross negligence only would not be a sufficient answer, where a party has given consideration for the bill; gross negligence may be evidence of *mala fides*, but it is not the same thing." In *Goodman* v. *Simonds*, 20 How. 343, it was held that a *bona fide* holder of a negotiable instrument for a valuable consideration, without notice of facts impeaching its validity, if indorsed to him before due, may recover upon it, though, as between antecedent parties, the transaction may be without any validity. In *Murray* v. *Lardner*, 2 Wall. 110, it was decided that a purchaser of coupons, in good faith, was unaffected by the want of title of the vendor. Applying the principles applicable to a note indorsed before maturity, Swayne, J.,

says: "Suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title. That result can only be produced by bad faith on his part."

The purchaser of negotiable paper not due is under no obligation to make inquiries as to its origin. Nor is he required to be on the alert for circumstances which might excite suspicion. *Magee* v. *Badger*, 34 N. Y. 247. *Belmont Branch Bank* v. *Hoge*, 35 N. Y. 65. A party taking a bank bill in good faith may recover upon it, although he be guilty of gross negligence in not ascertaining that it had been fraudulently put in circulation. *Worcester County Bank* v. *Dorchester & Milton Bank*, 10 Cush. 488. A note may be negotiated on the last day of grace within business hours and the purchaser acquires a good title, unless he has notice of a defect in the consideration. Gross negligence in not making inquiry is insufficient *per se* to defeat his title, though it may constitute evidence of fraud. *Crosby* v. *Grant*, 36 N. H. 273. In *Smith* v. *Livingston*, 111 Mass. 342, 345, the doctrine of *Goodman* v. *Simonds*, 20 How. 343, is adopted as the true view of the law, notwithstanding previous decisions which are in conflict with it. "The true question," says Morton, J., "for the jury is not whether there were suspicious circumstances, but whether the holder took it without notice of any infirmity or taint. This rule is simple, easily understood and acted on, and in conformity with the general principles of commercial law, which protect the free circulation of negotiable paper. The other rule laid down in some of the cases, that an indorsee for value cannot recover if he takes the note without due caution, or under circumstances which ought to excite the suspicions of a prudent man, is indefinite and uncertain. Circumstances which might excite the suspicion of one man might not attract the attention of another. It is a rule which business men cannot act upon in the ordinary affairs of life with any certainty that they are safe."

In *Phelan* v. *Moss*, 67 Pa. St. 59, it was held that the purchaser, before due and without notice, of a negotiable promissory

note, fraudulent as between the original parties, gets good title thereto, although he took it under circumstances which ought to excite the suspicion of a prudent man. Gross negligence is not enough to defeat the title of the holder for value; *mala fides* must be shown. So it was held in *Hamilton* v. *Vought*, 34 N. J. 187, that, in the absence of bad faith, the taking of a note under suspicious circumstances would not avail to defeat it. A charge, that the indorsee of a note before maturity, the defense being fraud, could not recover if he had notice of such facts and circumstances as would have put a prudent man on inquiry, was held erroneous. The jury should have been instructed that actual notice of fraud was necessary to defeat a recovery. *Lake* v. *Reed*, 29 Iowa, 258. In *Johnson* v. *Way*, 27 Ohio, 374, the same rule was established. In *Hamilton* v. *Marks*, 16 Am. Law. Reg. (N. S.) 37, the questions here presented were examined and determined by the supreme court of Missouri. It was there held that where a negotiable note is taken in good faith and for value before maturity, the holder has a good title, notwithstanding there may have been circumstances connected with the transfer sufficient to have put an ordinarily prudent man on inquiry. In *Moorehead* v. *Gilmore*, 77 Pa. St. 118, 119, Sharswood, J., in delivering the opinion of the court, says: "The latest decisions in England and in this country have set strongly in favor of the principle that nothing but clear evidence of knowledge or notice of fraud or *mala fides* can impeach the *prima facie* title of a holder of a negotiable paper taken before maturity. It is of the utmost importance to the commerce of the country that it should be strictly adhered to, however hard its operations in particular instances." In *Collins* v. *Gilbert*, 94 U. S. Sup. Court, 753, it was held that a negotiable instrument, payable to bearer or indorsed in blank, produced by a transferee suing to recover the contents, is, when received in evidence, clothed with the *prima facie* presumption that he became the holder of it for value at its date in the usual course of business, without notice of anything to impeach his title. "Proof of such facts and circumstances," observes Clifford, J., in delivering the opinion of the court, "as would have put a reasonable man upon inquiry in relation thereto, is not sufficient

to constitute a defense to a suit by the holder. *Lake* v. *Reed*, 29 Iowa, 258. *Gage* v. *Sharpe*, 24 Id. 15." In *Brown* v. *Spofford*, 95 U. S. Sup. Court, 474, the same doctrine was reaffirmed, Clifford, J., remarking that "nothing short of fraud, not even gross negligence, if unattended with *mala fides*, is sufficient to overcome the effect of that evidence (possession), or to invalidate the title supported by that evidence." Mere negligence on the part of the indorsee of negotiable paper is not sufficient to deprive him of the character of a *bona fide* holder. Proof of bad faith will alone deprive him of that character. *Shreeves* v. *Allen*, 79 Ill. 553. *Johnson* v. *Way*, 27 Ohio, 374. *Hamilton* v. *Marks*, 63 Mo. 167. *Harvey* v. *Eppinger*, 34 Mich. 29. *Commercial Nat. Bank* v. *First Nat. Bank*, 30 Md. 11.

The leading case opposed to the decisions cited is that of *Gill* v. *Cubitt*, 3 Barn. & Cress. 466, in which Abbott, C. J., instructed that "there were two questions for their consideration; first, whether the plaintiff had given value for the bill, of which there could be no doubt; and, secondly, whether he took it under circumstances which ought to have excited the suspicions of a prudent and careful man. If they thought that he had taken the bill under such circumstances, then, notwithstanding he had given the full value for it, they ought to find a verdict for the defendant." This the jury did, and the ruling of the presiding judge was sustained. But, as has been seen, the rule then first promulgated in England, has been repudiated there as well as by the supreme court of the United States, and of the several states wherever the question has arisen. Mere suspicion is too vague a basis for any rule. Some are more suspicious than others. One may suspect where another would not.

In this state, though there may be found some remarks indicating an approval of the doctrines of *Gill* v. *Cubitt*, there has been no authoritative decision sustaining the law as stated by Abbott, C. J. In *Aldrich* v. *Warren*, 16 Maine, 465, the ruling of the court was "that, if it was made out that there was fraud in the inception of the note, the burden of proof was on the plaintiff to show that he came innocently by it and paid a fair consideration for it." To this ruling exception was taken. The only

question for adjudication was the correctness of this ruling. The court affirmed it, but in the opinion, Weston, C. J., added an element not put in issue by the exceptions, and not required for the determination of the cause, viz., that the transfer should be "unattended with any circumstances justly calculated to awaken suspicion." This new element must be regarded as a mere *obiter dictum.* In *Perrin* v. *Noyes*, 39 Maine, 384, 385, no such statement of the rule as given by Weston, C. J., was necessary to the decision of the case or was called for by the exceptions. In *Wait* v. *Chandler*, 63 Maine, 257, Walton, J., ruled that evidence to impeach a promissory note in the hands of a *bona fide* purchaser before maturity and without notice, was inadmissible. In other words, he must have actual notice,—a mere knowledge of suspicious circumstances would not be enough. In *Smith* v. *Harlow*, 64 Maine, 510, 511, the court found the purchase of the bonds in controversy to have been made in good faith, for value, and without notice of any fraud. In *Abbott* v. *Rose*, 62 Maine, 194, it was held that a *bona fide* purchaser without notice of any fraud may recover, although, as between the original parties, there was fraud in the inception of the note.

The result, after a careful examination of the authorities, is that the holder of negotiable paper, taking it before maturity for good consideration in the usual course of business, without knowledge of facts impeaching its validity, holds it by a good title.

To defeat his recovery it is not enough to show that he took it under circumstances than ought to excite suspicion in the mind of a prudent man.

Applying the principles established by an overwhelming weight of authority to the facts found in the case at bar, the plaintiff's right to recover is fully established. He had neither actual nor constructive notice of fraud, if it existed. He took the notes for value and in the usual course of business. The fact that a small discount was made is immaterial. It afforded no reason to suspect dishonesty in the obtaining the notes in suit, still less can it be regarded as establishing fraud in their inception, or as affording actual notice of its existence. *Judgment for plaintiff.*

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

BARROWS, J., concurred in the result, because there was no evidence to connect the merchant with the peddler, except the inadmissible statement of the defendant that the peddler said he was the agent for the merchant, which should have been stricken out.

DICKERSON, J., non-concurred, on the grounds that the statement that "the goods were manufactured from the best material" was an assertion of a material fact known by him to be false, but not known or determinable by the defendant on inspection of the goods; and that the facts should be submitted to the jury on the question of notice.

ALBION K. JONES *vs.* JAMES MCNARRIN.

Penobscot. Decided June 19, 1878.

Execution. Deed. Lis pendens.

A reco d in the registry of deeds of a levy, designed to take a part of lot 32, but describing a part of lot 29 upon the same plan and survey, the description by metes and bounds perfectly fitting the one parcel as well as the other, excepting in the statement of the number of the lot, is not alone sufficient notice to a subsequent purchaser from the execution debtor, that a part of 32 instead of a part of 29 was in fact taken by the levy.

Nor does the pendency of a real action in the name of the creditor against the debtor to recover the premises levied upon, the declaration containing the same erroneous description and none other, operate as a notice to a subsequent purchaser, that 32 instead of 29 was levied upon.

Lis pendens, affects a purchaser with constructive notice of all the facts that are apparent on the face of the pleadings at the time he takes his deed, and of such other facts as those facts necessarily put him upon inquiry for, and as such inquiry, pursued with ordinary diligence and prudence, would bring to his knowledge.

ON REPORT.

WRIT OF ENTRY, for a certain piece of land with the buildings thereon, situate in Oldtown, in the county of Penobscot, and bounded as follows, to wit: "Beginning at the southeast corner of the lot of land occupied by Moses Buck, in June, 1862, and erroneously called lot No. 29 in a levy of this plaintiff against said Moses Buck, made June 9, 1862; thence northerly along the west side of the Bennock road, to a point opposite the centre of

the front door of the house on said lot, through the middle of the front entry of said house, to the east line or side of the stable; thence southerly at right angles, by the east side of said stable, to the south line of said lot; thence east to the first mentioned bound."

The plaintiff having an execution against one Moses Buck, levied June 9, 1862, on the real estate in suit, and afterwards recovered judgment against him for the land described as follows: "Commencing at the southeast corner of lot No. 29, according to Treat's plan of Upper Stillwater in Oldtown; thence northerly along the west side of the Bennock road to a point opposite the center of the front door of the house on said lot; thence," &c., the rest of the description being the same as in the declaration.

Pending the action of *Jones* v. *Buck*, Buck gave a deed of warranty, for a valuable consideration, of the land in question, which came by intermediate conveyances to the defendant. The land actually levied on was erroneously described in the levy as lot No. 29, and the action for its recovery, as shown in case of *Jones* v. *Buck*, 54 Maine, 301, which makes part of this case, was maintained, on the ground that, although the starting point was "the S. E. corner of lot number 29," none of the other calls applied to that lot, but all except the first did apply to lot 32. Additional evidence in this case tended to show another state of facts, and that all the calls in the levy were applicable as well to lot 29 as to lot 32.

J. Baker, for the plaintiff, relied upon *Jones* v. *Buck*, 54 Maine, 301.

W. H. McCrillis, for the defendant, contended that, although *Jones* v. *Buck* stated the law correctly on the facts assumed, the decision did not bind McNarrin, because the facts in that case were not correctly stated, the description in the levy as recorded in the registry of deeds applying to 29 as well as to 32, and the declaration in that case, following in terms the erroneous description of the levy, did not remove the ambiguity; that while both the registry and the *lis pendens* gave his client constructive notice as to lot 29, neither of them gave him such notice as to lot 32.

PETERS, J. No denial is made, that on July 23, 1864, Moses Buck, by deed of warranty and for a full consideration, conveyed lot 70 in Upper Stillwater to a person, under whom the defendant now holds possession of the same. Lot 70, by Howard's plan, includes what was 32 by Treat's plan of the same premises.

The demandant claims to be entitled to lot 32, by virtue of a levy made by him against Moses Buck, on June 9, 1862, prior in time to the defendant's title. The levy describes the land taken, "as the estate in fee simple, in severalty, and in possession of Moses Buck, the metes and bounds whereof are as follows: Commencing at the southeast corner of lot No. 29, according to Treat's plan, at Upper Stillwater in Oldtown;" and the balance of the description consists in a specification of full metes and bounds.

It appears clearly, by the evidence now reported, that this description would identify a part of lot 32 on Treat's plan as well as it does a part of lot 29 on that plan, provided the number 32 should be inserted in the description instead of the number 29. With the exception of the starting point, the language delineating the boundaries of either lot may very correctly be identically the same. Both lots (29 and 32) at the date of the levy were owned in fee simple, in severalty, and in possession by the execution debtor, Buck. The defendant does not admit the coincidence of description to be as perfect as we state it, but as the descriptions, excepting the number of lot, are, at least, substantially alike, for the purpose of this discussion we will regard them, with the exceptions stated, as if they did exactly correspond.

It is, however, suggested that the testimony of Buck, which establishes the identity of the two descriptions, may be disregarded as conflicting with statements made by him at a former trial. There is no absolute contradiction. At the former trial he testified in these words: "The description in the levy describes the house on 32 except the number of the lot." He says the same now. He did not say at the former trial that the same language was not descriptive of 29 as well as applicable to 32. David Norton at the former trial testified that the declaration in the writ covered the description of lot 29, and Buck nowhere denied it. Buck's point evidently was, that the levy was designed to be upon

32, and was void for misdescription. But if it were otherwise, Buck's present testimony cannot be contradicted in this way, the report of the former trial coming in, as it did, under positive objection. *Frye* v. *Gragg*, 35 Maine, 29.

The demandant claims that, as matter of fact, the appraisal was made of a part of lot 32 and not of a part of 29, and the levy was intended to embrace a part of the former and not of the latter lot. The first question is, whether, from the facts properly in proof, a subsequent purchaser can be charged with notice that 32 was levied upon, by the recitals in the extent recorded in the registry of deeds. We think not. The registry is silent as to 32. It expressly informs the world that only 29 was taken. By none of the tests of interpretation could it be otherwise. In *Birdsall* v. *Russell*, 29 N. Y. 220, 250, the doctrine is enunciated in these words: "The rights of a purchaser are not to be affected by constructive notice, unless it clearly appear that the inquiry suggested by the facts disclosed at the time of the purchase would, if fairly pursued, result in the discovery of the defect existing but hidden at the time. There must appear to be, in the nature of the case, such a connection between the facts discovered and the further facts to be discovered, that the former may be said to furnish a clue—a reasonable and natural clue—to the latter." Apply the severe rule laid down by Lord Hardwicke, in *Smith* v. *Low* (1 Atk. 489), and followed ever since, as the rule of constructive notice in equity, that what is sufficient to put the party on inquiry is good notice. What in this case could lead a purchaser to inquire beyond the facts so clearly declared in the record? He desires to see if 32 is clear of incumbrance. In his examination he finds that 29 has been levied upon. He ascertains that Buck owned 29 as well as 32. He finds no incumbrancer in the actual possession of 32. The record informs him that the land taken has certain definite boundaries. He finds them exactly fitted to lot 29, and demonstrating it perfectly. He finds every call exactly answered. He finds 29 included and 32 excluded by the description. Nothing in the registry warns him that he is at any risk or peril in taking the deed. If there had been any uncertainty in the description, he should have made further inquiry; but he finds a certainty of

description. If the description had been a general one, he should have investigated until he ascertained to what it applied. But he finds it in all respects particular. The position of the demandant is, that the number 29 may be rejected as false demonstration. It cannot be. It is not a false nor impossible nor inconsistent call. If it had been, the purchaser should have translated the difficulty somehow. But it was neither, and so far from it that it comported exactly with the rest of the description. It was in truth the vital and indispensable point of the description. The rule that one call may be rejected never applies where the description includes several particulars, all of which are necessary to ascertain the estate to be conveyed. *Herrick* v. *Hopkins*, 23 Maine, 217. This is a doctrine that prevails through all the cases. Nor can parol proof be admitted to show what property was designed to have been levied upon by the creditor. *Young* v. *McGown*, 59 Maine, 349, for excellent reasons denies such a power.

The authorities are uniform upon this branch of the case, illustrating it under various different phases of fact. A recorded deed of "forty-five feet in the rear of lot one in block twenty," is not sufficient to lead a subsequent purchaser to inquire, and thereupon learn, that the land is not "in block twenty," but in block sixteen. *Rogers* v. *Kavanaugh*, 24 Ill. 583. The record of a deed of land described as "lot and six," does not impart constructive notice to a subsequent purchaser, that lot one in block six was intended by the description. *Nelson* v. *Wade*, 21 Iowa, 49. Where a deed of the "east" half of a lot is recorded as a deed of the "west" half, a subsequent purchaser of the east half, without actual notice of the fact, will be protected. *Sanger* v. *Craigue*, 10 Vt. 555. A mistake in the number of a section is not cured by a reference to the land as that patented to A B, for service in M's company in the late war, without proof that there was but one person answering to that description, so as to render an alteration of the number immaterial. *Montag* v. *Linn*, 23 Ill. 551. In the case of *Loomis* v. *Jackson*, 19 Johns. 449 (S. C. 18 Johns. 81), the court allowed the number 51 to be rejected from a description, where the grantor owned lot 50 but not lot 51, and where the bounds were minutely described and applicable to the lot 50 and

not to the other lot. The court there say, "the second purchaser could not possibly have been misled had he consulted the registry." *Worthington v. Hylyer*, 4 Mass. 196. *Madden* v. *Tucker*, 46 Maine, 367, and *Peck* v. *Mallams*, 6 Seld. 509, are also pertinent cases hereto. And see *Whitman* v. *Weston*, 30 Maine, 285.

The point already discussed is presented in another form. At the time the defendant's predecessor in title received his conveyance from Buck, there was pending a real action by the demandant against Buck for the premises levied on, and it is contended that this defendant is bound by the result of that suit, by force of the doctrine of notice by the *lis pendens*. The rule of *lis pendens* is undoubtedly one of the well settled doctrines of this court, both at law and in equity. The defendant in this suit is bound by such notice as the record of that case could impart to his predecessor at the date of the conveyance from Buck. Precisely the same rule applies as to this kind of notice as to notice by a recording in the registry of deeds. The effect of *lis pendens* and the effect of registry are in their nature the same thing. They are only different examples or instances of the operation of the rule of constructive notice. They are record notices. One is a record in one place and the other a record in another place. A purchaser must consult both places of record for light and information. And he is only bound by such information as such record discloses to him at the time he takes his deed. If the description of the land intended to be conveyed by a deed or designed to be demanded in a writ, is insufficient to inform a purchaser, or put him upon inquiry that will inform him, as to what the premises deeded or demanded may be, the purchaser will not be bound by either form of notice. Therefore the argument and the authorities adduced in support of the point previously discussed in this opinion, will have equal force and application here.

What, then, did the pending suit disclose to the purchaser? Precisely what the registry of deeds did and no more. The description in the levy and that in the writ exactly correspond. There is nothing to indicate the slightest difference. It was "29" that was levied upon, and "29" that was demanded. If the defendant was not estopped to claim the locus by the one record, he cannot be by the other.

But it is said, that the opinion of the court in the case alluded to, *Jones* v. *Buck*, 54 Maine, 301, states that the word 29 might be rejected as unessential and inconsistent, and that the execution was correctly enough levied on 32. There are abundant answers to this position from the standpoint occupied by this defendant. 1st. The opinion was based, as it turns out, upon a misapprehension of the real facts, if the proof in the present case is true. The statement in that case is, that the rejection might be made upon the supposition that none of the other calls apply to lot 29. It now, however, appears that, instead of none of the calls applying to 29, they all do perfectly. 2nd. What was said by the court in that respect related only to the argument or grounds of the opinion, and was in no sense a part of the strict record of the case. The decision was merely that the action was maintainable. The writ declared for 29. The demandant recovered 29, and had *habere facias* for the same. And the opinion of the court was, that it would be a good description of 32, provided that a certain assumption of facts was true. But a writ of *habere facias* that described the premises in the exact words of the levy could give no more right of possession than the levy gave. Finally: a conclusive answer to this position is, that the opinion was not a decision of record at the time that the title, under which the defendant claims, accrued. It was not a decision affecting him or those claiming before him under Buck. The action of *Jones* v. *Buck* was entered in court in January, 1864. Buck conveyed in July, 1864. The action came to trial at the October term, 1865. Judgment was rendered in November, 1867, and the opinion of the court not published till 1868. How could Buck's grantee in 1865, anticipate the occurrences that took place afterwards, or be bound by them?

The position which is taken by us upon these facts is well sustained by numerous authorities, from some of which we quote. For a *lis pendens* to affect a purchaser, there must be something in the pleadings, at the date of the purchase, to point his attention to the property purchased, as the identical property in litigation. *Lewis* v. *Mew*, 1 Strobh. Eq. 180. A purchaser will not be affected with notice by a bill charging the vendor with a

general misapplication of the property of the complainant, without specifying what the property was. *Price* v. *White*, 1 Bailey Eq. 244. Notice to a purchaser, arising from a bill filed, should not be extended beyond the property which is plainly the subject of the suit. *Griffith* v. *Griffith*, 1 Hoff. Cas. 160. The same rule was distinctly admitted by Chancellor Kent in *Green* v. *Slayter*, 4 Johns. Cas. 38. He held that an averment in a bill that "divers lands in Cosby's manor" were held in trust for the complainant, was sufficient to affect a purchaser from the trustee with notice, for the reason that, as there were no detailed and particular descriptions, the purchaser had a warning of a general character to see and ascertain what the parcels were. And of this case it was said in *Griffith* v. *Griffith*, *supra*, that in the opinion Chancellor Kent was obviously pressed by the argument of insufficiency of description. In *Miller* v. *Sherry*, 2 Wall. 237, it was held that a creditor's bill, to be a *lis pendens*, and to operate as a notice against real estate, must be so definite in the description of the estate, as that any one reading it can learn thereby what property is the subject of the litigation. The American editors of Leading Cases in Equity (part 1 of vol. 2, p. 12) state the rule in this way: "A purchaser will also be affected with constructive notice, whenever his purchase is made during the prosecution of a suit brought to enforce an adverse claim or title, which is set forth with sufficient certainty and distinctness to apprise him of its bearing on the property purchased. The constructive notice arising from the pendency of a suit, is subject to those limitations which apply to the doctrine of notice generally. It must be sufficiently certain to give the means of distinct and intelligible information of the matter to which it relates." The American editor of Hill's Treatise on Trustees, 511, in note, enunciates the rule thus: "The bill must refer with sufficient certainty to the lands in question, at least, to put the purchaser on inquiry." Freeman on Judgments, § 197, regards the rule of *lis pendens* invoked, "if the land in all probability comes within the description, and if prospective purchasers, upon reading the bill, are advised by it that the land with which they propose to meddle may be, and probably is, a parcel of the lands in litigation." Justice Story, in

Dexter v. *Harris*, 2 Mas. C. C. R. 531, probably states the rule of constructive notice as acceptably as it can be compassed in any general terms. "The doctrine upon this subject as to purchasers," he says, "is this, that they are affected with constructive notice of all that is apparent on the face of the title deeds under which they claim, and of such other facts as those already known necessarily put them upon inquiry for, and as such inquiry, pursued with ordinary diligence and prudence, would bring to their knowledge."

It was urged, at the argument, that this conclusion would bring about a contrariety of decision by the court upon the same subject matter. Not so. The former case was between other parties, involved other facts, and determined other questions. Courts can settle cases only upon such facts as are brought before them. The very idea of constructive notice is that the immediate parties are bound by a proceeding, and that other persons may or may not be, according to circumstances. The former decision was not one *in rem*, but merely disposed of a question which arose between the parties in that suit.

There could be no judgment valid against the world, without notice to the world. The realty was never in the possession of the court. Freeman on Judgments, § 207. The consequences which follow the accidents that have occurred in these proceedings, are not to be borne by the defendant. The error in the return might have been avoided, had more vigilance been exercised by the officer.

No possession was taken by the demandant, either under the levy or the *habere facias* issued to him, to indicate what land he claimed. When he sued for possession, his declaration described only lot 29, when, upon his present theory, he sought to recover lot 32, making no amendment of his declaration before judgment was had.

If the testimony at this or the former trial was not satisfactory and full, it behooved him, if he could, to make it so. In *Etty* v. *Bridges*, 2 You. & Coll. 486, the Vice Chancellor remarks: "A first purchaser, if he cannot acquire possession, must go as near it as he can . . . must set his mark upon the property,

or do every thing reasonably practicable to prevent it from being dealt with in fraud of an innocent purchaser afterwards."

Plaintiff nonsuit.

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

JACOB HAZEN and SAMUEL F. YORK *vs.* JOHN WINSLOW JONES.

Cumberland. Decided July 1, 1878.

Evidence. Trial.

When a case is tried by the presiding judge without the intervention of a jury, exceptions do not lie to his rulings in relation to the sufficiency of the evidence. Whether there is any evidence in support of an action is a question of law. But whether it is sufficient is a question of fact.

ON EXCEPTIONS from the superior court.

ASSUMPSIT, on account annexed, for five loads of corn, valued at $74.12. Credit, $37.06. Balance, $37.06. No question was made by the defendant that he had the amount of corn charged, of one of the defendants, York, but he contended at the trial that whatever of the corn was received by him was under a contract with York alone, and not with Hazen and York; and after the evidence was out, requested the instruction which in the opinion appears.

C. P. Mattocks, for the defendant.

J. J. Perry, for the plaintiffs.

WALTON, J. Counsel for defendant requested the presiding justice, who tried the cause without the intervention of a jury, to rule as matter of law:

"That there is no sufficient evidence in the case on which recovery can be had for the corn delivered, without amendment of the writ by striking out the name of Hazen," which ruling was refused, and decision was rendered for plaintiffs.

To which ruling and refusal to rule the defendant excepts.

When a case is tried by the presiding judge without the inter-

vention of a jury, exceptions will not lie to his rulings in relation to the sufficiency of the evidence. Whether there is any evidence in support of an action is a question of law. But whether it is sufficient is a question of fact. *Sawyer* v. *Nichols*, 40 Maine, 212.

There was some evidence in support of the joint claim of the plaintiffs in this suit. Its sufficiency cannot be examined by the law court upon a bill of exceptions.

Exceptions overruled.

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

LYMAN J. PRATT *vs.* GEORGE SWEETSER.

Cumberland. Decided July 1, 1878.

Easement.

The non-user of an easement for twenty years is evidence of intention to abandon; but it is open to explanation, and may be controlled by proof that the owner had no such intention while omitting to use it.

ON EXCEPTIONS from the superior court.

TRESPASS *quare clausum.*

The defendant set up a right of way over the *locus in quo*, which was the upland mowing field of the plaintiff, for taking off marsh hay from his marsh adjoining the premises on which the trespass was alleged to have been committed, and introduced evidence tending to show that such right of way had been acquired by him and those under whom he claimed, by prescription.

The plaintiff claimed that there had never been an adverse or continuous use of the way in question for said purpose, for twenty consecutive years, and introduced evidence tending to show non-user, an abandonment and an interruption of use of the way, and that the line of travel over which the hay had been taken off was not the same each year.

The presiding justice instructed the jury as in the opinion appears; and the defendant alleged exceptions.

M. P. Frank & P. J. Larrabee, for the defendant.

A. A. Strout & G. F. Holmes, for the plaintiff.

VIRGIN, J. The defense set up was a prescriptive right of way across the *locus*. To this the plaintiff replied that, if the defendant had acquired such a right, he subsequently lost it by abandonment. Upon this point the presiding justice instructed the jury as follows:

"The question is whether, at any period in the past, the owners of the marsh, by such use as I have described, had obtained a right of way by prescription. Such a right of way, if once obtained, would continue until it was voluntarily abandoned with an intention to abandon it, or until it had ceased to be used for a period of twenty years.

"If you should find at sometime there was such a right of way, then, upon the question whether it continued or not down to the trespass, this would be the rule. It could be destroyed in two ways; and these two ways are all it is necessary for me to consider. First, by voluntary abandonment of it. If at any time the owners of the marsh had another right of way, and gave up this right of way with the intention to abandon it,—if that is proved, their right would cease at once. On the other hand, if there is no proof of that, notwithstanding they did not intend to abandon, but did not use it, then that non-use must continue for twenty years before the right by prescription fails. Having once obtained a right of way, they may abandon it at any time they see fit, and if the intention is proved, that is the end of it; or if they cease to use it for twenty years, then their right terminates in that way."

By giving this unqualified statement as to the effect of non-user, though some of the authorities sustain it, we think the learned judge erred. For, even if, as suggested by some of the authorities, there is any sound distinction between easements created by deed and those acquired by prescription, the right is not necessarily lost by mere non-user for twenty years. The bet-

ter doctrine seems to be that non-user for the period mentioned is evidence of an intention to abandon; but it is open to explanation, and it may be controlled by evidence that the owner had no such intention while omitting to use it. Wash. Easements, 673. 3 Kent Com. (12th ed.) 449, and notes. *Farrar* v. *Cooper*, 34 Maine, 394.

Exceptions sustained.
New trial granted.

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

SUSAN W. MUSSEY, administratrix of estate of Charles Mussey, *vs.* JOHN MUSSEY.

Cumberland. Decided July 1, 1878.

Trial.

Where, in the trial of a cause, evidence apparently irrelevant is admitted against objection, on the statement of counsel that its pertinency will be made to appear by evidence afterwards to be produced, its admission will be error and cause for a new trial unless the connecting link in the chain of evidence is supplied.

ON EXCEPTIONS.

ASSUMPSIT on the following paper, dated Portland, November 24, 1856, signed by the defendant and addressed to Mr. Charles Mussey, Portland:

"Brother Charles:—The re-building Mussey's Row, which was destroyed by fire a short time after my return, in June last, has occupied pretty much the whole of my thoughts, as well as time, this season. Before returning, I had concluded to assure you that you might rely on me for such pecuniary aid as would be necessary for your comfort and convenience during our lives. Although my verbal assurance would be sufficient for that purpose generally, circumstances might happen which would render a written one more satisfactory to your feelings and position.

"To this end, therefore, I hereby engage to appropriate seven hundred dollars annually, the same to be paid you semi-annu-

ally, in the months of January and July in each year, so long as you and I shall live. And I authorize you to call on my attorney, John Rand, esq., who is hereby directed and empowered to pay the same at the times aforesaid, and charge such payments to my account. Should you survive me, you will find I have already provided in my will for the continuance of the payment of the same amount annually, during your life."

The defense was want of a valuable consideration. To prove such consideration, the plaintiff put in evidence, against the defendant's objection, the following papers, dated Portland, December 1, 1838, and signed by the defendant, the first of which was witnessed by John Rand:

"For a valuable consideration received of Charles Mussey, of Portland, I hereby agree to sell and convey, by deed of quitclaim, to said Charles Mussey, the property conveyed to me by said Charles Mussey, on the third day of July, A. D. eighteen hundred and thirty-seven, by his mortgage deed of that date, recorded in the Cumberland registry, B. 153, p. 260. And on the twenty-second day of October, A. D. eighteen hundred and thirty-eight, by his quitclaim deed of that date, recorded in the Cumberland registry, B. 160, p. 164. Upon his paying me such sums of money, with interest, as I shall pay to the president, directors and company of the Casco bank, by virtue of my guarantee to said bank, dated the third day of July, A. D. eighteen hundred and thirty-seven, given on said Charles Mussey's account, and also paying me such further sum or sums, damages, expenses and costs as I may pay to any person or persons or corporation on account of the property above referred to, with interest on said sums so paid.

" Provided that the amount of the purchase, with interest, made by the president, directors and company of the bank of Cumberland, under their execution against said Charles Mussey, on the twenty-second day of October last past, be paid and satisfied by said Charles Mussey, within the time allowed by law."

" Whereas Charles Mussey, on the thirteenth day of June last, indorsed over to me his interest in the note of Thomas Merrill, dated July 27, 1827, payable to said Charles and myself, and also

assigned his interest in the mortgage given as security for said note, now I hereby agree to account with said Charles for whatever sum I may realize from said note, by adjustment of our accounts."

The verdict was for the plaintiff for $5,075; and the defendant alleged exceptions, which appear in the opinion.

N. Webb & L. D. M. Sweat, for the defendant.

W. L. Putnam with *W. M. Sargent*, for the plaintiff.

WALTON, J. This case is before the law court on exceptions to the admission of evidence.

The action is assumpsit. It is founded upon a promise contained in a letter from the defendant, John Mussey, to his brother, Charles Mussey, dated Nov. 24, 1856. In that letter the defendant assured his brother that he might rely upon him for such pecuniary aid as would be necessary for his comfort and convenience; and he therein engaged to appropriate seven hundred dollars annually, to be paid to him semi-annually, for that purpose. The only question at the trial was whether this promise was gratuitous or founded upon a valuable consideration. The plaintiff had averred in her declaration that it was founded upon a valuable consideration, and the burden was upon her to prove such a consideration.

For this purpose she offered two papers signed by the defendant, dated December 1, 1838,—nearly eighteen years prior to the date of the defendant's letter—by one of which the defendant agreed to account with Charles Mussey for whatever should be realized on a certain note therein described, and by the other to convey to him certain real estate upon his paying certain sums of money and performing certain other conditions therein mentioned. As these papers were not referred to in the defendant's letter containing the promise on which the suit was brought, and did not appear to have any connection with it, they were objected to as irrelevant, but admitted by the court and allowed to go to the jury.

We think they should have been excluded. It is a fundamental rule governing the introduction of evidence that it must be rele-

vant; that is, it must have some tendency to prove or disprove one or more of the facts in issue. We think this evidence had no such tendency.

The only question was whether the defendant's promise was gratuitous or supported by a valuable consideration. The consideration sought to be proved was the alleged compromise of the claims of Charles Mussey against his brother. Assuming that Charles had such claims against his brother, real or pretended,—and for the purposes of this inquiry it is not material which—what evidence is there in the case that the promise declared on was either made or accepted as a compromise of them? Not a scintilla. The character of the promise, the language employed in making it, and the manner in which it was communicated to the promisee, all negative such a conclusion. A life annuity is not the usual mode of extinguishing business claims between persons *sui juris*. "You may rely on me for such pecuniary aid as will be necessary for your comfort and convenience," is not the language of a debtor to a creditor. A letter from the debtor to the creditor is not the usual mode of prepetuating the evidence of a settlement. The evidence would be in the hands of the wrong party. Besides, the letter on which this action is founded contains no allusion whatever to business transactions between the parties, nor to the settlement of any claims growing out of business transactions, nor to the settlement or compromise of any claim or claims whatever. The inference to be drawn from the letter itself is that the promise therein contained was gratuitous, and not founded upon a valuable consideration; and we fail to find a scintilla of evidence in the case which has the slightest tendency to repel this presumption. The evidence offered for that purpose was apparently irrelevant, and this apparent irrelevancy was not removed by any other evidence in the case.

We have not overlooked the fact that in the trial of causes evidence apparently irrelevant often is, and, from the necessity of the case, must be admitted upon the statements of counsel that its pertinency will be made to appear by evidence afterward to be produced. But when this is done counsel must see to it at their peril that the connecting link in the chain of evidence is supplied;

for, if this is not done, and the evidence was seasonably objected to, its admission will be error, and cause for a new trial. To hold otherwise would virtually repeal the rule of law excluding irrelevant evidence.

The efforts to get before juries evidence which can have no other effect than to create in their minds some improper prejudice or bias, are constant, persistent, and too often successful. It is a practice which ought not to be encouraged. To hold that evidence apparently irrelevant may be received upon the statement of parties or their counsel that its relevancy will afterward be made to appear, and then allow it to remain in, when no such evidence is produced, and then hold that no peril is thereby incurred, would greatly encourage a practice which is already an existing evil, and virtually repeal a valuable and fundamental rule of the law of evidence.

We do not mean to say that a new trial should be granted for every inadvertent or accidental admission of irrelevant evidence. Such is not the law. If the court can see that the irrelevant evidence was perfectly harmless,—that it could not by any possibility have had any improper influence upon the jury—a new trial may properly be refused. But when, in addition to being irrelevant, it is of such a character as to be liable to mislead, confuse, or improperly influence the jury, a new trial should be granted. And such we understand to be the well settled rule of law. *Ellis* v. *Short*, 21 Pick. 142. *Farnum* v. *Farnum*, 13 Gray, 508. *Brown* v. *Cummings*, 7 Allen, 507. *Ellingwood* v. *Bragg*, 52 N. H. 488.

The documentary evidence to which we have referred,—we mean the two papers signed by the defendant, dated December 1, 1838—was, at the time it was offered by the plaintiff, apparently irrelevant to the issue being tried; it was seasonably and specifically objected to by the defendant upon the ground of its irrelevancy; its apparent irrelevancy was not removed by any other evidence produced at the trial; in addition to its irrelevancy, it was such evidence as would be liable to influence the jury improperly; they were not instructed to disregard it, but, on the contrary, were told that they might take it into consideration in

determining whether or not there was a legal consideration for the promise declared on. Its admission, under these circumstances, was, in the opinion of the court, such an error as entitles the defendant to a new trial.

Exceptions sustained.
New trial granted.

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

INHABITANTS OF BOOTHBAY *vs.* HENRY W. RACE.

Cumberland. Decided July 1, 1878.

Tax. Condition precedent. Town. Action.

Since the passage of the statute, R. S. of 1841, c. 14, § 88, defining the remedy for a party illegally assessed, which is now embodied in R. S. of 1871, c. 6, § 114, the requirement in R. S., c. 6, § 65 that the assessors shall give notice to the inhabitants of a town to bring in their lists of taxable property before proceeding to make an assessment, is no longer a condition precedent to a valid assessment.

An action may be maintained by a town against a tax payer to recover the amount of his tax without proof that this direction with regard to the proceedings of the assessors has been complied with.

ON EXCEPTIONS AND MOTIONS, from the superior court.

DEBT, brought under c. 232, of the public laws of 1874, to recover a tax assessed on personal property of the defendant for the year 1875.

The plea was *nil debet*, with a brief statement that the defendant was not, on the first day of April, 1875, an inhabitant of the town and liable to taxation therein; and that the tax was not legally assessed.

The presiding judge, among other things, instructed the jury as follows:

"Then it is further alleged that it does not appear by the evidence in the case that the assessors complied with the requirements of the 65th section of chapter 6 of the Revised Statutes."

"The following section provides that, 'If any person after

such notice does not bring in such lists, he shall be thereby barred,' &c.

"For the purposes of this case I shall rule that that section contains merely a direction to the assessors,—is what we call directory—and a failure to comply with it on the part of the assessors would not invalidate the tax. The law makes it the duty of the assessors to give that notice, but it does not provide that if the assessors fail to give such notice the tax subsequently assessed shall be illegal or void. It only provides, in my judgment, and that is the only effect of it, that if the assessors fail to give the notice, persons who fail to bring in their lists would still have a right to appeal to the county commissioners; whereas, if the assessors gave the notice, then the person who did not bring in a list would have no right to appeal to the commissioners, unless he showed that he was unable to bring in the list."

The verdict was for the plaintiffs for $152.45; and the defendant alleged exceptions.

P. J. Larrabee, for the defendant, contended that the provisions of R. S., c. 6, § 65, were imperative; that they were conditions precedent, and if not complied with, the tax is invalid.

M. P. Frank, for the plaintiffs, contended that the provisions of § 65, were directory merely, and not conditions precedent necessary to the validity of the tax.

BARROWS, J. There is no occasion to set aside the verdict as being against law or evidence. The testimony and admissions cover all the points which the plaintiffs were obliged to establish, and while the testimony offered in defense conflicted with it as to some matters, it is by no means apparent that the jury erred in estimating its weight, or that they failed to draw correct conclusions from the facts proved. The verdict should stand, unless one of the instructions given by the judge withdrew from the jury a question which they ought to have determined.

It seems the defendant contended that it did not appear by the evidence that the assessors complied with the requirements of R. S., c. 6, § 65. The section runs thus: "Before making any assess-

ment, the assessors shall give seasonable notice in writing to the inhabitants, by posting up notifications in some public place in the town, or notify them, in such other way as the town at its annual meeting directs, to make and bring in to them true and perfect lists of their polls and all their estates real and personal not by law exempt from taxation which they were possessed of on the first day of April in the same year."

The next section is as follows: "If any person after such notice does not bring in such lists, he shall be thereby barred of his right to make application to the county commissioners for any abatement of his taxes, unless he makes it appear to them that he was unable to offer such list at the time appointed."

The instruction excepted to was as follows: "For the purposes of this case, I shall rule that that section contains merely a direction to the assessors,—is what we call directory—and a failure to comply with it on the part of the assessors would not invalidate the tax. The law makes it the duty of the assessors to give that notice, but it does not provide that if the assessors fail to give such notice the tax subsequently assessed shall be illegal and void. It only provides that, if the assessors fail to give the notice, persons who fail to bring in their list would still have a right to appeal to the county commissioners; whereas if the assessors gave the notice then the person who did not bring in a list would have no right to appeal to the commissioners unless he showed that he was unable to bring in the list."

The effect of the instruction doubtless was that the jury did not feel called upon to determine from the evidence whether the assessors gave the notice required in § 65, understanding that such notice was not essential to the validity of the assessment or the plaintiff's right to recover. The question is whether such notice is a condition precedent to a valid assessment. If it is, no action can be maintained for the recovery of the tax without proof sufficient to satisfy the jury that it was given.

If the two sections we have quoted were the only provisions in the tax act bearing on the question it would not be free from difficulty, but we should strongly incline to construe language so peremptory as that of § 65 as creating a condition precedent.

Touching the discrimination between simple directions and conditions precedent in this matter, Shaw, C. J., says: "One rule is very plain and well settled, that all those measures which are intended for the security of the citizen, for insuring an equality of taxation, and to enable every one to know with reasonable certainty for what he is taxed and for what all those who are liable with him are taxed, are conditions precedent, and if they are not observed he is not legally taxed. *Torrey* v. *Millbury*, 21 Pick. 64, 67.

Another general rule is thus stated in Dwarris on Statutes, (Eng. ed.) 611: "Negative words will make a statute imperative; and it is apprehended affirmative may if they are absolute, explicit and peremptory, and show that no direction is intended to be given; and especially so where jurisdiction is conferred." Another rule of practical value is, that where the clause relates to circumstances which do not affect the essence of the thing to be done, it may be regarded as directory. Does the giving or failing to give this notice affect in any essential particular the rights of the tax paying citizen? Prior to the enactment of c. 319, Laws of 1865, the list which the tax payer might bring in in compliance with the assessors' notice was, if he exhibited it on oath and answered all proper questions which the assessors might require him to answer on oath, a rule for his proportion of the tax, conclusive upon the assessors as to the amount of his taxable property. While the law stood thus it could hardly be doubted that it was one of the substantial rights of the tax payer, to avoid all danger of being doomed and overtaxed and put to expense in some form, to set it right, by presenting his list to the assessors before the tax was assessed; and that, if there was no other provision in the tax act to control it, that which required the assessors to give him notice and opportunity to do this was an essential prerequisite to a valid assessment.

Accordingly in *Mussey* v. *White*, 3 Maine, 290, where one of the objections to the validity of the assessment was that this notice was not given to the tax payer, the court sustained the proceedings of the assessors, apparently only for the reason that "the plaintiff by his own act of artifice and evasion rendered it impossible for them to give him the usual notice." It is fairly to be

inferred from the reasoning of the court that except for the principle that no man shall take advantage of his own wrong, the objection would have been regarded as fatal. But since the passage of c. 319, Laws of 1865, the list is not conclusive, but the assessors may proceed upon such information as they deem satisfactory without regard to the tax payer's oath.

Was the conclusive character of the list the only thing which made the notice essential to the preservation of the tax payer's rights?

The objects, requisites and effects of these lists have all been discussed at large in Massachusetts, where the statute provisions were substantially similar, in *Newburyport* v. *Co. Com'rs*, 12 Met. 211; *Winnisimmet Co.* v. *Assessors of Chelsea*, 6 Cush. 477; and *Porter* v. *Co. Com'rs*, 5 Gray, 365; and various dicta in these cases indicate the opinion of the court that they were designed to subserve purposes important not only to the person returning such list, but to all other tax payers interested. See also *Granger* v. *Parsons*, 2 Pick. 392. *City of Lowell* v. *Wentworth*, 6 Cush. 221.

We do not see how it can be conclusively presumed that the giving of the notice which the legislature required in such positive terms would be completely nugatory in evoking information, as to taxable property, which the assessors could get in no other way, or that the oath of the tax payer would not affect the judgment of the assessors so as to relieve him from the necessary expense attending an application to the county commissioners for an abatement; and the existence of such contingencies might fairly be said to bring the matter within the rule laid down by Shaw, C. J., in *Torrey* v. *Millbury*, above cited.

Yet he speaks in the same case (21 Pick. p. 67) of "many regulations made by statute, designed for the information of assessors and officers, and intended to promote method, system and uniformity in the modes of proceeding, the compliance or non-compliance with which does in no respect affect the rights of tax paying citizens. These may be considered directory; officers may be liable to legal animadversion, perhaps to punishment for not observing them; but yet their observance is not a condition precedent

to the validity of the tax." Doubtless citizens who knew the law (and all are presumed to know it), by watchfulness and diligence, might present their lists seasonably to the assessors of their town when such notice had not been given with the same effect as if it had been.

In *Winnisimmet Co.* v. *Assessors of Chelsea*, 6 Cush. 477, 484, in the absence of proof whether the notice was given or not, the court held it unnecessary to decide whether such omission on the part of the assessors would excuse tax payers for not carrying in their lists so far as to constitute the "good cause" for not presenting them which would enable them to sustain appeals to the county commissioners for abatement; and they dismissed the tax payers' appeal, while they declared emphatically that the assessors had no right to waive the list, because the town and all tax payers have an interest in it.

But it is needless to pursue this discussion. The only excuse for entering upon it at all is to call attention to a matter too often overlooked; and that is the change in legal doctrines, decisions of the court upon the construction of statutes, and the force and effect of the statutes themselves (even where no change has been made in the terms of the section to be construed), which is made necessary by the introduction of some new provision. We have adverted to considerations which would have compelled us, if the tax act stood now as it did at the time of the decision in *Mussey* v. *White*, above cited, or if sections 65 and 66 of chap. 6 R. S. were to be construed by themselves, to declare that the requirement of notice in § 65 was mandatory and a condition precedent to a valid assessment.

But all the existing provisions of the act are to be construed together, so as to give their proper force and effect to each.

We must not overlook the emphatic and decisive provisions of § 114, which shows conclusively the legislative intention that no error, mistake or omission of the assessors or other officers shall render an assessment void, and remits the tax payer for the preservation of his rights to a suit against the town to recover "any damages he has sustained by reason of the mistakes, errors or omissions of such officers."

In fine, since the enactment of § 88, c. 14, R. S. of 1841, defining the "remedy for a party illegally assessed," the declared policy of the law has been to insure the collection of the tax and require the tax payer to show it if he has actually suffered any damage by reason of any failure of the assessors to regard the directions given as to the manner of the assessment. Sections 162 and 163 tend to the same end.

"Pay your tax," the legislature say to the tax payer, "and then, if you have suffered any actual damage by any illegality in the proceedings of the assessors, or any failure on their part to observe the requirements of the law as to the mode of the assessment, you may recover such damage."

But, clearly, under § 114, no error, mistake or omission by the assessors shall render the assessment void if any part of the money is legally raised. Sections 64–66, 114, 162 and 163 must be taken together when the question is whether an assessment is valid or void.

The defendant has no good ground to complain of the instruction that the law "does not provide that if the assessors fail to give such notice the tax subsequently assessed shall be illegal and void."

Section 114 must be regarded as a distinct and emphatic provision to the contrary. It follows that the other instruction, that a failure on the part of the assessors to comply with the direction would not invalidate the tax, was correct. If the defendant had suffered any damage by the omission of the assessors he might have his action, and the burden would be upon him to show it. But it was expressly admitted by defendant at the trial that if plaintiffs were entitled to recover anything they were entitled to the full amount claimed, and the defendant's own testimony indicates that he was actually taxed for a sum less than he would have been had he received the notice and carried in his list. The real controversy was whether defendant was an inhabitant of the town and liable to taxation there at all. This the jury have settled against him, and he must abide the result.

Motion and exceptions overruled.

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

GEORGE E. BARTLETT *vs.* INHABITANTS OF KITTERY.

York. Decided July 1, 1878.

Way,—defective.

A thing rightfully in the highway may constitute a defect by remaining there an unreasonable time; but to hold the inhabitants liable in such case, on the ground of notice, they must know not only that the thing is there, but that it is there under circumstances which constitute it a defect.

Thus, an eight ton boiler was transported from Kittery station towards the navy yard, its destination, and left in the highway at six P. M., and allowed to remain there, with knowledge of the inhabitants, till seven o'clock the next morning, when the plaintiff's horse took fright thereat, and in consequence ran away, and the plaintiff was hurt. *Held*, that, to render the inhabitants liable, it was necessary that they have reasonable notice not only that the boiler was there, but that it was unnecessarily there; in other words, knowledge of the illegal element which constitutes it a defect.

ON EXCEPTIONS.

CASE for injury from a defective highway. The defect alleged was a boiler weighing eight tons, which was hauled on trucks over the public highway from Kittery station towards the navy yard, its destination, and left in and partly over the wrought portion of the highway, from six o'clock, [probably in the afternoon of] June 21, 1875, until seven o'clock the next morning, when the accident occurred.

The plaintiff contended that the boiler was left without necessity by the persons having charge of its transportation, and thus rendered the way defective. The defendants contended that it was left there necessarily and was therefore not a defect. The presiding justice submitted this question to the jury under instructions not excepted to.

The evidence tended to prove that some of the citizens of Kittery had knowledge that it was left in the highway soon after it was left; and on the question of notice to the town of the alleged defect, the presiding justice, after instructing the jury what in general constituted a sufficient notice, gave the specific instruction which in the opinion appears; and the plaintiff, the verdict being against him, alleged exceptions.

G. C. Yeaton, for the plaintiff, contended that where a way is in fact defective, it is sufficient that the town have notice of its actual condition; that it is not necessary that the inhabitants recognize it as defective; that it was error to ground the defendants' liability upon the surveyor's finding an illegal leaving of the obstacle; that it imposed upon the surveyor the duty not of observing facts, but of determining law.

M. A. Safford with *I. T. Drew*, for the defendants, admitting that the general rule was as the plaintiff's counsel stated, contended, in substance, that a distinction was to be taken between an obstacle which might be rightfully in the highway and one which would constitute a defect *per se;* that the surveyor was not called upon to decide the question of law, whether, if the boiler was left there without necessity and was an obstacle to the public travel, it constituted in law a defect, but whether, as matter of fact, he knew it was left there without necessity, such absence of necessity being the illegal element which would constitute a defect. R. S., c. 18, § 74.

VIRGIN, J. The first paragraph of the bill of exceptions is somewhat ambiguous; but giving it the construction which was probably intended by the plaintiff, the jury must have found that the boiler was left upon the highway by necessity. The instructions under which that question was submitted to the jury are not excepted to, and neither is there any motion to set the verdict aside as being against evidence. On the other hand, the only question relied upon by the plaintiff pertains to the instruction in relation to notice. On this point the presiding justice instructed the jury as follows:

"If the boiler was left unlawfully there (in the highway) the town must have had notice that it was unlawfully there; that is, the town must have had notice that the parties charged with the transportation of it had left it without necessity within the traveled part of the highway, or that part of the highway wrought and prepared for public travel. It would not be sufficient merely to show notice to the town that it was there. But the illegal element must be brought home to the knowledge of the town. It

must be shown that the town had knowledge that it was left there without necessity. Because, until they had such knowledge, neither the highway surveyor nor any of the town officers would have a right to interfere with it."

We think the instruction is entirely correct.

But the plaintiff cites several decisions of this court, which hold that the "reasonable notice" mentioned in R. S., c. 18, § 65, is information of the "actual condition" of the road; and that although the statute uses the phrase "reasonable notice of the defect," still it is not necessary that the officer of the town having notice of the actual condition should recognize it as, or believe it to be, a defect. And while the plaintiff does not question this construction of the statute, he contends the instruction given required more, and that it is therefore inconsistent with the decisions. In other words, that knowledge of the mere fact that the boiler, loaded on a truck, was on the wrought part of the way was all that the decisions required; while the instruction called for knowledge, not only of the fact of its being there, but also that it was not there by necessity, which would constitute a recognition of it as a defect.

We do not so understand the effect of the instruction, but consider it to be in perfect harmony with the decisions cited on the plaintiff's brief upon this point.

Ways are required to be reasonably "safe and convenient for travelers with horses, teams and carriages;" and if any one be injured in person or damaged in property through any defect in any way, he may, under certain circumstances, recover for the same. There are numberless kinds of defects. Every team traveling along and upon a highway more or less obstructs and hinders others traveling in the same or opposite direction, and to some extent thereby renders the way unsafe and inconvenient. But the roads being made for teams to travel on, every person has a lawful right to use them, in a reasonable manner, for the purpose for which they are made. A defect, such as the statute contemplates, must be something which unlawfully impairs the reasonable safety and convenience of the way. Until some unlawful cause in fact exists, the town cannot be made responsi-

ble; nor then, unless they have reasonable notice of such cause, in order that they may remove it. And when they have reasonable notice of the existence of such a cause, whether they so consider it or not, they may be liable. In other words, the boiler, as it stood there in the road, was lawfully or unlawfully there according to the circumstances. If the owner hauling it there had abandoned it, of course it would have been illegally there, and the town upon reasonable notice should remove it. But if it were there in pursuance of the owner's legal right of transporting it from the depot to the navy yard, and it was delayed there by necessity longer than circumstances would have warranted had it been of much less weight, still, if there by necessity, the surveyor would have had no authority to remove it. R. S., c. 18, § 74. And unless the town knew it was there by necessity, it could not be said to have knowledge of the actual condition of the way.

It is further said that the instruction entirely ignores c. 18, § 50. Our opinion is otherwise. At the first glance §§ 50 and 74 would seem to be much the same. But upon following the suggestion of the plaintiff and reading § 50 in the light of its original language, it will readily be perceived that the two sections relate to entirely different matters. Thus the language of the original § 50 is: "The surveyors shall have full power and authority to cut down, lop off, dig up and remove all sorts of trees, bushes, stones, fences, rails, gates, bars, inclosures or other matter or thing that shall in any way straiten, hurt, hinder or incommode the highway," etc. St. 1821, c. 118, § 14. Section 74 retains its original language. Thus the original of § 50 shows that in building or repairing highways the surveyor may remove any erection, natural or artificial, which narrows the way; while § 74 relates to things deposited on the way, which may be removed and sold.

Exceptions overruled.

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

CHARLES E. WINSLOW *vs.* CHARLES E. MORRILL.

Cumberland. Decided July 1, 1878.

New trial. Jurors.

Jurors should decide cases upon such evidence as is produced before them by the parties to the litigation, and not go in search of evidence privately, or act upon evidence thus obtained.

ON MOTION, from the superior court, by the defendant for a new trial because, among other grounds, of the misconduct of Edward S. Hacker, one of the jurors who tried the cause.

The plaintiff's declaration avers that he was the owner and occupier of a milk farm in Deering, through which ran Fall brook, a stream from which his cows were accustomed to drink; and that the defendant erected on the stream near its source and above the plaintiff's premises, a currier and wool pulling shop, in which he used noxious and poisonous mixtures, compounds and substances, and permitted the same, and all the filth of the said currier and wool pulling shop to flow into said brook; by reason whereof the plaintiff's cows became poisoned by drinking the polluted water, shrank in flesh, gave poorer milk and less of it, etc. The damages were laid at $2,000.

The plea was not guilty, with a brief statement, alleging that the substances from the defendant's premises were trifling in quantity; that the stream was purified of them by running a great distance before reaching the plaintiff's premises, and that the pollution of the water, if any, was caused by impurities from sources other than the premises of the defendant. The defendant also claimed a prescriptive right of drainage into the brook in question.

The alleged misconduct of the juror, which the evidence taken in support of the motion tended to prove, was that, while the case was on trial, without leave of court, and without the consent or knowledge of the defendant, he visited the defendant's wool shop, and investigated its location as to the stream, and drain, and water supply, about which there was conflicting testimony, and imparted his supposed knowledge thus obtained to his fellow

jurors, together with the fact that he had examined the premises himself.

A. A. Strout & G. F. Holmes, for the defendant.

M. P. Frank & P. J. Larrabee, for the plaintiff.

WALTON, J. It is now well settled that jurors must decide cases upon such evidence as is produced before them by the parties to the litigation, and that they cannot go in search of evidence privately, or act upon evidence thus obtained. *Heffron* v. *Gallupe*, 55 Maine, 563. *Bowler* v. *Washington*, 62 Maine, 302.

The court is of opinion that the conduct of Mr. Hacker, one of the jurors who tried this cause, was such, in this particular, as entitles the defendant to a new trial.

Motion sustained. New trial granted.

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

SYLVESTER MCINTIRE *vs.* FRANCIS PLAISTED *et als.*

York. Decided July 1, 1878.

Insurance. Mortgage.

If one has a subsisting right to redeem or re-purchase land conveyed by him as security for a debt, he cannot require the grantee or his assignee to account to him for insurance money received for loss of the buildings upon it, if the insurance was procured by the grantee, or his assignee, with his own money, and for his own benefit, and there is no contract between the parties requiring him to account for the money.

BILL IN EQUITY, to redeem a lot of land in York, in the county of York, known as the McIntire stand, and praying that the defendants compensate the plaintiff for the value of the buildings destroyed by fire, and account for the insurance money obtained thereon.

The bill alleges, in substance, that the defendant Bowden having obtained the deed and the legal title to the premises under a promise which he never fulfilled, to give a written obligation to reconvey to the plaintiff on payment of certain advances, refused to reconvey after a tender, on August 15, 1860, of $978, the

whole amount of indebtedness; that Bowden & Plaisted, to whom he sold a half interest, joined in a deed to the defendant Grant, who had knowledge of all the circumstances.

Grant in his answer denied knowledge of Bowden's promise to give a writing, but admitted that he was informed of the promise to reconvey on payment of the sum due, but coupled with the further information that the plaintiff had refused to redeem and that Bowden and Plaisted had taken possession for non-payment of principal, interest, or rent.

The evidence tended to show that Bowden took the deed as security, under a promise to sign and give the plaintiff an obligation to reconvey on payment, as in the bill alleged; that while the attorney, Goodwin, was drawing up the writing for him to sign, he left, under pretense to see a person on the street, and never returned to the office or delivered the writing to the plaintiff; that Bowden & Plaisted sold the property to Grant for $1,000, about its value in its then condition; that Grant, after making extensive improvements, procured an insurance of $1,750; that the house, store, shed and fish house were burned, the barn only remaining; that he collected the insurance; that the premises in their present condition are worth about $200.

R. P. Tapley, for the plaintiff.

I. T. Drew, for the defendants.

WALTON, J. The plaintiff claims that he has an existing right to redeem or re-purchase a parcel of real estate, the legal title to which is now held by the defendant Grant. Since Grant held the title the buildings have been burned, and he recovered therefor $1,750 insurance money. The plaintiff claims not only the right to have the land conveyed to him, but he also claims that Grant must account to him for the insurance money. Can this latter claim be maintained? For if it cannot, it is useless to inquire whether the plaintiff is or is not entitled to a conveyance of the land, as the amount which he admits he must pay for a conveyance of it is four or five times as much as it is worth, now that the buildings have been destroyed; and it is only in case he has a right to the insurance money as well as the land that he asks for

a decree in his favor. The prayer of his bill is that the defendants may be compelled to convey to him the land, "and account to him for the insurance money."

We think he is not entitled to the insurance money. If it be true, as he asserts, that he parted with his title to the property as security for a debt; that he still has a subsisting right to redeem it; his position would be substantially that of a mortgagor,—certainly it would be no better—and it is well settled that a mortgagor cannot require a mortgagee to account to him for money received for insurance, where there is no contract between them to that effect, and the insurance was procured by the mortgagee for his own benefit, and the premium was paid out of his own money. *Cushing* v. *Thompson*, 34 Maine, 496. *White* v. *Brown*, 2 Cush. 412. *King* v. *Ins. Co.*, 7 Cush. 1.

Bill dismissed, with costs.

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

WILLIAM BLAKE, JR., *et ux. vs.* INHABITANTS OF NEWFIELD.

York. Decided July 1, 1878.

Way,—defective.

When one voluntarily leaves the highway for any purpose, and on going out of it or returning into it, at a point which the town has not prepared for travel, receives an injury from an obstacle outside the traveled path, the town is not responsible. And it makes no difference whether the obstacle is without or within the limits of the way as located, provided it is so situated as not to create a danger or an inconvenience to travelers who keep within that portion of the way which is prepared for travel.

That which was not a defect before cannot be made so by another and an independent defect having no connection with it.

The highway was safe and convenient, except that the owner of the adjoining land in building a cattle pass opened a trench across the entire width of the traveled portion of the road, rendering it temporarily impassable. The plaintiff, to get by this obstruction, passed through the adjoining field, and in coming from the field into the road, her carriage struck a rock within the limits, but outside of the wrought portion of the highway, and she was thrown out and hurt. *Held*, that the town was not liable.

ON MOTION of the defendants to set aside the verdict, which was for the plaintiffs.

CASE for injuries received by plaintiff wife from an alleged defect in a highway.

C. R. Ayer & G. F. Clifford, for the defendants.

W. J. Copeland, for the plaintiffs.

WALTON, J. We think the verdict in this case was clearly wrong. It is an action to recover damages occasioned by an alleged defect in one of the highways in the town of Newfield. There is so little dispute about the facts that the case presents substantially a question of law only.

The facts are these: The highway was in all respects safe and convenient except that the owner of the adjoining land had undertaken to build a cattle pass across it, and in doing so had opened a trench across the entire width of the traveled portion of the road, thereby rendering it temporarily impassable. To enable travelers to get by this obstruction, the fences were removed and they were allowed to pass through the adjoining field. The plaintiff had twice so passed on the day previous to the accident. On the day of the accident she undertook to pass in the same way, and, in coming into the road from the adjoining field, her carriage struck a rock and she was thrown out and injured. The rock was within the limits of the way as located, but not within the wrought portion of it. It was a rock naturally existing in the soil, and was upon the side of the road outside of the ditch, and created no danger or inconvenience to travelers passing along the wrought portion of the road in the usual way.

Are towns responsible for injuries thus received? We think not.

It was decided in *Howard* v. *North Bridgewater*, 16 Pick. 189, that towns are not obliged to keep the whole of a highway free from obstructions; that in many cases all the property of the town would not be sufficient for that purpose; and that they are not responsible for injuries occasioned by stones outside of the wrought portion of the road and beyond the ditches. The doctrine of this case has been many times affirmed, and was affirmed by this court in *Dickey* v. *Maine Telegraph Co.*, 46 Maine, 483, and many subsequent cases.

In *Tisdale* v. *Norton*, 8 Met. 388, the court held that if one voluntarily leaves the highway because he finds it obstructed and impassable, and goes upon the adjoining land and there receives an injury, the town is not responsible; and the doctrine in this case has been many times affirmed.

In *Shepardson* v. *Colerain*, 13 Met. 55, and in *Smith* v. *Wendell*, 7 Cush. 498, and in *Kellogg* v. *Northampton*, 4 Gray, 65, the principle of the last case was applied to obstructions upon the sides of a road. In the latter case (4 Gray, 65), the court say that towns are not liable for obstructions or defects in portions of the highway not a part of the traveled path, and not so connected with it that they would affect the safety or convenience of those traveling on the highway and using the traveled path; and that a town would not be liable where an injury is received by one in passing to or from the highway, although it is caused by a defect within the limits of the highway as located by law, but outside of the way used for public travel. And the doctrine of these cases was affirmed in *Leslie* v. *Lewiston*, 62 Maine, 468.

We think the doctrine of these cases is correct,—namely, that when one voluntarily leaves the highway for any purpose, and in going out of it or returning into it, at a point which the town has not prepared for travel, receives an injury from an obstacle outside of the traveled path, the town is not responsible. That it can make no difference whether the obstacle is without or within the limits of the way as located, provided it is so situated as not to create a danger or an inconvenience to travelers who keep within that portion of the way which is prepared for travel. The town is under no more obligation to remove stones or other obstacles, naturally existing in the soil, within the limits of the way but outside of that portion of it prepared for travel, than it is to remove similar objects in the adjoining fields. That which was not a defect before cannot be made so by another and an independent defect having no connection with it.

The ditch across the road was undoubtedly a defect, but that did not make all obstacles upon the sides of the road defects, simply because travelers, in order to get by the ditch, might want to use the sides of the road. The remedy was to fill up the ditch

across the road, and not to remove all possible obstacles to travel upon the sides of it.

Motion sustained. New trial granted.

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

INHABITANTS OF HAMPDEN *vs.* CITY OF BANGOR.

Penobscot. Decided July 23, 1878.

Pauper.

Acts of kindness or charity or aid furnished as a gift or loan do not constitute supplies within the pauper act.

When the person furnishing and the person receiving aid understand the aid to be a mere act of neighborly kindness, the subsequent voluntary payment by the town of what was never a charge against it will not make the aid thus furnished to be supplies within the pauper act.

ASSUMPSIT for supplies furnished by plaintiffs to Miss Knowles, as a pauper, whose settlement was alleged to be in the defendant city. The only question was one of settlement. The case was referred and afterwards made law on the following facts found in the referee's report:

"The pauper was an aged single woman, who had made her home for many years with her brother in Bangor, both having their home and settlement there in October, 1868, when her brother (and she with him) moved their residence from Bangor to Hampden, and he has resided there ever since. In August, 1873, the pauper, being dissatisfied with her situation at her brother's house, and needing assistance at his house, or elsewhere, (in his absence) left his house with an intention not to return, and went to the house of a neighbor by the name of Murch, and asked him to make an application to the overseers to take her to the poor house of Hampden. Murch at once notified one of the Hampden overseers, who went to Murch's house to see her, and after an interview with her, arranged with Murch that she could stay at his house a day or two, until other arrangements could be made. The overseer consulted with his colleagues, and they notified Bangor, in writ-

ing, in the usual form, supposing Bangor would provide for her, thus saving themselves (overseers of Hampden) the necessity of taking her to their own poor house on the town farm. Thereupon Mr. Jewett, overseer of Bangor poor house, being an acquaintance of the pauper's family, called upon the pauper at Murch's house, but not by the direction of the Bangor overseers, and he also requested Murch to keep the pauper until some arrangement was made.

"At the end of three days, the brother being notified of the condition of things, took his sister away, carrying her upon a visit to their sister's in Bradford. She remained there about eight months, not however changing her residence from Hampden, when she returned to her brother's in Hampden, remaining with him about a year, and on June 9, 1875, went into plaintiffs' poor house, where she remained till she died. She did not suppose that she was living at Murch's as a pauper, but expected to go to the poor house. Nor did Murch, at the time, make any charge against either Hampden or Bangor, for her keeping, or ask, or expect anything for it, all parties supposing the trouble was remedied by her going to Bradford. But after the pauper fell into distress, in 1875, the selectmen of Hampden requested Murch to make out a bill for the three days' keeping. If the keeping by Murch was, under the circumstances, such a reception of pauper supplies as would break the continuity of her residence in Hampden, then the plaintiff shall recover the bill sued for. If not, then judgment shall be given for the defendant."

A. W. Paine, for the plaintiffs.

F. H. Appleton, city solicitor, for Bangor.

APPLETON, C. J. The question presented for our determination is whether, under the facts as found by the referee, pauper supplies were furnished by Murch to, and received as such by Miss Knowles. We think they were not.

Miss Knowles requested Murch to make an application to the overseers to take her to the poor house, which he did. Had she left Hampden immediately on making this request, there could be no pretense that supplies had been furnished or received. Had

the town made an arrangement to furnish them, and they were never furnished, the result would be the same. The rights of all parties interested must be determined by the facts existing at the time the alleged supplies were furnished. *Veazie* v. *Chester*, 53 Maine, 29, 30.

The pauper knowingly received no supplies. She applied to be sent to the poor house. She was not so sent. So far as she was concerned, she supposed she was enjoying mere neighborly kindness and hospitality. Murch had no other idea. He made no charge to either Hampden or Bangor. He neither asked nor expected anything for the kindness rendered. The board was not furnished on account of the town as supplies nor received by the person, who subsequently became a pauper, as such. Murch made out his bill, not because he had a claim against Hampden, but at the instance of the town officers. They paid it, not because it was a debt, but hoping it would break the continuity of the pauper's residence in their town. The case shows that nothing was furnished or received as supplies.

Acts of private charity or aid voluntarily furnished one, though in distress, do not constitute supplies within the statute. *Canaan* v. *Bloomfield*, 3 Maine, 172. *Veazie* v. *Chester*, 53 Maine, 29, 30. n *Oakham* v. *Sutton*, 13 Met. 192, the supplies were claimed to have been furnished by an order drawn by Torrey, one of the overseers of the poor. The instruction to the jury was "that if Torrey furnished the order to Simpson (the pauper) in the way of a gift or loan, solely on his (Torrey's) own account, without any expectation or intention o being remunerated by the town; or if he took a promise to himself, with a view of recovering the debt for his own use; then a subsequent payment to him of the sum advanced by the overseers would not make such aid the furnishing of relief by the town, so as to affect Simpson's settlement." This instruction was held to be correct.

In *Fayette* v. *Livermore*, 62 Maine, 229, it was the intention of the brother, when making application for and in behalf of his sister, to charge the town for all supplies after that date. The officers of the town expected he would so do. He did so. The supplies in that case were furnished with the expectation of pay-

ment therefor on the part of the person furnishing them. Not so in the case at bar.

Judgment for the defendants.

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

JAMES E. OXTON *vs.* DANIEL W. GROVES.

Waldo. Decided July 23, 1878.

Deed,—boundaries.

When the line runs "to the road and thence by the road," the grant is to the center of the road, even though the measurement of distances would extend only to the side of the road.

ON REPORT.

TRESPASS q. c. f., and for cutting and carrying away grass. Both parties claimed title to the *locus in quo* under their deeds of parts of the Mitchell farm, the southern boundary of which was the centre of a road existing at the time the parties took their deeds, but discontinued before the time of the alleged trespass. The defendant's deed called for twenty acres of the eastern part of the farm, and the plaintiff's for the residue. The question was one of boundary, and whether the defendant's land extended to the center of the road or stopped at the side of it, the *locus* of the alleged trespass being a strip one and a half rods wide and some seventy rods long, the half of the road northerly of the center line.

The description in the deed under which the defendant justifies is as follows: "A certain parcel of land, situated in Montville aforesaid, and described as follows, viz: It being a portion of the premises conveyed to me, said Palmer, by Jabez Mitchell, and is bounded as follows, to wit: Commencing at a stake and stones, the southeast corner of the said premises, at the road, thence, running northerly on range line to land of Nancy Harriman, to the northeast corner of said described premises; thence, westerly on the northerly line of said lot, far enough to contain twenty acres

of land, to stake and stones to be erected; thence, southerly on a line parallel with said first named line to said road; thence, by said road to point begun at, containing twenty acres and no more."

J. W. Knowlton, for the plaintiff.

W. H. Fogler, for the defendant.

APPLETON, C. J. The deed, under which the defendant justifies the acts complained of, commences "at a stake and stones, the southeast corner of the said premises, at the road;" thence, after certain courses and distances, "to said road; thence, by said road to point begun at, containing twenty acres and no more." It is to be observed that the line runs to the road, not to the side or line of the road, and thence, by the road, not by the side or line of the road.

The rule is now well settled that when a line is given running "to the road and thence by the road," the grant is to the center of the road. *Hunt* v. *Rich*, 38 Maine, 195. *Cottle* v. *Young*, 59 Maine, 105. *Reed's petition*, 13 N. H. 381, 384. This is held to be the true rule, even though the measurement of distances would extend only to the side of the road. *Phillips* v. *Bowers*, 7 Gray, 21. "The road," observes Shaw, C. J., in *Newhall* v. *Ireson*, 8 Cush. 595, "is a monument; the thread of the road, in legal contemplation, is that monument or abuttal. . . Land may no doubt be bounded by the side of a highway, but it must be done in clear and distinct terms to control the ordinary presumption." No apt words are here used to limit the grant to the edge or side of the highway. *Boston* v. *Richardson*, 13 Allen, 146,147. Where the highway is a boundary, the center line of the street is presumed to be the limits, unless the description excludes the soil of the highway. *Child* v. *Starr*, 4 Hill, 369. *Morrow* v. *Willard*, 30 Vt. 118. *Paul* v. *Carver*, 24 Penn. 207.

Under ordinary conditions, nothing short of express words of exclusion will prevent the street in front of the premises conveyed from passing. *Salter* v. *Jonas*, 10 Vroom, 469.

Judgment for the defendant.

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

SERENO JELLISON *vs.* LUTHER JORDAN.

Hancock. Decided July 23, 1878.

Frauds, statute of.

A contract for the conveyance of real estate not in writing is void by the statute of frauds.

When a party to such contract has complied with its conditions and made all the payments required by its terms, he is entitled to recover back such payments in case the other party refuses to perform on his part.

Nor will it defeat his right of recovery that he is in possession of the premises agreed to be conveyed.

ON EXCEPTIONS, by the defendant, to instructions stated in the opinion.

G. S. Peters, for the defendant.

A. P. Wiswell, for the plaintiff.

APPLETON, C. J. This was an action of assumpsit on an account annexed and for money had and received.

It was in evidence, that the defendant bargained with the plaintiff to sell him a small farm for a sum of money down and the balance on time, the defendant to give a warranty deed and to receive from the plaintiff his notes for the balance of the purchase money secured by mortgage. The plaintiff went into immediate possession of the premises and has ever since remained there. The plaintiff made the cash payment and gave the notes and mortgage. The defendant was to get his wife to sign the deed and then deliver the same to the plaintiff. The plaintiff went on; paid a portion of the notes under an expectation that he should have his deed, which the defendant repeatedly promised to give him. Finally, the plaintiff demanded his deed which the defendant refused to deliver, and commenced the process of forcible entry and detainer, which is now pending. Thereupon, the plaintiff, on account of such refusal and the previous refusal and neglect of the defendant to deliver a deed, brought this action to recover back what he had paid.

The instruction to the jury was that the action might be main-

tained, notwithstanding the plaintiff had not surrendered the possession of the premises, and although the notes were not fully paid when the action was commenced.

The plaintiff has done as he agreed. He is in the right. The defendant has refused to perform his contract. He is in the wrong. The contract between the parties related to real estate and is within the statute of frauds. The plaintiff cannot enforce its performance. The defendant had the election to perform it or not. The plaintiff had no such election. He could not rescind the contract, if he would, if the defendant was willing to perform. *Kneeland* v. *Fuller*, 51 Maine, 518, 519. *Plummer* v. *Bucknam*, 55 Maine, 105.

The defendant, having alone the option to perform or not, has elected not to perform his contract. It then has no validity as a contract. The defendant has the money of the plaintiff in his hands in part performance of a contract which he has voluntarily repudiated. It is well settled that an action for money had and received lies to recover back money paid by a party to an agreement invalid by the statute of frauds, which the other party refuses to perform. *Cook* v. *Doggett*, 2 Allen, 439.

The fact that the plaintiff is in possession of the premises to be conveyed affords no defense to his claim. In *Richards* v. *Allen*, 17 Maine, 296, the plaintiff had been in possession, eighteen or twenty years, of the farm the defendant had promised, under circumstances like those in the present case, to convey; but the action was nevertheless maintained. If the possession of the plaintiff was rightful it can furnish no defense to the defendant, especially when the defendant has been allowed for the use of the premises from the time of the plaintiff's entry thereon to the date of the writ, as in *Richards* v. *Allen*.

If the plaintiff's possession was wrongful, his wrong doing can furnish no defense for the wrong doing of the defendant. The plaintiff is entitled to compensation from the defendant. If he has violated any rights of the defendant, he is amenable to the law for such violation in a suit therefor.

Exceptions overruled.

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

CALEB CHASE *et als. vs.* CHARLES F. COLLINS *et al.*

Aroostook. Decided July 23, 1878.

Poor debtor. Bond. Evidence.

One of the conditions of a poor debtor's bond was that the debtor would "take the oath prescribed in the 28th section, of chapter 113 of the revised statutes," but no oath was prescribed by that section. *Held*, that the bond was not a statute bond, and that evidence was not admissible to show how the reference to a wrong section happened.

ON EXCEPTIONS.

DEBT on poor debtor's bond.

PLEA, *nil debet*, with brief statement that the bond was not a statute bond, because among its conditions was this, that the debtor would "take the oath prescribed in the 28th section of c. 113 of the R. S." The words "28th" were printed in the bond taken by the officer. The oath referred to was prescribed by the 28th section R. S. of 1857. In all other respects the bond conformed to the requirements of section 24, c. 113, R. S. 1871.

The plaintiffs introduced the execution on which the debtor was arrested, with officer's return thereon that the debtor "gave me the bond provided in the 24th section of the 113th chapter of the revised statutes." The plaintiffs also offered to show by the officer that he intended to take the bond provided for by section 24, c. 113, R. S., and that the words "28th" printed in the bond were left there unintentionally; but the presiding justice, by whom the case was tried without a jury, with the right to except, excluded the evidence, and ruled that the bond, on account of its reference to the oath in the 28th section, was invalid as a statute bond, but was a bond at common law, and assessed damages for the plaintiffs in the sum of $1.00; and the plaintiffs alleged exceptions.

J. Mulholland, for the plaintiffs.

J. B. Hutchinson, for the defendants.

APPLETON, C. J. This is an action of debt on a poor debtor's bond. Among the conditions there was one that the debtor

would "take the oath prescribed in the 28th section of chapter 113 of the revised statutes." But no oath is prescribed by § 28. The oath required to be taken when a bond is given under the provisions of § 24 is to be found in § 30.

The bond given is not therefore in conformity with the requirements of § 24, and is not a statute bond. *Fales* v. *Dow*, 24 Maine, 211. *Hovey* v. *Hamilton*, 24 Maine, 451. *Woodman* v. *Valentine*, 24 Maine, 551.

The oath referred to was the one required by R. S. 1857, c. 113, § 28. The plaintiff offered to show that the words "28th" were unintentionally left in the bond, and that the officer intended to take the bond required by R. S. 1871, c. 113, § 24, but the presiding justice excluded the evidence. The exclusion was right.

The mistake or accident is not one which is cured by R. S., c. 113, § 48. The penalty of the bond does not vary from the sum required by law.

The plaintiffs have judgment for the damages actually sustained, as assessed by the presiding justice at *nisi prius*, and with that they must be content.

Exceptions overruled.

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

MARCIA S. JEWETT *vs.* CHARLES RICKER.

Somerset. Decided July 26, 1878.

The plaintiff deeded certain premises, "reserving the right of flowage as now flowed by Ricker's dam, and the yearly payments as I have heretofore received them." *Held:* 1, that this was a valid reservation; 2, that the plaintiff might recover the yearly payment against the occupant of the Ricker dam on his parol promise to pay the same.

ON EXCEPTIONS.

ASSUMPSIT on a parol promise, to recover compensation for the flowing, by the defendant's dam, of the plaintiff's interest in certain land, from March 12, 1872, to date of writ, September 7, 1876, at $25 per year.

The declaration also contained a count for money had and received to cover three years of the same time, when the mill was occupied by Frank Ricker, the brother of the defendant, on the ground that the defendant had agreed with Frank to assume and pay the debts, and received money or its equivalent therefor.

The plea was, never promised, with a brief statement that the defendant did not own the flowage nor the land flowed.

The plaintiff, November 23, 1863, mortgaged the land to Henry S. Jewett. There was evidence of the foreclosure of the mortgage, and of a sheriff's sale of her right of redemption, December 5, 1870. On April 13, 1872, there was a record in the registry that "this mortgage is fully discharged and satisfied by payment of the within notes;" and on the same day, two deeds passed to Benjamin Duren, under whom the defendants claimed title, one of quitclaim from Henry S. Jewett, and the other of warranty from the plaintiff, "reserving the right of flowage as now flowed by Ricker's dam, and reserving the yearly payments for flowage as I have heretofore received the same, and excepting the right and title of Henry S. Jewett in said premises, which has this day been purchased by said Duren."

The presiding justice ruled that the plaintiff had sufficient interest in the land to maintain the action, and that a parol agreement to pay the price sued for would be sufficient. The verdict

was for the plaintiff for $106.53; and the defendant alleged exceptions.

S. S. Brown with *E. O. Howard*, for the defendant, contended,

I. That, under the evidence, the plaintiff had no title to the land at the date of her deed to Duren; that Duren's title by Henry S. Jewett's quitclaim was complete without the conveyance of the plaintiff, and therefore there was nothing that could be reserved.

II. If she had any title, that after parting with it by her deed to Duren, it was immaterial to her whether there was much or little or any flowing or not; that there was no basis for the reservation to rest upon.

III. That the promise was within the statute of frauds.

J. Wright, for the plaintiff.

APPLETON, C. J. The plaintiff owning the Richardson farm, a part of which was overflowed by the Ricker dam, on April 13, 1872, conveyed the same to Benjamin Duren by deed "reserving the right of flowage as now flowed by Ricker's dam, and reserving the yearly payments as I have heretofore received them, and excepting the right and title of Henry S. Jewett in said premises, which has this day been purchased by said Duren."

As the land was flowed at the time of the above conveyance, the reservation of the right of flowage saved the grantor from liability on his covenants against incumbrance, in case Ricker had such right. *Hill* v. *Lord*, 48 Maine, 83, 95.

In *Sprague* v. *Snow*, 4 Pick. 54, the grantor, after describing a tract of land conveyed by his deed, but without having mentioned a stream included within the bounds, proceeded thus: "And it is to be understood, and it is the intention of this deed to convey to the grantee as much of the privilege of water as shall be sufficient for the use of a fulling mill, whenever there is a sufficiency therefor." It was held this was a reservation of the surplus water. In *Richardson* v. *Palmer*, 38 N. H. 212, 213, the plaintiff conveyed land, "reserving to the public the use of

the road through said farm; also reserving to the White Mountain Railroad the roadway for said road, as laid out by the county commissioners; and also reserving to myself the damages appraised for said railroad way by the commissioners and selectmen." It was there held that the land described passed to the grantee subject to the incumbrance of the public highway and of the White Mountain Railroad, but that the plaintiff retained his claim for unpaid damage awarded for the laying out of the railroad.

The evidence shows the defendant promised the plaintiff repeatedly to pay for the yearly flowage. The compensation for the flowage was reserved to the plaintiff in her deed to Duren. The defendant has had the benefit of it, and no satisfactory reason is shown why he should not perform his promise.

It is urged that Duren acquired a title to the Richardson farm from Henry S. Jewett, to whom this plaintiff had mortgaged the same. The deed from H. S. Jewett to Duren bears the same date as that from the plaintiff to him. But the title of H. S. Jewett was by mortgage, and the same was discharged when the conveyance was made from this plaintiff to Duren. It is obvious, therefore, that Duren's title is from the plaintiff, and that he holds under her deed and subject to its terms.

Motion and exceptions overruled.

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

JAMES SLADE *et al. vs.* JAMES T. PATTEN *et als.*

Sagadahoc. Decided July 27, 1878.

Will. Trust.

The will says: "I give and devise my estate, real and personal, as follows: To each and all my children an equal part or proportion of all and singular my property; to (naming two sons and five married daughters) one-seventh part to each of them and their heirs, with the proviso, that the parts and proportions hereby devised and bequeathed to (naming four of the daughters) and their heirs, instead of paying into their hands, is to go into the hands of J S and G M P, whom I hereby appoint trustees, to hold, manage and dispose of said parts, and the property received therefor, for the use and benefit of said (naming the four daughters) and their heirs, according to the discretion of said trustees. *Held:* 1, That the trust for the use and benefit of the heirs of his daughters indefinitely, as well as for the use and benefit of his daughters, was void for perpetuity; 2, That, the trust being void, the absolute gift remained in full force and unimpaired.

A devise, if limited to vest within a life or lives in being and twenty-one years, adding, however, in case of an *enfant en ventre sa mere*, sufficient to cover the ordinary period of gestation, is good; but such limitation, to be valid, must be so made that the estate devised not only may, but must necessarily, vest within the prescribed period.

In a subsequent clause, the will says: "In case that S E (one of the daughters named) should die before her husband and leave no children, I will that her part, after the expiration of six years, be transferred by the trustees over to the parties of the six other heirs, and be equally divided between them." *Held:* That this special clause is so connected with and dependent upon the trust clause, if that fails, this will fail with it; that any other construction would defeat the prevailing purpose and manifest intent of the will, which was to give to each and all of his children "an equal part and proportion of all and singular his property."

The tenure of trustees is to be measured by the powers given and the duties imposed upon them.

A trust never fails for want of trustees. The circumstance, that there are no words of limitation or devise to the trustees, cannot affect or change the result.

BILL IN EQUITY, asking the construction of a will.

W. L. Putnam, for the complainants.

N. Webb, for Ann Augusta Whittlesey *et als.*

C. W. Larrabee, for George P. Slade *et als.*

M. M. Butler & B. F. Thomas, for Statira Elliot.

S. C. Strout & H. W. Gage, for James T. Patten *et als.*

APPLETON, C. J. This is a bill in equity, brought in pursuance of the provisions of R. S., c. 77, § 5, by the complainants claiming under the will of George F. Patten, to obtain the construction of the same. All having an interest in the question to be determined have been made parties to the bill, and have entered an appearance.

The will is in these words: "I give, devise and bequeath, all and singular, my estate, real and personal, as follows; that is to say, to each and all my children an equal part or proportion of all and singular my property, viz: To Catherine F. Walker, Hannah T. Slade, wife of Jarvis Slade, James T. Patten, Statira Elliot, wife of John Elliot, Paulina Tappan, wife of Winthrop Tappan, Augusta Whittlesey, wife of Eliphalet Whittlesey, and George M. Patten, one-seventh part to each of them and their heirs, with the proviso, that the parts and proportions hereby devised and bequeathed to Catherine F. Walker, Statira Elliot, Paulina Tappan and Augusta Whittlesey and their heirs, instead of passing into their hands, is to go into the hands of James Slade, of New York, and George M. Patten, of Bath, whom I hereby appoint trustees, to hold, manage and dispose of said parts, and the property received therefor, for the use and benefit of said Catherine F. Walker, Statira Elliot, Paulina Tappan and Augusta Whittlesey and their heirs, according to the discretion of said trustees."

It is apparent that the testator intended to treat all his children with perfect equality, giving "to each and all his (my) children an equal part and proportion of all and singular his (my) property;" and, while he placed "the parts and proportions" of four of his daughters in the hands of trustees, the trustees were "to hold, manage and dispose of said parts, and the property received therefor, for the use and benefit" of his said daughters and their heirs. True, it was to be according to the discretion of the trustees, but that discretion related solely to the holding, managing and disposing of these parts. There is no provision for the termination of the trust estate. It continues for the heirs of the daughters named, equally as for the daughters.

If the trustees are to hold the estate for the four daughters and the heirs of the daughters, then the trust is void as creating a perpetuity.

But it has been argued that the intention of the testator was that the trust, as to each of his daughters, should cease as to such daughter and vest in the children of such daughter. But this is against the express terms of the will, by which the trustees are to hold the estate "for the use and benefit" of the four daughters named "and their heirs." The trust is as much for the heirs of the daughters as for the daughters. The will makes no provision for the termination of the trust at the death of the daughters or their heirs. It continues as much for the latter as for the former. The devise is one and indivisible to the trustees to hold, manage and dispose of, for the use and benefit of the daughters and their heirs. In no legal sense can the daughters be deemed the first takers, and the trust valid as to them and not as to their heirs.

But assuming it to have been the testator's intention that on the decease of his daughters their respective shares should go to the heirs of such daughters in fee simple, still, this would create a perpetuity, because it was possible, that they might have heirs unborn at the testator's death and in whom the estate would not vest within lives in being and twenty-one years and a fraction afterwards.

"This rule is imperative and perfectly well established. An executory devise, either of real or personal estate, is good," observes Merrick, J., in *Fosdick* v. *Fosdick*, 6 Allen, 41, "if limited to vest within the compass of a life or lives in being, and twenty-one years afterwards; adding thereto, however, in case of an infant *en ventre sa mere*, sufficient to cover the ordinary time of gestation of such child. But the limitation, in order to be valid, must be so made that the estate, or whatever is devised or bequeathed, not only may, but must necessarily, vest within the prescribed period. If by any possibility the vesting may be postponed beyond this period, the limitation over will be void." In any view of the trust, therefore, it must be deemed void, as creating a perpetuity. 1 Perry on Trusts, §§ 381, 382, 383.

Here, in the first instance, there was an absolute gift to the daughters and their heirs. Upon this gift a limiting or restrictive clause was attempted to be grafted, which, it has been seen, was void. The first gift remains in full force, if the attempted qualifi-

cation becomes ineffectual. The presumption is that "the testator intends the prior absolute gift to prevail, except so far only as it is effectually superseded by the subsequent qualified one." 1 Jarman on Wills, § 257. "Whenever there is a limitation over," remarks Merrick, J., in *Fosdick* v. *Fosdick*, 6 Allen, 41, 43, "which cannot take effect by reason of its being too remote, the will is to be construed as if no such provision or clause were contained in it; and the person or persons otherwise entitled to the estate or property will take it wholly discharged of the devise, bequest and limitation over. *Sears* v. *Russell*, 8 Gray, 86, 97. *Brattle Square Church* v. *Grant*, 3 Gray, 142."

The conclusion is that the trust for the daughters is void as creating a perpetuity, and the absolute gift remains.

It is obvious that there are no words of inheritance in the trustees. But that cannot be deemed material. Courts of equity do not permit a trust to fail for want of trustees. Their tenure is to be determined by their powers and duties. "The intent of the parties is determined by the scope and extent of the trust. Therefore the extent of the legal interest of a trustee in an estate given to him in trust is measured, not by words of inheritance or otherwise, but by the object and extent of the trust upon which the estate is given. On this principle two rules of construction have been adopted by courts; first, when a trust is created, a legal estate sufficient for the purposes of the trust shall, if possible, be implied in the trustee, whatever may be the limitation in the instrument, whether to him or his heirs or not; and, second, although a legal estate may be limited to a trustee to the fullest extent, as to him and his heirs, yet it shall not be carried further than the complete execution of the trust requires." 1 Perry on Trusts, § 312. Courts will imply an estate in the trustees, though no estate is given them in words, to carry into effect the intention of the parties. The absence of words of inheritance in the trustees would not be held to limit the duration of the trust to their lives, if the trust were a valid one. But the trust being void, for the reasons already given, the estate of the trustees must cease; as no provision has been made for a trust which could be carried legally out.

The devise to Mrs. Elliot differs from that to the other daughters. The provisions of the will as to her stand thus: First, there is a devise to her and her heirs. Then a trust is interposed, which we have seen is void, followed by the following clause: "In case that Statira Elliot should die before her husband and leave no children, I will that her part, after the expiration of six years, be transferred by the trustees over to the parties of the other six heirs, and to be equally divided between them."

Leaving out of consideration the trust as void, there is first a gift to her and her heirs, but in case she dies before her husband leaving no children, then over. This is as if he had said to Statira Elliot and her children, but in case she dies leaving no children, then over. The doctrine is thus stated: "When a testator in the first instance devises land to a person and his heirs, and then proceeds to devise over the property in terms which show that he used the word heirs in the prior devise in the restricted sense of heirs to the body; such devise confers only an estate tail, the effect being the same as if the latter expression had been originally employed." 2 Jarman, 238. "If, therefore," remarks Shaw, C. J., in *Nightingale* v. *Burrell*, 15 Pick. 104, "an estate is devised to A and his heirs, which is a fee; and it is afterwards provided that if A die without issue, then over, this reduces it to an estate tail by implication. The law implies that by 'heirs' in the first devise, was intended heirs of the body, and it also implies from the proviso, that it was not the intent of the testator to give the estate over and away from the issue of the first devisee, but, on the contrary, that such issue should take after the first devisee." *Parkman* v. *Bowdoin*, 1 Sumn. 367. The cases cited by the counsel for Mrs. Elliot lead to the conclusion that she would be entitled to an estate tail in the real estate.

But the words which will create an estate tail when applied to real estate, will give an absolute interest when applied to personalty. "The same limitation under the English law, which would create an estate tail if applied to real estate, would vest the whole interest absolutely in the first taker if applied to chattels." 4 Kent Com. 283. *Hall* v. *Priest*, 6 Gray, 18, 22.

Such might have been the legal rights of Mrs. Elliot had there

been no attempt at creating a trust estate, but this provision cannot be eliminated from the will. It is there. If the trust is void as to one daughter, it is void as to all. Equality among the children is the rule. It was not the intent that three daughters should have an absolute estate in their shares and the fourth to have an interest only for life. Now to set aside the trust as to three of the daughters and giving such a construction to the will as would give Mrs Elliot a life estate only in case she survived her husband, thus limiting her only to her income, so that the estate may be kept intact to meet the contingency of her dying and leaving no children, would be the making a will the testator never made and defeating his manifest intent of giving "to each and all his (my) children an equal part and proportion of his property."

If the trust was void from the beginning, then those named as trustees never held any of her property as trustees to be transferred to the heirs.

The result is that the trust as to the daughters is void as creating a perpetuity; and, as it is the manifest intention of the testator to divide his estate equally among his children, the special clause as to Mrs. Elliot is so connected with and dependent upon the trust clause, that if that fails this fails with it, and, as they hold the estate devised as an absolute gift, so equally does she.

According to the true construction of the will of George F. Patten, it is declared:

I. That the trust attempted by said will to be vested in the complainants is wholly void.

II. That the children of Catherine F. Walker, deceased, are entitled to receive payment, delivery and conveyance of a share, to wit: one-fourth of the principal and body of the estate in the hands of the complainants, to the use of themselves, their heirs and assigns forever, absolutely and free of all control from the complainants.

III. That said Statira, Paulina and Augusta are each entitled to receive payment, delivery and assignment of a share, to wit: of one-fourth of the principal and body of the said estate in the hands of the complainants, each to the use and behoof of her-

self, her heirs and assigns forever, free from the control of these complainants.

IV. That these complainants may and shall pay, deliver and assign to said Statira, Paulina and Augusta, and to the children of said deceased Catherine, any and all of the principal and body of the estate in their hands to the use of said Statira, Paulina, Augusta, and to the heirs and assigns of each forever, and to the use of the heirs of said Catherine, their heirs and assigns, their respective and several shares, free from the control of the complainants.

And it is ordered and decreed that the costs of the proceeding be charged upon the estate of Statira, Paulina, Augusta and the heirs of Catherine.

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

SARAH R. LOVEJOY *vs.* PHINEAS RICHARDSON.

Androscoggin. Decided August 3, 1878.

Deed. Estoppel.

Where the name of the grantor is signed to his deed by another in his presence, at his request and by his direction, he is bound thereby.

Where the grantor's name is thus affixed, and he acknowledges the deed, receives the consideration therefor and delivers the same, he is estopped to deny his signature thereto.

ON EXCEPTIONS.

TRESPASS *quare clausum fregit.*

The defendant offered in evidence a deed of the *locus in quo*, from Cornelius T. Richardson to himself, which closed thus: "Cornelius T. Richardson. [L. S.] Signed by David House in presence of and by the request of C. T. Richardson. E. B. House, David House. Signed, sealed and delivered in presence of A. Barker, David House." The deed was duly acknowledged and recorded. It was offered in evidence by the defendant and objected to by the plaintiff, on the ground stated in the opinion.

The presiding justice sustained the objection; and the defendant alleged exceptions.

L. H. Hutchinson & A. R. Savage, for the defendant.

N. Morrill, for the plaintiff.

APPLETON, C. J. This is an action of trespass *qu. cl.* Both parties derive title from Cornelius T. Richardson; the plaintiff by devise, and the defendant by deed.

The defendant offered in evidence the deed of Richardson to him, which was objected to on the ground that it was not signed by the grantor or his attorney, as required by R. S., c. 73, § 10; and that he did not sign it or make his mark upon it, as required by R. S., c. 1, § 4, rule 18. The objection was sustained and the deed excluded.

The deed was signed by another, "in the presence of and by the request of" the grantor. His seal was affixed thereto. The grantor duly acknowledged "the instrument to be his free act and deed," and that he had received ten hundred dollars in consideration therefor. He delivered the deed to the defendant, who is in possession claiming title under the same. All this appears in evidence, and, if it did not, we have a right to assume it could be proved, for the purpose of testing the correctness of the ruling of the presiding justice in excluding the deed for the causes assigned. The deed being excluded, the defendant was necessarily precluded from showing the consideration paid and the circumstances attending its execution, acknowledgment and delivery.

A seal is absolutely necessary for the authentication of a deed. If a stranger seal a deed by the allowance or the commandment precedent, or agreement subsequent, of the person who is to seal it, that is sufficient. Therefore if another man seal a deed of mine, and I take it up after it is sealed and deliver it as my deed, this is said to be a good agreement to, and allowance of the sealing, and so a good deed. Perk. § 130. But the sealing is as much required to make an agreement a deed as the signing. If another person seals the deed, yet if the party delivers it himself, he thereby adopts the sealing, and by parity of reason, the sign-

ing also, and makes them both his own. "The character of the power under which a deed may be executed by an agent for another, depends upon the circumstance whether the act of signing is done in the presence or absence of the principal. If done in his presence, an oral direction to do the act will be sufficient, it being theoretically the act of the principal himself. But if the act is to be done in the absence of the principal, it must be given by an instrument under the hand and seal of the principal." 3 Washburn on Real Property, 252. To the same effect are the repeated decisions of this court. In *Frost* v. *Deering*, 21 Maine, 156, 159, Whitman, C. J., says: "The authorities are perfectly clear that a deed or other instrument is well executed if the name of the party be put to it by his direction, and in his presence, by the hand of another person." In *Bird* v. *Decker*, 64 Maine, 550, the court say, referring to the grantor: "It was his signature made by him, through the exercise of his will and judgment, though he employed in the manual act the hand of another."

The statutes of Massachusetts on this subject are similar to those of this state to which the presiding justice referred and upon which his ruling was based. The same questions have been there considered as with us and with like result. In *Gardner* v. *Gardner*, 5 Cush. 483, the deed under discussion was signed by another, in the presence and at the request of the grantor. "The name being written by another hand, in the presence of the grantor, and at her request, is her act. . . To hold otherwise, would be to decide that a person having a clear mind and full capacity, but through physical inability incapable of making a mark, could never make a conveyance or execute a deed; for the same incapacity to sign and seal the principal deed would prevent him from executing a letter of attorney under seal." "When one writes the name of another to a deed, in his presence, at his request and by his direction, the act of writing," observes Fletcher, J., in *Wood* v. *Goodridge*, 6 Cush. 117, "is regarded as the party's personal act, as much as if he had held the pen and signed and sealed the instrument with his own hand." In *Holbrook* v. *Chamberlin*, 116 Mass. 155, 161, Gray, C. J., uses the

following language: "The law is settled in this commonwealth that the unauthorized execution of a deed in the name either of a partnership or of an individual may be ratified by parol."

But here is more than the signing of the deed in the presence and at the request of the grantor. It is not to be recorded without its acknowledgment, and he has acknowledged it before a magistrate. In *Bartlett* v. *Drake*, 100 Mass. 174, it was held that one whose name was subscribed to a deed by his wife in his absence, adopted the signature as his own by acknowledging it before a magistrate.

Even after the adoption of the signature by his acknowledgment that it was his free act and deed, before a magistrate, the deed was of no avail while it remained in the hands and under the control of the grantor. To make it effectual there must be a further act, its delivery to the grantee. If then the consideration of the deed has been paid and the grantor has delivered it, is not the deed valid?

But the grantor was estopped by his own acts from denying his signature. By acknowledging the deed as his he authorized its recordation. On receiving the consideration he delivered it; for it is not to be assumed, in the absence of proof, that he delivered it without receiving such consideration. By delivering it, he gave authority to the grantee to place it on record, and by thus placing it on record, to give notice to all the world that he had parted with his title, which could never have been done without such acknowledgment and delivery. If a party is ever to be estopped, a stronger case of estoppel is not conceivable. Suppose a grantor had brought a deed signed by another for him, in his presence and at his request, duly acknowledged, and had, upon receiving the stipulated consideration, delivered it to the grantee, ignorant of the fact that the grantor's name was affixed by the hand of another, is he to be permitted to deprive the *bona fide* purchaser, of his rights? The deed is recorded by the direction of the grantor, for its acknowledgment and delivery by him are equivalent to direction or authority to record. Are subsequent purchasers to be deprived of their rights because a grantor fraudulently acknowledged and delivered and authorized to be recorded

a deed which he never signed; or is he to be held legally, as he is equitably, bound by these solemn and deliberate acts? A party who performs acts required to be done by a written instrument purporting to be signed by him will be estopped to deny his execution of it. *Bogg* v. *Ocott*, 40 Ill. 303.

The result is that the signature to the deed made at the request and in the presence of and acknowledged by the grantor is to be deemed his signature.

Exceptions sustained.

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

JAMES MELLEN *vs.* GEORGE MOORE.

Androscoggin. Decided August 3, 1878.

Promissory notes.

A promissory note of this form: "One year after date we promise to pay to the order of A B, one thousand dollars, value received," and signed "George Moore, treasurer of Mechanic Falls Dairying Association," is the note of Moore and not of the association; and it makes no difference that the plural "we" is used instead of "I."

ON REPORT.

ASSUMPSIT against George Moore on a promissory note signed "George Moore, Treasurer of Mechanic Falls Dairying Association," and indorsed and delivered to the plaintiff before suit commenced.

The defendant offered to prove that he was treasurer of the Mechanic Falls Dairying Association, a corporation duly established by law when the note in suit was signed and delivered; that he had authority to sign the corporation's name to the note; that the corporation hired, received and used the money for which the note was given; that the defendant intended to bind the corporation and not himself. The presiding justice ruled that the above facts would constitute no defense; that the note was the note of George Moore, and that he was personally liable upon the same. Whereupon, by consent, the case was reported to the law court for decision.

L. H. Hutchinson, *A. R. Savage & W. W. Sanborn*, for the plaintiff, under various positions taken, cited *Sturdivant* v. *Hull*, 59 Maine, 172. *Tucker Manf'g Co.* v. *Fairbanks*, 98 Mass. 101, 104. *Thomson* v. *Davenport*, 2 Smith's Leading Cases, 366. *Haverhill M. F. Ins. Co.* v. *Newhall*, 1 Allen, 130. *Stackpole* v. *Arnold*, 11 Mass. 27. *Bank of British North America* v. *Hooper*, 5 Gray, 567. *Titus* v. *Kyle*, 10 Ohio, N. S. 444. *Slawson* v. *Loring*, 5 Allen, 340, 342.

T. B. Swan, for the defendant, in argument, cited *Dyer* v. *Burnham*, 25 Maine, 9, 13. *Evans* v. *Wells*, 22 Wend. 324, 339, 340. And specially to the point that the use of the plural "we" as the grammatical subject of promise was inconsistent with an intention on the part of Moore to bind himself. *Rogers* v. *March*, 33 Maine, 106, 110. *Means* v. *Swormstedt*, 32 Ind. 87.

WALTON, J. The note declared on in this case is as follows:

"$1,000. Minot, June 19, 1875. One year after date we promise to pay to the order of O. A. S. Maybury one thousand dollars, value received, and interest at eight per cent per annum. George Moore, Treas. of Mechanic Falls Dairying Association."

Is this the note of George Moore, or is it the note of the Mechanic Falls Dairying Association?

We think it must be regarded as the note of George Moore. *Sturdivant* v. *Hull*, 59 Maine, 172.

The question involved in this class of cases was so thoroughly discussed in the case just cited that we doubt if any new light can be thrown upon it. It was there held that the liability or non-liability of the parties must be determined by an inspection of the note itself; that resort cannot be had to parol evidence to show an intention other than that expressed by the instrument itself. And it was held further that the words "I promise to pay," without any words importing that the promise is made for or on behalf of another, create a personal obligation on the part of the signer, although he adds to his name words describing himself as treasurer of some company or corporation.

The only difference between that case and this consists in this: In that case the personal pronoun "I" was used; in this it is "we." There it was "I promise;" here it is "we promise."

It is suggested that this difference would justify the court in coming to a different conclusion. We think not. The language used just as clearly imports an undertaking on the part of the speaker or writer in the one case as in the other. There is the same absence of apt words indicating an intention to bind another, and not the speaker or writer. There is no difference between the words "I promise" and "we promise," so far as the creation of a personal obligation upon the speaker or writer is concerned. To hold otherwise would be trifling, and not the performance of a grave duty. If the court does not intend to be bound by a former decision, it is infinitely better to say so than to undertake to distinguish the one case from the other when no real difference exists.

Lord Elden is quoted as saying that instead of struggling by little circumstances to take cases out of a general rule, it is more wholesome to struggle not to let little circumstances prevent the application of a general rule; and Lord Mansfield that such subtleties and refinements are encroachments upon common sense, and mankind would so regard them; that they should be got rid of, and no additions made to them; that our jurisprudence should be bottomed on broad and plain principles, such as not only the court, but those whose rights are to be decided by them, can understand; that, if our rules of law are to be incumbered with all the exceptions which ingenious minds can imagine, there will be no certain principles to guide us, and it would be better to apply the principles of natural justice to every case, and not attempt to be governed by fixed rules. Ram on Legal Judgment, 253.

The principle established by *Sturdivant* v. *Hull*, 59 Maine, 172, is that, unless the signer of a promissory note uses words which, fairly interpreted, indicate that the promise is not his promise, but the promise of another, he will be personally bound; and that adding to his name words which describe him as the treasurer or other officer of a company or corporation or association is not sufficient to relieve him from such responsibility. To the same effect are *Fogg* v. *Virgin*, 19 Maine, 352, and *Chick* v. *Trevett*, 20 Maine, 462.

The words used in the note declared on in this case clearly indicate an undertaking on the part of the signer, and, fairly construed, cannot be made to import a promise on the part of any one else. It must therefore be regarded as the note of the signer.

Judgment for plaintiff.

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

GEORGE W. DAVIE *vs.* HORACE H. JONES.

Cumberland. Decided August 4, 1878.

Witness. Party. Evidence. Trial.

The refusal of a plaintiff, who is also a witness, to show his books of account already in court, upon which the articles in his account annexed are claimed to be charged, after refreshing his recollection by a paper and testifying that it is a copy from the book, may be considered by the jury as bearing upon the credit to be given to his testimony relative to the charges; and it is error for the presiding justice to refuse so to instruct them.

ON EXCEPTIONS, from the superior court.

ASSUMPSIT on account annexed for boots and shoes delivered defendant's wife, partly during cohabitation and partly after the defendant and his wife had separated. The verdict was for the plaintiff; and the defendant alleged exceptions, stated in the opinion.

T. H. Haskell, for the defendant.

S. L. Carleton, for the plaintiff.

LIBBEY, J. The plaintiff was a witness in his own behalf to prove the sale and delivery of the articles for which he claimed to recover. He used what he testified was a copy of his account on his book to refresh his recollection, and, after so doing, testified to the sale and delivery of the articles at the dates contained in the bill annexed to the writ. He afterwards stated that he had his book of original entries, made by himself, in court; and on cross examination was asked to produce it. Under instructions from his

counsel not to do so, and a ruling of the presiding judge that he was not legally obliged to do so, he refused to produce it. Having testified by refreshing his recollection by referring to what he said was a copy, and having the original in court, the refusal to produce it that it might be seen whether it would support his testimony or not, was an act in court as a witness and party which it was competent for the jury to consider in weighing his evidence. The refusal by the presiding judge, on request, to tell them so was virtually withdrawing it from their consideration. The competency of the fact as evidence was a question of law for the court. The weight to be given to it was for the jury.

The requested instruction on this point should have been given.

Exceptions sustained.

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

CHARLES TREAT *et als. vs.* FRANKLIN SMITH.

Kennebec. Decided August 6, 1878.

Tax. Deed.

The deed of A B, treasurer of the town of C, of land sold for the non-payment of taxes, under R. S., c. 6, § 160, so describing himself in the deed, and signing it A B, treasurer, is only the personal deed of A B, and will not avail or aid in making out a *prima facie* title under § 162.

ON REPORT.

REPLEVIN for ninety-four hard wood logs valued at $350, cut, marked and hauled by William G. Heselton, who sold to the plaintiffs, and caught at Waterville by the defendant and turned into his boom. Writ dated October 3, 1873.

Plea, general issue, with brief statement of title in defendant.

Plaintiffs put in evidence a deed from M. W. Berry, treasurer of the town of Concord, so describing himself, and not "in the name of the town," to Corydon Felker, dated and acknowledged December 13, 1867, of the northerly half of No. 11, in range 5, in the town of Concord, one hundred acres, consideration $8.73.

Also deed from same to same, of same date, of three hundred and twenty acres, consideration $17.04.

Also deed from Corydon Felker to William G. Heselton of both the above described lots, consideration $105.

Also assessment of non-resident taxes of the town of Concord for the year 1866, with other matters unnecessary to state.

The defendant put in evidence deed from William King to himself, of August 11, 1836, conveying No. 11, in range 5, in Concord, one of the pieces described in the deed to Felker, and the land from which the timber in question was cut.

S. Lancaster, for the plaintiffs, contended that under law of 1878, he had made out a *prima facie* case by the production of treasurer's deed.

E. F. Webb, for the defendant, contended that the act of 1878 was not retrospective, and, if it were, that the "treasurer's deed," not being in the name of the town, was of no avail, even towards making out a *prima facie* case.

VIRGIN, J. The report discloses that the defendant held the title of lot 11, range 5, in Concord, until an alleged sale and conveyance thereof for taxes, by deed dated December 13, 1867, from M. W. Berry, treasurer of Concord, to Corydon Felker, who by his deed of March 16, 1870, conveyed the premises to William G. Heselton, who cut from the lot the logs in controversy and sold them to the plaintiffs.

The plaintiffs introduced other documentary evidence, and contended that they had thereby made out a *prima facie* title to lot 11, in accordance with the provisions of R. S., c. 6, § 162.

Passing by several fatal omissions in the testimony of the plaintiffs, and looking into the deed from Berry to Felker, we find it fatally defective, in that it is not "in the name of the town," as is peremptorily required by R. S., c. 6, § 160. Tax Collector, 194. The deed as executed is simply the personal deed of M. W. Berry, and it could not convey the title to the grantee named therein.

The defendant, having established his title to the lot from which the plaintiffs' vendor cut the logs, is entitled to judgment.

Stat. 1878, c. 35, having been enacted since the commencement of this action, and it containing no language indicating an intention of the legislature to make it retrospective, is not applicable. R. S., c. 1, § 3. *Rogers* v. *Greenbush*, 58 Maine, 395, 397. Neither was the defendant bound to pay or tender the amount of taxes, etc., while the plaintiffs were making out their *prima facie* case. *Orono* v. *Veazie*, 57 Maine, 517.

Judgment for the defendant.
Damages to be assessed by the judge at nisi prius.

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

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

DANIEL DUDLEY *et als.*, trustees, and WILLIAM W. BOLSTER, bank examiner, petitioners in the matter of the NEWPORT SAVINGS BANK, in insolvency.

Penobscot. Decided August 21, 1878.

Savings banks. Form of a decree.

Under the act of 1877, c. 218, § 36, this court has no power to proceed and reduce the deposits of a savings bank, if it appears, upon an examination of its assets and liabilities, and from other evidence, that it has exceeded its powers, or failed to comply with the rules, restrictions and conditions provided by law for its government in the management of its affairs; notwithstanding such violation of law has not caused nor contributed to its insolvency.

A violation of the rules, restrictions and conditions provided by law for the investment of the funds and deposits of the bank, by the trustees, is a violation of such rules, restrictions and conditions by the corporation, within the meaning of said act.

The court has no power to order the sums to which the deposits are reduced to be paid by installments.

Form of a decree. See statement of case.

ON REPORT.

PETITION, drawn under section 36 of c. 218, of the acts of 1877, for reducing the deposit and dividing the loss *pro rata*

among the depositors, and for such other orders and decrees as are authorized under that section.

The following report was drawn up by Appleton, C. J., presiding: "Penobscot, ss. Supreme judicial court, April term, 1878. In the matter of Newport Savings Bank, upon the petition of the trustees of the same, and William W. Bolster, bank examiner, under the act of 1877, c. 218.

"Due notice of the time and place of hearing having been given, the bank examiner and the petitioning trustees appeared, and the depositors also who objected to the granting of the prayer of said petition appeared by William H. McCrillis and F. H. Appleton, their attorneys.

"Upon examination of the records of the bank and other evidence before me, it appeared that in one instance a large loan, to the amount of $23,000, was effected on real estate in Kansas; that the loan not being paid, the property was sold by the bank to E. W. Shaw, then one of the trustees, for $10,000; that, in repeated instances, loans had been made to trustees, and to firms of which they were members, and to principals where they were indorsers; and that loans had been made on personal security in two or three instances.

"It was insisted by the depositors objecting, that, inasmuch as the rules, restrictions and conditions provided by law had been violated as herein set forth, that the court had no jurisdiction in the premises; but I ruled otherwise, and, upon a full hearing, I deemed it for the interests of the depositors and the public to reduce the deposit account of each depositor to sixty per cent of his deposit.

"It was claimed that the amount to be paid to depositors might be authorized to be paid in installments, designating the time of such payments; but I declined so to do. My decree was as follows: 'Whereas, the foregoing petition, on the fifth day of March, A. D. 1878, in vacation, was duly presented to me, one of the justices of said court, and a time for the examination of the affairs of said corporation was duly appointed by me, as prayed for; and, whereas, due notice thereon of the time and place of the intended examination thereof was duly given to all parties interested

therein, pursuant to the foregoing order, and, upon examination of the assets and liabilities of said institution, and from other evidence introduced at the time and place appointed by said order for said examination, being satisfied of the facts set forth in said petition, and that said corporation has not exceeded its powers, nor failed to comply with any of the rules, restrictions and conditions provided by law, and finding the actual liabilities of said institution to be $91,538.77, consisting of the amount due depositors, amounting to $91,413.77, and other liabilities amounting to $125.00; and the assets to be $91,413.77, as appears by the books of said corporation, and estimating the value of said assets as available at the sum of $54,973.26, and the loss on and by depreciation of the value of the same at $36,440.51, and deeming it for the interest of the depositors in said institution and the public, it is therefore decreed, in order to divide such loss *pro rata* among said depositors, thereby rendering the said corporation solvent, so that its further proceedings shall not be hazardous to the public or those having or placing funds in its custody, that the deposit account of each of said depositors be and is hereby reduced to sixty per cent of the amount due on the same, which is the sum fixed by the court that may be drawn from said corporation in conformity to law, and that no larger sum shall be withdrawn from said institution until further decree of court.

"'And it is further decreed and ordered that the treasurer of said corporation and his successors keep an accurate account of all sums hereafter received by said institution for the assets of the corporation held by it at the time of filing the aforesaid petition; and if a larger sum shall be realized therefrom than the value estimated as aforesaid by the court, to render, at such time or times as the court may prescribe, a true account thereof, that the court may thereupon, after due notice thereof to all parties interested, declare a *pro rata* dividend of such excess among the depositors, at the time of filing the aforesaid petition.'

"If, by reason of the objections herein set forth, this court, for the causes stated, has no jurisdiction, the petition is to be dismissed.

"The court is also to determine if authority is given by statute, to order the amount to be paid, to be paid in installments.

"The petition of the trustees and bank examiner may be referred to, or made part of this case, and the objections filed."

E. Walker, for the petitioners, contended that the limiting clause in § 36, c. 218: "and that the corporation has not exceeded its powers, nor failed to comply with any of the rules, restrictions or conditions provided by law," should not be literally and strictly construed, and was subject to the implied condition that such violation of law caused or contributed to the insolvency.

S. F. Humphrey & F. H. Appleton, for the objecting depositors, contended for strict construction, and that the court had no discretionary power, no jurisdiction to grant the petition, unless the conditions precedent in § 36 had been complied with, and cited Potter's Dwarris on Statutes, 224, note and cases cited. *People* v. *Schermerhorn*, 19 Barb. 540, 558. *U. S.* v. *Warner*, 5 McLean, 178. *Nicholson* v. *U. S.*, Deveraux, C. C. R. 158. *Jackson* v. *Lewis*, 17 Johns. 475. *People* v. *N. Y. Central Railroad Co.*, 13 N. Y. 78.

LIBBEY, J. This is a petition by the trustees of the Newport Savings Bank, and the bank examiner, for reducing the deposits of the bank, by virtue of c. 218, § 36, of the acts of 1877. It involves the true construction of that section, which reads as follows:

"Sect. 36. Whenever any savings bank, institution for savings, or trust and loan association, shall be insolvent, by reason of loss on, or by depreciation in the value of, any of its assets, without the fault of the trustees thereof, the supreme judicial court, in term time, or any justice thereof, in vacation, shall, on petition, in writing, of a majority of the trustees, and the bank examiner, setting forth such facts, appoint a time for the examination of the affairs of such corporation, and cause notice thereof to be given to all parties interested, in such manner as may be prescribed; and if, upon an examination of its assets and liabilities, and from other evidence, he shall be satisfied of the facts set forth in said petition, and that the corporation has not exceeded its powers, nor failed to comply with any of the rules, restrictions and conditions provided by law, he may, if he shall deem it for the interest of

the depositors and the public, by proper decree, reduce the deposit account of each depositor, so as to divide such loss *pro rata* among the depositors, thereby rendering the corporation solvent, so that its further proceedings would not be hazardous to the public, or those having or placing funds in its custody, and the depositors shall not be authorized to draw from such corporation a larger sum than thus fixed by the court, except as hereinafter provided; provided, however, that it shall be the duty of the treasurer of such corporation to keep an accurate account of all sums received for such assets of the corporation held by it at the time of filing such petition; and if a larger sum shall be realized therefrom than the value estimated as aforesaid by the court, he shall, at such time or times as the court may prescribe, render to the court a true account thereof, and thereupon the court, after due notice thereof to all parties interested, shall declare a *pro rata* dividend of such excess among the depositors at the time of filing the petition. No deposit shall be paid or received by such corporation after the filing of the petition, till the decree of the court reducing the deposits as herein provided. If the petition is denied, it shall be the duty of the bank examiner to proceed for the winding up of the affairs of the corporation as provided in section thirty-five."

Under this statute, has the court power to proceed and reduce the deposits, if it appears that the corporation has exceeded its powers or failed to comply with any of the rules, restrictions and conditions provided by law for its government in the management of its affairs? The main contention between the parties is upon this question.

In behalf of the petitioners, it is contended that the statute should be so construed that, if the corporation has exceeded its powers, or failed to comply with any of the rules, restrictions and conditions provided by law for the management of its affairs, the court shall have power to reduce its deposits, if it appears that such violation of law did not cause or contribute to its insolvency.

On the other hand, it is claimed by the respondents that, when it appears that the corporation has exceeded its powers, or failed to comply with any of the rules, restrictions and conditions pro-

vided by law, the observance of which the legislature has declared essential for the security and safety of its funds and deposits, the court has no power, under this statute, to proceed and reduce the deposits, though it does not appear that such violation of law has caused or contributed to the insolvency of the bank.

Prior to the act of 1877, when a savings bank became insolvent, on application to the court, it was to be enjoined from doing any further business under its charter, and its affairs were to be settled under the direction of the court. It thereupon ceased to have any existence under its charter. But the legislature, acting upon the fact of the large depreciation in the value of some classes of property in which savings banks had properly invested, anticipated that they might become insolvent, without the fault of the trustees, and without any violation of law in the management of their affairs, and still be entitled to the confidence of the public; and to meet such cases enacted this statute.

The statute, being in derogation of the common law right of the depositor, under the contract of the deposit, to draw out the full amount of his deposit, and, if refused by the bank after due notice, to maintain an action against it therefor, is not to be extended by construction beyond its clear and obvious meaning. In ascertaining the meaning of the section involved, all of its clauses, as well as all other provisions of the act, so far as they tend to modify or control it, are to be considered. The act is entitled, "An act to revise and consolidate the laws relating to the government, powers, duties, privileges and liabilities of savings banks and institutions for savings." It clearly defines the powers of savings banks, and prescribes the rules, restrictions and conditions by which they shall be governed, so that their proceedings shall not be hazardous to the public, or those having or placing funds in their custody. It prescribes the classes of securities and property in which savings banks may invest their funds and deposits, and prohibits investment in any other kinds of property or securities. Section 35 authorizes the bank examiner, "if he is of opinion that such corporation has exceeded its powers, or failed to comply with any of the rules, restrictions or conditions provided by law," to apply to the court for an injunction, and gives the

court power, for such cause, to pass a decree of sequestration and cause the affairs of the bank to be wound up, notwithstanding it may be solvent.

What, then, is the clear and obvious meaning of the legislature as declared in § 36? What is the language used? "Whenever any savings bank . . shall be insolvent, by reason of loss on, or by depreciation in the value of, any of its assets, without the fault of the trustees thereof, the supreme judicial court . . shall, on petition, in writing, of a majority of the trustees, and the bank examiner, setting forth such facts, appoint a time for the examination of the affairs of such corporation, . . and if, upon an examination of its assets and liabilities, and from other evidence, he shall be satisfied of the facts set forth in said petition, and that the corporation has not exceeded its powers, nor failed to comply with any of the rules, restrictions and conditions provided by law, he may, . . by proper decree, reduce the deposit account of each depositor," etc. This language is clear, direct and unambiguous. We find nothing in the other provisions of the act to modify, restrict or control its meaning.

The bank is insolvent. It comes into court and asks for the privilege granted in this section. But for its provisions the court must pass a decree of sequestration, and cause its affairs to be wound up, and it would then cease to exist as a corporation. It asks for a new lease of life. It asks to have its legal liabilities reduced to such an amount as the court, in its discretion, may deem proper; and to have a stay of any further legal remedy, by the depositor, against it, for the balance of his deposit, till it, in the management of its affairs as it may see fit, may realize from its assets, on hand at the time of the application to the court, a sum larger than the amount of the deposits as fixed by the court.

By the provisions of this section the court has power to grant this privilege, if it is satisfied from an examination of the assets and liabilities of the bank, and from other evidence, that it is insolvent, by reason of loss on, or depreciation in the value of, any of its assets without the fault of its trustees, and that it has not exceeded its powers, nor failed to comply with any of the rules, restrictions and conditions provided by law, for its gov-

ernment in the management of its affairs. Proof of these facts is a condition precedent to the exercise by the court of the power to reduce the deposits. If such facts do not appear the court has no power to proceed. No other construction can be put upon this section without entirely disregarding its plain, clear and positive language. To declare that the violations of law specified do not deprive the bank of the privilege claimed, if it appears that such violations did not cause or contribute to the insolvency, is not to declare the clear and plain meaning of the language, but would be legislation by the court; and it would be the declaration of a policy calculated to be destructive of the whole system of savings institutions. A savings bank is a trustee for its depositors. Its affairs are managed by trustees, who are required to give no security for the faithful discharge of their trust. It receives the funds of widows and orphans, and the small savings of the laboring classes. The first great object to be accomplished is security. The trustee should never be allowed to make speculative or hazardous investments. Establish the rule that a savings bank may do so; that it may invest its funds and deposits in violation of the provisions of law; that it may loan to its own trustees on their personal security, and sell to one or more of them its assets, without prejudice or the loss of any rights, unless it appears that loss results therefrom, and disaster and bankruptcy must be expected, followed by a loss of public confidence in these institutions, which, when properly managed, accomplish so much good. A policy calculated to hazard such vast interests as are held in charge by these institutions, in this state, cannot be sanctioned, unless clearly declared by the legislature.

It is said, in behalf of the petitioners, that this construction of the statute will be attended with very serious consequences; that very few, if any, of the savings banks in the state which are insolvent, have managed their affairs in accordance with the rules, restrictions and conditions provided by law; and that great loss will result to depositors by converting the assets of the banks into cash at the present time of business depression and depreciated values, as well as great hardship to their debtors. This argument may be entitled to weight when addressed to the legisla-

ture in favor of a change of the statute. But we must declare the law as we find it. The legislature has established the rule, and it is for it to change it, if satisfied that the public interests require it.

But it is further contended by the petitioners that, in this case, the acts claimed to be violations of the rules, restrictions and conditions provided by law are not acts of the corporation, but of its trustees. The report of the justice who heard the case finds that, " Upon the examination of the records of the bank, and other evidence before me, it appeared that in one instance a large loan to the amount of $23,000 was made on real estate in Kansas; that the loan not being paid, the property was sold by the bank to E. W. Shaw, then one of the trustees, for $10,000; that, in repeated instances, loans have been made to trustees, and to firms of which they were members, and to principals where they were indorsers." These acts were acts of the corporation within the meaning of the statute. By § 4, "The members of the corporation shall annually, at such times as may be provided in their by-laws, elect from their number not less than five trustees, who shall have the entire supervision and management of the affairs of the institution, except so far as may be otherwise provided by their by-laws." Section 10 prescribes the classes of securities and property in which savings banks may invest their funds and deposits. By § 14, " The trustees shall see to the proper investment of deposits and funds of the corporation in the manner hereinbefore prescribed. No loan shall be made, directly or indirectly, to any of the trustees, or any firm of which he is a member." In making investments and managing the affairs of the bank, the trustees represent the corporation. In regard to these matters, it can act in no other way. The acts of the trustees are the acts of the corporation. The acts found by the report are palpable violations, by the corporation, of the rules, restrictions and conditions provided by law for the management of its affairs, and the court has no power to proceed and reduce the deposits.

By the report the court is to determine if any authority is given by statute to order the amount to be paid, to be paid in

installments. By the statute we find no power given to the court to decree when the sum to which the deposits are reduced shall be paid to the depositors; that is fixed by law. The court has no power, by its decree, to stay the remedy of the depositor for the whole, or any portion, of the sum to which his deposit is reduced. It has no power to order such sum paid by installments.

Petition dismissed.

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

JEFFERSON P. MOORE *et als.*, appellants from the decision of county commissioners.

Piscataquis. Opinion delivered September 10, 1878.

County commissioners. Ways. Appeal.

R. S., c. 18, § 2, provides when a petition for the location or discontinuance of a highway is presented to the county commissioners, that, before giving the prescribed notice of the time and place of their meeting, they must be "satisfied that the petitioners are responsible, and that an inquiry into the merits is expedient." *Held*, that, on these preliminary questions, their judgment is conclusive, and no appeal lies to their decision.

ON EXCEPTIONS.

PETITION to the county commissioners of Piscataquis county, dated at Abbot, March 20, 1877, and signed J. P. Moore and 111 others, and of the following tenor:

"The undersigned petitioners would respectfully request your honors to discontinue a location for a county road and bridge across the Piscataquis river, as located by your honors. Said road commenced at or near J. J. Buxton's hotel, in Abbot, in said county; thence, running in an easterly direction, to and across said Piscataquis river, and terminating at or near Calvin Carr's, in said Abbot."

The county commissioners' record on this petition, at their April term, 1877, was as follows:

"The foregoing petition was entered in this court, at the present term thereof; and now the petitioners and those opposed to

the petition appear and are heard, touching the matter set forth in the petition. Whereupon the commissioners make return upon the same in the words and figures following, to wit: 'Piscataquis ss. Court of county commissioners, April term, A. D. 1877. Upon the foregoing petition, it is considered by the commissioners that the petitioners are responsible, but an inquiry into the merits is inexpedient; and for that reason the petition is dismissed.'"

The appellants appealed from the decision dismissing the petition, at the regular term of court, holden on the first Tuesday of April, A. D. 1877, and also at the regular term, holden on the first Tuesday of August, A. D. 1877.

The presiding justice dismissed the appeal on motion of counsel for the commissioners; and the appellants alleged exceptions.

H. Hudson and *C. A. Everett*, for the petitioners.

A. G. Lebroke with *J. F. Sprague*, for the county commissioners, said that the road sought to be discontinued was a mile long, all in a single town, Abbot (*Harkness* v. *Co. Commissioners of Waldo*, 26 Maine, 353), laid out with a bridge across the Piscataquis to connect with the railroad, and accommodating many towns; that proceedings were closed December term, 1875; time allowed to build, eighteen months; the town did not build; this petition was a flank movement to destroy the road; that the commissioners appointed an agent, under whom the road had been built; but the legal question remained; that the legislature never intended that a few individuals by persistent petitions and appeals could prevent the building of a road, laid out and ordered built by the county commissioners; that no appeal lay to their decision on the preliminary question, whether an inquiry into the merits was expedient.

DANFORTH, J. By R. S., c. 18, § 2, when a petition for the location or discontinuance of a highway is presented to the county commissioners, before giving the prescribed notice of the time and place of their meeting, they must be "satisfied that the petitioners are responsible, and that an inquiry into the merits is expedient." These adjudications are indispensable prerequisites

to any further proceedings. In this case, the commissioners were not satisfied of the expediency of an inquiry into the merits, and dismissed the petition. From this decision an appeal was taken, and the question now presented is whether such an appeal can be entertained by this court.

The provisions authorizing and regulating such appeals are found in R. S., c. 18, § 37, as amended by the acts of 1873, c. 91, and 1875, c. 25, § 5. By these provisions any party appearing "at the time of hearing before the commissioners . . may appeal from their decision thereon at any time, after it has been placed on file," etc. This "hearing" can be no other than that fixed in the notice referred to in § 2; for no other is provided. The striking from the R. S. the words, "it has been entered of record," and inserting the words, "their return has been placed on file," as provided in the act of 1873, has peculiar significance, not only in reference to the time when the appeal is to be made, but also as showing the subject matter from which it is to be taken. The only decision which is to be returned and placed on file is that which results from the hearing after notice given, and refers to the granting or refusal of the petition upon its merits after the view as well as the hearing. Hence, an appeal is allowable only from the final decision of the commissioners, which they thus return and place on file, and not from the preliminary adjudication, which may perhaps properly be a matter of record, but can for no purpose be made a matter of return to be placed on file to await ulterior proceedings.

This view is confirmed by the nature and purpose of an appeal. In all cases it is allowed that a party may have his case re-examined by a tribunal other than that appealed from; and in the appellate court the decision complained of must be open to revision. But in this case no such revision can be had. If the commissioners are not satisfied of the responsibility of the petitioners, or of the expediency of an inquiry into the merits, no further proceedings can be had. The statute nowhere gives the court, or the committee to be appointed, authority to inquire into either of these preliminary questions. If, then, the appeal should be allowed, the judgment of the commissioners upon both these questions must

stand, for the simple reason that the appellate court has no power to revise it. It would hardly be contended that an appeal would open the question as to the responsibility of the petitioners, and certainly there is no more authority under the statute for revising the judgment upon the other question. Each rests upon the same foundation. The judgment upon either cannot be affirmed or reversed by any subsequent proceedings.

It is, then, very apparent, taking together the several provisions of the statute upon this subject, that the legislature did not intend to authorize an appeal from the decision of the commissioners upon these preliminary questions, but that their judgment thereon should be conclusive.

This view is not in conflict with the case of *Hanson et als., appellants*, 51 Maine, 193. That involved a question of jurisdiction, a decision of which could as well be made after a notice and hearing as before, or in any stage of the proceedings. It would be open to the appellate court equally as to the tribunal appealed from, and therefore, if erroneously decided, that judgment could be reversed on appeal.

Exceptions overruled.

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

STATE, by complaint, *vs.* JAMES WOODS, appellant.

Cumberland. Decided September 14, 1878.

Intoxicating liquors. Words,—appurtenances.

The designation in the warrant of a certain dwelling-house and its appurtenances occupied by the defendant, is sufficient to authorize the officer to search a stable on the same lot about ten feet in the rear of his store and dwelling-house, the store being under his dwelling-house and a part of it, and the stable being used by him for storing coal and carriage and depositing ashes and stores, though tenants of his used the stable in connection with him. *State* v. *Burke*, 66 Maine, 127, followed and approved.

One who has been convicted, under R. S., c. 27, § 35, is subject to a heavier penalty on any subsequent conviction for a similar offense, committed since c. 215 of the laws of 1877 took effect, though the prior conviction was before; the punishment under § 4, c. 215, being not for what was done before the passage of the law, but for the subsequent violation of it with the increased penalty in view.

ON EXCEPTIONS from the superior court.

SEARCH AND SEIZURE COMPLAINT AND WARRANT, before the municipal court of the city of Portland, in 1877, for violation of the liquor law. The premises to be searched were designated as "the dwelling-house and appurtenances occupied by said Woods, a part of which said dwelling-house is used for purposes of trafficking by said Woods."

The liquors were seized in a barn or stable on the premises of defendant, situated about ten feet in the rear of his store and dwelling-house, the store being under the dwelling-house and a part of it. The government offered evidence tending to show his use and occupation of the stable in connection with his store and dwelling-house. Defendant admitted that he used the stable for purpose of storing his coal and carriage, and depositing ashes and stores, but testified, without being contradicted on that point, that certain tenants of his, who occupied another building in the rear of the stable on his premises, also had access to the stable and used it in connection with him; he denied all knowledge and ownership of the liquors. The liquors were concealed in a hiding-place under the stable, access to which was had by means of a door opening from the inside, where it was hasped at the end of a stall,

skillfully concealed, and the officers testified that there was a well-worn path from the hiding-place to defendant's store. The jury took a view of the premises.

One of the questions submitted to the jury was as to whether or not the stable was appurtenant to defendant's store and dwelling-house, his counsel contending that it was not, and that the search of the stable was unauthorized.

The defendant admitted that he was the owner of all the buildings referred to, but claimed that the stable was not sufficiently described to authorize the officer to search it; government claimed that it was appurtenant, and on that point the presiding judge gave instructions similar to those stated in the opinion in *State* v. *Burke*, 66 Maine, 127, closing as follows: "If, under the evidence in the case, the barn falls within the rule, then it would be an appurtenance of the house, and the search would be justified. You have seen the premises and heard the testimony, and your judgment of the matter should control."

The defendant also objected to the admission of the record of the previous conviction alleged in the complaint, on the ground that section 4, chapter 215, laws of 1877, does not apply to offenses committed before it went into effect, and if it was intended so to apply, to that extent, it is *ex post facto*. The judge overruled the objection and admitted the evidence of the conviction in December, 1876; and the defendant alleged exceptions.

M. P. Frank, for the defendant.

C. F. Libby, for the state.

BARROWS, J. This is a complaint under R. S., c. 27, § 35, dated June 27, 1877, alleging the keeping and depositing of intoxicating liquors intended for unlawful sale by the defendant, on the 26th of said June and the day of the date of the complaint, "in the dwelling-house and its appurtenances occupied by him, situated," etc., . . "a part of which said dwelling-house is used for the purposes of traffic by said Woods;" with a further allegation that the defendant was convicted December 20, 1876, of a violation of the provisions of the same chapter and section of the revised statutes.

Defendant excepts to certain instructions touching the sufficiency of the warrant to authorize the search of the stable, where the liquors were seized, as an appurtenance of the defendant's dwelling-house.

The facts and evidence stated in the exceptions bring the case clearly within the doctrines laid down by the court in *State* v. *Burke*, 66 Maine, 127; and the instructions complained of were conformable to those doctrines. Further consideration upon this point is needless. A reference to the previous decision is sufficient.

The defendant also excepts to the admission of the record of the previous conviction alleged in the complaint, claiming that section 4 of chapter 215, laws of 1877, does not authorize the imposition of the increased penalty upon subsequent convictions after the first offense, where the first conviction took place before chapter 215 took effect, and, if it was intended to have that effect, it would be, to that extent, *ex post facto*.

We think neither of these positions is tenable. The import of the section referred to in the statute of 1877 is unmistakable. The penalty for the first commission of the offense described in section 35 of chapter 27 of the revised statutes remains unchanged. From and after the time when chapter 215 of the laws of 1877 took effect, he who had been convicted of the offense described in R. S., c. 27, § 35, was warned that he laid himself liable to a heavier penalty upon every subsequent conviction in case he should thereafterwards repeat the offense. The defendant must suffer the penalty prescribed by the statute of 1877 for what he did after it became a law. It is not easy to see how the intention of the legislature that every subsequent repetition of the offense should be visited with a heavier punishment where the party charged had been previously convicted under R. S., c. 27, § 35, could be more plainly expressed. Nor is the law liable to objection as *ex post facto*. The offender is punished, not for what he had done before the statute of 1877 took effect, but for his subsequent violation of the law with the increased penalty before his eyes.

Whether, under like circumstances and conditions, a law should

be regarded as *ex post facto*, because it prescribed an increase of punishment upon a second conviction of compound larceny, was one of the questions before the court of Massachusetts in *Ross's Case*, 2 Pick. 165, and the decision was adverse to the prisoner. This decision is referred to with approval by Shaw, C. J., in *Plumbly* v. *Commonwealth*, 2 Met. 413, 415. And the doctrine of both these cases on this topic is expressly commended in the opinion of the Virginia court of appeals in *Rand's Case*, 9 Gratt. 738.

We find no substantial support for the defendant's positions, either in principle or authority.

Exceptions overruled.

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

FRED S. MERRILL *vs.* CHARLES CROSSMAN, administrator.

Cumberland. Decided September 15, 1878.

Statutes,—construction of. Jurisdiction. Appeal. Abatement.

All the existing statute provisions upon a particular topic should be examined to ascertain the meaning of each; and a meaning which is found to be incompatible with any plain provision must be rejected.

The action for money had and received, commenced by one claiming to be a creditor of an insolvent estate under administration, in pursuance of the provisions of R. S., c. 66, § 11, cannot be regarded as a probate appeal cognizable by the supreme judicial court as the supreme court of probate without regard to the amount involved; this construction being inconsistent with the provision in § 14 for the commencement of such actions before justices of the peace, who have no appellate jurisdiction from the probate court.

Section 11 simply authorizes the parties concerned, in case of dissatisfaction with the decision of the commissioners of insolvency appointed by the probate court, under certain provisions and restrictions, to transfer the question between the claimant and the estate from the probate court to any court, proceeding according to the course of the common law which may have jurisdiction of the parties and the case, for decision.

Where an action of this description is commenced under said § 11 in Cumberland county, and, by reason of the amount claimed, it falls within the exclusive original jurisdiction of the superior court for that county, it must be brought in that court, and if brought in the supreme judicial court, it is abatable.

ON EXCEPTIONS.

ASSUMPSIT, for money had and received, $156.00, commenced under R. S., c. 66, § 13, under an appeal by the plaintiff from the decision of the commissioners appointed by the judge of probate for the county of Cumberland, to receive and decide upon claims against the estate of M. C. Merrill, late of Brunswick, in said county, represented insolvent, and to determine the plaintiff's claim against said estate.

The defendant seasonably pleaded in abatement to the plaintiff's writ. The presiding justice sustained the plea in abatement and ordered judgment for the defendant; and the plaintiff alleged exceptions.

L. H. Hutchinson, A. R. Savage & F. D. Hale, for the plaintiff.

I. This is an appellate proceeding in a probate matter. R. S. of 1871, c. 66, §§ 11, 12, 13, 15.

II. The superior court of Cumberland county has no jurisdiction in appellate proceedings in probate matters. Acts and Resolves of 1868, c. 151, § 5.

III. The supreme judicial court has jurisdiction. R. S., c. 63, § 21, and c. 66, §§ 12, 13.

H. Orr, for the defendant.

BARROWS, J. The plaintiff insists that this action for money had and received is to be regarded as substantially a probate appeal, and so cognizable by the supreme judicial court, which is the supreme court of probate under R. S., c. 63, § 21; and not by the superior court for Cumberland county, which has in that county exclusive original jurisdiction of "all civil actions at law, not exclusively cognizable by municipal courts and trial justices, where the damages demanded do not exceed five hundred dollars," with certain exceptions which do not touch this case.

If his position is correct, it would follow that all actions commenced against the administrators of insolvent estates, in pursuance of the provisions of §§ 11, 12, 13, of R. S., c. 66, must be commenced in the supreme judicial court, however trifling the amount involved. Such a result, with its burdensome conse-

quences as to costs, is to be avoided, unless the statute provisions construed together clearly require it. All existing statute provisions upon a particular topic are to be examined together to ascertain the intent of each; and a meaning which is found to be incompatible with any plain provision must be rejected. Now R. S., c. 66, § 14, distinctly provides for the commencement of actions of this particular description before justices of the peace. Such magistrates have no jurisdiction of probate appeals.

The true solution of the matter is that this statute action given to one who claims to be a creditor of an insolvent estate, where the commissioners of insolvency decide against him, or where the administrator, an heir at law, or another creditor, gives notice at the probate office of an appeal from a decision of such commissioners in his favor, is not to be regarded as a probate appeal. In cases of dissatisfaction with the decision of the commissioners of insolvency appointed by the probate court, under certain statute provisions and restrictions, the question between the claimant and the estate is transferred from the probate court to a common law court having jurisdiction of the parties and case for decision.

The language of § 25, c. 51, laws of 1821, is this: "Provided that, notwithstanding the report of any commissioners, any creditor whose claim is wholly or in part rejected may have the same determined at the common law, in case he shall give notice thereof in writing at the probate office within twenty days after such report shall be made, and bring and prosecute his action as soon as may be." Like provision is made in the same section, where the executor or administrator is dissatisfied with the allowance of any claim by the commissioners. Subsequent provisions touching the form of the action and the precise time within which it may be commenced, and giving power to the supreme court to permit it to be brought under certain limitations in cases where the claimant has by accident or mistake failed to give his notice or commence his action seasonably, do not affect the jurisdiction, except so far as this is done by their express terms. Nor is it affected by the introduction of the word "appeal," which has come about in the condensation of the statutes of 1821, c. 51, § 25. It is not, properly speaking, an appeal from any decree of

the probate court; but a statute permission to settle the question of indebtment in the common law courts proper to try it—by the verdict of a jury if either party demands it—and not according to the course of proceedings in probate appeals which are regulated by R. S., c. 63, §§ 21—26. Plaintiff's counsel ingeniously argues that, if this action be abated, and the plaintiff obtains leave from the supreme judicial court, under R. S., c. 66, § 12, "to commence a suit at the next term of the court in the county where administration was granted," the action would be just where it is now. If it be conceded that the expression quoted can refer only to the court which grants leave to commence the suit, the suggestion is as plausible as an argument *ab inconvenienti* well can be; but the difficulty is that the present action is not one which is commenced by leave of court, and therefore necessarily restricted by the terms of the statute to the county where administration was granted; but it is one which the plaintiff had a legal right to commence, observing the statute regulations, in any common law court having jurisdiction of the parties and the case. We must not give a construction which would wrongfully restrict all other creditors thus situated, merely because our decision in the present case may not put an end to the litigation or settle the main controversy between these parties, and may, perhaps, determine nothing between them but a liability to a bill of cost. The contingency supposed in argument must be taken care of when it arises.

Should the court be satisfied, upon notice to the administrator and a hearing, that the plaintiff had a meritorious claim which the commissioners disallowed, and grant leave to commence a suit under the provisions of § 12, it may become necessary to determine what is signified by "the next term of the court" mentioned in that section, in a county where there is another court, proceeding according to the course of the common law which has by statute exclusive jurisdiction of a case of this amount. We need not now inquire.

Exceptions overruled.

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

GEORGE F. HOLMES, administrator of John Tenney, *vs.* EDWARD P. BROOKS, surviving partner.

Cumberland. Decided September 14, 1878.

Evidence. Limitations,—statute of.

R. S., c. 82, § 87, provides that where the legal representative of a deceased person is a party, he may testify to any facts, legally admissible upon the general rules of evidence, happening before the death of such person. *Held*, that the surviving partner, who gives bond under R. S., c. 69, § 2, and is afterwards sued upon a note of the firm, is not, therefore, a representative of his deceased partner, and as such entitled to testify to facts happening before his decease, within the provisions of c. 82.

The defendant, residing in Maine, gave his unwitnessed promissory note in 1868 to the plaintiff's intestate, residing in Vermont, who died in 1869, and his administrator was there appointed in 1870, but no administration was taken out in Maine till the appointment of the plaintiff in 1877, who commenced this suit in 1878. *Held*, that the suit was not barred by the provision (of R. S., c. 81, § 88) that "an action may be commenced by an administrator within two years after his appointment, and not afterwards if barred by other provision;" although administration had been taken out on the estate in Vermont more than two years before the commencement of the action.

ON EXCEPTIONS from the superior court.

ASSUMPSIT on this note: "$1,289.63. For value received we promise to pay John Tenney, or order, twelve hundred eighty-nine dollars sixty-three cents on demand, with interest annually. Portland, Maine, May 26th, 1868. O. M. & E. P. Brooks."

Plea, general issue, with a brief statement of the statute of limitations, and that the note was given by the other partner in the defendant's firm for his own private debt without the defendant's knowledge or consent.

The case was commenced January 16, 1878, entered at the next March term, and tried at the April term by the justice without the intervention of a jury, subject to exceptions in matters of law.

It appeared from admissions that, at the time of the date of the note, John Tenney, the payee and plaintiff's intestate, lived at Waterbury, Vermont, and continued to reside there until his decease, January 5, 1869; that within one year thereafter one

Dillingham was appointed administrator of his estate in Vermont, and that no administrator of his estate was appointed in Maine until the plaintiff was appointed, September 4, 1877; that the defendant's firm, consisting of himself and Oliver M. Brooks, resided and were in business at Portland, Maine, at the time of the date of the note, and until the death of O. M. Brooks, November 2, 1874; and that since then the defendant has continued to reside there; that the name of the firm was signed to the note by the deceased partner; and that the defendant has filed his bond as surviving partner under R. S., c. 69.

The defendant offered himself as a witness, generally, in the cause, and to show that the note was given for the private debt of O. M. Brooks, without his knowledge or consent.

The presiding justice ruled: 1. That the defendant was not competent as a witness generally, as to facts happening before the decease of the plaintiff's intestate, the plaintiff not having testified thereto. 2. That, upon the foregoing admitted facts, the plaintiff's action upon the note was not barred by the statute of limitations.

The defendant alleged exceptions.

H. C. Peabody, for the defendant.

A. A. Strout & G. F. Holmes, for the plaintiff.

APPLETON, C. J. This is an action upon a promissory note, given by the firm of O. M. & E. P. Brooks to the plaintiff's intestate. It is brought against the defendant as surviving partner. The defendant, as such partner, gave the bond required by R. S., c. 69, § 2.

The judge of the superior court ruled that the defendant was not competent as a witness generally, as to facts happening before the decease of the plaintiff's intestate, the plaintiff not having testified thereto. The defendant excepted to this ruling, on the ground that, as a party, he was the "legal representative of a deceased person," to wit, his partner, and, as such, was entitled to testify to facts happening before his decease, within the provisions of R. S., c. 82, § 87, and c. 145 of the acts of 1873.

The ruling was correct. The defendant is sued in his own

name. He represents only himself. The judgment is against him as an individual, and not against him in any representative capacity. He is not the representative of a deceased person, and can claim no rights as such.

The plaintiff was appointed administrator in Maine on the estate of John Tenney, of Waterbury, Vermont, on September 4, 1877, and commenced this suit January 16, 1878. It is brought within two years after his appointment, and is not barred by R. S., c. 81, § 88.

Exceptions overruled.

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

STATE *vs.* JAMES E. GRAMES, appellant.

Cumberland. Decided September 23, 1878.

Intoxicating liquors. Search and seizure.

A traveling rumseller, carrying intoxicating liquors on his person and selling the same, is liable for single sales or may be indicted as a common seller.

The search and seizure process under the statute relating to intoxicating liquors, applies only against liquors in a place and not against them on a person.

The statutes against the sale of intoxicating liquors do not authorize the search and seizure process against a person.

ON REPORT, from the superior court.

SEARCH AND SEIZURE PROCESS, against the person, on complaint made and sworn to before the judge of the municipal court for the city of Portland, and of the form following:

"L. T. Chase, of Portland, in said county, competent to be a witness in civil suits, on the twenty-ninth day of March, A. D. 1878, in behalf of said state, on oath complains that he believes that on the twenty-eighth day of March in said year, at said Portland, intoxicating liquors were kept and deposited by James E. Grames, of Portland, in said county, upon his person, said James E. Grames not being then and there authorized by law to sell said liquors within said state, and that said liquors then and there were

intended for sale in this state by said James E. Grames in violation of law, against the peace of the state and contrary to the statute in such case made and provided.

"And the said L. T. Chase on oath further complains that he, the said L. T. Chase, at Portland, on the twenty-eighth day of March, A. D. 1878, being then and there an officer, to wit, a deputy sheriff, within and for said county, duly qualified and authorized by law to seize intoxicating liquors kept and deposited for unlawful sale, and the vessels containing them, by virtue of a warrant therefor, issued in conformity with the provisions of law, did find upon the person of the above named James E. Grames one bottle containing about one-half pint of rum, one bottle containing about one pint of whiskey, intoxicating liquors as aforesaid, and vessels containing the same, then and there kept, deposited and intended for unlawful sale as aforesaid, within this state, by said James E. Grames, and did then and there, by virtue of this authority as a deputy sheriff as aforesaid, seize the above described intoxicating liquors and the vessels containing the same, to be kept in some safe place for a reasonable time, and hath since kept and does still keep the said liquors and vessels, to procure a warrant to seize the same.

"He therefore prays that due process be issued to seize said liquors and vessels, and them safely keep until final action and decision be had thereon, and that said James E. Grames be forthwith apprehended and held to answer to said complaint, and to do and receive such sentence as may be awarded against him."

On this complaint a warrant was issued, and the officer made return as follows: "Cumberland, ss. March 29, 1878. By virtue of the within warrant, I have seized the following described liquors, with the vessels in which they are contained, viz: One bottle containing about one pint of whiskey, one bottle containing about one-half pint of rum. And I have arrested the within named Grames this 29 day of March, A. D. 1878, and have him before the court for trial."

The defendant seasonably moved to dismiss the complaint, and thereupon the question of the sufficiency of the complaint was by agreement reserved for the determination of the law court.

C. F. Libby, county attorney, for the state, said this was not a question in regard to the liquors, for they were already forfeited, but in regard to the person; and an offense against the statute being set out in the complaint, it should not be quashed. The complaint is in the usual form, alleging the belief of the complainant as to the keeping of the liquors for illegal sale by the respondent "at said Portland," but, instead of describing a shop or building, as is usually the case, says, "upon his person." The defendant is prosecuted under c. 27, § 33, which provides "no person shall deposit or have in his possession any intoxicating liquors with intent to sell the same in this state in violation of law." Having liquors upon his person is having them in his possession, and, if intended for unlawful sale as alleged, the offense is complete.

The fact that they were intended for sale in the highway instead of a building is no defense under the law. A peripatetic liquor dealer is not favored by the statute.

M. P. Frank, said that the officer, not being authorized to seize liquors upon the person with a search and seizure warrant, was not authorized to seize them without a warrant, and that a complaint and warrant for search and seizure after such illegal seizure by the officer, was unauthorized and void.

APPLETON, C. J. The complaint in this case alleges a finding, by the complainant, a deputy sheriff, of liquors intended for sale in this state in violation of law upon the person of the defendant, a seizure of the same and the subsequent making of a complaint and issuing of a warrant against the defendant, upon which he was arrested.

A traveling rumseller is undoubtedly liable for a single sale. He may be indicted as a common seller. The questions here presented are whether liquors may be seized, without a warrant, on his person, and whether he is liable under any existing statute to the search and seizure process.

The seizure was without warrant. By R. S., c. 27, § 34, it is provided that "in all cases where an officer is authorized to seize intoxicating liquors by virtue of a warrant, he may seize the same without a warrant."

The question then arises, in what cases is the officer authorized to seize intoxicating liquors intended for sale within this state in violation of law by virtue of a warrant duly issued.

The answer to this inquiry is to be found in § 35, which pro vides that if any competent witness "shall make complaint upon oath or affirmation before any judge of any municipal or police court, or trial justice, that he believes intoxicating liquors are unlawfully kept or deposited in any place in this state by any person or persons, and that said liquors are intended for sale within this state in violation of law, such magistrate shall issue his warrant, directed to any officer having power to serve criminal process, commanding such officer to search the premises described and specially designated in such complaint and warrant, and, if such intoxicating liquors are there, to seize the same with the vessels in which they are contained. . . The name of the person so as aforesaid keeping said liquors, if known to the complainant, shall be stated in such complaint, and the officer shall be commanded by said warrant, if he shall find said liquors, to arrest such person or persons, and have him or them forthwith before such magistrate for trial."

The complaint must allege a "place in this state" where intoxicating liquors are "unlawfully kept and deposited" by a person or persons and "intended for sale within this state in violation of law." The liquors are to be kept and deposited *by*, not kept and deposited *upon* a person or persons. The person or persons unlawfully keeping and depositing, and the place where the unlawfully kept and deposited liquors are to be found, are obviously separate and distinct. It is one thing to find liquors in a place, and a very different thing to find them upon a person. A place to be searched is not a person to be searched. "Premises described and specially designated" in a complaint and warrant cannot, by any reasonable use of language, be held to apply to a person or persons. It is apparent that § 35 does not authorize the search of a person with a warrant. It follows, therefore, that an officer cannot without warrant seize intoxicating liquors from the person, under § 34.

By c. 63, § 5, of the acts of 1872, § 35 was amended so

as to read as follows: "If any person competent to be a witness in civil suits shall make complaint upon oath or affirmation before any judge of any municipal or police court, or trial justice, that he believes intoxicating liquors are unlawfully kept or deposited in any place in the state by any person or persons, and that said liquors are intended for sale within this state in violation of law, such magistrate shall issue his warrant, directed to any officer having power to serve criminal process, commanding such officer to search the premises described and specially designated in such complaint and warrant, and, if such intoxicating liquors are there found, to seize the same with the vessels in which they are contained, and them safely keep until final action on the same, and make immediate return of said warrant. The name of the person so keeping as aforesaid said liquors, if known to the complainant, shall be stated in such complaint, and the officer shall be commanded by said warrant, if he shall find said liquors, or shall have reason to believe such person has concealed them about his or her person, to arrest such person or persons and have him or them before such magistrate for trial," etc.

It will be perceived that the only change in § 35 consists in the interpolation of these words: "or shall have reason to believe such person has concealed them about his or her person."

No arrest is to be made unless the liquors are found on the premises specially designated by the magistrate to be searched, or the officer "shall have reason to believe such person has concealed them about his or her person." But, in the latter alternative, the person may be arrested, but there is no provision for searching him. Besides, there could be no warrant for such search, for the officer has not even sworn to such belief. The belief is one arising after the issue of process, and after a failure to find intoxicating liquors upon due search. The only belief sworn to is that they are kept in some designated place—not concealed upon the person of some designated individual. To search the person would be to search without a previous warrant "supported by oath or affirmation."

This is a search and seizure complaint. No provision is found for issuing such process against liquors concealed upon a person,

or for seizing them without process when so concealed. The peripatetic rumseller is liable for his violations of law, but it is not perceived that he is amenable, or that it was intended that he should be amenable to this process.

Complaint dismissed.

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

SILAS H. MCALPINE *vs.* NATHANIEL L. SMITH.

Cumberland. Decided September 24, 1878.

Abatement.

A writ in the supreme judicial court returnable at a term after an intervening term, at which it might have been returnable, is voidable and may be abated on motion seasonably filed.

ON EXCEPTIONS, at the April term, 1878.

ASSUMPSIT against the maker, on an unwitnessed promissory note, dated December 14, 1870, payable one year after its date; *ad damnum* $600. The defendant was described as resident of Cornville, county of Somerset; plaintiff, of Portland, county of Cumberland. The writ was dated December 13, 1877, returnable at this court for Cumberland county at the April term, 1878, was served on the defendant, March 23, 1878, and entered on the first day of this April term.

The defendant by attorney appeared generally, and on the second day of the term filed the following motion:

"And now said defendant moves that said case be dismissed, because the writ, as it appears upon its face, is dated on the thirteenth day of December, A. D. 1877, and is made returnable at this term of this court, when it should have been made returnable at the term of this court held in and for the county of Cumberland, on the second Tuesday of January, A. D. 1878, and is not legally returnable at this term of this court."

On a subsequent day, a hearing on the motion to dismiss was had, and the motion was sustained. The plaintiff alleged exceptions.

G. W. Verrill, for the plaintiff, contended that the motion, not being to the jurisdiction, was not in order after a general appearance and answer to the action; that it was defective, should have been a plea in abatement with affidavit that the plaintiff could have made service of writ in season for the January term, 1878; that the provisions in the acts creating the superior courts of Cumberland and Kennebec counties, providing in one of the acts that the actions shall be returnable at one of the three next terms, and in the other at one of the two next terms begun and held after the commencement of such actions, were not the grant of a new right, but the application of the old rights to the new courts; at any rate, they would sanction the same right in a court of more general jurisdiction.

Counsel cited as to the motion, *Fox* v. *Money*, Bos. & Pul. 250. Anon, 1 Chitty, 129. *Young* v. *Wilson*, 5 Taun. 664.

H. & W. J. Knowlton, for the defendant.

APPLETON, C. J. The writ is dated December 13, 1877, and is made returnable at the April term of this court, one term intervening between the date and the return day at which it might and should have been returnable.

On the second day of the term, the defendant filed a motion to dismiss because the writ was made returnable at the April term, when it should have been made returnable at the intervening January term of this court.

The motion was sustained, and the action dismissed, and to the dismissal the defendant filed exceptions.

A writ returnable upon a day out of term is voidable. *Wood* v. *Hill*, 5 N. H. 229. When a term or more intervened between the teste and the return of the writ, it was held a mere nullity. *Bunn* v. *Thomas*, 2 Johns. 190, cited approvingly in *Ames* v. *Weston*, 16 Maine, 266. In *Kelly* v. *Gilman*, 29 N. H. 385, it is assumed as unquestionable law, that a writ made returnable after an intervening term is voidable. Such has been the uniformly recognized law of this state in accordance with the forms of process in use. St. 1821, c. 63.

If one term can be passed over, it is difficult to perceive why more

than one may not be, at the option of the plaintiff. The difference in the superior courts for Cumberland and Kennebec counties is the result of special legislation. C. 151, § 6, Stat. of 1868. C. 10, § 6, Stat. 1878.

The defect here is apparent upon inspection. It was not necessary to plead it in abatement. When the defect is apparent of record, it may be taken advantage of by motion seasonably filed. *Chamberlain* v. *Lake*, 36 Maine, 388. *Mace* v. *Woodward*, 38 Maine, 426. Here the motion was filed within the time allowed for filing pleas in abatement.

Exceptions overruled.

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

JOHN S. BANGS *vs.* HENRY H. BEACHAM.

Androscoggin. Decided September 24, 1878.

Bailment. Officer. Receiptor.

The receiptor of property attached is bound to surrender it to the attaching officer, on seasonable demand, whether there has been a judgment in the suit on which the attachment was made, or not.

The officer, as representing attaching creditors, may impeach a fraudulent judgment; but the receiptor cannot.

ON REPORT.

ASSUMPSIT on a receipt given by the defendant to the plaintiff, as an attaching officer, for goods attached in a suit of *Gilman M. Keyes* v. *Rebecca J. Parker*, brought under R. S., c. 113, § 51, for knowingly aiding and assisting a debtor, Clement Parker, in a fraudulent transfer of his property to secure it from his creditors, and particularly from Keyes. The defendant offered to show that there were then pending in this court, cross suits between Keyes and Clement Parker, to determine whether said Parker is indebted to Keyes; that the suits, together with the suit of *Keyes* v. *Rebecca J. Parker*, were entered in this court at the April term, 1876; that Rebecca employed attorneys to defend the suit against her; that prior to the April term, 1877, she discharged

her attorneys and employed another attorney, who came into court and consented to a default in her case, for the amount of the officer's receipt; that attorneys for the receiptor offered to appear and defend his rights. The presiding justice declined to allow them to appear, and ordered judgment for the plaintiff.

The defendant offered further to show that Clement Parker was not indebted to Keyes, and that the judgment was obtained by the fraud and collusion of Rebecca with Keyes, for the purpose of creating a liability against Beacham, as receiptor, and that Keyes agreed not to enforce the judgment against Rebecca.

If the law court are of opinion that the foregoing facts would be admissible in evidence and constitute a defense, then the action is to stand for trial; otherwise, defendant to be defaulted.

W. P. Frye, J. B. Cotton & W. H. White with *S. M. Carter*, for the plaintiff.

L. H. Hutchinson, A. R. Savage & F. D. Hale, for the defendant.

APPLETON, C. J. The plaintiff, a deputy sheriff, attached, on a writ *Gilman M. Keyes* v. *Rebecca J. Parker*, certain personal property, which he placed in the defendant's hands for safe keeping and for which he took his receipt. Judgment having been rendered in that suit, he demanded seasonably of the defendant the property delivered him, which not being given up, this action is brought.

The defendant is the mere bailee of the plaintiff. He is bound to surrender the property on seasonable demand, whenever the plaintiff may require it, whether there has been a judgment in the action in which the attachment was made or not. He has no interest in the property bailed by which he can retain it as against the bailor. His contract is with the officer attaching, and with no one else. The officer has a right at any moment to the possession of the property, that he may be ready to restore it to the defendant, if the attachment is dissolved, or that it may be sold on the execution if the plaintiff recover judgment.

It is urged that the judgment is fraudulent. But whether fraud-

ulent or not, the plaintiff has a right to the property attached for his own protection. If fraudulent, it is nothing to the defendant. He cannot show any invalidity in the attachment or judgment. *Drew* v. *Livermore*, 40 Maine, 266. He cannot impeach it for fraud. *Brown* v. *Atwell*, 31 Maine, 351. Nor for irregularity. *Clifford* v. *Plumer*, 45 N. H. 269. The plaintiff could only impeach a fraudulent judgment as representing attaching creditors. *Willard* v. *Whitney*, 49 Maine, 235. But the defendant does not represent such creditors.

Defendant to be defaulted.

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

JOHN AUGUR *et al. vs.* WILLIAM COUTURE, and LEWISTON STEAM MILL COMPANY, trustees.

Androscoggin. Decided September 24, 1878.

Trustee process. Contract. Assignment. Name. Words,—wages, earnings.

An assignment of a contract is not the assignment of wages, and need not be recorded under c. 93, § 1, of the acts of 1876.

A contract is binding when signed by the party making it, though he may use an English translation of a French name, as Seam for Couture, in his signature thereto.

ON REPORT, to settle questions of law arising under a trustee disclosure.

J. W. Mitchell, for the plaintiff.

W. P. Frye, *J. B. Cotton* & *W. H. White*, for the trustee.

L. H. Hutchinson, *A. R. Savage* & *F. D. Hale*, for the assignee, claimant.

APPLETON, C. J. On May 23, 1877, the defendant made a contract in writing with the Lewiston Steam Company to peel and pile "all the hemlock timber standing on the Virgin lot so called, in Canton;" to be all peeled by August 1st, and to be paid for in thirty days from the time of the completion of the contract.

The defendant, "in consideration of one hundred dollars and an agreement to furnish groceries," on May 28, 1877, assigned all claims under the above contract to T. F. Day & Co.

Here was an existing contract upon which a debt might arise, which would become due at some future time. The assignment to the claimants was valid. *Cutts* v. *Perkins*, 12 Mass. 206. *Farnsworth* v. *Jackson*, 32 Maine, 419, 420.

The trustee writ was duly served February 28, 1878.

At the time of this service the alleged trustee was indebted to the defendant in the sum of $107.10, while the defendant was indebted to the claimants in the sum of $195.15.

It is obvious that the trustees must be discharged, if the assignment is to be regarded as effective.

The plaintiff claims to avoid it, because it was not recorded in Canton.

By an act approved February 17, 1876, c. 93, § 1, it was provided that "no assignment of wages shall be valid against any other person than the parties thereto, unless such assignment is recorded by the clerk of the city, town or plantation, organized for any purpose in which the assignor is commorant, while earning such wages."

But this case cannot be brought within the provisions of c. 93. There was no assignment of wages. A contract was assigned and the earnings under it. The distinction between wages and the earnings under a contract is apparent, and it is recognized in *Jenks* v. *Dyer*, 102 Mass. 235. The assignment, then, being of the future earnings under a contract, need not be recorded.

The defendant is a Frenchman. In the contract and in its assignment he signed the name of William Seam to both these instruments, Seam being the translation of Couture, and he being known by both names. The defendant was equally bound by his signature, whether it be Couture or Seam. If he chose to anglicize his name he cannot thereby escape the performance of his contracts.

Trustee discharged.

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

TIMOTHY O'NEIL *vs.* JOSEPH BAILEY *et ux.*

Waldo. Decided October 19, 1878.

Replevin. Action.

When the defendant in replevin, with the general issue, pleads property in himself, avows the taking and demands a return, it is not necessary to prove a demand previous to suing out the writ of replevin.

Where a replevin writ was made provisionally, to be used only in case of the refusal of the defendant to give up the property, the action was held not to have been prematurely commenced.

ON EXCEPTIONS.

REPLEVIN of furniture, on writ made one day and dated and served the next, where the plea was the general issue with a brief statement of property in the defendants and not in the plaintiff, and a ruling of the presiding justice that if the property was lawfully in possession of defendants a demand was necessary before action commenced, more fully stated in the opinion.

The verdict was for the defendants; and the plaintiff alleged exceptions.

J. W. Knowlton, for the plaintiff, contended a demand was not necessary, and if it were, it was seasonably made.

W. H. Fogler, for the defendants.

APPLETON, C. J. This is an action of replevin. The writ was made August 26, and dated August 27, 1877.

The plaintiffs' attorney testified that he went with an officer to the defendants' house, took the writ from the officer, demanded the articles replevied, which were refused, then handed the same to the officer by whom the service was made.

The court instructed the jury, "that if the goods were lawfully in the possession of the defendants at the time the action was brought, although the plaintiff may have been the owner of the property, yet he could not maintain his action until he made a formal demand for its return to him and there had been a refusal to return it; and that if they found that the plaintiff was the

owner of the property, he would be entitled to a verdict, provided demand was made for it before the commencement of this action and return refused."

The defendants pleaded the general issue with the statement that the property in the goods replevied was not in the plaintiff but was in the defendants.

In this state of the pleadings it was unnecessary for the plaintiff to prove a demand, previous to suing out his writ of replevin. *Lewis* v. *Smart*, 67 Maine, 206, 207, reaffirming *Seaver* v. *Dingley*, 4 Maine, 306.

"A writ may be considered as purchased at any moment of the day of its date, which will most accord with the truth and justice of the case," observes Putnam, J., in *Badger* v. *Phinney*, 15 Mass. 359. If the writ was made provisionally, to be used only in case of refusal by the defendant to deliver the property upon demand, it might not, it seems, be regarded as prematurely brought. *Federhen* v. *Smith*, 3 Allen, 119. The case of *Grimes* v. *Briggs*, 110 Mass. 446, is in point. There the plaintiff went to the defendant with an officer and a writ, bearing date of that day, against the defendant, intending to demand the goods and to serve the writ only in case of refusal; they demanded the goods, which the defendant refused to deliver and the writ was served, and an action of tort for the conversion of the goods was brought thereon. The plaintiff relied on the refusal as evidence of conversion. *Held*, that the action was not prematurely brought.

It appears that the verdict was for the defendants, but it does not appear that the jury found that the title to the property replevied was in the defendants, as was the case in *Webber* v. *Read*, 65 Maine, 564. The instructions, therefore, so far as they relate to the demand, cannot be regarded as immaterial.

Exceptions sustained.

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

JOSEPH B. SANFORD *vs.* AUGUSTUS S. PHILLIPS.

Penobscot. Decided October 19, 1878.

Insane persons. Guardian and ward. Costs.

Where, after the commencement of a suit, the defendant is adjudged insane and a guardian appointed, by whom his estate is rendered insolvent, and the suit defended, the guardian is not liable for costs.

ON EXCEPTIONS.

ASSUMPSIT, where the verdict was against the insane defendant for $27.75, and the plaintiff claimed costs, $48.86, against the guardian, which the presiding justice *pro forma* allowed; and the guardian alleged exceptions.

A. L. Simpson, for the guardian.

W. S. Clark, for the plaintiff.

APPLETON, C. J. This is an action upon an account annexed. Since its commencement, the defendant has been adjudged insane, and F. A. Simpson has been appointed his guardian and has represented his estate insolvent. The plaintiff's account being contested, there was a trial, and a verdict for the plaintiff for the amount claimed.

The plaintiff asks for an execution for costs against the guardian.

By R. S., c. 66, §§ 16, 17, in certain cases, when an estate has been rendered insolvent, costs are allowed against an administrator.

It is provided by R. S., c. 67, § 15, that the guardian of an insane person "may, if necessary, represent said estate insolvent, with like proceedings, rights and liabilities as in the case of estates of deceased persons."

The argument is that, as the administrator may be liable to costs, so the guardian is under like liability.

But it will be seen by reference to R. S., c. 66, § 21, it is provided that "the provisions of this chapter are applicable to estates under the charge of executors; and of guardians of insane persons and of spendthrifts, except so far as they cannot be applied; and an allowance for the support of their wards and their families shall take the place of an allowance to widows and children."

There is a marked and obvious difference between guardians, and executors and administrators. Guardians are not invested with the legal title to the property intrusted to them. The *choses in action* of the ward do not become the property of the guardian. Suits for their enforcement must be brought in the name of the ward. *Hutchins* v. *Dresser*, 26 Maine, 76. If the guardian defends an action it must be in the name of the ward, against whom alone an action is maintainable. "The proper discharge of their duties," observes Chapman, J., in *Hicks* v. *Chapman*, 10 Allen, 463, "does not require them to subject themselves to any personal litigation or liability for costs." If judgment is recovered against one under guardianship, the execution issues against the ward, and the levy is made upon his estate. When a suit is brought or defended by one under disability it is prosecuted or defended by a guardian or *prochein ami*. The *prochein ami* is no party to a suit and is not liable for costs. *Leavitt* v. *Bangor*, 41 Maine, 458. *Sanborn* v. *Merrill*, 41 Maine, 467. So, by statute, c. 67, § 13, the guardian is to "appear for and represent his ward in all legal proceedings, unless another is appointed for that purpose as guardian or next friend." But whether a ward is defended by a guardian or next friend, the ward alone is the party to the litigation. It is otherwise in suits by or against executors or administrators. They have the title to the property in their charge. They are parties to the suits, and executions issue in their name. Not so with a guardian or *prochein ami*. They are no parties to the suit. They only "appear for and represent" their ward. Not being, then, parties to the suit against their ward, no execution can or should issue against them.

But this seems fully provided for by statute. By R. S., c. 82, § 32, "when a party to a suit becomes insane, it may be prosecuted or defended by his guardian, who, on application of his friend or of

the other party, may be appointed for that purpose by a justice of the court in term time or in vacation. He shall be entitled to a reasonable compensation, and not be liable for costs."

Exceptions sustained.

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

FRANCIS E. HEATH, executor, *vs.* ELVIN JAQUITH.

Kennebec. Decided October 21, 1878.

Evidence. Promissory notes.

The defendant, in an action on a promissory note, to show fraud in its inception, introduced, as a witness, the agent of the Granite Agricultural Works, whose promise was the consideration of the note, who testified he sold the note to the plaintiff. *Held*, that the defendant could not introduce the declarations of the witness, not accompanying any act within the scope of his agency, that he had not sold the note but left it for collection.

If a party, having the burden of proof upon an issue necessary to the maintenance of an action, or to the defense of a *prima facie* case, introduces no evidence which, if true, giving to it all its probative force, will authorize the jury to find in his favor, the judge may direct a verdict against him.

If a judge improperly submits a case to the jury, and they deliberate upon it and report that they cannot agree, he still has the same power to direct a verdict that he had before the submission.

Such direction supersedes all instructions previously given to the jury.

ON EXCEPTIONS.

ASSUMPSIT on this note, made December 4, and dated back:

"$398.50. Clinton, Oct. the 1, 1874. One year after date, I promise to pay to the order of C. B. Mahan, agent, three hundred ninety-eight 50–100 dollars, at the People's National Bank, Waterville, Me. Value received. (Signed) Elvin Jaquith."

The following was executed at the same time:

"Office of the Granite Agricultural Works. Proprietors of the Granite Mower and Reaper. Manufacturers and dealers in agricultural implements, iron and wood-working machinery.

Lebanon, N. H., Dec. 11, 1874. Elvin Jaquith, of Clinton, Me., bought of Granite Agricultural Works

2	‡	0	Mower, 4—9	150.00
2	‡	1	Mower, 4—6	150.00
1	‡	2	Mower, 4—	75.00
2	‡	1	Side Hill Plower,	23.50
		1	Pair Shafts,	11.75
				398.50

"Received payment by note payable at the People's National Bank, Waterville, Me. We hereby agree with the said Jaquith that if he should not be able to sell all the above goods before July the 20th, 1875, and shall notify us of such fact, by mail or otherwise, at that time, we will then send a general agent to assist him in the sale of the same. If then neither our agent nor the said Jaquith can succeed in selling all the above goods before August the 1st, 1875, then we will take them off his hands and pay him the same prices at which they are now billed to him, with all money paid out for railroad freight charges on same from our factory. We hereby reserve the right to send an agent to assist the said Jaquith at any time when we deem it necessary, in order to secure the sale of the said goods, and will account to the said Jaquith for all goods so disposed of by us. It is also further agreed that if the said Jaquith shall succeed in selling all the said goods, either alone or with our aid, before August the 15th, 1875, then the said Jaquith shall pay his obligation given this day for the same, in good faith, and the same as if this agreement had not been given at all.

"The above goods shall be well housed and properly cared for at all times.

"All the above goods are warranted from flaws or other defects in manufacturing.

"I hereby accept the terms of the above agreement, and will accept the goods named above in good faith, and do the best I can, soon as sent, to sell the same and pay for them as above specified. (Signed) Elvin Jaquith. Granite Agricultural Works. C. B. Mahan, agent."

There was evidence that this note and the one described in

Ticonic Bank v. *Bagley*, *ante*, 249, were sold to S. Heath, the plaintiff's testator, for $600, without knowledge on his part of any infirmity therein.

The jury took the case under instructions and retired, and subsequently came into court and reported that they were unable to agree upon the facts. The presiding justice then addressed them as follows:

"Gentlemen. Rather than there should be a disagreement in this case I will give a rule that will relieve you from any trouble. I had serious doubts whether I should submit this case to you in the manner that I did. It has been once before the law court upon the evidence substantially as developed here, and the court held that the evidence was not sufficient to authorize a verdict in favor of the defendant, and sent it back again. And I instruct you now that the evidence is not sufficient to authorize a finding in favor of the defendant, and you may return a verdict for the plaintiff for the amount of the note, with interest from the 4th of October, 1875, to the present time."

The verdict was for the plaintiff; and the defendant alleged exceptions.

L. Clay, for the defendant.

E. F. Webb, for the plaintiff.

LIBBEY, J. This is an action on a promissory note for $398.50, dated October 1, 1874, signed by the defendant, payable to the order of C. B. Mahan, agent, in one year from date, and indorsed by Mahan.

I. Exception is taken to the ruling of the presiding judge, excluding evidence of the declarations of Coburn Ireland, the agent of the Granite Agricultural Works, who made the contract with the defendant and took the note in suit, made some time after the sale of the note to Heath, the plaintiff's testator, that he had not sold the note, but had left it with Heath for collection. Ireland was the defendant's witness, and testified to the sale to Heath. He could not introduce his declarations to contradict him. They were not made accompanying any act of the agent within the scope of his authority. It is well settled that they are not admissible.

II. After the case had been committed to the jury, and they had deliberated upon it for some time, they were brought into court and reported that they could not agree. The presiding judge, thereupon, directed them to retire and return a verdict for the plaintiff for the amount due on the note. They retired and returned a verdict in accordance with that direction.

The learned counsel for the defendant maintains that the direction of the judge to the jury is erroneous on two grounds.

1. It is contended that, where a case is opened to the jury, and there is evidence submitted to them by both parties, the judge has no power to direct a verdict for the plaintiff or defendant.

2. It is maintained that there was sufficient evidence in the case to authorize a verdict for the defendant.

Upon the first point relied upon by the defendant, we regard the rule as well settled by the modern decisions that, if the party having the burden of proof upon an issue necessary to the maintenance of an action, or to the defense of a *prima facie* case, introduces no evidence which, if true, giving to it all of its probative force, will authorize the jury to find in his favor, the judge may direct a verdict against him. *Beaulieu* v. *Portland Company*, 48 Maine, 291. *Cooper* v. *Waldron*, 50 Maine, 80. *Bank* v. *Hagar*, 65 Maine, 359. *White* v. *Bradley*, 66 Maine, 254. *Polley* v. *Lenox Iron Works*, 4 Allen, 329. *Denny* v. *Williams*, 5 Allen, 1. *Dame* v. *Dame*, 20 N. H. 28. *Parks* v. *Ross*, 11 How. 362. *Hickman* v. *Jones*, 9 Wall, 197. *Merchants' Bank* v. *State Bank*, 10 Wall. 604. *Improvement Co.* v. *Munson*, 14 Wall. 442. *Pleasants* v. *Fant*, 22 Wall. 116. *Commissioners* v. *Clark*, 94 U. S. 278. *Ryder* v. *Wombwell Law Rep.*, 4 Exch. 33, 39. Law Rep., 2 Priv. Council app's, 335.

In *White* v. *Bradley*, Barrows, J., in the opinion of the court, says: "But were the case before us upon exceptions to the ordering of a non-suit, we should not hesitate to declare that the later and better doctrine and practice are in favor of the course taken by the presiding judge, viewed merely as a question of practice; *i. e.*, if upon the unquestioned facts, and the uncontroverted testimony introduced, by which party soever it is offered, it is apparent that the plaintiff's action cannot be maintained, it is competent

for the presiding judge so to declare in the form of a ruling, the correctness of which may be tested upon exceptions or upon report in the present form. . . And this, although there may be some evidence to support the plaintiff's claim, if it is not sufficient to justify the jury in finding the issue in his favor."

In *Denny* v. *Williams*, Chapman, J., in delivering the opinion of the court, says: "But the practical line of distinction is that, if the evidence is such that the court would set aside any number of verdicts rendered upon it, *toties quoties*, then the cause should be taken from the jury by instructing them to find a verdict for the defendant."

In *Commissioners* v. *Clark*, *supra*, the rule is very clearly and succinctly stated by Clifford, J., as follows: "Matters of fact are involved in the second instruction. Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence.

"Decided cases may be found where it is held that, if there is a *scintilla* of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to wit: that before the evidence is left to the jury there is, or may be, in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed."

This rule is fully supported by the other cases cited from the supreme court of the United States. It is the same in principle as the well established rule that the judge, on request, is not required to give to the jury the law upon any abstract issue, when there is no evidence in the case which would warrant the jury in finding such issue in favor of the party requesting the instruction. This rule is so uniformly held that no citation of authorities is required.

And it makes no difference on which party the burden of proof

is imposed. If upon the defendant, upon any issue essential to his defense, and he fails to produce any evidence in support of it, or any which, if true, would, in law, authorize the jury to find in his favor, he has no right to have the issue submitted to them, and the case may be taken from the jury by directing a verdict for the plaintiff, as in *Commissioners* v. *Clark*, and *Improvement Co.* v. *Munson*, *supra*, as well as for the defendant if the plaintiff fails to introduce evidence sufficient to authorize the jury to find in his favor. It would be but an idle ceremony to submit the case to the jury by instructions authorizing them to find for a party, when he has introduced no evidence which would authorize it; and when, if they find a verdict in his favor, it would be the duty of the court to set it aside because there was no evidence sufficient to support it. And if, in such case, the judge has improperly submitted the case to the jury, and they have retired and deliberated, and reported that they cannot agree, he has the same power to direct them to find a verdict against the party failing in his evidence, as he had before submitting the case to them.

The direction of the judge to the jury to return a verdict for the plaintiff was correct, unless there was evidence in the case which, if true, giving it all its probative force, would have authorized the jury to proceed and render a verdict for the defendant.

This brings us to the second proposition. The plaintiff made out a *prima facie* case by introducing the note and indorsement declared on. He is entitled to recover, unless the defendant shows some legal defense. He places his defense upon two grounds. 1. That the note was procured by fraud. 2. That there was a failure, or partial failure, of the consideration.

Upon the first ground the defendant may prove that the note originated in fraud; and if he establishes such a defense, a presumption arises that the plaintiff's testator was the holder without value, and, to overcome this presumption, the plaintiff must prove that his testator paid value for it. But upon the issue of fraud in the inception of the note, the law imposes the burden of proof upon the defendant; and the plaintiff is not called upon to prove that his testator was the holder for value, until the fraud is proved. *Commissioners* v. *Clark*, *supra*.

For the purpose of proving the fraud, the defendant introduced two witnesses. Ireland, who was the agent of the Granite Agricultural Works, and took the note in suit, and Nathaniel White. From a careful examination of the testimony of these witnesses, we fail to see anything which tends to prove fraud in the inception of the note. There is nothing that tends to prove misrepresentation, or suppression of any fact material for the defendant to know in entering into the contract, or any device or artifice to mislead him and induce him to give the note. Nothing in their testimony is pointed out by the learned counsel for the defendant in his argument tending to prove the issue of fraud.

The defendant also introduced the contract, dated December 4, 1874, made between the parties at the time the note was given, and which was the consideration for it; and he relies upon that as evidence of fraud. By this contract it appears that the defendant bought of the Granite Agricultural Works certain of their manufactured goods amounting to $398.50, for which he gave his note for that sum, payable at the People's National Bank, Waterville. It contains an agreement that, if the defendant, with the aid of the agent of the company, as therein specified, shall not be able to sell all of the goods before August 1, 1875, then they would take them off his hands and pay him the same prices at which they were billed to him, with all money paid out for railroad freight charges on the same from their factory. But if the defendant sold said goods, either alone or with their aid, before August 15, 1875, he was to pay his obligation given that day for the same. The goods were warranted free from flaws and other defects in manufacture. The contract is signed by the company, and the following memorandum at the bottom is signed by the defendant: "I hereby accept the terms of the above agreement and will accept the goods named above in good faith, and do the best I can, soon as sent, to sell the same and pay for them as above specified."

The defendant gave his negotiable note for the goods, and took this executory contract to protect himself in case he should not be able to sell them within the time stipulated. If the Granite Agricultural Works were solvent, and should continue so, it fully

protected him. He took his chances of profits if he could sell; if not, he had the contract of the company to take the goods and reimburse him for all he had paid. There is no evidence tending to show that the company was insolvent. It cannot be inferred without evidence. We see nothing in the terms and stipulations of the contract from which fraud can be inferred. The most that can be said of it is that it is a transaction which a prudent man would not be very likely to enter into; but it cannot be inferred from that consideration that it was procured by fraud, especially as there is no evidence tending to show that the defendant did not fully understand the terms of the contract he was making. If such a test could properly be applied to a contract, the defense of fraud in its inception would become a very common one.

But if the evidence was sufficient to authorize the jury to find fraud in the inception of the note, we think the evidence clearly and conclusively shows that the plaintiff's testator paid full value for it; and there is no evidence tending to show that he had any notice of such fraud. Upon the issue of payment of value for the note there is no conflict of evidence. The defendant's witness, Ireland, says he thinks he sent the note, immediately after taking it, to Mahan, and that it was returned to him a short time before he sold it to Mr Heath, the plaintiff's testator; that he could not positively swear he sold this note to Heath, but that he thinks so beyond a doubt; that he sold two notes to Heath for $600, and took his check, December 9, 1874, on the Ticonic Bank; that he had no doubt one of the notes was the note in suit, the other was against one E. E. Bagley; the Bagley note was smaller than the one in suit; that the two notes amounted to $670 or $680, and that Heath paid him the amount of the notes less twelve per cent. There is no evidence that he sold Heath any other note. The plaintiff put in evidence the check drawn by his testator on the Ticonic Bank, dated December 9, 1874, for $600, with the testimony of the cashier that it was paid the same day; also his bank check book, showing an entry in his handwriting, under date of December 9, 1874, of a check to "Ireland, 2 notes, $600." This evidence, uncontroverted, would not authorize the jury to find that the plaintiff's testator was not the holder for

value. The defense of fraud in the inception of the note cannot avail the defendant.

After what has been said as to the defense on the ground of fraud, it is hardly necessary to say that the defense of failure of consideration is not open to the defendant. The plaintiff's testator was the holder of the note for value, and he could not have had notice of failure of consideration when he took it; because, if there was a failure of consideration, it was long afterwards.

It is unnecessary to consider the other grounds of exception to the charge of the judge, as the final direction to the jury to return a verdict for the plaintiff for the amount due on the note, superseded all that had been previously said to them; and if the defendant was not aggrieved by the final direction, he could not be by the charge that had previously been given to them.

Exceptions overruled.

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

FREEMAN W. VARNEY *vs.* NATHANIEL A. HAWES.

Penobscot. Opinion delivered October 24, 1878.

Mortgage.

A man may make a valid mortgage for the payment of money without particularly describing the writing which may be evidence of the debt, or without even giving any independent written evidence thereof.

But he is not at liberty to substitute a different condition, by parol evidence, for that which he expressed in his deed.

A man may mortgage to an agent in order to procure credit from his principal, and the agent may enforce the mortgage as the trustee of his principal.

Plaintiff was selling agent of a wholesale firm of whom defendant desired to purchase goods on credit. To obtain the credit it was arranged between plaintiff and defendant that plaintiff should become surety on defendant's note to the firm on four months, for the price of the goods, and defendant should give plaintiff a mortgage on the property demanded in this suit, conditioned for the payment to the plaintiff in four months of a sum of money equal to the amount of the note. This was all done, and defendant had the goods and made partial payments to the plaintiff as agent, which were accounted for on the note. He resisted the suit on the mortgage before the presiding justice who heard the case at *nisi prius*, without the intervention of a jury, claiming that the conditional clause in the mortgage did not sufficiently describe the plaintiff's liability on the note and was contradictory to it, and because plaintiff had not then paid the note to his principals. But the justice ruled the suit maintainable, overruled defendant's objections and ordered a conditional judgment for an amount equal to the balance due on the note. *Held*, no error.

In the same case, the plaintiff signed and gave to the defendant this writing: "Whereas said Hawes has this day given to said Varney a bill of sale of certain parts of five schooners to secure a debt of $1,476. Now if the said Hawes shall pay said debt in four months from this date, then the said Varney shall re-convey such said parts of the vessels described in said bill of sale." The vessels remained in the custody of the defendant for more than four months, after which one of them was lost, *Held:* The finding of the presiding justice negatives the defendant's claim that there was ever any absolute and completed sale to the plaintiff of the part of the vessel which was lost at sea, while in defendant's possession and control, or any agreement or understanding that would entitle the defendant to have the value thereof allowed as a partial payment. It was designed and treated throughout as security only; and never having been in plaintiff's possession or control, and he never having received any of the proceeds thereof, he cannot be required to account for its value as a payment on the debt.

ON EXCEPTIONS, by the defendant.

WRIT OF ENTRY, on mortgage, claiming a conditional judgment.

C. J. Abbott, for the defendant.

E. Hale & L. A. Emery, for the plaintiff.

BARROWS, J. Plaintiff was the selling agent of Shaw, Hammond & Carney, of whom defendant desired to purchase goods upon credit. To obtain the credit it was arranged between plaintiff and defendant that defendant should give his note on four months for the amount of the goods, payable to S, H & C; that plaintiff should become surety on the note and defendant should give plaintiff a mortgage on the property demanded in this action, conditioned for the payment to the plaintiff in four months of a sum equal to the amount of the note. Defendant made partial payments to the plaintiff, as agent of the payees and had credit for them on his note.

The presiding justice to whom the case was submitted with right to except, ordered a conditional judgment for plaintiff for the balance due. The defendant conteuded that the plaintiff could not recover because the condition did not sufficiently describe the plaintiff's liability on the note, and because the plaintiff had not paid the note to Shaw, Hammond & Carney.

We do not see that the defendant has any just or legal ground to complain of the decision.

We know of no rule of law which prohibits a man from mortgaging to an agent in order to procure credit from his principal, or which should prevent the agent to whom such mortgage was given from enforcing the same as the trustee of his principal.

The defendant conditioned his mortgage for the payment, to the agent from whom he desired to purchase the goods, of the amount of the purchase money at the expiration of the term of credit.

Had he performed that condition he would have had a perfect defense to the action. He has not done it, and the mortgage may be enforced in the name of the agent. A man may make a valid mortgage for the payment of money without particularly describing the writing which may be evidence of the debt designed to be secured, or without even giving any independent written evidence of the debt.

But he is not at liberty to substitute a different condition, by parol evidence, for that which is expressed in his deed. If the defendant had designed this mortgage merely to indemnify the

plaintiff for becoming his surety to Shaw, Hammond & Carney, apt words should have been used to express such a condition. The fallacy of the defendant's position consists in the assumption that the plaintiff proceeds upon the ground that the mortgage was made to indemnify him as surety for the defendant, which is opposed to the express language of the condition. Upon this assumption he based the objection which he made at *nisi prius*, to the plaintiff's suit. The presiding judge overruled it, apparently finding that the mortgage was designed as security for the payment of the price of the goods sold, at the expiration of the term of credit, and that it was received and held by the plaintiff as agent and trustee of his principals. This is not inconsistent with the language of the condition. Even if the defendant's assumption that the mortgage was designed to secure the plaintiff on account of his liability as the defendant's surety could be admitted, the result would be the same; for the plaintiff would be entitled to recover upon production of his mortgage, unless the defendant, upon whom the burden of proof would then devolve, should "show that the note had been paid or the plaintiff released, or that for some cause the plaintiff could not be damnified." *Davis* v. *Mills*, 18 Pick. 394.

In case of a mortgage for indemnity the mortgagee's title to the property does not depend upon his having actually paid the debt, or being solely liable therefor. *Barker* v. *Buel*, 5 Cush. 519.

In no view that can be taken of the case can it be made to appear that the defendant is wronged in being held to the performance of the contract by means of which he procured the credit and the goods. There was an ample consideration to support the mortgage, and defendant has credit for all the payments he has made.

It is conceded by the able counsel for the defendant that the facts stated in the exceptions do not leave much ground for the defendant's position, that he is entitled to have the value of the part of the vessel which was lost at sea, while in defendant's possession and under his control but after it had been conveyed by an absolute bill of sale to the plaintiff, allowed as part payment of the debt. There was a sealed agreement (of the same date as the bill of sale) given by plaintiff to defendant, reciting that the bill

of sale was given to secure a debt of $1,476, and promising to re-convey upon payment of the debt in four months.

The presiding judge who heard the testimony negatived the defendant's claim that there was at any time an absolute and complete sale or reception of the part of the vessel by the plaintiff as payment, and found that the parties intended a transaction which would in law amount to a mortgage, and thereupon rightly held that as the property remained in the possession of the mortgagor and no part of the proceeds of the vessel came to the hands of the mortgagee, he should not be held accountable for her value as a partial payment.

The judge's finding is conclusive as to the facts, and it leaves no legal ground for the defendant to stand upon.

Exceptions overruled.

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

EDWARD C. PIKE *vs.* BANGOR & CALAIS SHORE LINE RAILROAD COMPANY, and CITY OF ELLSWORTH, trustee.

Washington. Decided October 25, 1878.

Trustee process. Corporation.

A creditor of a railroad corporation sues the corporation and trustees the city of Ellsworth, subscriber to its stock.

Held. 1. The first assessment upon the stock of the corporation, made before the trustee subscribes for the stock, creates no liability against the trustee.

2. The second assessment, not being made on all the shares of the stock, but on the stock held by the towns and cities only, and omitting the shares held by persons, is invalid.

3. An assessment made by S N C, committee, not by the directors nor ratified by them, is void.

4. A corporation cannot legally assess its stock till it fixes its capital.

5. The city, having by its vote, in accordance with the charter of the corporation, designated what part of the railroad line the money raised and subscribed by it should be expended, a general creditor cannot by trustee process divert and hold such money for a debt not contracted for the purpose designated.

6. The city is not estopped by a vote of the city council, after the commencement of the action, to pay the assessment.

ON REPORT.

ASSUMPSIT for money and labor, to which no defense was made, the contention being as to the liability of the alleged trustee.

J. M. Livermore, for the plaintiff.

E. Hale & L. A. Emery, for the alleged trustee.

LIBBEY, J. The plaintiff claims to charge the trustee for sums due from it to the principal defendant for two assessments on the capital stock of the defendant corporation, subscribed for by the trustee. The first assessment was made by the directors of the corporation, September 19, 1876, and was for five per cent on the stock payable on or before October 15, 1876, and five per cent payable on or before December 15, 1876. The second assessment was made June 28, 1877, and was for $1.25 per share, amounting to $1,541.25 on the shares subscribed for by the trustee. The trustee made its subscription for 1233 shares of the stock, under date of October 26, 1876.

The first assessment created no liability against the trustee for which it can be charged, because it was made before it subscribed for the stock, and therefore was not made on the stock subscribed for by it.

The second assessment was made by virtue of a resolve passed at a meeting of the corporation, held June 6, 1877, which directed the directors to "obtain all bills for past expenditures, audit the same, and make an assessment upon the towns owning stock, *pro rata*, for the payment of such bills, re-imbursing, without interest, any towns the amount already paid by them, which shall exceed their proportion of the expenditures aforesaid." By the charter of the corporation, Private and Special Laws of 1872, c. 140, § 3, the directors are authorized to make equal assessments from time to time on all of the shares in said corporation, etc. This assessment was made on the towns and cities only which had subscribed for stock, and not on the stock held by persons, though by the record of the meeting at which it was ordered it appears that thirty-one of such stockholders were present. Such an assessment was unauthorized by the charter. It was not on "all" of the shares in said corporation. But by the record of the assessment it appears to have been made by Samuel N. Campbell, committee.

If Mr. Campbell was appointed by the directors a committee to audit the claims and make the assessment directed by the corporation, in so doing they exceeded their authority. The action of Mr. Campbell does not appear to have been ratified by them. For this reason the assessment is void. *Monmouth Mut. F. Ins. Co.* v. *Lowell*, 59 Maine, 504.

Again, it is objected, on the part of the trustee, that both assessments are void, because it does not appear that the capital stock of the corporation had been fixed. By § 2 of the charter, "the capital stock of said company shall consist of not less than one thousand shares of one hundred dollars each, par value; but the number of such shares may be from time to time increased, at the discretion of the stockholders, to an amount not exceeding twenty thousand shares." The corporation had no power to assess the subscribers to its stock till it had fixed its capital stock, and it had been fully taken. *S. & K. R. R. Co.* v. *Cushing*, 45 Maine, 524. *Somerset R. R. Co.* v. *Clarke*, 61 Maine, 379, 380.

If it be said that the minimum of one thousand shares must be taken to be the capital stock of the corporation, in the absence of any action by the corporation fixing it, the answer is that the assessments are on four thousand four hundred and sixty-six shares, a much larger number, and it does not appear at what number of shares the corporation had fixed its capital, nor that all of its stock had been taken.

But there is still another ground on which it is claimed that the trustee is not chargeable. By § 14 of the charter a town or city voting to subscribe for the stock of the corporation, "may in such vote, designate on what part of said railroad line, or between what points on said railroad line, any money so voted to be raised by such city or town shall be expended and used; and said corporation shall use and expend all of such money in the manner designated by such vote and in no other manner." The vote of the city of Ellsworth, by virtue of which the subscription was made, and the subscription, designate the part of the railroad line upon which the money voted to be raised shall be used and expended. It is claimed by the plaintiff that this is a condition subsequent; that the corporation has the right to assess the stock subscribed

for, and collect the assessments, before it can be required to use and expend the money on that part of the line of the road designated. If this be so, the corporation would have no right to collect the money and use and expend it for purposes other than the one designated. And having collected it, if it should attempt to divert it from the use designated, and use it for another purpose, this court, by appropriate process, would restrain it from so doing and compel it to specifically perform the contract on its part. A general creditor cannot, by trustee process, divert the fund to a use to which the corporation could not legally appropriate it. The plaintiff's debt was not incurred for the use or purpose designated in the vote of the city authorizing the subscription, and the trustee is not chargeable.

But it is claimed by the plaintiff that the trustee is estopped from denying the legality of the second assessment of $1,541.25 by the vote of the city council passed August 6, 1877, authorizing the mayor to pay it from the contingent fund or by loan. This vote was not a contract between the city and the railroad company. No action was taken by the corporation by reason of it. It contains no elements of estoppel, and the city is not precluded by it from setting up any legal defense to the assessment.

Trustee discharged.

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

PETERS, J., being a tax payer of Ellsworth, did not sit.

WASHINGTON ICE COMPANY *vs.* NATHANIEL WEBSTER.

Lincoln. Opinion delivered November 11, 1878.

Replevin. Damages. Trial. Witness. Tax. Evidence.

Where the plaintiff in replevin becomes nonsuit under an agreement that if the action is maintainable it is to stand for trial for the assessment of damages for the defendant, such assessment is to be regarded as an inquisition to assess damages, and the defendant claiming them is entitled to open and close.

Where the defendant in replevin pleads property in himself and prays for a return, no motion adverse to such return being filed, and upon the evidence a nonsuit is entered, the order for a return is rightfully made a part of the judgment consequent on such nonsuit.

A request "that the measure of damages to be assessed in this case, is the same sum of money which under ordinary circumstances attending a sale and purchase might reasonably be agreed upon as a fair price for the property, between a vendor desirous of selling and a purchaser desirous of purchasing the property as a whole," was properly refused.

When property has been wrongfully taken from its owner, he is entitled as damages to the actual value of the property to him at the time when and the place where it was taken, for any lawful use to which it could be put.

The state of the market and the large or small supply in reference to the demand is a proper subject for the consideration of the jury.

Hearsay evidence is admissible to show the market value of an article.

An instruction, that the allegations in a writ as to quantity are not conclusive on the plaintiff, and that they may be considered as declarations of his, but that they are not binding on him, if mistaken ones, is not erroneous.

The disallowance of questions, the answers to which are obvious and acknowledged truths, afford no substantive ground of complaint,—as whether forty-five tons of ice are or are not worth more than forty tons, or that prices are greater by retail than by wholesale.

The expression of an opinion, as to fair worth of an article by a witness, furnishes no ground of exception, when the phrase is used to express value or price.

When a plaintiff in replevin pays to the collector, without the request and against the will of the defendant, a tax assessed to the defendant on property wrongfully replevied, where there has been no seizure of property to enforce its collection, such payment is to be regarded as voluntary.

In such case the plaintiff cannot recover the amount so paid against the owner, nor can he claim it in reduction of damages for such wrongful taking.

The expense of procuring men, teams and appliances for the removal of goods subsequently replevied, and which become useless by reason of their being so replevied, may be recovered by the defendant as damages, when a nonsuit has been entered.

The defendant is not required to delay his efforts for the care and removal of his property, because of the greater or less probability that it may be wrested from him by a groundless action of replevin. He may well continue his efforts until the writ is served on him.

He is entitled to recover the expenses incurred in preparation for the removal of his property when reasonable and proper and at prices fair and reasonable,—all which is for the jury.

When the plaintiff in replevin procures the property replevied, after it is in his possession, to be weighed by one not shown to have been appointed and sworn as a weigher according to R. S., c. 43, §§ 5 and 6, and on scales not shown to be sealed, as required by § 8, and the weight is entered in a book containing only the weight of the articles replevied, and the weigher dies,—the weighing being *ex parte*, not in the ordinary course of business as between buyer and seller, and being *post litem motam*,—the book is not admissible.

ON EXCEPTIONS AND MOTION.

REPLEVIN of 3,800 tons of ice at Boothbay, stated in 62 Maine, 341, as the case first came before the law court, where it was decided that the defendant recover and that he have damages assessed in this action if he so elect. Afterwards at the April term, 1875, the officer by leave of court to amend his return according to the facts, made the following amended return dated, Lincoln ss. August 13, A. D. 1870, and signed Thomas Boyd, deputy sheriff.

"By virtue of this writ, having first taken a bond as prescribed by law, I have this day replevied all the ice by me found in the ice-houses within mentioned, all of which said ice I caused to be weighed on delivery at the wharf in said Boothbay, about three miles from said ice-houses, being the nearest place thereto where ice could be shipped; 2,297 tons and 1,921 pounds of which was thus weighed on successive days, portions of it on each week day, between the twenty-third day of August, 1870, and the sixteenth day of September, 1870; and 33 tons and 1,930 pounds thereof was thus weighed on three several days between the twenty-sixth day of September, 1870, and the twenty-sixth day of October, 1870; the whole of said ice thus taken by me, weighing 2,331 tons and 1,851 pounds; and on the nineteenth day of said August, 1870, I delivered all the said ice at said ice-houses, to the plaintiffs, reserving to myself authority to weigh the same; and on the nineteenth day of said August I summoned the within named Nathaniel Webster to appear at court as within directed by reading this writ aloud in his presence and hearing."

The defendant's damages for the taking of the property replevied were assessed by the jury at $6,555.00, and they found specially that the value of the ice replevied where it was situated at the time it was taken was $20,069.33, and that the defendant sustained damage by reason of the taking of the ice in replevin, on account of the preparations he had made to remove it, $835.25.

The plaintiffs moved to set aside the verdict and alleged exceptions stated thus:

Before proceeding to trial the plaintiffs moved the court to strike off the docket entry, "judgment for a return of the goods replevied," and claimed a hearing upon the question whether there should be judgment for a return; and contended that upon the former report of the case to the law court, that court was not authorized to order an entry of judgment for a return; and that the question whether there should be such judgment had never been properly tried, and that the court had no authority to make such entry without a distinct submission of that question to them; and the plaintiffs offered the former report of the case to the law court, to show the limitation of authority upon which that court acted. No other hearing has been had upon the question of a return, except as appears by that report, which makes a part of the case.

The plaintiffs claimed the right to open and close, and especially the right to make the closing argument. They contended that under the decision of the law court, the case should now proceed to the assessment of damages as if in the original trial, and that it was the right of the plaintiffs under the state of the pleadings to make the closing argument. But the presiding justice ruled otherwise; and the defendant's counsel made an opening argument before any evidence was introduced, and made the closing argument to the jury.

The plaintiffs requested the following instructions, the first of which was given, the second refused, and the third and fourth not given except as appears in the charge.

"I. That defendant is not entitled to any damage on account of his being so situated that he would have special advantages or opportunities over other men in the community to sell the ice to fishermen.

"II. That the measure of damages to be assessed in this case is the same sum of money which, under ordinary circumstances attending a sale and purchase, might reasonably be agreed on as a fair price for the property, between a vendor desirous of selling, and a purchaser desirous of purchasing the property as a whole.

"III. The question for the jury is, what was in fact the quantity of ice taken on the writ,—and the plaintiffs are liable only for the quantity actually taken on the writ, without regard to the quantity stated in it.

"IV. That the allegations in the writ are not *prima facie* evidence of either the quantity or value of the ice replevied in this case."

Plaintiffs except to the instructions to the jury in the charge relating to the subject matter of the several requests.

They also except to the following paragraphs in the charge: "The defendant is entitled to the value of that ice, at the time it was taken, and where it was situated, for any lawful use to which it could be put. If it was valuable to use there, he is entitled to its value for use. If it was valuable for sale, he is entitled to its value for sale. If it was valuable to send to market, he is entitled to whatever value it bore at the time and place for any market, not what it might bring at another market,—I don't mean that —but its value at Boothbay, on August 13, 1870, for any purpose to which it might be put.

"In cases like this I do not understand the rule to be that the jury must be confined as a measure of value, to what the commodity might have been sold for if put in the market on the precise day it was taken. For example, the keeper of a hotel at one of our interior lakes, or a summer watering place, puts up a hundred or two hundred tons of ice for his own use during the summer season. If that ice is taken in the month of April, it bears no value for sale at that time, and if he had put it on the market, and endeavored to sell it at the time taken, he might not have been able to procure a farthing for it, but still it has a value for use, and if taken, the owner of the property would be entitled to the fair value at the time taken, for use, or for any lawful purpose to which he might put it.

"You have a right to consider also whether there was a large supply of ice, or a small supply of ice, at that time for the markets calling for it. You may consider the state of the markets, and the demand for ice at that time. You have a right to consider whether the market was a rising or a falling market."

And plaintiffs also except to the following paragraphs and instructions in the charge:

"Now you have heard the discussion of the evidence on this subject of quantity. The allegations in the writ have been commented on. I instruct you that the alleged quantity in the writ is not conclusive on the plaintiffs in this case. You may consider it as evidence of the declaration of the plaintiffs. If it was a mistaken declaration, it is not binding on the plaintiffs. You may regard it as a piece of evidence tending to show quantity. It is said that it does not appear by the officer's return that all the ice described in the writ was taken. The officer states in his return that he took all the ice that he found, in both houses. You can regard the officer's return as evidence on that point. I instruct you not to regard it as evidence of the quantity by weight, on a subsequent day.

"You must determine, if you think it material, whether the same quantity of ice was found in the houses on the 13th, which was there on the 12th, because the writ bears date on the 12th, and must be regarded as made on the 12th, and so can only be regarded as evidence of quantity in the houses on the 12th."

Also the following on question of value:

"Evidence has been introduced, which you may consider as bearing upon it, of the value upon other days in August.

"The allegation in the writ is, that the ice in those ice-houses, estimated at 3,800 tons, was worth $15,000, on the 12th day of August, 1870. If you find the quantity described in the writ, there at the time of taking, then I instruct you that this allegation of value estops the plaintiffs. But if you find there was no such quantity there, only one-half, three-fourths, seven-eighths as much, I instruct you that you may regard the allegation of value, as evidence tending to show its value."

Plaintiffs also except to that part of the charge giving instruc-

tions to the jury on the subject of damages for preparations made to remove the ice, and especially to this: "You will consider, gentlemen, whether the owner of the ice having made his preparations to remove it, and got as far as this place (Wiscasset) with his teams, for that purpose, might not reasonably wait until the writ was served upon him; whether he was bound to know that the suit would not be abandoned, and the writ not served upon him, and to take notice before the service of the writ. . . . I do not think that the defendant was bound to take notice of the pendency of the suit, until the fact that the property was taken on the replevin writ, and held by the officer, was communicated to him by the officer, or the writ served on him."

And as to the defendant's compensation for the use of his own team: "If it was reasonable and proper for him to incur the expense of bringing his horse and carriage here, and keeping them here during the removal of the ice and the selling of it, then that was a part of the expense, incurred in the preparation for removal, and he is entitled to compensation."

Plaintiffs also except to all other parts of the charge; and to all rulings made during the trial.

The exceptions, to the admission and the exclusion of evidence, which were considered by the court, sufficiently appear in the opinion.

A. P. Gould & J. E. Moore, for the plaintiffs, argued at length under the following heads:

I. Plaintiffs were entitled to the opening and closing arguments.

Citing *Washington Ice Co.* v. *Webster*, 62 Maine, 341, 365, showing that it was the right of the defendant in the first trial to have his damages assessed by a jury, and contending that the last trial was but a resumption of the first; citing also *Ayer* v. *Austin*, 6 Pick. 225. *Robinson* v. *Hitchcock*, 8 Met. 64, 66—77. *Page* v. *Osgood*, 2 Gray, 260. *Toppan* v. *Jenness*, 21 N. H. 232, 234. *Curtis* v. *Wheeler*, 1 Moody & Malkin, 493. S. C., 4 Car & P, 196. *Moulton* v. *Bird*, 31 Maine, 296, 298. Colby's Practice, 236. *Brooks* v. *Barrett*, 7 Pick. 94, 100. 1 Greenl. Ev. § 74. *Thurston* v. *Kennett*, 22 N. H. 151. *Belknap* v.

Wendell, 21 N. H. 175. *Buzzell* v. *Snell*, 25 N. H. 474, 481. *Lunt* v. *Wormell*, 19 Maine, 100, 102. *Spaulding* v. *Hood*, 8 Cush. 602.

II. (1). There has been no binding order for a return in this case, and we should have been allowed to show that the defendant is not entitled to a return, and therefore is not entitled to damage for taking. *Bath* v. *Miller*, 53 Maine, 308, 318. *Smallwood* v. *Norton*, 20 Maine, 83, 88. *Badlam* v. *Tucker*, 1 Pick. 284, 286. *Bath* v. *Miller*, 53 Maine, 308, 316. *Witham* v. *Witham*, 57 Maine, 447, 449. *Bartlett* v. *Kidder*, 14 Gray, 449. *Whitwell* v. *Wells*, 24 Pick. 25, 32, 33.

(2). Even if the defendant had lawful possession of the ice at the time it was taken on this writ, but did not own it, and held it simply as the agent of his vendee, he was not entitled to a return, or to damages; because the owner of the property could have maintained trespass against the plaintiffs for taking it, or could have taken the ice from the plaintiffs on a writ of replevin. *White* v. *Dolliver*, 113 Mass. 400.

It was there held that, "one whose property has been replevied by a writ against his agent, or his bailee, can retake it by replevin from the plaintiff in the first action, even during the pendency of that action."

We should surely then have been allowed to prove that defendant did not own the property.

(3). But the order for a judgment of return, even if the court was authorized to make it, should not have precluded us from proving that the defendant had no title and no right to damages. *Davis* v. *Harding*, 3 Allen, 302. *Tuck* v. *Moses*, 58 Maine, 461, 476. *Bartlett* v. *Kidder*, 14 Gray, 449. *Witham* v. *Witham*, 57 Maine, 447, 449.

III. The most important fact to be ascertained by the trial was the quantity of ice replevied. (1). Plaintiffs' third and fourth requests should have been given. *Miller* v. *Moses*, 56 Maine, 128, 139. *Ramsdell* v. *Buswell*, 54 Maine, 546. *Brown* v. *Smith*, 1 N. H. 36, 38.

(2). The officer's return is evidence of quantity, and not only evidence but the most important and reliable, if not the only com-

petent evidence, where the quantity replevied is distinctly stated. *Miller* v. *Moses*, 56 Maine, 128, 138. *Pierce* v. *Strickland*, 2 Story, 292, 308-9. *Haynes* v. *Small*, 22 Maine, 14. *Tuck* v. *Moses*, 58 Maine, 461, 474. *Johnson* v. *Stone*, 40 N. H. 197. *Avery* v. *Bowman*, 39 N. H. 393, 395. *Angier* v. *Ash*, 26 N. H. 99, 106. *Bamford* v. *Melvin*, 7 Maine, 14. *Hines* v. *Allen*, 55 Maine, 114, 115. *Stevens* v. *Tuite*, 104 Mass. 328, 331-2. *Lockwood* v. *Perry*, 9 Met. 440. *Burkle* v. *Luce*, 6 Hill. 558.

That the officer's return is the proper evidence of quantity, see also, *Bruce* v. *Holden*, 21 Pick. 187, 189. *Brown* v. *Davis*, 9 N. H. 76. *Morse* v. *Smith*, 47 N. H. 474, 477. *Stinson* v. *Snow*, 10 Maine, 263. *Agry* v. *Betts*, 12 Maine, 415. *Grover* v. *Howard*, 31 Maine, 546. *Messer* v. *Bailey*, 31 N. H. 9. *Dickinson* v. *Lovell*, 35 N. H. 9. *State* v. *Lang*, 63 Maine, 215, 221.

IV. Error in rulings rejecting and admitting evidence on the subject of quantity.

The plaintiffs proposed, for the purpose of ascertaining the actual value of the ice replevied, to prove that it was removed from the houses to the vessels in the most prudent, careful and expeditious manner, and weighed on delivery at the wharf. They "proposed to show by Meserve that he was an experienced man in barring up and removing ice from the ice-house; and that he, with other experienced men, cut out and barred up and removed from the houses all the ice in question, in a prudent and careful manner; also that the ice was removed from the ice-houses to the vessels in the most prudent, careful and expeditious manner, in which it could possibly be done, and that the ice was weighed on delivery at the wharf about three miles from the house."

This testimony was excluded, and "the court informed the counsel that he had come to the conclusion to rule out any further evidence as to what plaintiffs did, by their servants, with that ice, after it was delivered to them by the officer, except so far as it goes to show the condition that the ice was in, in the houses at the time taken."

This ruling cut off the only possible means the plaintiffs had except the officer's return to show what quantity of ice was replev-

ied. They had conducted the business of removal and shipment in the usual manner.

They did not measure the ice in the houses after it was replevied, because the quantity could not thus be accurately ascertained. The quantity which can be taken out of a house of a given size, depends very much upon the manner in which it was packed when put in. Plaintiffs contended that this ice was very badly packed, and necessarily wasted a good deal in cutting out. The defendant denied this. It is obvious that while this question was unsettled a measurement in the houses would be of little value. No measurement of the ice was produced by the defendant.

Samuel E. Marshall, experienced in the ice business, testified that weighing ice out of houses that it would hold out from forty-five to fifty feet to the ton; that he never could make it hold out at forty feet. He testified, on the defendant's examination against plaintiffs' objection, that in 1870 and prior to that time it was customary to sell at the rate of forty feet per ton on the Kennebec. We were not permitted to ask the witness whether, when the ice was sold at forty feet per ton according to the custom on the Kennebec, it was sold at full price or less than the market price because forty feet were actually less than a ton.

Eliphalet Thorpe weighed all the ice. He owned the only public scales in that town, and weighed the ice in the regular course of his business, and made a record of the weights at the time in a book kept by him for that purpose, which was signed and sworn to by him before a justice of the peace. He is now dead. As he was a disinterested person, his record of the weights is competent evidence, as we think, upon the authorities which we have consulted.

The record does not stand alone, as we have proof *aliunde* that Thorpe weighed all the ice as it was delivered at the wharf, and that he actually kept a record of the weights in this book, and furnished them every Saturday night, to the witness Fisher.

And we offered to prove, and could show at a future trial, "that it was in accordance with the usual course and custom of business in Boothbay, for all commodities in large quantities to be weighed on those scales for the public, by this weigher, Mr. Thorpe."

Thorpe's record, and other evidence on the subject, was excluded very properly under the ruling which had just been made that no evidence of the weighing of the ice at the wharf, by the plaintiffs would be received, but if the court should hold that this ruling was wrong then Thorpe's record and the testimony relating to it would be important and both parties must desire to have it decided before another trial. *Augusta* v. *Windsor*, 19 Maine, 317, 320, 321. *Warren* v. *Greenville*, 2 Strange, 1129. *Nicholls* v. *Webb*, 8 Wheat. 326, 337. *Oldtown* v. *Shapleigh*, 33 Maine, 278, 280. *Dow* v. *Sawyer*, 29 Maine, 117. *Price* v. *Torrington*, 1 Saulk. 285 (the leading case). *Holliday* v. *Martinet*, 20 Johns. 168. *Batre* v. *Simpson*, 4 Ala. 306, 312. *Jones* v. *Howard*, 3 Allen, 223, 224. *Philadelphia Bank* v. *Officer*, 12 Serg. & R. 49. *Nourse* v. *McCay*, 2 Rawle, 70. *Higham* v. *Ridgway*, 10 East. 109.

V. Rulings on the subject of damages.

(1). The rule stated in the second request is that laid down in *Stevens* v. *Tuite*, 104 Mass. 328, and confirmed in this case, 62 Maine, 362. The purpose of the defendant was to get a rule which would give him the benefit of the high prices later in the season if he chose to keep his ice till that time; this, though contrary to the decision of the court, was accomplished by the ruling. *Shepherd* v. *Johnson*, 2 East. 211, the leading case for intermediate higher damages, is disapproved in Mass. *Gray* v. *Portland Bank*, 3 Mass. 364, 390. So especially in actions of tort. *Greenfield Bank* v. *Leavitt*, 17 Pick. 1 *Brown* v. *Haynes*, 52 Maine, 578, 581. *Robinson* v. *Barrows*, 48 Maine, 186, 190. *Hayden* v. *Bartlett*, 35 Maine, 203. *Pinkerton* v. *Railroad*, 42 N. H. 424, 463. *McKenney* v. *Haines*, 63 Maine, 74. . .

VI. Taxes. We offered to show "that the ice was taxed to Webster, and that when plaintiffs were about to remove it, the tax collector came and proposed to distrain the property," whereupon plaintiffs paid the tax. The evidence was wrongly rejected. *Huggeford* v. *Ford*, 11 Pick. 223. Sedgewick on Damages [500,] 6th Ed. 626. *Mattoon* v. *Pearce*, 12 Mass. 406. *Stollenwerck* v. *Thacher*, 115 Mass. 224, 228.

VII. The special finding for expenses in preparing to remove

the ice; and the overestimate of value even on defendant's testimony.

B. F. Butler with *C. P. Thompson*, for the defendant.

APPLETON, C. J. When this cause was first tried, the presiding justice was of opinion that the action was not maintainable, and that the defendant's claim for damages for the plaintiffs' unlawful taking could only be determined in a suit upon the replevin bond. By agreement of parties, the case was withdrawn from the jury, to be reported to the full court. If the action could not be maintained upon the evidence offered and introduced by the plaintiffs, a nonsuit was to be entered. If the action could be maintained, it was to stand for trial; and the court were also authorized to pass upon the several propositions in respect to damages, made by the defendant's counsel.

Upon a full hearing of the questions of law raised upon the report, it was determined that the action was not maintainable; and a nonsuit in pursuance of the agreement of parties was ordered. It was further decided that the defendant had a right to have his damages assessed. 62 Maine, 341.

Nothing is better settled than that if the trial had proceeded, and the title to the property replevied and the damages severally claimed by the plaintiffs and defendant had been submitted to a jury, the plaintiffs would have been entitled to open and close.

But by the agreement of parties, if the title of the plaintiffs failed they were to be nonsuit, in which event they could claim no damages.

In replevin both parties are actors. But the plaintiffs, having become nonsuit, had thereby ceased to be actors. They had nothing to do by way of opening the case. They had no evidence to adduce in the first instance. As between them and this defendant they had ceased to be actors and were only to be heard in the defense to resist the claim of damages. The affirmative of the issue rests on the party claiming damages. He is the moving party. The case as to him is simply an inquiry as to damages. It is an inquisition made at the instance of the defendant. When, either from the position of the case or the agreement of parties,

the only inquiry relates to the assessment of damages, the party making the claim should open and close. The party denying damages has nothing to do until the other party has shown in some way the extent and grounds of his claim. This is in fact an inquisition to assess damages as in *Cable* v. *Dakin*, 20 Wend. 172. So when property is to be taken for public uses, the owners of land claiming damages have always the right to open and close without regard to the question by which party the petition has been filed. *Burt* v. *Wigglesworth*, 117 Mass. 302. The reason is that the affirmative rests on the one who claims damages, as in the present aspect of the case it does on the defendant. The plaintiffs asked nothing and had no opening to make. The defendant claimed all that was in dispute, and it was for him to commence to show his claim.

The plaintiffs having failed to make out any title to the property replevied, the order for a return was properly made. There was no evidence whatever negativing the defendant's right to have a return of the property replevied. The defendant in his plea had prayed for a return. The plaintiffs had not even interposed a motion adverse to an order for a return in accordance with the defendant's prayer. The order for a return was rightfully made as part of the judgment of the court consequent upon the nonsuit. In *Hoeffner* v. *Stratton*, 57 Maine, 369, Walton, J., says: "In all cases when the defendant pleads property in himself or a stranger and traverses the plaintiff's title, if he prevails, he will be entitled to a return. . . When the defendant prevails on such an issue, his right to a judgment for a return is as clearly established as his right to a judgment for costs." In *Quincy* v. *Hall*, 1 Pick. 357, 359, "if he (the plaintiff) fail to make out his title," observes Parker, C. J., "the possession ought to be restored to him from whom by process of law it was taken; and it is wholly immaterial whether the defendant had any title or not, provided the plaintiff has none; for the defendant is entitled to the possession, being answerable for the chattel to the true owner. Nor is it necessary there should be an avowry, in order that there should be a judgment for a return; for, if it appears that the property is not in the plaintiff, the law will restore the chattel to him who had the possession."

The plaintiffs having without right taken the property from the possession of the defendant, the law requires that they should restore it. "A return of the property as a general rule," observes Colt, J., in *Barry* v. *O'Brien*, 103 Mass. 520, "follows of course. If the defendant be not the true owner, he may still be accountable over for it to such owner."

The plaintiffs except to the refusal of the presiding justice to give the following instruction: "That the measure of damages to be assessed in this case is the same sum of money which, under ordinary circumstances attending a sale and purchase, might reasonably be agreed on as a fair price for the property, between a vendor desirous of selling, and a purchaser desirous of purchasing the property as a whole."

This instruction could not properly have been given. The seller was not obliged to sell to one purchaser the property as a whole. He might sell in such proportions as he could find purchasers. According to this request the seller must find a purchaser desirous of purchasing all the ice as a whole. If he failed, is he to be precluded from selling a portion to one and a portion to another? Assuredly, it is not so.

Besides it seems that there may be cases when the jury may be authorized to give smart money, when the proceedings on the part of the plaintiff are vexatious and oppressive. *Cable* v. *Dakin*, 20 Wend. 172. Exemplary damages may be given where there has been outrage in the taking or vexation or oppression in the detention. *Craig* v. *Kline*, 65 Pa. St. 399.

The court instructed the jury as to damages as follows: "The defendant is entitled to the value of that ice, at the time it was taken, and where it was situated, for any lawful use to which it could be put. If it was valuable to use there, he is entitled to its value for use. It it was valuable for sale, he is entitled to its value for sale. If it was valuable to send to market, he is entitled to whatever value it bore at the time and place for any market, not what it might bring at another market,—I don't mean that,—but its value at Boothbay on August 13, 1870, for any purpose to which it might be put."

To these instructions there can be no reasonable objections

urged. The value at the time and place of taking is the rule. But suppose there is no market at the place of taking and no sales there. Then, what is the rule? Is the party wrongfully taking the property of another to be exempt from damages? Certainly not. If there had been none on the precise day, then it is necessary to have recourse to sales nearest the time at which the goods in question were taken. *Dana* v. *Fielder*, 12 N. Y. 40. *Berry* v. *Dwinel*, 44 Maine, 255. So, if at the place of taking, there were no sales, then the value of the property taken at the nearest points affording a market at which sales are made, should be ascertained for the purpose of determining damages. *Gregory* v. *McDowell*, 8 Wend. 435. Such is the general rule.

As the taking by the plaintiffs was wrongful, the defendant is entitled to full indemnity. The measure of damages is the actual value of the property to the plaintiffs as an article of merchandise or sale, whether the market for it is in this state or elsewhere. *Coolidge* v. *Choate*, 11 Met. 79. The actual value to the owner is the just rule of damages in an action against one who converts it to his own use. *Suydam* v. *Jenkins*, 3 Sandf. 621. In *Selkirk* v. *Cobb*, 13 Gray, 313, while the rule was recognized that in trover the measure of damages was the value of the property at the time of conversion, a refusal to instruct the jury, that the plaintiff was entitled to recover only the value at the time and place of conversion, was held no ground of exception. The ice, besides its value in use, had value as an article of merchandise for exportation. Its value at the place of deposit was dependent upon the price to be paid in the market to which it might or would have been exported, less the cost of transportation.

Throughout the entire charge, the measure of damages was held to be the fair value of the property at the time taken for use or any lawful purpose to which the owner might put it. This rule is fully sanctioned by the opinion of the court in *Stickney* v. *Allen*, 10 Gray, 352. It is not for the wrong doer to limit or restrict the owner in the use he may make of his property, or in the lawful purposes to which he might put it.

The state of the ice market, the large or small supply of ice, the price at which sales were made, were all proper subjects for the

consideration of the jury. The price of an article, its value in the market, rises or falls accordingly as the relation between supply and demand changes. "So, persons familiar with a market have been examined as to the demands of such market, what is the market valuation of a particular article, and how such value is affected by particular influences." 1 Wharton on Evidence, § 446.

"Value, it must be remembered, consists in the estimate, or opinion of those influencing the market, attachable to certain intrinsic qualities belonging to the article to be valued. The opinion of such persons can only be presented in most cases, by hearsay. A broker, for instance, who is called as to the market value of a particular piece of property, and who is cross-examined as to the sources of his knowledge, must ultimately say 'it came from A, B & C.' Even should we call on A, B & C, we should get no further than hearsay; for the testimony of A, B or C, as to what he would give for the article, is of little weight, unless such testimony is based, not on any properties of the thing making it peculiarly valuable to this particular witness, but on the estimation at which the thing is generally held in the market. Hence it is, that it is no objection to the evidence of a witness testifying as to market value that such evidence rests on hearsay." 1 Wharton on Evidence, § 449. In *Whitney* v. *Thacher*, 117 Mass. 523, 527, Wells, J., uses the following language: "We see no reason why merchandise brokers in Boston, members of firms doing business, and having houses established both in Boston and New York, might not properly be admitted to testify as to the market value, at a particular date, of an article of merchandise with which they are familiar, even though their knowledge was chiefly obtained from daily price currents and returns of sales furnished them in Boston from their New York house. It is not necessary in order to qualify one to give an opinion as to values, that his information should be of such a direct character as would make it competent in itself as primary evidence." Prices current obtained from the agent of a manufacturer or from dealers in the manufactured article generally, and which have been prepared and used by parties furnishing them in the ordinary course of their business, are so far evidence of the value of the article men-

tioned in them, as that they may be submitted to the jury as throwing light on the matter and as some guides to honest men and for their consideration. *Cliquot's case*, 3 Wall. U. S. 115. The weight to be attached to this kind of evidence depends on the means of knowledge of the witness as ascertained upon his direct and cross-examination.

A remark made by way of illustration cannot be regarded as the subject of exception when no rule of law is erroneously stated.

The writ commanded the officer to replevy "a certain lot of ice being about thirty-eight hundred tons of ice, now lying and being in certain ice-houses situated in the town of Boothbay, in the county of Lincoln and state aforesaid, and owned and occupied by Nathaniel Webster," etc. The officer returned that he had "replevied all the ice by him (me) found in the ice-houses within mentioned," etc.

In relation to the writ, the presiding justice instructed the jury as follows: "The allegations in the writ have been commented on. I instruct you that the alleged quantity in the writ is not conclusive on the plaintiffs in this case. You may consider it evidence of the declaration of the plaintiffs. If it was a mistaken declaration, it is not binding on the plaintiffs. You may regard it as a piece of evidence tending to show quantity."

The writ was dated August 12, 1870. The officer's return was the next day. There was no proof of any material change of quantity during that time. The writ is a declaration of the quantity on the day preceding the service of the declaration. If a plaintiff in replevin had made a statement of the quantity, now in certain places, and to be replevied, his allegations would be admissible proof to show the quantity at the time and place referred to. They would not be conclusive. They would be receivable against him. But when it is seen that this instruction is limited only to the day when the writ was sued, and that this declaration is not to be regarded as evidence of the amount on a subsequent day, and that the jury were restricted to the "quantity of ice found" in the defendant's ice-houses, when he "was dispossessed and the plaintiffs took possession," there seems no just ground of complaint of the ruling of the justice presiding.

Throughout the charge the amount taken by virtue of the replevin writ is the amount upon which damages are to be assessed.

Complaint is made that Dennis W. Clark was not permitted to answer the inquiry whether the market value of ice per ton for small quantities was not higher than for large. A jury must be very incompetent to the discharge of its duties, if it needs testimony to prove that sales by retail are at higher rates than at wholesale. But if information on this point was needed for their enlightenment, they had it; for subsequently during cross-examination this question was put, whether the market price of small quantities of ice would not be greater than large, to which the answer was, "in general I should say yes;" so that the information on that point, if needed, was thus obtained.

The defendant offered evidence of a custom, in sales of ice in large quantities, of ascertaining the number of tons by admeasurement, as by allowing forty cubic feet to a ton, and that such sales were usually made upon this basis. The plaintiffs called Samuel E. Marshall to show that forty-five or fifty feet were required for a ton by weight. The defendant inquired of him on cross-examination, if it was not customary to sell ice on the Kennebec river upon the basis of forty cubic feet to a ton, to which he answered in the affirmative. The plaintiffs then inquired if it was not usual to sell at a less price per ton when sales were made upon this admeasurement than when by weight; but the court excluded the answer to this inquiry.

It needs neither argument nor proof to show that less than a ton of ice is not equal in value to a ton. If it took, as the plaintiffs' testimony shows, forty-five or fifty cubic feet for a ton by weight, there was no need of witnesses to prove that when less than a ton of ice was thus sold by admeasurement at the rate of forty cubic feet per ton, the price would be less than when a greater quantity, *i. e.*, a ton by weight was sold. If, then, the witness had answered affirmatively, that the price was less when sold by admeasurement than when sold by weight, it would have been but simply a re-affirmation of what he had before stated, and it would not have aided the plaintiffs. It is no just ground of exception that a witness is not permitted to repeat what he had

before stated because a different phraseology is adopted in making the inquiry. It hardly needed testimony to show that a less quantity of ice would not bring so much as a greater quantity. Yet that was the substance of the question.

If the witness had answered that the price was the same, the plaintiffs would not have been benefitted by an answer so palpably absurd.

It is obvious that the plaintiffs cannot have been harmed by this ruling of the presiding justice. The value of a ton by measurement would depend upon the number of cubic feet required for a ton by weight. If in their judgment it took forty-five or fifty cubic feet for a ton by weight, and sales were usually made at the rate of forty cubic feet a ton, it hardly required testimony to show that a ton of forty cubic feet would sell for less than a ton of forty-five for fifty cubic feet.

The objection is taken that Alfred Lennox was permitted to give his opinion of "the fair worth of ice instead of its market value." The witness knew of no sales at Boothbay where the ice in dispute was, except made by himself. In his testimony, he speaks of having made inquiries as to the value of ice; and he was cross-examined by the plaintiffs on his qualification to testify to the value of ice. After this, in answer to an inquiry by the defendant as to "the fair worth of ice at Boothbay in the middle of August," he said eight dollars a ton. It is apparent that the "fair worth" and value of ice were regarded as identical, and that there could have been no misunderstanding as to the meaning of the witness nor any injury to the plaintiffs from either the question or the answer. Indeed, neither counsel use the term value, yet it is impossible to doubt that both made their inquiries in reference thereto and were correspondingly answered. If there had been an apprehension that there could be a possible misunderstanding on the part of any one, all danger of such misunderstanding would have been easily obviated by pertinent inquiry. The niceties of language are not always regarded in the trial of causes, and a new trial is not to be granted for mere inaccuracy of expression, where such inaccuracy has and can have had no tendency to mislead the jury.

The plaintiffs' counsel offered to show that the ice was taxed to the defendant, and that when the plaintiffs were about removing it, the tax collector came and proposed to distrain the property, and that thereupon (the witness) an agent of the plaintiffs paid the taxes. This evidence was excluded, and we think rightfully.

The tax was against the defendant, and, if for the ice, upon his property. There was no seizure of the property replevied. There was merely a proposal to distrain. The plaintiffs did not wait till there was a seizure. They made no payment to relieve from distress; for there had been no distress. It was then a voluntary payment, by one not owning the ice, of a tax assessed against the owner. It was a payment without the consent of such owner and presumably against his will.

The present trial was to assess damages against the plaintiffs for wrongfully taking the defendant's property from his possession. A wrongdoer cannot pay taxes upon property tortiously taken by him, because the collector threatens to seize it, and then recover of the owner the amount paid. One cannot make another in such case a debtor by reason of his wrong doing. It will be observed, that here was no existing lien to be removed; for there was no seizure or other act by which the collector had acquired a lien.

Whether in a suit upon the bond for a non-return of the property replevied a deduction could be made for this cause is a matter to be determined when the question shall arise. Here only the damages for the unlawful taking were involved.

The defendant had made preparations for removing his ice. What he had done, how far he had proceeded, was in evidence before the jury. It was decided in 62 Maine, 341, when this case was before us, that the expense of procuring men, teams and appliances for the removal of the goods replevied, which became useless by reason of such replevin, might be recovered in damages.

That portion of the charge to which exception was specially taken is as follows: "You will consider, gentlemen, whether the owner of the ice, having made his preparations to remove it and got as far as this place (Wiscasset) with his teams, for that purpose, might not reasonably wait till the writ was served upon him; whether he was bound to know the suit would not be abandoned

and the writ not served upon him, and to take notice before the service of the writ. . . I do not think the defendant was bound to take notice of the pendency of the suit, until the fact that the property was taken on the replevin suit, and held by the officer, was communicated him by the officer or the writ served on him."

There is no legal presumption a wrong will be done. The defendant was not bound to assume there would be an invasion of his rights. He was not bound to delay the taking proper care of his property, because a groundless suit of replevin might withdraw it from his control. He might properly act, until notified that the suit had been commenced.

As to the defendant's compensation for the use of his team, the judge charged as follows: "If it was reasonable and proper for him to incur the expense of bringing his horse and carriage here, and keeping them here during the removal of the ice and the selling of it, then that was a part of the expense incurred in the preparation for removal and he is entitled to compensation."

It was matter of fact for the jury to determine what expenses had been incurred and how far such expenses were reasonable and proper. It was not a question of law but of fact.

In another part of the charge (the whole of which is reported) the presiding justice says to the jury "you will determine whether the preparations which he (the defendant) describes and tells you he made, were reasonable and proper for the purpose for which he tells you they were made, the removal of the ice. If the preparations he made were reasonable and proper and the prices he tells you he paid were fair and reasonable, then he is entitled to what he paid."

It is difficult to perceive how these questions could have been presented to the jury more fairly and clearly than they were.

The defendant fixed his quantity by admeasurement at the ice-house. The ice was replevied on August 13th, 1870. It was removed at various times between August 23d, and October 26th, of the same year, a distance of about three miles to the place of shipment, where it was weighed. The plaintiffs were wrongdoers in the removal of the ice. It was in their custody and control during the removal. The principal question related to quantity. The

plaintiffs inquired of some of the witnesses as to the number of tons handled by them, which the court excluded.

Subsequently in the progress of the cause the court ruled that the plaintiffs might prove the weight of ice at the wharf where it had been weighed.

"The plaintiffs afterwards called Gideon Meserve and proposed to show by him that he was an experienced man in barring and removing ice from the ice-house; and that he with other experienced men cut and barred up and removed from the houses, all the ice in question in a prudent and careful manner; also that the ice was removed from the ice-houses to the vessels in the most prudent, careful and expeditious manner in which it could possibly be done, and that the ice was weighed on delivery at the wharf, about three miles from the house." This evidence was excluded.

The amount of ice taken from the ice-houses was one of the most material and important questions to be determined. The defendant showed the amount in the ice-houses by admeasurement, that is, the number of cubic feet. It is customary, it appears from the evidence, to sell large quantities of ice, as in a storehouse, by admeasurement at the rate of forty cubic feet for the ton by weight. How many cubic feet, whether forty or forty-five or any other number more or less, would be equivalent to a ton by weight, is an inquiry bearing mainly on the question of value, as it is evident that the price of a ton by admeasurement, at the rate of forty cubic feet to the ton, will be same as that by weight if that number of cubic feet is equivalent to a ton by weight, and that it will vary from that price as a larger or smaller number of cubic feet is held to be the equivalent of a ton when ascertained by weight. Whether the number of tons should be determined by actual weight or admeasurement was important only as bearing on the price and value.

The offer was a totality. Obviously, the most important portion of it related to the weight at the place of shipment, for if not weighed there, or if there was not legal evidence of its weight, the care used in its removal would be unimportant. The total weight at the ice-houses was the ultimate fact sought. That would be the weight at the place of shipment, to which is to be added the

weight lost, by heat, breakage, etc., in the process of removal. The amount was an unascertainable quantity, to be arrived at only by approximation. All that could be hoped for would be an approximation to the true weight of the ice actually removed.

If, then, for any cause, it should be impossible to procure legal evidence of the weight at the place of shipment, the other evidence contained in the offer would lose whatever importance it might otherwise have. The mode and manner of removal, and all admissions and exclusions of evidence relating thereto, would become unimportant. The question then occurs, did the plaintiffs offer any competent evidence of the weight at the place of shipment, even if the ice was removed with the most scrupulous care and caution.

It appeared that the ice was weighed at the wharf by one Thorpe, who owned platform scales which were used for weighing coal, hay, etc., and on which he was accustomed to weigh all commodities in large quantities for the public. Thorpe has since deceased, and the plaintiffs offered a weigh book containing the original entries of the weight of the several loads of ice weighed by him for the plaintiffs, and nothing else.

The scales, upon which the ice was weighed, are not shown to be those required by R. S., c. 43, § 8, to be used. There is no evidence they were even sealed as is provided by § 8. There is no proof that Thorpe was ever appointed or sworn as a weigher, as provided by §§ 5, 6. If proof had been attainable of these several facts, it should, and we doubt not from the known vigilance of the able counsel for the plaintiffs, it would have been forthcoming. The ordinary weighing is between buyer and seller where the fees are "to be paid by the purchaser." Here the weighing was *ex parte.* It was a weighing *post litem motam* and for the purpose of creating evidence to affect the result. It was a weighing to which the owner was no party. The book was not one containing Thorpe's general doings as a weigher. It contained only the special entries of the weight of the ice of the defendant which the plaintiffs procured him to weigh, and it is entitled to no more consideration than if any employee of the plaintiffs had done the weighing and made the entries on a book or paper and then deceased. What

was done, was under a special employment and not in the discharge of any public duty. The book is a record made at the instance of a wrongdoer and for his protection, and it is not admissible within any of the recognized principles of law or within any adjudged case.

The book being inadmissible, the rest of the evidence offered became of no consequence. Whether the ice was prudently cut out and barred and removed from the ice-houses to the vessels in the most prudent, careful and expeditious manner, can be of no avail, if the weight after such removal cannot be established by legal and competent proof.

The ice was removed between August 23d and October 26th. It was exposed to loss by the heat of the sun during its removal. The ice remaining after each removal was exposed to loss. There was loss by breakage. The defendant had no knowledge of or control over the removal. The plaintiffs were wrongdoers throughout. Even if there was evidence of the weight at the time and place of shipment, it would be a grave question how far the defendant's rights were to be affected by these wrongdoings of the plaintiffs continued during a period of more than two months. But it is not necessary to discuss this question.

A motion is made for a new trial as against evidence. The case was submitted to the jury under a charge clear, accurate and impartial. The defendant is entitled to damage. The amount was for the jury. The evidence was conflicting. The trial occupied much time and was necessarily attended with heavy expense. It was for the jury to determine the damages sustained. There is no such error in the verdict as will justify our interference. Indeed, it is doubtful whether any jury would be likely to make a reduction of the damages equal to the cost attendant upon a trial. We think no sufficient reason is given for disturbing the verdict. The parties have appealed to the jury, and they must abide the result.

Motion and exceptions overruled.

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

BENJAMIN B. DYER *vs.* EDWARD C. MORRIS *et al.*

Cumberland. Received November 11, 1878.

Trial. Practice. Auditor. Set-off. Nonsuit.

The defendant filed his account in set-off. The case was sent to an auditor, who heard the parties and made report to the court. *Held*, that the plaintiff could not then discontinue his suit without the consent of the defendant. R. S., c. 82, § 59. Judgment was properly rendered on the auditor's report.

ON EXCEPTIONS from the superior court.

ASSUMPSIT on account annexed, to recover $160.48, balance due on account. At the return term defendants filed an account in set-off amounting to $5,689.29, and the further claim for $500 as interest thereon. The case was sent to W. L. Putnam, as auditor, who, after hearing the parties, stated the accounts and made report to the court, finding the amount due from defendants to plaintiff to be $1,211.25, and the amount due from plaintiff to defendants to be $1,310. At the March term the case was assigned for trial before the court without the intervention of a jury, and called for hearing. The plaintiff appeared by counsel and declined to prosecute his suit, offering to become nonsuit, to which defendants objected. The court ruled, as matter of law, that at that stage of the case the plaintiff could not become nonsuit against the objection of the defendants. The plaintiff then again declined to proceed to trial, and the court received in evidence the auditor's report offered by defendants, which was all the testimony offered, and thereupon rendered judgment against the plaintiff in the sum of $98.75, as per statement of accounts in auditor's report.

The plaintiff alleged exceptions.

J. Howard, N. Cleaves & H. B. Cleaves, for the plaintiff.

M. P. Frank, for the defendants.

Per curiam. *Held*, as in the head-note stated.

STATE *v.* JOEL PATTERSON.

Cumberland. Opinion delivered November 12, 1878.

Trial. Law and fact. Extortion.

Writings which can be expounded without the aid of extrinsic facts, are for the court to interpret; if aided by extrinsic facts which are controverted, either the jury find the facts and the court interprets the writing in view of such finding, or the court instructs the jury hypothetically what the construction shall be according as the facts may be found by them.

If the writing is introduced as a fact or circumstance in connection with oral evidence to prove some other proposition of fact in issue, while the court may declare what meaning the writing is capable of, the inference to be drawn from it and its weight and value are usually for the jury to settle.

The respondent sent to the complainant a letter reading thus: "Freeport, Sept 31 you may if you pleas you can enclose ten dollers in an letter cend it to Joseph Boothby Yarmouth me or els you will be enbited next tuesday or complained of me no fool —— demacratt head quarters." *Held*, that the letter is, *prima facie*, a "communication threatening to accuse another of a crime or offense with the intent to extort money," and that "enbited" may be regarded as written for the word "indicted."

ON EXCEPTIONS from the superior court.

INDICTMENT under R. S., c. 118, § 23, for maliciously threatening to accuse the complainant, Oliver H. Briggs, of some offense with intent to extort money from him, by sending him a written communication of the following tenor:

"Freeport, Sept 31
you may if you pleas you can enclose ten dollers in an letter and cend it to Joseph Boothby Yarmouth me or els you will be enbited next tuesday or complained of me no fool demacratt head quarters."

The presiding judge stated to the jury that the construction of the written communication was a question of law for the court, and instructed them that, so far as its terms were concerned, it did constitute a threatening communication within the meaning of the statute, and that, if all other facts necessary to establish the guilt of the respondent were proved, a verdict of guilty should be rendered.

The defendant alleged exceptions.

J. Howard, N. Cleaves & H. B. Cleaves, for the defendant, to the point that in a prosecution for sending a threatening letter,

the question whether it contained a threat, if doubtful, is to be decided by the jury, cited Girdwood's case, 1 Leach, C. C. L. 169. *Rex* v. *Tyler*, 1 Moody's Crown Cases, 428 (1835). *Regina* v. *Walton*, Crown Cases by Leigh & Cave, 228, 298, (1863). 1 Stark. Ev. 525. 1 Greenl. Ev. § 277. The counsel contended that the document did not sustain the indictment; did not in terms contain any threat, and that it might have been intended as prophetic or cautionary or jocose.

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

Everything was left to the jury except what the court declared was the legal effect of the paper, if all else was proved to their satisfaction. "me" in the letter means "Maine;" "enbited" is "indicted" clumsily written; and even without this term, the threat of a complaint remains. To the point that whether a letter contains such a demand (viz, that forbidden by the statute), is a matter of construction on which the court will instruct the jury, counsel cited, as directly in point, *Robinson's case*, East's Crown Law, 110–115.

PETERS, J. The respondent was indicted, for sending to the complainant a threatening letter with the intent to extort money. The first question that arose at the trial was whether it was the province of the court or of the jury to interpret the letter.

As a rule, both in civil and criminal cases, cases of libel to some extent excepted, writings are to be expounded by the court. Whenever a paper can be understood from its own words, its interpretation is a question of law for the court. *Nichols* v. *Frothingham*, 45 Maine, 220. *Nash* v. *Drisco*, 51 Maine, 417. *Fenderson* v. *Owen*, 54 Maine, 372. *State* v. *Goold*, 62 Maine, 509. Wills, deeds and other contracts usually fall under this classification. In such cases, the meaning of the instrument, the promise it makes, the duty or obligation it imposes, is a question of law for the court.

There is, however, a large class of writings where the meaning of particular words or phrases or characters or abbreviations must be shown by evidence outside the writing, and there may be extrinsic circumstances of one kind or another affecting its inter-

pretation, which may be shown by oral testimony. Here the same rule virtually applies as before. It is often but inaccurately said, in cases of the kind named, that the writing itself is to be passed upon and construed by the jury. Strictly, that is not so. They find what the oral testimony shows, and the court declares what the writing means in the light of the facts found by the jury. The facts may be found by a special verdict, and then the court interpret the writing in view of such finding, or the case may go to the jury with hypothetical instructions from the court, to render a verdict one way if certain facts are found, and another way if the facts are found differently. The court may first inform the jury as to the law, or the jury may first inform the court as to the facts, as may be most practicable. *Hutchison* v. *Bowker*, 5 Mee. & W. 535, 540. *Smith* v. *Faulkner*, 12 Gray, 251, 255. *Putnam* v. *Bond*, 100 Mass. 58. *Cunningham* v. *Washburn*, 119 Mass. 224. *Powers* v. *Cary*, 64 Maine, 9, 21.

Of course there are exceptions to the rule. It frequently happens that a writing is introduced merely as a fact or circumstance tending to prove some other fact. In such case it is generally but a link in a chain of evidence, the accompanying evidence being mostly or altogether oral. When that occurs the jury have to pass upon the whole transaction, of which the writing is but a part. The question then is, not so much what the document means, but what inference shall be drawn from its meaning, and what effect it shall have towards proving the point at issue. The writing and all the concomitant evidence go to the jury together. Here the duty of the court is comparatively unimportant. It may pronounce what meaning the writing is or is not capable of, and whether it is or not relevant to the issue; still the value and effect of such evidence is a question of fact for the jury. The opinion in *Barreda* v. *Silsbee*, 21 How. 146, 147, speaks of such a writing as evidence "collaterally introduced." Other cases denominate it "indirect evidence." The case of *Miller* v. *Fichthorn*, 31 Pa. St. 256, defines it thus: "A writing, as evidence of a relation or right, must be direct or indirect evidence of it. Statutes, ordinances, wills, conveyances and other contracts which, *per se*, declare the right or relation, are direct evidence of it. Letters,

contracts, *inter alios*, or *de aliis rebus*, or any other writings demonstrative of facts relevant to the matter in controversy and tending to show its true character, are indirect evidence of it. The indirect written evidence of a relation is usually accompanied by oral testimony aiding or rebutting the inference desired to be drawn from it, and all such usually go to the jury together, as evidence on the disputed question; and this was the meaning of Chief Justice Gibson (1 Pa. St. R. 386), when he said that 'an admixture of parol with written evidence draws the whole to the jury.'" The following cases are pertinent hereto. *Primm* v. *Hazen*, 27 Mo. 211. *Heft* v. *McGill*, 3 Pa. St. 257. *Reynolds* v. *Richards*, 14 Pa. St. 208. *Iasigi* v. *Brown*, 17 How. 183. *Bolckow* v. *Seymour*, 17 C. B. (N. S.) 107.

The rule may be subject to other qualification. It is sometimes difficult to determine, in the construction of papers, where the office of the court ends and that of the jury begins. But, in view of the rule or any possible qualification, we think the judge at *nisi prius* was right in undertaking, as matter of law, to give an interpretation of the letter relied on by the government as being a threatening communication. His course is sustained by direct authorities. *Regina* v. *Smith*, 2 Car. & Kir. 882. *Rex* v. *Boucher*, 4 Car. & P. 562. *Rex* v. *Pickford*, Id. 227.

The other question is whether the judge interpreted the letter correctly or not. He directed the jury to regard the letter as, *per se*, a threatening communication. He does not say what the crime or offense indicated in the letter was. He merely informs the jury that an accusation of some person for some crime or offense was intended. The letter, upon its face, can bear no other interpretation. What extrinsic and independent facts there were to modify the *prima facie* character of the communication, does not appear in the exceptions. All opportunities of explanation, it is presumed, were allowed to the state and also to the accused. Parol evidence was admissible for the purpose. Archbald Crim. Prac. and Plead. Title: Threatening Letters, p. 325. *Goodrich* v. *Davis*, 11 Met. 473. *Shattuck* v. *Allen*, 4 Gray, 540, 546. *White* v. *Sayward*, 33 Maine, 322. Threatening letters are likely to be written with as much disguise and artifice as

possible, and be sufficient to accomplish the purpose intended, requiring evidence *aliunde* to explain them.

It was not necessary to submit to the jury to ascertain what the term "inbited" was intended for; it not appearing that any extraneous facts were offered for that purpose. If its intended meaning could be best determined by external facts and circumstances, then the question was one of fact for the jury. If ascertainable from an inspection of the whole paper itself, in such case it was a question of law for the court. It is obvious enough from the context that an indictment was the thing threatened. The letter "d" in the word was deficiently made. *Fenderson* v. *Owen*, *supra*. *Coolbroth* v. *Purinton*, 29 Maine, 469. *Green* v. *Walker*, 37 Maine, 25. *Gallagher* v. *Black*, 44 Maine, 99.

Exceptions overruled.

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

STATE *vs.* SANFORD S. CHAPMAN *et al.*

Somerset. Decided November 19, 1878.

Fraudulent conveyance.

Chapman was the assignee of a note and a mortgage securing it, of two pieces of land to one of which the original mortgagor gave a warrantee deed to Emery, and to the other of which the mortgagor's interest came to Campbell by intermediate assignments through Bunker, each assignee agreeing with his assignor to pay the whole note secured by the mortgage of the two pieces. Chapman transferred his interest in the note and mortgage to Campbell's daughter. An indictment stating these facts and that the transfer by Chapman was made to defraud Emery and Bunker: *Held*, to charge no offense known to the law, and particularly that it does not sufficiently set out a fraudulent conveyance under R. S., c. 126, § 3.

ON EXCEPTIONS.

INDICTMENT for fraudulent conveyance under R. S., c. 126, § 3.

D. D. Stewart, for the defendants.

L. L. Walton, county attorney, for the state.

LIBBEY, J. This case comes before this court on demurrer to the indictment. The strongest case stated against the respondents in any of the counts in the indictment, embraces these facts:

John H. Gilbreth mortgaged two pieces of land to the West Waterville Savings Bank to secure his note for $1,200. Afterwards, William H. Emery became the owner of the equity of redemption of the first piece described in the mortgage, and Benjamin Bunker became the owner of the equity of redemption of the second piece, and became liable to pay the note and redeem the mortgage; and conveyed that piece to the respondent, Campbell, who became liable to Bunker to pay the note and redeem the mortgage.

The respondent, Chapman, became the holder of the note and mortgage by assignment from the savings bank, and assigned the same to Annie J. Campbell, with intent to defraud Emery and Bunker.

It is nowhere alleged that the mortgage had been paid; nor that Chapman was not the holder of it, by assignment, for full value; nor that he assigned to Annie J. Campbell without receiving full value therefor. The only title held by Emery was subject to the mortgage. The only interest which Bunker had in the matter was the liability to pay the note and redeem the mortgage, and Campbell's contract with him to do the same. Taking all the allegations in the indictment to be true, it is not perceived that it can make any difference to Emery and Bunker whether the note and mortgage is held by Chapman or Annie J. Campbell. For aught that appears their rights and liabilities are the same in one case as in the other. The indictment does not show how the assignment from Chapman to her can possibly defraud them.

The indictment charges no offense known to the law.

Exceptions sustained. Demurrer sustained. Indictment bad.

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

CHARLES V. LOOK, plaintiff in review, *vs.* WILLIAM R. RAMSDELL.

Aroostook. Decided November 20, 1878.

Review.

By R. S., c. 89, § 7, if the plaintiff fails to enter a writ of review at the next term after it is granted, the court has power, in its discretion, to allow it to be entered at the second term.

ON EXCEPTIONS.

ACTION OF REVIEW. A petition for writ of review was granted at the February term, 1876. The docket entries under the action of review are as follows:

"Madigan & Donworth and H. L. Whitcomb for Pl'ff.—James Mulholland for Def't. Feb. term, 1877, (2) motion to dismiss; (7) leave to enter the action. Sep. term, 1877, (4) motion sustained; action dismissed; (16) Law on Exceptions."

At the February term, 1877, the defendant, Ramsdell, filed the following motion to dismiss:

"And now the defendant in this action comes and moves to dismiss the above entitled action, because he says that the writ in this action was not entered at the first term of this court after said writ was granted, to wit, the September term, 1876; and that no leave was obtained at the term at which said writ was granted, to wit, the February term, 1876, of this court, to enter said writ at the second term of this court after said writ was granted."

At the September term, 1877, the plaintiff, Look, filed the following bill of exceptions:

"Action of review. Writ dated September 23d, 1876. The petition of the plaintiff was heard and review granted at the February term of said court, 1876. The action of review was served February 12th, 1877, and was placed on the docket the first day of the February term, 1877. On the second day of the last mentioned term a motion to dismiss the action was filed, and on the seventh day of said term the presiding judge heard the motion of plaintiff for leave to enter the action, and caused the following entry to be made on the docket. 'Leave to enter the action,' and

the case was continued. At the succeeding term (September, 1877), the presiding judge *pro forma* sustained the motion and ordered the action dismissed. The plaintiff claimed that the motion had been passed upon at the preceding term when he obtained leave to enter the action, and offered evidence to show that the record, as made upon the docket, was incomplete, and that Judge Danforth had heard the motion, and the arguments and authorities of counsel touching the motion, and had virtually if not fully overruled said motion; which evidence the presiding judge at the September term, 1877, excluded. To the exclusion of such evidence, and to the ruling sustaining the motion, and to the order to dismiss said action, the plaintiff alleged exceptions."

J. Madigan & J. P. Donworth, for the plaintiff.

J. Mulholland, for the defendant.

LIBBEY, J. The motion to dismiss was properly before the court. The docket did not show that it had been acted upon at the previous term. The evidence offered by the plaintiff was inadmissible. There was no motion to correct the docket entry. The evidence contradicted the record.

We think the case brings properly before this court the construction of R. S., c. 89, § 7. This section provides that the writ "shall be entered at the next term after the review is granted, unless leave is granted to enter it at the second term."

This provision of the statute is derived from the laws of 1826, c. 347, § 5, which reads as follows: "Whenever a review is granted by the supreme judicial court, and the plaintiff fails to enter the same at the next term thereof, the entry of such action of review may be allowed at the second term of said court, holden after said review is granted; and the plaintiff shall be authorized to prosecute the same to final judgment."

This statute was enacted soon after the decision of *Hobart* v. *Tilton*, 1 Maine, 399, cited and relied on by the counsel for the defendant, in which the court held that, when a review is granted, the writ must be entered at the next following term, unless otherwise specially provided in the order of court by which the review is granted. We think it perfectly clear that the legisla-

ture, having this decision before it, intended to change the rule as held therein, by giving the court power to allow the entry at the second term, if the plaintiff fails to enter it at the next term after the review is granted. The language is plain and admits of no other construction.

Has the meaning of this statute been changed by the several revisions?

It first appears in the revision of 1840, c. 124, § 5, in the following language: "The plaintiff in review shall enter the action at the next term after it is granted, unless for special reasons the court on motion grant leave to enter it at the second term." The language of the revision of 1857 is the same as the present statute.

We think the legislature, in revising the act of 1826, by changing its phraseology did not intend to change its meaning; and that, by the true construction of R. S., c. 89, § 7, if the plaintiff fails to enter the writ of review at the next term after it is granted, the court has power, in its discretion, to allow it to be entered at the second term.

Exceptions sustained.
Motion overruled.

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

G. W. COLTON *et als. vs.* WILLIAM F. STANWOOD *et als.*

Androscoggin. Decided November 22, 1878.

Bond. Poor debtor. Pleading. Venue. Variance.

In an action on a poor debtor bond executed in accordance with R. S., c. 113, § 24, the plaintiff in the first instance need not count upon any other than the penal part of the instrument, leaving the condition to be pleaded by the defendant if it affords him any defense.

The penal part of the instrument will maintain an action, the breach being the non-payment of the money.

The bond in its terms appeared to be signed by the defendants at Lewiston, in the county of Androscoggin. The declaration was that the defendants, "at said Lewiston, to wit, at said Auburn," bound and acknowledged themselves. *Held,* that the venue was properly enough laid, and that there was no variance between the bond and the declaration.

Form of a declaration where the obligees are wrongly named in the bond. See statement of the case.

ON REPORT.

DEBT. "For that the said defendants, at Lewiston, aforesaid, to wit, at said Auburn, on the twenty-third day of February, A. D. 1875, by their writing obligatory of that date, by them signed, sealed with their seals, and here in court to be produced, bound and acknowledged themselves to be indebted to the plaintiffs, under the names of G. W. Carlton, C. B. Carlton, H. F. Zahm and L. A. Roberts, all of the city, county and state of New York, copartners in business under the firm name and style of Carlton, Zahm & Roberts, in the sum of one hundred and eighty two dollars and seventy-eight cents, to be paid to the plaintiffs on demand. Yet the said defendants, though requested, have not paid the same, to the damage," etc.

The plaintiffs put in evidence, subject to the defendants' objection, the bond declared on, running to G. W. Carlton, etc., as stated in the declaration, and not to Colton, etc., the true names of the plaintiffs. The bond contained this condition: "Now if the said William F. Stanwood shall, in six months from the time of executing this bond, cite the said Carlton, Zahm & Roberts, the creditors, before two justices of the peace and of the quorum, and submit himself for examination, agreeable to the 113 chapter

of the revised statutes, and take the oath prescribed in the 30th section of said chapter, to pay the debt, interest, cost and fees arising in said execution, or deliver himself into the custody of the jailer, agreeable to the 24th section of the chapter above referred to, then this obligation to be void, otherwise to remain in full force."

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

C. Record, for the defendants.

I. Plaintiffs should allege breaches of the conditions of the bond. R. S., c. 82 § 16. And, not having done so, cannot recover. *Willoughby* v. *Swinton*, 6 East. 550. *Welch* v. *Ireland*, Id. 613. *Gale* v. *O'Bryan*, 12 Johns. 216. The statute of 8 and 9, William III, c. 11, § 8, similar to ours, has been construed to be compulsory on the plaintiff. *Roles* v. *Rosewell*, 5 Term R. 538. *Hardy* v. *Bern*, Id. 636.

II. The bond set out is an obligation to pay money; the breach assigned is that the money has not been paid. The qualified covenant, having been set out as a general covenant, omitting the limitation, the variance is fatal. 1 Greenl. Ev. § 69.

III. A disclosure by Stanwood would be no defense to a suit on such a bond.

VIRGIN, J. The bond in suit was executed in accordance with the provisions of R. S., c. 113, § 24, and is therefore a statute bond. It was made to these plaintiffs as obligees in fact, although by other names. This is alleged and proved; and the law pertaining to that subject was settled between these parties in the case reported in 67 Maine, 25.

The authorities cited under the first two points of the defendants' brief are not applicable to this case. All authorities concur in holding that, in debt on bond, it is not necessary for the plaintiff, in his declaration, to count upon any other than the penal part of the instrument; leaving the condition to be pleaded by the defendant, if it affords him any defense. For the penal part of the instrument alone constitutes, *prima facie*, a right of action, the breach being the non-payment of the money. *Waterman* v.

Dockray, 56 Maine, 52, 56. 1 Chit Pl. 363, 430, and notes. Gould Pl. c. 4, § 17, and notes. The defendant, Stanwood, never having even attempted to perform any of the conditions of the bond, had no occasion to pray oyer and plead performance. If he never performed the conditions he could not be benefitted by having them spread upon the record by the plaintiffs.

The defendants complain that Stanwood's disclosure would be no defense. If that be true, they should not have tendered such a bond. He did not make any disclosure, and whether his disclosure, if made, would constitute a defense we have no occasion to consider.

The venue is properly laid in the declaration.

This being a statute bond, judgment should be entered for the plaintiffs, in accordance with the provisions of R. S., c. 113, § 40.

Judgment for plaintiffs.

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

WILLIAM COOMBS *et als.*, appellants from the decision of the county commissioners of Franklin county.

Franklin. Decided November 23, 1878.

Way. County commissioners. Appeal.

The committee's report that the "proceedings of the commissioners" in discontinuing said way be reversed in part (describing the part), "and the residue of the proceedings of the commissioners be affirmed," is tantamount to declaring that the "judgment" of the commissioners be reversed as to the part described, and affirmed as to the remainder, and is sufficiently definite as a guide to the commissioners in the subsequent proceedings required by law.

An agreement by a land owner to claim no damages for a way located over his land does not vitiate the location.

ON EXCEPTIONS.

On the acceptance of the report of a committee appointed by this court.

The committee had made a former report that the proceedings of the commissioners in discontinuing said way be reversed in

part, viz: "From the north end of Porter Hill road (so called) to the line of land owned and occupied by William Coombs, and the residue of the proceedings of said commissioners be affirmed." That former report was re-committed.

In the second report "now offered," the committee say: "We do affirm our previous decision and report." Annexed to their report, and forming a part of it, was this paper, signed Samuel Mann:

"To whom it may concern. This is to certify that I agree to claim no land damages for the Coombs road, so called, crossing my land, if the road is sustained or built in whole or in part as the committee may decide."

The respondents' objections to the acceptance of the report were: "1. That the report shows no adjudication or decision of the matter and questions submitted to them. 2. That the committee were induced to make the report in consideration that Samuel Mann released his claim for land damages."

The presiding justice ruled that the facts alleged furnished no legal objection to the acceptance of the report; and the respondents alleged exceptions.

S. Belcher, for the respondents, contended that it was the duty of the committee to proceed *de novo* and make a new report; that they had no power to resuscitate their old and defunct report; that reversing or affirming proceedings was not reversing or affirming a judgment, and that Mann's gift of land damages was an improper influence.

H. L. Whitcomb, for the appellants.

VIRGIN, J. The committee refer to and adopt their former report. It was as competent for them to do so as to adopt any other paper. By so doing it became a part of their report upon which the court is to base its action.

To say (as the report does) that the "proceedings of the commissioners" in discontinuing said way be reversed in part (describing the part), "and the residue of the proceedings of the commissioners be affirmed," is the same as saying that the "judgment"

of the commissioners be reversed as to the part described and affirmed as to the remainder; and is sufficiently definite as a guide to the commissioners in the subsequent proceeding required by law, although we should not recommend it as a precedent.

The amount of damages to be paid is always an element to be considered as bearing upon the expediency of locating a way. The public convenience may require it, while its location might not be judicious at damages deemed extravagant. Nor does it render a location invalid if a private individual pays all the expense. *Gay* v. *Bradstreet*, 49 Maine, 580-5. No testimony was offered tending to show that the committee acted in disregard of, or that their judgment was not based upon the public convenience.

Exceptions overruled.

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

OZIAS B. COTTON, in equity, *vs.* ELIZA J. MCKEE and CHARLES B. JORDAN.

Androscoggin. Decided November 23, 1878.

Mortgage. Deed. Evidence. Burden of proof.

A deed absolute on its face, with a separate instrument of defeasance, must be executed at the same time or as a part of the same transaction.

The plaintiff who alleges the affirmative of such a proposition must prove it if he would prevail.

BILL IN EQUITY, praying for an order to account and to be allowed to redeem, setting out, in substance, that, April 30, 1870, the plaintiff quitclaimed the premises to the defendant, Jordan, as security for the payment of $451.08 then owing; and on the same day, and as a part of the same transaction, Jordan gave him a bond of defeasance, on condition of payment of that sum in one year from date with interest.

The defendant, Jordan, in his answer, admitted the making and delivery of the quitclaim deed to himself, and also that, on the same day, a note was made and signed by Cotton, running to him, for $451.08, payable in one year, and that a bond was then made

and signed by Jordan to convey the premises to Cotton, if the note was paid according to its terms. But the defendants say these were two independent transactions; that Jordan previously held a judgment against Cotton, as on mortgage for the premises; that Cotton quitclaimed to him to satisfy the judgment, a completed transaction; that he thereupon let the premises to the plaintiff for a year at a small rent; that afterwards, on request of Cotton, he did verbally agree with him that on payment of $400 in one year he would convey, and that this was not put in writing; but that Cotton made a note for the full amount of the judgment, and Jordan signed the bond, not as a part of the same, but as a new and independent transaction; that both bond and note were put into the hands of a third party as an escrow, the bond not to be valid unless the note was paid according to its tenor; that it never was paid, and that Jordan afterwards gave a bond for a deed to the defendant, McKee, who subsequently paid the consideration and took a conveyance from him of the premises.

The plaintiff testified that he never paid any rent and that he never agreed to.

A. P. Moore testified that the bond and note were left with him by the makers and put in an envelope and sealed, on which he made the following memorandum: "This contains a bond for a deed from Charles B. Jordan to Ozias B. Cotton, dated April 30, 1870, for one year, with note from Cotton to Jordan for $451.08, same date, payable in one year with interest, both left with me by Charles B. Jordan and Ozias B. Cotton. If note is paid on or before maturity, bond to be given up to Cotton. If not paid as above, bond to be null and void. Left April 30, 1870, due April 30, 1871." He testified that the envelope and its contents remained with him intact till November, 1875, when Cotton by Jordan's permission took the bond, which was recorded December 16, 1875.

Jordan testified that Cotton remained on the premises till fall, when he abandoned them; that he paid no rent, taxes, nor anything on the note, and on April 10, 1872, he gave a bond for a deed to the defendant, McKee, on payment of $400 in four annual payments of $100 each and interest; that she finally paid the

amount, and that he gave her a deed of warranty, August 17, 1876, which was recorded September 2, 1876.

Prescott R. Strout, the deputy sheriff who had in his hands for service the writ of possession, testified that a settlement was made without service, and corroborated defendants' version.

Mary Cotton, wife of the plaintiff, was called by the defendants, and testified that, at the time her husband told her he had sold the place to Jordan, he said nothing about his having a bond from Jordan, nor until two years after; that plaintiff told her at the time of the settlement that he was to pay rent at $2.50 per month.

C. Record, for the plaintiff, contended that the whole transaction constituted, in fact as well as in law, a mortgage. R. S., c. 90, § 1. *Mills* v. *Darling*, 43 Maine, 565. *Rice* v. *Rice*, 4 Pick. 349. *Brown* v. *Holyoke*, 53 Maine, 9. *Bailey* v. *Myrick*, 50 Maine, 171. *Shaw* v. *Erskine*, 43 Maine, 371. *Peugh* v. *Davis*, 5 Reporter, 673.

A. P. Moore, for the defendants.

VIRGIN, J. Was the bond from Jordan to Cotton executed and delivered under such circumstances as to constitute it an "instrument of defeasance," and a "part of the same transaction" with the quitclaim deed from Cotton to Jordan? The plaintiff testifies that it was, and the defendants deny it. If the plaintiff is right, and has sustained the burden of establishing the proposition by the proofs in the case, then his bill should be sustained. R. S., c. 90, § 1.

After a careful examination of the proof, it fails to satisfy us. Against the testimony of the plaintiff alone, stands the positive testimony of the defendant Jordan and two disinterested witnesses. The papers themselves are silent upon this point. Neither makes any allusion to the other, as in *Bailey* v. *Myrick*, 50 Maine, 171, 175. The facts and circumstances testified to by the plaintiff's wife, the agreement to pay rent during the life of the bond, and the delay in moving for redemption until after the valuable improvements made by the other defendants, are too

strong to be overcome by the plaintiff's unsupported testimony.

Again we think *Bodwell* v. *Webster*, 13 Pick. 411, is decisive of the case.

Bill dismissed with costs.

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

NATHANIEL M. HEALEY *vs.* ELVIRA H. GRAY.

Somerset. Decided November 27, 1878.

Innkeeper. Bailment.

To create the common law liability of an innkeeper the relation of guest and host must exist.

Where one leaves his horse with an innkeeper, with no intention of stopping at the inn himself, but stops at a relatives, whose guest he is, he is not a guest of the inn.

In such a case, the liability of the landlord is simply that of an ordinary bailee for hire.

ON MOTION.

CASE against an innkeeper, to recover the value of the plaintiff's mare, put into the defendant's stable December 4, 1875, and found dead therein the next morning, alleging negligence on the part of the defendant.

Jesse Healey drove the plaintiff's mare from Concord to Solon and delivered her to the defendant's hostler at her inn, to be kept till the next day, Healey himself not stopping at the inn, but with his son-in-law in the same village. The next morning the mare was found dead in defendant's stable. There was evidence tending to show that she was hitched in the usual manner, and came to her death by halter pulling. There was evidence that she had that habit, and evidence to the contrary. Neither the defendant nor her hostler had any information of such habit. The verdict was for the plaintiff for $166.35, which the defendant moved to set aside as against law and evidence.

A. H. Ware, for the defendant.

O. R. Bacheller, for the plaintiff.

APPLETON, C. J. This is an action against the defendant, an innkeeper, for the loss of a horse left by the plaintiff at her inn.

The plaintiff did not stop or intend stopping at the defendant's inn, but staid with a son-in-law, leaving his horse in the charge of the defendant's hostler. Whether, under such circumstances, the plaintiff is to be regarded as a guest and entitled to the rights of one may well be questioned. In *Mason* v. *Thompson*, 9 Pick. 280, the traveler did not go to the inn, but stopped as a visitor with a friend and sent her horse and carriage to the inn. After four days she sent for the property and found a part of it had been stolen, and the innkeeper was held liable. In *Berkshire Woolen Co.* v. *Proctor*, 7 Cush. 417, 425, the authority of *Mason* v. *Thompson* was somewhat doubted. But in *Grinnell* v. *Cook*, 3 Hill, 485, its authority was denied, and it was there held that one who has neither been at the inn nor intends going there, though he may have sent his goods to be taken care of by the innkeeper, could not be regarded as a guest. In *Ingallsbee* v. *Wood*, 36 Barb. 455, Bockes, J., says: "Ingallsbee was not a traveler. He had arrived at his place of destination, and had taken up a temporary abode and had become a sojourner at the house of his mother-in-law. He accepted entertainment and accommodation there. If the guest of any one, he was her guest. He did not receive nor contemplate any favor at the inn by way of personal entertainment there." In that case the loss was of a horse left by one whom the court found not to be a guest. The case came before the court of appeals in 33 N. Y. 577, and the judgment of the court below was affirmed. Porter J., in delivering the opinion, says: "The liability as an innholder presupposes the relation of host and guest, . . when one receives property from one who is neither a guest nor a traveler, the custom of the realm has no application. The property is subject to no lien, and protected by no insurance. His obligation is simply that of an ordinary bailee for hire." To enforce the strict common law liability of an innkeeper, the technical relation of guest and innkeeper must be established. *Mowers* v. *Fethers*, 61 N. Y. 34. In *Binns* v. *Pigot*, 9 C. & P. 208, it was held that an innkeeper has no lien on a horse placed in his stable for its keep, unless it

be placed there by a guest. In *Lynar* v. *Mossop*, 36 Up. Can. Q. B. 231, the plaintiff arrived in Toronto from Ireland, and drove from the railway station to defendant's hotel, leaving a portmanteau and carpet bag, etc., with him,—saying he only wanted a room to change his dress before going to a friend's—had his things taken to it, and, after occupying it about half an hour, went to his friend's with whom he remained. He was furnished with a key to his room but did not use it. Next morning he went to get his things but the portmanteau was not to be found. *Held*, the plaintiff was not a guest after he had dressed and left the inn, and that the defendant was not liable as an innkeeper, the portmanteau having been lost after he left.

In the case at bar the plaintiff was not a guest nor entitled to the rights of one. In *Shaw* v. *Berry*, 31 Maine, 479, the plaintiff was a guest, and the defendant was held to his strict common law liability as an innholder.

The defendant was liable only as an ordinary bailee for hire, and as such bailee we do not think a case is made out against her. The evidence shows that the mare received usual and ordinary care. No neglect is shown on the part of the defendant or her servant. In the morning, the mare was found dead by strangulation—the result of halter pulling. If the mare had the habit of halter pulling, and that fact was known to the plaintiff, it was his duty to communicate it to the defendant or her servant, so that any and all necessary precautions might be taken to prevent any injury arising fr om this habit. If it was not known to the plaintiff, while he would be exonerated from negligence in not informing the defendant, yet he cannot justly impute negligence to her for not guarding against the effect of a habit, the existence of which was unknown. The mare of the plaintiff was in fault for her own self destruction, and not the defendant.

Motion sustained. New trial granted.

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

FIRMAN CYR *vs.* NARCISSE DUFOUR *et als.*

Aroostook. Decided November 27, 1878.

County commissioners. Way. Jurisdiction. Trespass.

It is not essential, in order to give the county commissioners jurisdiction upon a petition for the laying out or altering of a highway, that the record should set forth in terms that the petitioners were responsible persons.

The requirement of responsible petitioners in the statute is directory to the commissioners and for the protection of the county against costs in case the prayer is denied, and is of no importance to the land owner in cases where it is granted, upon the adjudication of the commissioners that public convenience and necessity require it.

That the commissioners are satisfied, according to c. 18, § 2, that the petitioners are responsible and that an inquiry into the merits is expedient, sufficiently appears from their proceeding to order notice on the petition.

The land owner, across whose land a highway has been legally located as an alteration of one previously existing, cannot maintain an action of trespass against the highway surveyor of his district for doing, within the limits of the location, only those acts which were necessary to make such highway passable, safe and convenient, even where it does not appear that the town had raised or appropriated money to make the alteration, or that the selectmen had specially directed the surveyor to expend his money upon that part of the way.

By a valid alteration of an existing way, the newly located portion is substituted for the old, and the surveyor of the district may, in the exercise of his official discretion, expend the money in his rate bills thereon; and, unless he goes outside the located limits or does acts injurious to the land owner within them which were not necessary for the proper preparation of the way for use, he will be justified.

Where the record states the alteration thus: "Beginning on said county road at a point six rods south of J L's line," in the absence of anything in the record to show that a different point was intended, the line commences at the centre of the traveled part of such road. The jury may be instructed that this would be a proper construction of the record and the proper place to commence a survey of the line.

Where the surveyor, appointed by the court, has thus commenced and delineated the road on the plaintiff's premises by black lines, following the courses and distances and width given in the record from that point, it is not error to instruct the jury that, if all the acts done by the surveyor and his men for the purpose of making a road upon the plaintiff's land were within the width of the road as stated in the record and as delineated on the plan by the black lines, and the defendant had authority to go there as an officer of the town, then, in such acts, they would not be guilty of trespass.

Nor can exceptions be sustained in such case because the presiding judge did not permit the plaintiff to ask the surveyor appointed by the court, upon cross-examination, after rehearsing the statement in the record, "beginning on the

county road," etc. : "Is that a definite fixed place on the face of the earth as described in the record to guide you to begin?" And the further question: "If the beginning place is not as definite as the ending place, what is the practice among surveyors in order to ascertain where the true line is?"

A motion for a new trial, on the ground that the verdict is against law and evidence, cannot be sustained without a full report of all the evidence in the case. The losing party cannot base such a motion upon a report of portions of the testimony produced by his opponent tending to show that the verdict was wrong, because such portions may have been effectually controlled or explained by that which is not reported.

ON EXCEPTIONS AND MOTION.

TRESPASS, *quare clausum*, stated, as it came before the law court on a former motion, in 62 Maine, 20. The defendant in his brief statement admitted the acts alleged as trespasses, but justified as highway surveyor, constructing a new piece of road laid out over the plaintiff's land by the county commissioners as an alteration of an existing highway within his limits. The plaintiff contested the legality of the laying out, and the authority of a highway surveyor, as such, to build a new road; and contended that the commissioners' report did not show jurisdiction, because it did not state that the petitioners were responsible; and that the location was void for uncertainty of description. In order to determine where the location was, A. A. Burleigh was appointed by the court a surveyor, and made a survey and plan of the premises. The plaintiff, at the last trial, requested the following instructions:

"I. That, if the plaintiff has proved that he owned the land described in the writ, and that the defendants entered upon it and dug up the soil and did other acts, without the permission of the plaintiff, the defendants are liable in this action of trespass; unless, taking the burden upon themselves, they show a legal justification.

"II. That, unless the records of the county commissioners show affirmatively that they found that the petitioners for the road in question were responsible persons, they had no jurisdiction of the case, and all their proceedings are void, and furnish no justification to the defendants for their trespasses.

"III. That it is not the official duty of any highway surveyor, chosen under the general statutes, to open and make new roads,

but only to repair existing roads. *Todd* v. *Rowley*, 8 Allen, 51.

"IV. That, unless the jury find that Narcisse Dufour was appointed, or in some way authorized, by the town or the municipal officers of the town, to open and make this new road, he had no right to interfere with the plaintiff's land, and has no justification for his trespass.

"V. That, unless the jury find that the town raised money to be expended in opening and making this new road, the defendants had no right to open and make it, and no justification for their trespass. 8 Allen, 51."

The presiding justice gave the first requested instruction, and refused the others, except as given in the charge, which makes part of the case, an examination of which shows that they were substantially refused.

The presiding justice, among other things, said to the jury that the petition gave to the county commissioners jurisdiction, and that, as matter of law, the record of their doings under that petition authorized and was a legitimate laying out of a highway according to the courses and distances mentioned in that record, which, so far as Cyr's land was concerned, were as follows: "Beginning on said county road at a point six rods south of Joseph Lizott's south line."

"Is there any difficulty in finding a point on the highway six rods from a certain man's line, when you know where that line is? The surveyor has undertaken to place it upon his plan, as you will see, in a certain manner. He testified, as I understand, but of that you will judge, that he commenced in the middle or center of the highway, six rods south of the man's line mentioned in that record. I instruct you as matter of law that would be a proper place and a proper construction of that record; when it says, commencing in the highway, six rods south of a certain man's land, that meant the middle or center of the highway. . . After getting the starting point, six rods south of Joseph Lizott's line, the record says: 'And running thence N. 55°, W. 36 rods to a fir stake.' The surveyor has laid down on his plan what purports to be a course in that direction. Then from that point there is an angle 'thence, N. 50½°, W. 258 rods, to the N. line

of Dufour's land.' . . I instruct you as matter of law that if you find, so far as that part of the case is concerned, that all of the plowing and all of the acts done upon Cyr's land by Dufour and the men working under him were within the four rods as delineated on that plan by the black lines, and they did nothing alleged in the writ outside of those four rods, then, so far as those acts are concerned, if you find he had any authority to go there as an officer of the town, they are not guilty of trespass. That is to say, that location is one according to law. If he did all his work inside of that location he is not in fault so far as the location is concerned. If he threw rocks, trees, bushes, or logs, or anything which has been in proof here, outside of those four rods upon land not appropriated by the county commissioners to the highway (and that would include all outside of the four rods), then he is a trespasser just so far as he is guilty of anything of that kind. It is in testimony that he was forbidden going on to the land at all. You can understand perhaps that two neighboring farmers being on good terms would not consider when they stepped on to each other's land that they were committing trespass; they would take it for granted that they had a standing permission to do so. But here there was a forbidding on the part of Cyr of Dufour and his men going on there; so that, if he did do any technical act overstepping that four rods wide, or his men did under him, anything in connection with the building of that road, by throwing rocks or trees or stumps or anything of that character, he is guilty of trespass, and the only question remaining would be as to the amount of damage. . . In order that you may come to a determination of the facts, I instruct you that, if you find from the record that Dufour was elected highway surveyor, and that was in his district, he had lawful authority to go and build that road where it was located. If he or any of his men did not go beyond these four rods, you must say not guilty. If you find any of his acts, by the way of moving rocks, trees, bushes or anything, testified to here, by himself or men under him, were outside of that four rods, then he is guilty of trespass, and the only remaining question is what damage did he do."

The plaintiff alleged exceptions to the foregoing instructions to

the jury and the refusals to instruct and also to the exclusion of evidence in regard to the location, stated in the opinion.

E. Madigan with *J. Baker*, for the plaintiff, contended that, under R. S., c. 18, § 1, it is a jurisdictional fact that responsible persons are petitioners, and that fact should appear, not in the petition necessarily, but in the report. *Small* v. *Pennell*, 31 Maine, 267, 271. *Plummer* v. *Waterville*, 32 Maine, 566, 568. *Bethel* v. *Oxford Commissioners*, 42 Maine, 478, 480. *Goodwin* v. *Sagadahoc Commissioners*, 60 Maine, 328, 330, 331. *Thompson* v. *Stevens*, 10 Maine, 27. 11 Gray, 512. 16 Gray, 36. That, as matter of fact, the defendants went outside of the limits; that it was error to instruct the jury that commencing on the highway meant the middle of the highway; that though in settling boundaries it was often so, it was not a rule for a case like this; that the reverse running by the surveyor, giving the red line on the plan, was more reliable, because the starting point was more definite, and this showed a trespass outside of the location; that the surveyor's warrant requiring the amount of said list to be expended in labor and materials "upon the highways and townways" within his limits, according to law and agreeable to a vote of said town, gave him no authority "to open and make the new road" as claimed in his plea of justification; that highways and townways meant existing traveled ways. *Sproul* v. *Foye*, 55 Maine, 162, 165. *Todd* v. *Rowley*, 8 Allen, 51, 58.

J. C. Madigan & J. P. Donworth, for the defendants, contended that all questions of law were settled favorably for the defendant in *Cyr* v. *Dufour*, 62 Maine, 20, and the only question for the jury was whether in constructing the road the surveyor went outside of his limits, and that the verdict was decisive on this point.

BARROWS, J. Is it a jurisdictional fact which must appear affirmatively in express terms upon the record that the county commissioners before ordering notice upon a petition for the location or alteration of a highway were satisfied that the petitioners were responsible persons?

Unless this was essential in order to give the commissioners jurisdiction, the validity of the alteration or change of location cannot be questioned collaterally here. *Cyr* v. *Dufour*, 62 Maine, 20.

We think it was not thus essential. The language of the statute defining the power of county commissioners herein (R. S., c. 18, §§ 1 and 2), is this: "Responsible persons may present, at their regular sessions, a written petition describing a way," etc. "Being satisfied, that the petitioners are responsible, and that an inquiry into the merits is expedient, they shall cause thirty days notice to be given," etc.

But the next section (§ 3) shows the whole aim and intent of the legislature in requiring that the petitioners should be responsible. It runs thus: "When their decision is against the prayer of the petitioners, they shall order them to pay . . . . all expenses incurred on account of it; and if they are not then paid, they shall issue a warrant of distress against the petitioners therefor." The direction to the commissioners touching the responsibility of the petitioners is for the protection of the county against needless costs where the location or alteration is not found to be of common convenience and necessity.

But the rights of the land owner must yield to the common convenience and necessity, proper provision for compensation being made; and to him it makes no difference when it is decided by the lawful tribunal before whom he has had an opportunity to be heard, that common convenience and necessity do require the use of his land, whether that adjudication is had upon the petition of those who represent large taxable property or none at all.

There must be a written petition before the commissioners, presented at a regular session, and containing such a description of the way and such prayer respecting it, that all interested may understand by the notice what action is contemplated.

When the commissioners order such notice and give all concerned an opportunity to be heard, it must be presupposed that they were satisfied as to the responsibility of the petitioners; and it is no more necessary to set that fact out upon the record than it is the other with which it is classed in § 2, that they were satis-

fied that "an inquiry into the merits is expedient," which is necessarily implied from their action in the premises. In any event, the provision is directory, not esse ntial to the acquirement of jurisdiction by the issuing of a notice; and a failure to observe it would be detrimental only to the county in case the prayer of the petition was denied, and not to the land owner, where it is granted at the call of public convenience and necessity. We must still hold that the validity of the location over the plaintiff's land cannot be questioned collaterally here. *Cyr* v. *Dufour*, 62 Maine, 20, 22, and cases there cited.

But the plaintiff further insists that even if the location be held valid, Dufour had no authority as highway surveyor or by virtue of any vote of the town or employment by the selectmen to open the way over the new location, and that he was a trespasser in attempting to do it.

He objects to the instruction given by the presiding judge in substance that, if Dufour was highway surveyor and the *locus* was in his district, he had lawful authority to go on and build the road where it was located, and if neither he nor any of his men went outside the four rods covered by the location, the verdict should be not guilty; and to his refusal to instruct at the request of the plaintiff that, it is not the official duty of any highway surveyor chosen under the general statutes to open and make new roads but only to repair existing roads; and that, unless the jury find that the town raised money to be expended in opening and making this new road, and that Dufour was appointed or in some way authorized by the town or its municipal officers to open and make it, he had no right to interfere with plaintiff's land and has no justification for the trespass.

The plaintiff's position is taken and his requests are predicated upon supposed facts which are not precisely those of the case.

The county commissioners' record shows alterations in an existing road, not the location of a new road. We have no occasion to determine whether a highway surveyor by virtue of his office has power to open a piece of road newly located without a vote of the town authorizing him under R. S., c. 18, § 57, to contract for that purpose, or whether the land owner could maintain trespass against him if he undertook under such circumstances to do it.

The proposition, which, if maintained, would justify the instructions and refusals to instruct on this point in the present case, is that a highway surveyor, by virtue of his official authority, may lawfully construct an alteration in an existing road in his district, without subjecting himself to an action of trespass by the land owner whose interests are affected by such alteration. We think he may. He is bound to expend all the money in his rate bill upon the ways in the district assigned to him, and to give notice of any deficiency thereof to the municipal officers of his town. If he fails in either particular, he is liable under R. S., c. 18, § 69, to pay such fine and costs as may be imposed upon his town under § 40, or may be himself indicted instead of the town. He is to exercise his own proper discretion as to what portion of the ways in his district requires the expenditure of money to make them safe and convenient, and how the money and labor shall be bestowed, and is responsible under his official oath for the faithful exercise of such discretion.

By § 50, he is empowered to remove obstacles likely to obstruct a way or render its passage dangerous. "He may dig for stone, gravel or other material suitable for making or repairing ways in land not inclosed or planted, and remove the same on to the ways; and the town shall pay for the materials so taken, if not within the limits of the way." His office is one of high responsibility to the public, to his town and to the individual proprietors whom his acts may affect. His duties are to be discharged upon the ways in his district. Was the *locus* a part of a way in Dufour's district? That it was within the district is admitted. The question narrows itself to this, was it part of a way which it was his business to look after and expend money upon? The answer must be in the affirmative. When an alteration is made in an existing highway by lawful authority, it operates *ipso facto* as a discontinuance of so much of the old way as lies between the two points where the alteration begins and ends. *Commonwealth* v. *Westborough*, 3 Mass. 406, 408. *Commonwealth* v. *Cambridge*, 7 Mass. 158, 163, 164.

The way described in the warrant to Dufour had been altered by proceedings before the county commissioners which, never

having been adjudged defective, must for the purposes of this suit be regarded as valid. The year allowed by law for the land owner to remove his property had expired, and that which was allowed by the commissioners for the completion of the altered portion of the road was lapsing.

Whether Dufour could or could not be justified under these circumstances in expending the money in his rate bills upon that portion of the old road which was discontinued by the action of the commissioners, we think it was within his official discretion to lay out the town's money in making the altered portion passable and convenient for the public, who had acquired an easement in it by the proceedings of the commissioners, and that at all events he could not be treated as a trespasser by the land owner for so doing. It had become, by substitution, a part of the way assigned to him in his warrant. Our attention has been called to no decisions which would justify the plaintiff's claim to treat a surveyor of highways as a trespasser for conforming to such an alteration. Various *dicta* and decisions look the other way.

In *Cool* v. *Crommet*, 13 Maine, 250, the surveyor, who seems to have gone upon the plaintiff's land for the purpose of making a road where the selectmen of Waterville had laid out a town way, justified by virtue of his office; and the court, finding that the way was legally laid out, sustained the justification of the officer and his assistants.

In *State* v. *Kittery*, 5 Maine, 254, 259, Mellen, C. J., remarks, referring to the act of 1821, which conferred powers upon the court of sessions substantially similar to those now exercised by our county commissioners: "When a highway has been laid out and accepted it is thenceforward to be known as a public highway; and any man may, if he should incline so to do, lawfully travel in it before it is opened and made."

In *Howard* v. *Hutchinson*, 10 Maine, 335, the defense failed because the road was not legally laid out, and the court held that "the defendant as surveyor of highways had no legal authority to enter thereon for the purpose of constructing a town road, unless such road had been legally laid out by the selectmen and accepted by the town according to the provisions of the statute." See also *Baker* v. *Runnels*, 12 Maine, 235, 238.

In *Small* v. *Pennell*, 31 Maine, 267, upon an offer to justify by proof from the records of the proprietors that the *locus* was part of a public rangeway or allowance road, the ruling was that "unless the defendant was a surveyor of highways such proof would be no justification;" and the ruling was sustained.

In *Hunt* v. *Rich*, 38 Maine, 195, this distinction made between surveyors of highways and private individuals not authorized by a vote of the town at a legal meeting, appears more distinctly. The court, after alluding to the right of all to pass over a highway, remark: "But it does not follow that such private individual could in his own discretion, reconstruct the highway, take down the fences which are within its limits, cut down trees and take away the earth on parts which travelers have not before used for passing and repassing. The statute has intrusted this duty to an officer to be legally chosen at a meeting of the town properly called and held, and to be under oath in the discharge of his duty." Here seems to be a distinct recognition of the power of a highway surveyor by virtue of his official authority to do all that may be necessary to change the course of travel within the limits of a highway legally located. It would seem to follow that the surveyor would have the same power in cases where the course of the highway assigned to him has been changed by lawful authority, thus substituting the new course for that which previously existed. Our statutes defining the powers, duties and responsibilities of surveyors of highways were derived from and are essentially the same that existed in Massachusetts when this state was a part of that commonwealth. For further discussion of these topics see *Craigie* v. *Mellen*, 6 Mass. 7. *Callender* v. *Marsh*, 1 Pick. 418.

The plaintiff places his chief reliance here on the case of *Todd* v. *Rowley*, 8 Allen, 51, 58. That the learned court there, upon a presentation under a different aspect from this, of the question as to the right of the surveyor to expend the town's money upon a portion of the highway not before wrought, held a different doctrine from that hereinbefore suggested, is undeniable. But it does not follow that they would regard the officer of the town as a trespasser upon the land owner whose property had

been lawfully subjected to an easement in favor of the public for doing upon such property only those acts which were necessary to the proper enjoyment of the easement which the public had acquired. Thus much protection we think his official character would give him, even if, without special authority from the town or its general agents, his expenditures should not be allowed by or recoverable against the town.

The question here is not whether, if Dufour had expended all the money in his rate bills in making the road over Cyr's land passable, he could recover against the town for an injury received by reason of a defect existing elsewhere in his district, nor whether he could recover for labor, but whether he invaded any rights that Cyr had in the land after it had been subjected to the alteration in the highway made by the commissioners.

The plaintiff's position is that the lack of proof that the town raised and appropriated money specially to cover the expense of making the alteration ordered by the commissioners, or that the surveyor was specially directed by the selectmen to expend his money on that part of the highway in his district, deprives that officer of the justification which he claims. We cannot so view the law touching the duties and responsibilities of the highway surveyor.

The plaintiff further complains that, the presiding judge committed an error prejudicial to him in instructing that, where the record says "Beginning on said county road, at a point six rods south of Joseph Lizott's south line," it meant the center of said road, and of the further instruction, which was a necessary sequence of this, that, "if all the plowing and all the acts done upon Cyr's land by Dufour and his men were within the four rods as delineated on the plan by the black lines, and nothing was done outside of those four rods, and if Dufour had authority to go there as an officer of the town, they were not guilty of trespass." The plan was made by the surveyor appointed by the court in this case, and the black lines spoken of represented the location of the road, taking for a starting point the center of the county road and following the courses and distances given in the commissioners' record. The elaborate argument of plaintiff's

counsel fails to satisfy us that there was error in the construction which the presiding judge gave to the record of the location touching the place of beginning, or that the instruction that the true location was represented by the black lines upon the plan took any question of boundary from the jury upon which it was competent for them to pass.

Where nothing indicating a different intention appears, and the point of beginning is on a highway a certain distance from a known and fixed line, we think the point intended is the center of the highway. This is in conformity with the law as held in respect to the construction of deeds, legislative acts establishing boundaries, and in other analogous cases. *Bradford* v. *Cressey*, 45 Maine, 9. *Boston* v. *Richardson*, 13 Allen, 146, 154, 155. *Perkins* v. *Oxford*, 66 Maine, 545, 550, and cases there cited.

The presiding judge carefully called the attention of the jury to the testimony bearing upon the question as to "where upon the face of the earth the real location is," and especially to the necessity there was for them to ascertain where the location was across the plaintiff's land, and gave full and elaborate instructions as to the effect of the defendant's going outside of the four rod strip, or placing any rocks, stumps or logs removed from the road bed outside the location. His instructions as to the record and plan covered only their legal construction, or what was mathematically deducible from it, and left all the controverted questions of fact, depending on evidence, fully to the jury. Little more remains to be considered.

The motion to set aside the verdict as against evidence cannot be sustained for want of a full report of all the evidence in the case. It is not competent for the losing party to base a motion of this sort upon selected portions of his opponent's evidence, which for aught we know, may have been effectually controlled or explained by the testimony not reported.

The only exceptions to the admission or exclusion of evidence relied on in argument are to the refusal of the judge to permit plaintiff, on cross-examination of the surveyor appointed by the court, to ask the following questions: "Beginning on the county road south of Joseph Lizott's south line; is that a definite

fixed place on the face of the earth as described in the record to guide you to begin?" "If the beginning is not as definite as the ending place, what is the practice among surveyors in order to ascertain where the true line is?"

The first question does not state the record correctly; but if it did, the construction of the record was a question of law for the court; and its true construction was given by the judge, as we have before seen.

The next question was immaterial, because the center of the road a certain distance south of a known and undisputed line (J. Lizott's line) was as definite a "beginning place" as "the center of the county road at a point six rods north of S. Cyr's north line," which was the "ending place" of the alteration.

Now the truth seems to be that the plaintiff mistook his remedy. His real grievance was that the commissioners did not allow him the fifty dollars which he claimed as his proper damages on account of the alteration. If, instead of resisting the law, attempting to drive off the surveyor and his men, and then suing that officer in this action, he had conformed to the law, and called for a jury to estimate his damages, he could have had all his rights amply protected.

Motion and exceptions overruled.

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

WILLIAM B. HAYFORD *et al. vs.* CHARLES A. EVERETT.

Piscataquis. Decided November 30, 1878.

Execution. Amendment. Judicial discretion.

The statute requires an execution against a town to run against the real estate situated therein, and against the personal property of its inhabitants. If issued only against real and personal property owned by the inhabitants of the town, the land of a non-resident proprietor cannot be legally sold thereon.

The court can, in its discretion, render such sale valid by permitting an amendment of the execution. If the question of amendment is acted upon by a judge at *nisi prius*, his action is not reviewable by the law court, unless he decides the question as one of law instead of expediency, or sends the record to the law court for its opinion, or allows an amendment not by law allowable.

The amendment should be allowed or disallowed according as it is or is not in the furtherance of justice. There can be no other rule to guide the court in exercising its discretionary power in such cases.

The land was sold with technical and without actual notice to the owners; they knew nothing of the sale until too late to redeem therefrom; the value of the land greatly exceeded the price bid for it; the purchaser and the seller can be restored substantially to their former conditions if the sale be not upheld; and the owners would be serious losers if upheld. Amendment disallowed.

ON REPORT.

WRIT OF ENTRY, for about 13,300 acres of wild land in Kingsbury, in the county of Piscataquis, for which the defendant paid $598.32, on an execution sale. The plaintiffs put in evidence tending to show that they were in possession under deeds making a *prima facie* chain of title for a full and valuable consideration. The identity of the land was not questioned.

The defendant put in copy of record of a judgment recovered at the October term, S. J. C. Penobscot county, 1873, in favor of the county of Piscataquis, against the inhabitants of Kingsbury.

Also, execution issued on the judgment, dated April 10, 1875, for the sum of $495.48 damage, and $16.08 costs of suit, with the following direction to the officer: "We command you, therefore, that of the goods, chattels or lands of said debtor within your precinct you cause to be paid and satisfied unto said creditor, at the value thereof in money, the aforesaid sums, being $511.56 in the whole, and legal interest on the debt and costs since the

rendition of judgment, together with forty-five cents more for this and two former writs, and thereof also to satisfy yourself for your own fees."

Also the officer's return of seizure and sale to the defendant of the lands embraced in the suit for the sum of $598.32.

The defendant submitted the following motion to amend the execution, the full court to pass upon it with the same effect as at *nisi prius :* "Defendant moves this court for leave to amend the execution issued from the clerk's office, S. J. C. Penobscot county, on which the officer seized and sold the land in dispute, and the former executions on the same judgment.

"That J. H. Burgess, the present clerk of said courts, add to and insert in said executions in the proper places, 'that of the goods and chattels of said inhabitants within your precinct, and of the real estate situated in said town of Kingsbury.'

"That E. C. Brett, the former clerk who issued the executions, be permitted to make the amendments aforesaid."

There was evidence that the defendant was, at the time of the seizure and sale upon execution, county attorney for the county of Piscataquis, the creditor in the judgment execution, and had the control of the proceedings by the officer in fixing the time and the place of sale, which was at the county attorney's office; that, though the statute notice thereof was given, the plaintiffs had no notice in fact of any proceedings hostile to their ownership until the year had passed within which they had by law a right to redeem from the sheriff's sale.

F. A. Wilson & C. F. Woodard, for the plaintiffs, thought the execution was not amendable, and contended that, if it were, the power of the court to amend was discretionary, and that the amendment ought not to be granted in such a case as this.

C. A. Everett, pro se, contended that the court had the power to amend, referred to the adage of "glass houses," and said that the title under which the plaintiffs claimed was a tax title for which their grantor paid $6.80, and was void for informality.

Wilson, for plaintiffs, replied that his clients had a warranty deed, for which they paid full consideration, and under which they were in possession.

PETERS, J. The county of Piscataquis recovered a judgment against the town of Kingsbury. The statute requires that the execution on such a judgment, shall be issued against the goods and chattels of the inhabitants of the town, and against the real estate situated therein, whether owned by such town or not. This requirement was neglected, and the execution issued runs only against the property of the inhabitants of the town. Upon this execution the officer sold real estate in the town belonging to the plaintiffs, who are non-residents. The plaintiffs seek in a real action to recover the land from the execution purchaser. Several points are discussed, upon a motion of the defendant that the execution be amended by the proper officer.

Is an amendment necessary, to cure the irregularity and make the defendant's title good? It must be. As the proceedings now stand, the sale was unauthorized. An officer could not sell property without any execution in his hands. No more can he sell property against which an execution in his hands does not run. As to such property he has no execution. The statutory requirement would be nugatory, if to obey it or disobey it amounted to the same thing. *Pillsbury* v. *Smyth*, 25 Maine, 427. *Thompson* v. *Smiley*, 50 Maine, 67. *Chase* v. *Merrimack Bank*, 19 Pick. 564. *Kent* v. *Roberts*, 2 Story, 59. See other cases *infra*. This case does not come within the class of amendments allowed by the statutes of *jeofails*, which provided for the correction of many trifling errors that, under the liberalizing influence of those statutes, cannot now be regarded as errors, but comes under the general power of the court, conferred by the common law and our present statutes. Undoubtedly, in many cases the court could and would, instead of allowing a defect to be fatal to a court proceeding, remit parties to the right of having the records amended, or, even without motion, order the amendment to be made, as was done in the case of *Lewis* v. *Ross*, 37 Maine, 230. But this is not a case of the kind, for reasons to be stated hereafter.

Has the court the power to order the amendment asked for? The error was the fault of the attorney or the clerk. It is clearly amendable by order of court. The precedents are numerous that

show this. *Hall* v. *Williams*, 10 Maine, 278. *Rollins* v. *Rich*, 27 Maine, 557. *Morrell* v. *Cook*, 31 Maine, 120. *Lewis* v. *Ross*, *supra*. *Keen* v. *Briggs*, 46 Maine, 467.

While the court may allow the amendment, it is not compelled to allow it. It is a matter within its discretion. *Inhabitants of Limerick, petitioners for certiorari*, 18 Maine, 183. *Rowell* v. *Small*, 30 Maine, 30. *Herrick* v. *Osborne*, 39 Maine, 231. *Balch* v. *Shaw*, 7 Cush. 282, 284. *Bean* v. *Ayers*, 67 Maine, 482. So much is this so, that, where a single justice acts upon a motion to amend, his action is not reviewable by this court. His own discretion must govern. The reason for it is well stated in *Clapp* v. *Balch*, 3 Maine, 216, 219. An exception, however, lies to this principle, where a justice rules as matter of law, instead of as matter of expediency, or where he sends the record to the full court for its opinion, or where he allows an amendment to be made not by law allowable. Of course the discretion is a judicial one, and not the mere arbitrary will and pleasure of the judge who exercises it.

What is the rule to guide the court in exercising this discretionary power? From the very nature of things the test prescribed must be of a general and somewhat indefinite character. It is quite universally declared in the cases that an amendment is to be allowed or disallowed according as it is or is not "in the furtherance of justice." There can be no other rule. Freeman on Judgments, § 74. Bouvier's Law Dic. Amendment.

In *Rex* v. *Mayor, etc., of Grampond*, 7 Term R. 695, 696, Lord Kenyon says: "I wish that that could be attained that Lord Hardwicke in the case before him lamented, . . could not be done, namely, 'that those amendments were reducible to some certain rules;' but there being no such rule, each particular case must be left to the sound discretion of the court. And the best principle seems to be that on which Lord Hardwicke relied in the same case, that an amendment shall or shall not be permitted to be made, as will best tend to the furtherance of justice." In that case it was a binding custom that the mayor should be a resident of the city, and the jury found against him. But as there was an infirmity in the officer's return of the service of the mandamus

requiring him to appear, the court would not allow an amendment, inasmuch as there was some harshness in removing the mayor, who had regularly attended to his duties, and it not appearing that the corporation was injured by his non-residence within the limits of the borough.

In *Charlwood* v. *Morgan*, 1 Bos. & P. N. R. 64, the court refused to allow a slight mistake to be amended or the suit to be discontinued, because it was an encouragement of a writ of right, the effect of which greatly extended the period of the statute of limitations. Mansfield, C. J., said: "The soundest exercise of our discretion will be not to allow the amendment," which was merely the correction of the christian name of a party occurring in the statement of the pedigree of the title of the demandant. Heath, J., in the same case, said he thought "writs of right ought not to be encouraged, and that the least slip was fatal to the demandant."

In *Sale* v. *Crompton*, 2 Strange, 1209, the court refused to amend a record which had stood eleven years, in which the defendant's name (Crompton) was written "Compton," "for fear of inconvenience to other persons."

Judge Story declined to amend a writ by substituting James H. for John H. (although the judiciary act of 1789, § 20, contained the substance of our act of amendment), lest for some reason it might be injurious to a co-defendant in the case. *Albus* v. *Whitney*, 1 Story's R. 310.

In *Ridabock* v. *Levy*, 8 Paige, 197, the court declared it would not allow one party to amend who has made a slip in drawing papers, to relieve him from the consequences thereof, for the mere purpose of allowing him to take advantage of a similar slip on the part of his adversary.

In *People* v. *Montgomery, C. P.* 18 Wend. 633, the court refused to amend an amendable process, where an attorney, without leave, undertook himself to amend it, and then call upon the court to make it right.

In *Goodwin* v. *Smith*, 4 N. H. 29, the court refused to amend a process of *scire facias* against bail, the principal having been too sick to be surrendered, although the sickness was not a good

plea to a count not defective. And the same court, in *Wendell* v. *Mugridge*, 19 N. H. 109, said: "Amendments are not to be made if injustice would thereby be done to any one." That case was an action of debt upon an irregular judgment, and the court said they would refuse a necessary amendment of the judgment that was asked for by the plaintiff, if the defendant could show that, if he had had actual instead of technical notice of the first action, he could have defended against it successfully.

In *Dawes* v. *Gooch*, 8 Mass. 488, the court refused to allow to the plaintiff an amendment in the pleadings in a suit upon an administrator's bond, for the reason that the bond was of such long standing that more mischief might be produced by the investigation than could arise from finally closing the business where it then stood.

In *Campbell* v. *Rankins*, 11 Maine, 103, this court refused to allow an amendment of a declaration in a *qui tam* action, where the claim might be strictly legal, but where a hardship would be put upon the defendant. There are other cases in this state that bear upon the points here in issue. *Newall* v. *Hussey*, 18 Maine, 249. *Harvey* v. *Cutts*, 51 Maine, 604. *Boyd* v. *Bartlett*, 54 Maine, 496.

We have thus referred to cases, selected here and there, as practical illustrations of the denial of amendments "in the furtherance of justice." It is plain to be seen that the rule is to be more or less strictly construed as demanded by circumstances. What would be a just amendment under some circumstances would be unjust under other circumstances. The rule is thus stated by another court: "Where a party has obtained, through legal proceedings, an unjust advantage, and in these proceedings has made a mistake, be it ever so trivial, the law will not tolerate an amendment to secure him in his advantage. But, where it is in furtherance of justice, the law looks tolerantly on mistakes, and seeks to uphold whatever is honestly attempted to be done." *Foreman* v. *Carter*, 9 Kansas, 674.

We are convinced that in the case before us the amendment cannot be justly allowed. The plaintiffs had no actual and only a constructive notice that their land was to be sold. It was sold

for a small, while worth a large sum. They had no chance to avoid the sale or redeem the land therefrom. With the amendment allowed, they would innocently and not negligently be great losers. The amendment disallowed, none of the parties will suffer any considerable loss. The defendant can receive his money back. The original plaintiffs can renew their execution and proceed to collect it anew. In this result, the rights of all parties are substantially preserved. It is urged by the defendant that the title of the plaintiffs' predecessors was not in all respects based upon very meritorious foundation. That consideration could not weigh here. The plaintiffs claim under deeds of warranty, gave full consideration, and are in as much of an actual possession of the land as the nature of wild land permits them to be.

Judgment for defendants.

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

ABIEZER VEAZIE *vs.* CITY OF ROCKLAND.

Knox. Decided November 30, 1878.

Way,—defective. Notice.

Where a claim for damages caused by a defective highway is made against a city, the mayor has no authority to waive the notice in writing required by St. 1876, c. 97.

In such case a verbal notice is not sufficient, nor one in writing after the expiration of the sixty days specified in the statute.

ON REPORT.

CASE for injuries from defective highway. Writ dated April 6, 1877. Plea, not guilty, with a brief statement that the defendant did not notify the municipal officers within sixty days after the injury was alleged to have been sustained, by letter or otherwise in writing, setting forth his claim for damages and specifying the nature of his injuries and the nature and location of the defect which caused such injury.

The case was reported to the law court to determine whether a sufficient notice was given to the municipal officers as required by the statute of 1876, or whether notice was waived.

The injury was alleged to have been received on May 8, 1876. The plaintiff called on the mayor the next morning after, and gave him a verbal notice and a full description of the defect in the street and the nature of the injury; and by the request of the mayor he informed the street commissioner of the injury and defect; the mayor advised the plaintiff to have a competent person treat his horse, which plaintiff did. A notice, dated Rockland, July 22, 1876, signed by the plaintiff, and of the following tenor, was directed to the mayor of the city of Rockland: "This is to notify you that I claim damages for injuries received by my horse through a defect which existed in a certain highway, to wit: Scott street in said city of Rockland, on the 8th day of May, A. D. 1876. Said highway was rendered defective by reason of ballast stones lying therein, and my said horse was injured by stepping upon said stones with his off or right hind foot, losing his footing on account of the roughness, unevenness and slipperiness of said stones, thereby spreading his hind legs, wrenching, straining and laming the same, and wholly unfitting him for use or work, in which condition said horse hath ever since been and now is, to my great damage, to wit: the damage of five hundred dollars."

Also the following, directed to the mayor and city council and signed by the plaintiff: "City of Rockland, to Abiezer Veazie, Dr. 1876. May 8th. To damage suffered by defective highway, to wit: loss of horse through injuries received by said defective highway in said Rockland, $500. And the claimant proposes, if agreeable to your body, to refer the claim, as regards amount of damages, to three or more disinterested men." Indorsed thereon was this: "In board of aldermen, September 12, 1876, read and laid on the table. Attest: Charles A. Davis, city clerk. In board of aldermen, September 14, 1876, taken from the table, referred to committee on streets and sent down for concurrence. Attest: Charles A. Davis, city clerk. In common council, September 14, 1876. Referred to committee on new streets, etc., in concurrence. Enoch Davies, clerk."

The committee made the following report to the city council: "The joint standing committee on new streets, &c., to whom was

referred the claim of Abiezer Veazie for the loss of a horse from injuries claimed to be caused by defective highway, have considered the subject matter of said petition, and herewith submit the following report: Your committee, after investigation and due consideration, have come to the conclusion that the claimant is not entitled to damages from the city of Rockland. Our sympathies are with the claimant for his misfortune, but justice forbids that we should recommend that the city pay a claim we do not believe to be just." This report was in board of aldermen November 14, 1876, read and accepted, and sent down for concurrence, and on the same day in common council read and accepted in concurrence. The record of the city council for January 9, 1877, shows the following: "On the petition of Abiezer Veazie for the city to pay him $500 for the loss of his horse, the petitioner was granted leave to withdraw."

J. E. Hanly, for the plaintiff.

T. P. Pierce, for the defendants.

APPLETON, C. J. This is an action for damages occasioned by a defective highway which the defendants were bound to keep in repair.

The injury occurred on May 8. The next day, the plaintiff gave verbal notice of the nature of the injury, and of the defect in the street, to the Mayor of Rockland, who requested him to inform the street commissioner of the same, which he did forthwith. But by the act of 1876, c. 97, the notice to municipal officers was in all cases required to be in writing. The mayor had no authority, if he wished to do so, to waive any of the requirements of the statute. The notice was bad because not in writing.

The notice given on July 22, 1876, was not within the sixty days required by c. 97, and was too late. The vote of the city government "that the claimant is not entitled to damages from the city of Rockland," negatives the idea of any waiver by the defendants of their strict legal rights.

Plaintiff nonsuit.

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

EBEN MERRILL *et al. vs.* MICHAEL SCHWARTZ.

Hancock. Decided November 30, 1878.

Bankruptcy. Warranty.

A discharge in bankruptcy is a bar to an action upon a warranty, when the right of action for a breach accrued before the defendant filed his petition.

CASE on a warranty of a shingle machine, alleging deceit and fraud and breach of warranty.

ON REPORT, as follows: "The defendant is in bankruptcy, and filed his petition after the cause of action, if any, accrued. If a discharge or composition in bankruptcy, to which plaintiffs did not consent, would be a bar to plaintiffs' claim, the action is to be entered neither party, otherwise to stand for trial."

G. P. Dutton, for the plaintiffs.

E. Hale & L. A. Emery, for the defendant.

APPLETON, C. J. This is an action brought upon a warranty of the defendant. It is not to recover for a tort, but for a breach of contract. A warranty is a contract. The plaintiffs claim that a breach has occurred, and have commenced this action to recover the damages arising from such breach. The damages are ascertainable, and this suit was brought for their ascertainment. A contract cannot be converted into a tort by the mere use of vituperative language in the declaration. When a claim originates in contract, although fraudulently induced, and is prosecuted in an action sounding in damages, it constitutes a provable debt, although the fraud must be proved in order to recover. *In re Henry Schwartz*, 15 B. R. 330. When the substantial ground of action rests on promises, the plaintiff cannot, by changing the form, make a person liable, who would not be liable on the promises. *Green* v. *Greenbush*, 4 E. C. L. 375. *Gibson* v. *Spear*, 38 Vt. 311.

The plaintiffs' right of action had arisen before the defendant filed his petition. The damages had then accrued and were ascertainable upon the application of the creditor. R. S. of U. S. § 5068. *In re Clough*, 2 B. R. 151.

The discharge in bankruptcy is a bar to the plaintiffs' demand. If the bankrupt give a deed with warranty of title when he had no deed for the land, his liability on the warranty is released by his discharge. *Williams* v. *Harkins*, 15 B. R. 34. Bumps on Bankruptcy, (10 ed.) 752. It matters not whether the warranty relates to real or personal property. The result is the same.

Neither party.

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

STATE OF MAINE *vs.* WATERVILLE SAVINGS BANK.

Kennebec. Decided November 30, 1878.

Tax. Savings banks.

The trustees of the defendant bank, on April 29, 1876, voted to close the bank to paying or receiving deposits for the present, and arranged with the depositors to scale down their deposits 12½ per cent, the depositors exchanging their books for new ones, and to credit them with 87½ per cent on their deposits, as of April 29. These arrangments being consummated, the bank, on November 14, 1876, resumed business; and its treasurer returned the reduced amount to the state treasnrer, upon which a tax was assessed.

Held, that the assessment was valid and binding; that the tax having been legally assessed and due, a right of action existed by statute for its recovery, and that the repeal of the act, under which the assessment had been made did not vacate a previous assessment duly made under then existing statutes, for the recovery of which a right of action was given.

ON REPORT.

DEBT, to recover tax due on deposits from May, 1876, to November, 1876. Writ was dated February 1, 1878.

The trustees, finding that the bank was insolvent, voted, April 29, 1876, to "close the bank to receiving or paying deposits for the present." No deposits were received or paid until November 14, 1876, when business was resumed, in accordance with a vote of the trustees passed October 5, 1876. After the suspension, and while the bank examiner was giving directions in regard to conducting the affairs of the bank, and between May and November, negotiations were carried on with the depositors to "scale

down" their deposits twelve and one-half per cent, and agreements were signed by which depositors agreed to exchange their books for new ones crediting them with 87½ per cent of their deposits. These arrangements were consummated so that, November 14, 1876, the exchange of deposit books commenced, and the depositors' accounts were reduced twelve and one-half per cent, as of April 29, 1876.

The treasurer of the bank returned this reduced amount to state treasurer, in November, 1876, viz: $365,828.40, on which amount a tax to the state was duly assessed amounting to $1,829.14. which, if valid and binding on the bank, was due and payable December 15, 1876, and which was duly demanded and remains unpaid.

L. A. Emery, attorney general, for the state.

J. H. Drummond, for the defendants.

The statute of 1875, c. 47, § 1, in amendment of preceding statutes, provides that "every savings bank in this state shall return under oath to the state treasurer the average amount of its gross deposits as held on the first Saturday of each and every month for the then last preceding six months," etc., "and if any bank neglects to pay when due a warrant of distress may issue." This law of 1875 gave the right to tax. The statute of 1876, c. 115, § 1, gave the remedy by action invoked here. The statute of 1875 giving the right, was repealed by c. 218 of laws of 1877, without a saving clause. Being a right created by statute and existing only by virtue of the statute, its repeal defeats the right itself, not already vested by a judgment. *Butler* v. *Palmer*, 1 Hill, 324, quoted from in *Coffin* v. *Rich*, 45 Maine, 507, 512. In this case, there was no judgment and no suit commenced before the repeal.

L. A. Emery, in reply.

In *Coffin* v. *Rich*, there was no contract or privity between plaintiff and defendant, and no judgment before the repeal of the statute. The plaintiff had no right of action against the stockholder until he got his judgment against the corporation. The statute giving the action against the stockholder was repealed in

1856. The plaintiff obtained his judgment against the corporation in March, 1857. Before his right could arise the statute was repealed. Here the tax and the right to have it were in existence before the repeal. Though a tax is not technically a judgment, it is in the nature of a judgment, it was assessed, the warrant of execution could issue, the state could take, the right was vested. Not judgments only, but rights by contract, and rights to compensation, are saved from the consequences of repeal.

APPLETON, C. J. This is an action of debt, to recover the assessment the defendants were required to pay the state treasurer under the provisions of c. 47, § 1, of the acts of 1875.

The organization of the bank was admitted. The trustees of the bank, finding it insolvent, temporarily closed it, and then, under the advice and direction of the state bank examiner, entered into negotiations with the depositors, the result of which was that the deposits were reduced twelve and one-half per cent, and the depositors exchanged their books for new ones crediting them with eighty seven and one-half per cent of their original deposits. These arrangements were consummated so that, on November 14, 1876, the depositors' accounts were reduced twelve and one-half per cent, as of April 29, preceding.

The bank treasurer returned the reduced amount to the state treasurer, in November, 1876, upon which the assessment provided by statute was duly made, which being duly demanded and payment refused, this action, authorized by c. 115, § 1, of the acts of 1876, was commenced.

No proceedings had been instituted by the bank examiner for the purpose of sequestrating the assets of the bank. For a brief term, the directors were arranging with the depositors for the reduction of the deposits; but they were acting as officers of the bank. There was no interference with the chartered rights and privileges of the bank. Its investments were untouched. The interest on its loans was continuing. The value of its assets remained unimpaired. They should equitably bear their proportion of the expenses of the government which protects them.

The treasurer of the defendants returning "the average amount

of its gross deposits" in accordance with the statute, it became their duty "to pay the state treasurer." In case the "bank neglects to pay said tax when due," the treasurer is authorized to issue his "warrant of distress to enforce payment out of its estate and effects." The bank is to pay to the state treasurer. It is in default if not done.

Here, then, there was an existing, vested right in the state, enforceable by warrant of distress or by action at law. Here was a sum of money due the state, which the defendants were legally bound to pay. It is not denied that this right on the part of the state, and this duty on the part of the defendants, continued in force to the passage of the act of 1877, c. 218, by which the preceding acts relating to savings banks were condensed into the last named statute. It is, however, claimed that by the repeal of prior legislation on this subject, the state has released, discharged, or in some way lost its right to the sum the defendant corporation was previously bound to pay. Is such the case?

The act of 1877, c. 218, is entirely prospective in its operation. It repeals existing law, but it does not repeal or annihilate existing and vested rights. In *Steamship Co.* v. *Joliffe*, 2 Wall. 450, which was a suit to enforce a claim arising under a statute, which had been repealed, Field, J., in delivering the opinion of the court, says: "The claim of the plaintiff below for half pilotage fees, resting upon a transaction regarded by the law as a *quasi* contract, there is no just ground for the position that it fell with the repeal of the statute under which the transaction was had. Where a right has arisen upon a contract, or a transaction in the nature of a contract, authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It becomes a vested right, which stands independent of the statute." In that case pilotage services had been tendered but not rendered, but the claim for compensation arose upon the tender, and it was not lost by reason of the repeal of the statute.

It was held in *Belvidere* v. *Warren R. R. Co.*, 34 N. J. 193, that when a statute authorizing the laying of a tax was repealed,

after an assessment of such tax, that the repeal did not prevent the collection of such tax, such collection being regulated by the general tax law which remained unrepealed. In the case before us, the act of 1876, c. 115, under which this suit is brought, remains in full force. The remarks of Beasley, C. J., in the case last cited, are fully applicable to the one at bar. "When therefore, this assessment was made, the force of the act of 1862 with respect to it was wholly spent and exhausted; the thing authorized to be done was completely done; and," he adds, "the consequence is that, even on the most stringent application of the rule as claimed, a repeal of the statute cannot invalidate a proceeding that was fully perfected while such statute remained in force."

The act of 1877 is a consolidation of previous laws relating to savings banks. Such a law, being prospective in its operation, cannot affect acquired rights. It cannot be imagined that it was the intention of the legislature to surrender uncollected dues. *Pacific & Atlantic Telegraph Co.* v. *Commonwealth*, 66 Penn. St. 70. It cannot be for a moment supposed that the legislature intended to discriminate against those who paid in accordance with the law and in favor of those who neglected to discharge their statutory obligations. A right acquired under a statute while in force—as a settlement—does not cease by a repeal of the statute. *Starksboro* v. *Hiramsburg*, 13 Vt. 215.

The act of 1877, c. 218, § 15, imposes the same assessment upon savings banks as was provided by the act of 1875, c. 47, § 1. There was no time in which the savings banks were exempt from the precise statute liability sought to be enforced in this action. "There was no moment in which the repealing act stood in force without being replaced by the corresponding provisions of the revised statutes," observes Shaw, C. J., in *Wright* v. *Oakley*, 5 Met. 400, 406. It matters not whether it be a revision of statutes or a condensation of statutes on a particular subject. As a question of intention, it cannot be supposed that the legislature intended to annul existing assessments by the very act by which the same assessments were continued.

The cases cited by counsel for the defendant are not adverse to the maintenance of this action. In *Com.* v. *Hampden*, 6 Pick.

501, where a special tribunal was created by an act of the legislature, and the act was repealed without any saving of proceedings commenced and pending before, it was held that the whole power of such tribunal ceased on such repeal, and that it could not proceed and finish what it had commenced. But Parker, C. J., in his opinion, says: "The position that everything done under a statute while in force remains valid, though the statute may afterwards be repealed, is undoubtedly true, but goes no further than to render valid things actually done; but when those things themselves are merely preliminary, the principle does not authorize a further proceeding in order to render them effectual." But in the case before us, the liability had accrued. Nothing remained to be done except to discharge an existing liability. In *Com.* v. *Kimball*, 21 Pick. 373, the defendant was indicted under an act which was repealed pending the indictment, and judgment was arrested, but in delivering the opinion of the court, Shaw, C. J., says: "Where one statute is enacted in the same terms as a former one, without a repealing clause, and without any change of provisions, it may well be maintained that one is no repeal of the other, and that both are in force." The case of *Coffin* v. *Rich*, 45 Maine, 507, is relied upon, but it was overruled in *Hawthorne* v. *Calef*, 2 Wall. 10. All that is determined in *Smith* v. *Estes*, 46 Maine, 158, 159, is that an action which was brought by an administrator against one for aiding a debtor of the plaintiff's intestate in the fraudulent transfer of his property, cannot be maintained, the cause of action not surviving. In *Augusta* v. *North*, 57 Maine, 392, an act imposing a tax was repealed. An action was brought to recover the tax, but in the repealing act there was a special provision that "no proceedings under the act hereby repealed shall be hereafter enforced." Act 1869, c. 63, § 2.

By R. S. c. 1, § 3, "The repeal of an act shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, or any suit or prosecution or proceeding pending at the time of the repeal, for an offense committed, or for the recovery of a penalty or forfeiture incurred under the act repealed." Much more, could it not have been the intention of the legislature to surrender what was legally and equitably due the state, when the

only purpose was to fuse various acts into one for greater convenience.

In the case of *Jones* v. *Winthrop Savings Bank*, 66 Maine, 242, it was held that the bank was not liable to taxation, on the ground that it had ceased to exist by reason of the sequestration of its assets. So, it was held in *Com.* v. *Lancaster Savings Bank*, 123 Mass. 493, that where a savings bank is in the hands of a receiver, and the bank is enjoined from transacting business, it is not liable to taxation under a statute like the one under which it is claimed in this case.

In the case before us there has been no sequestration of assets, and no injunction against the further transaction of business.

Judgment for the state.

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

TIMOTHY MURPHY *vs.* ANDREW KELLEY, JR.

Penobscot. Decided November 30, 1878.

Watercourses. Surface water. Sewers. Action.

The owner of land may prevent surface water flowing on his land, whether from a highway or an adjoining field.

The plaintiff, failing to show any easement in or right to the sewer on defendant's land by deed or prescription, has no cause of action against defendant for closing it.

ON REPORT.

CASE for obstructing, on defendant's premises, a drain or sewer leading from plaintiff's cellar through and across a highway, through and over ground in possession of the defendant, and thence until it vented and discharged itself into a brook below.

L. Barker, T. W. Vose & L. A. Barker, for the plaintiff.

A. L. Simpson, for the defendant.

APPLETON, C. J. This is an action on the case for obstructing a sewer or drain on the defendant's premises.

The drain has existed for thirteen years. The plaintiff has

owned his house and lot for about five years. He shows no right to the use of the defendant's drain, by deed or prescription.

The defendant "may prevent surface water from coming upon his land, whether flowing thereon from a highway or any adjoining land," remarks Peters, J., in *Morrison* v. *Bucksport & Bangor Railroad*, 67 Maine, 353. So he may erect structures thereon regardless of its effect upon surface water or how much others may be affected by it. *Bates* v. *Smith*, 100 Mass. 181.

The evidence entirely fails to show a watercourse where the drain is; and if there had been one there, this suit is not for its disturbance.

Plaintiff nonsuit.

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

BELFAST NATIONAL BANK *vs.* ALONZO J. HARRIMAN *et als.*

Waldo. Decided November 30, 1878.

Trial. Law and fact.

Whether there has been an alteration in a note; whether, if one, it was made before the note passed from the hands of the maker or afterwards; whether he consented to such alteration or not, and whether the same was fraudulent or not, are questions of fact for the jury.

Whether such alteration is material or not is a question of law for the court.

ON REPORT.

ASSUMPSIT on a promissory note for $500, dated Belfast, November 30, 1872, and payable to the defendants four months after date, wherein Harriman & Co. were principals, and Frye & Locke, sureties.

Defense, material alteration. The word July was apparently written and partially erased, and November 30 written afterward. Frye and Locke both testified they first heard the note was not paid after Harriman & Co.'s failure; Frye, that he first so heard the day it was sued, in June, 1875. Harriman testified that he

knew nothing about the alteration; C. M. Littlefield, the other defendant, that the note was written by him, and negotiated that day, November 30, or soon after; that he presumed it was signed by the sureties the day it was carried to the bank, or a day or two before. Bradbury, the cashier, testified that the note was taken at the bank, exactly as it is now, about the time of its date.

W. H. Fogler, for the plaintiffs.

W. H. McLellan, for the sureties.

APPLETON, C. J. By the terms of the report, if there are any facts for the jury, the case is to stand for trial.

The defense relied upon is that there has been a material alteration in the note in suit, and without the assent of the defendants.

I. Whether the alteration is material is matter of law for the court. Whether there has been an alteration or not is a fact for the determination of the jury. *Wood* v. *Steele*, 6 Wall. 80. *Cole* v. *Hills*, 44 N. H. 227.

II. If the jury find there was an alteration, then it is for them to determine, if it was made before the note passed from the hands of the makers or afterwards, and whether or not they consented to the alterations made. Those questions are to be settled upon all the evidence in the case, the surrounding circumstances and the nature, character and appearance of the alterations. *Ely* v. *Ely*, 6 Gray, 439. Whether a note is altered subsequently or not is a question for the jury, when no explanatory evidence is offered. *Crabtree* v. *Clark*, 20 Maine 337. When there are no indications of falsity found upon the paper, the plaintiff is not bound to go further and prove it was made on the day it purports to be. *Pullen* v. *Hutchinson*, 25 Maine, 249. The question by whom the alterations were made, when made and whether fraudulent or not, are for the jury. *Cole* v. *Hills*, 44 N. H. 227. "Whether there be an alteration, and the time of it, the manner of it, by whom it was made, with what authority, or design, or on what grounds, are all questions of fact for the jury." 2 Parsons on Notes and Bills, 576. While proof of the defendant's signature is *prima facie* evidence that the whole body of the note written over it is the act of the defendant, still the burden of proof is on

the whole evidence on the plaintiff to show that the note declared on is the note of the defendant. *Simpson v. Davis*, 119 Mass. 269.

The case to stand for trial.

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

WILLIAM F. COLBY *vs.* SAMUEL BUNKER.

Somerset. Decided November 30, 1878.

Interest. Promissory notes.

On a note payable on demand with the rate of interest specified therein, interest is to be computed at such rate till the rendition of verdict, or default.

ON EXCEPTIONS.

ASSUMPSIT, on two promissory notes, each for $75, dated December 29, 1870, payable to the plaintiff or order on demand, at eight per cent. The writ was dated October 13, 1875. The defendant testified that the plaintiff demanded payments on the notes in September, 1871.

The presiding justice instructed the jury to ascertain whether or not a demand was made, and if so, to compute the interest at eight per cent from the date of the notes to the time of the demand, and after that at the rate of six per cent to the time of the verdict; and the plaintiff alleged exceptions.

A. H. Ware, for the plaintiff.

O. D. Baker, for the defendant.

Per curiam. *Held*, as in the head note stated.

Exceptions sustained.

GEORGE F. HOLMES *vs.* JOHN S. FRENCH.

Cumberland. Decided December 2, 1878.

Interest. Usury. Promissory notes.

R. S., of 1857, c. 45, relating to usury, was unconditionally repealed by St. of 1870, c. 169, which was expressly excepted by the general repealing act, c. 174, St. 1870.

To a promissory note in which is reserved and on which was received excessive interest, given May 13, 1857, while R. S. of 1841, c. 69, was in force, and sued upon August 5, 1874, after the unconditional repeal of R. S. 1857, c. 45, usury is no defense, and the maker of the note can claim no deductions for excessive interest reserved or paid.

ON EXCEPTIONS, from the superior court.

ASSUMPSIT, on a promissory note dated May 30, 1857, by the indorsee, to whom it was indorsed after maturity, against the maker.

The justice of the superior court tried the action without a jury, and found as matters of fact, that, a certain sum as interest, exceeding six per cent, was included in the principal of the note; that additional sums had been paid by the defendant to the payee, at different times, and by their mutual consent, applied to the subsequently accruing interest, exceeding the rate of six per cent, and that there was no proof of actual knowledge on the plaintiff's part, of the payment or inclusion of interest exceeding six per cent. And the court ruled as matter of law that, the St. of 1870, c. 169, having repealed without exception R. S. of 1857, c. 45, the reservation of excessive interest in the principal of the note, or the receipt of such interest after the maturity, affords no legal ground of defense; and that the amount so received and applied as excessive interest, is not to be deducted from the amount due on the note, and that the plaintiff was entitled to judgment for the amount of the note according to its tenor.

The defendant alleged exceptions.

A. A. Strout & G. F. Holmes, for the plaintiff.

J. J. Perry, for the defendant, contended that his clients had vested rights under the statutes in force when the contract was

made; that these statutes had never been unqualifiedly repealed; that even if the complex legislation of 1870 should be construed as an unqualified repeal of R. S. of 1857, c. 45, yet those statutes, not taking effect till 1858, long after the date of the note, did not deprive him of his rights under R. S. of 1841, c. 69, and amendments thereto, because the repealing act of 1857, § 2, provided that "the acts declared to be repealed remain in force . . . for the preservation of all rights and their remedies."

To the point that a note given for interest above the legal rate was without legal consideration, counsel cited *Goodrich* v. *Buzzell*, 40 Maine, 500. The defense is open to an action by the indorsee. *Wing* v. *Dunn*, 24 Maine, 128. *Tufts* v. *Shepherd*, 49 Maine, 312.

The consideration being in part at least for excessive interest which the statute in terms declared to be "void," a simple repeal of the statute would not validate it. *Hathaway* v. *Moran*, 44 Maine, 67. *Robinson* v. *Barrows*, 48 Maine, 186. And that part of the consideration representing excessive interest should be deducted from the principal. And not only the usurious interest reserved but also that received. *Larrabee* v. *Lumbert*, 32 Maine, 97.

Other points taken by counsel are stated in the opinion.

VIRGIN, J. The Stat. of 1870, c. 124, § 1, provided that, in the absence of any agreement in writing, "the legal rate of interest shall be six per cent per annum;" and it took effect on March 11, 1870. Section 2 repealed "all acts and parts of acts inconsistent therewith;" and § 1, c. 45, R. S. of 1857, being the only section or part of a section "inconsistent therewith," was alone thereby repealed, leaving §§ 2 and 3 (pertaining to remedies in cases of excessive interest) as amended by Stats. of 1862, c. 136, and of 1863, c. 209, in force and unmodified.

The Stat. of 1870, c. 169, provided "that c. 45, of R. S. of 1857, and all acts additional thereto and amendatory thereof, passed prior to 1870, are hereby repealed." Unless repealed, c. 169 became "effective in thirty days after the recess of the legislature passing it," inasmuch as no "different time is named

therein." R. S., c. 1, § 3. The legislature which passed the act finally adjourned on March 24, 1870; and the act therefore took effect, unless previously repealed, on April 23, 1870. The effect was to repeal §§ 2 and 3 of c. 45, R. S. of 1857, above mentioned, § 1 having already been repealed by Stat. of 1870, c. 124.

The general repealing act of 1870, c. 174, § 1, provides as follows: "The public acts passed during the years hereafter named and herein designated are repealed, except so far as they are preserved or excepted in the following sections; but no other acts are hereby repealed:

"1857. All the chapters of R. S. of 1857, numbered one to one hundred and forty-three, inclusive. . . 1870. Chapters numbered seventy-seven to one hundred and seventy, inclusive, except . . c. 169." This general repealing act, being preliminary to the enactment of the new revision, did not take effect until February 1, 1871.

What were the intention and purpose of the legislature as they are indicated by the several enactments above mentioned? It appears to us that only one answer can be given, viz., to unqualifiedly repeal the whole of c. 45, R. S. of 1857.

As already seen, § 1, c. 45, R. S. of 1857, being inconsistent with § 1, c. 124, Stat. of 1870, was repealed by § 2, c. 124, leaving §§ 2 and 3, of c. 45, in full force. Subsequently, the same legislature enacted c. 169, purporting in terms to repeal c. 45 and all acts additional thereto or amendatory thereof, passed prior to 1870. These terms included in the repeal the acts of 1862 and 1863, cc. 136 and 209, but excluded c. 124, of 1870. The repeal of c. 45 and the amendatory and additional acts named is without condition or reservation. It took effect April 23, 1870. The general repealing act, c. 174 of 1870, expressly excepts c. 169, thus leaving it in full force.

It is contended, however, that, notwithstanding these facts, the legislature really intended to repeal c. 169; and that "by implication the general repealing act did repeal it;" and *Coe* v. *Co. Commissioners*, 64 Maine, 31, is cited as an authority to sustain this view. But we are not able to perceive how one statute can "by implication" repeal another in the absence of any inconsis-

tency in their provisions, and when the former statute expressly excepts the latter from repeal. Neither do we understand how *Coe* v. *Co. Commissioners* can reasonably be considered an authority for the defendant's position. In that case the principal fact was the antipode of the main fact in this. The subsequent statute there purported to expressly repeal the repealing statute itself before the latter took effect, both being passed by the same legislature and taking effect at the same time. In reading the intention of the legislature in the language and purpose of the act, the court might well say, "the only possible inference to be drawn is that the legislature intended that the former act should have no force whatever; that it should never come into life for any purpose." While in the case at bar, instead of c. 169 being expressly repealed by the general repealing act, it is expressly saved from repeal; and we may add that the only possible inference to be drawn is that the legislature intended that c. 169 should have force; that it should come into life for the purpose of repealing unqualifiedly c. 45, R. S. of 1857, and that it has fulfilled that purpose.

The case finds that a certain sum as interest, exceeding six per cent, is included in the principal of the note in suit; and the defendant contends that therefore the note, to the extent of such excess, is in contravention of the statute of usury (R. S. of 1841, c. 69), and the consideration to that extent illegal. *Goodrich* v. *Buzzell*, 40 Maine, 500. That the statute named rests upon principles similar to that prohibiting the sale of intoxicating liquors. *Ellsworth* v. *Mitchell*, 31 Maine, 247, 250. And that the repeal of the statute of usury does not validate this note so far as it is usurious. *Hathaway* v. *Moran*, 44 Maine, 67.

Had this note been given under the Stat. of 1821, c. 19, which was in terms prohibitory, and declared that all contracts made in violation thereof "shall be void," there would be much force in the proposition, and reason as well as authority would sustain us in holding that the note would not be made valid by the mere repeal of the statute, the violation of which made it void. But the Stat. of 1821, c. 19, was very materially changed in 1834. Stat. 1834, c. 122. Its penal provisions were eliminated, so that

when it became embodied in the revision of 1841, (R. S. of 1841, c. 69, in force when the note in suit was made) it became remedial in its character. Chapter 69 fixed the legal rate of interest at six per cent, and provided two remedies in behalf of debtor parties to contracts in which was reserved usurious interest, viz: 1. In actions on such contracts, debtors could avoid the usurious portion by proving the usury under the general issue, and recover costs. 2. Whenever they had paid usurious interest, recover it back in an action commenced within one year after payment. *Tuxbury* v. *Abbott*, 59 Maine, 466, 471. With the latter we now have nothing to do. The former is contingent upon the commencement of an action by the proper party. It is somewhat penal in its consequences; but the debtor cannot resort to it until he is put upon his defense by an action against him. So long as the remedy depends upon, or is subject to this contingency, the right to resort to it is but inchoate at best. It is not founded upon the obligation of the contract, and is in nowise a vested right, unassailable under the constitution. It is simply a remedy created by the statute, based upon what the legislature at the time considered the public good required; and the same authority, actuated by the same motives, recognized the change of circumstances which warranted their taking away what they had previously given, by a total abrogation of the statute which gave the remedy. This they had an undoubted right to do; and this they have done. *Oriental Bank* v. *Freeze*, 18 Maine, 109.

In *Butler* v. *Palmer*, 1 Hill (N. Y.), 324, Cowan, J., after reviewing the authorities as to the effect of a repealing statute, says: "The amount of the whole comes to this, that a repealing statute is such an express enactment as necessarily divests all inchoate rights which have arisen under the statute, which it destroys. These rights are but incident to the statute, and fall with it unless saved by express words in the repealing clause." So in *Curtis* v. *Leavitt*, 15 N. Y. 9, 153, Brown, J., says: "The borrower can have no vested interest in the penalty or forfeiture which follows the proof of usury in an action where that defense is interposed. Whatever right he had was contingent upon the fact of the usury being established upon the trial. This the

repealing act declares shall not be done. It makes no difference whether the forfeiture is given to the borrower, to be recovered in an action, as under the gaming statutes, or whether it is given him by way of defense to an action brought to enforce the contract. The form of the remedy is of no moment." In the same case Selden, J., says: "Usury being a mere statutory defense, not founded upon any common law right, either legal or equitable, it was clearly within the power of the legislature to take it away." And discussing the general effect of a repealing statute in *Key* v. *Goodwin*, 4 Moore & Payne, 351, Lord C. J. Tindall says: The repealing statutes "obliterates the statute repealed, as completely as if it had not been passed, and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted and concluded while it was existing law." In *Lowell* v. *Johnson*, 14 Maine, 240, the question was not raised.

Exceptions overruled.

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

PATRICK MCDONOUGH *vs.* GEORGE WEBSTER.

Cumberland. Decided December 3, 1378.

Wager.

All wagers in this state are unlawful.

The stake-holder is liable for money deposited in his hands on a wager, upon a demand on him while he has the money. It is no defense that, after such demand, he has paid it to the winner.

ON EXCEPTIONS from the superior court.

ASSUMPSIT to recover $100, deposited by plaintiff with defendant as stake-holder on a wager.

The evidence, not contradicted, tended to show that one Henry Milliken, a few days after the presidential election, bet $25 to $100 that Hayes would be the next president of the U. S.; the plaintiff took the bet. On cross-examination, the defendant

stated that when the demand was made on him, it had not been decided who was to be president; that after the fourth of March and the inauguration of Hayes, and before the date of the writ, he paid the money to Milliken, the winner.

The presiding justice ruled that the plaintiff was entitled to recover the $100, with interest from March 4, the date on or before which the demand was proved to have been made; and the defendant alleged exceptions.

J. H. Drummond & J. O. Winship, for the defendant.

A. W. Bradbury, for the plaintiff.

APPLETON, C. J. The plaintiff bet with one Milliken on the result of the last presidential election. The parties deposited the money with the defendant. The plaintiff, before the 4th of March, 1877, and when the money deposited by him was in the defendant's hands, demanded the same of him, which he refused to deliver, but paid it to Milliken, whereupon this action was brought.

The instruction that the plaintiff was entitled to recover was in accordance with the statutes of the state as well as with the decisions of the court. R. S., c. 4, § 71. It was decided in *Lewis* v. *Littlefield*, 15 Maine, 233, that all wagers in this state are unlawful. The same result was had in *House* v. *McKenney*, 46 Maine, 94. So, in Massachusetts all wagers are held unlawful, and the money can be recovered back. *Love* v. *Harvey* 114 Mass. 80. Decisions to the same effect are found in New Hampshire. *Hoyt* v. *Hodge*, 6 N. H. 104. In Vermont, *West* v. *Holmes*, 26 Vt. 530. In Illinois, *Padfield* v. *Green*, 85 Ill. 529.

Exceptions overruled.

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

JOHN A. BUCK *vs.* MERCHANTS' MUTUAL MARINE INSURANCE COMPANY.

Hancock. Decided December 3, 1878.

Corporation.

The charter of the company provides that all the corporate powers shall be exercised by the trustees. Special act of 1869, c. 17, provides "when the business of said corporation shall be closed up," etc., "its remaining assets shall be divided among the holders of (said) consolidated scrip in proportion to the amount held by each." The members of the company voted "to recommend to the trustees that $117,400 be divided among the holders of consolidated scrip," and that the "president is instructed to pay the proportion (which amounts to 200 per cent) upon the presentation of the certificates." The president paid as so instructed on all the certificates (including his own and those of seventy-six others), except only on one scrip of $200 held by the plaintiff, which he refused to pay on account of certain alleged equities, and a supposed legal justification, that the trustees had never voted to pay the final dividends. *Held*, that the evidence was sufficient to authorize the inference that the corporation was winding up its affairs and dividing its assets, as provided in the act of 1869; that the dividend was properly made, and that the plaintiff was entitled to maintain an action for his share thereof.

ON EXCEPTIONS.

ASSUMPSIT for money had and received, for the sum to which the plaintiff is entitled by virtue of a certain scrip or certificate of indebtedness, with dividend and interest to date of writ, October 7, 1875, entitled "the consolidated scrip of the Merchants' Mutual Marine Insurance Company," numbered 297, dated Bangor, July 19, 1872, signed J. B. Foster, president, and of the following tenor: "This certifies that John A. Buck is entitled to two hundred dollars in the consolidated scrip of the Merchants' Mutual Marine Insurance Company, and to receive interest on two hundred dollars, payable semi-annually, on the first Monday of January and July of each year.

"This certificate is issued in conformity with the provisions of the charter, and is subject to all its conditions and restrictions, and is transferable only on the books of the company by——— or ——— attorney. ——— secretary."

After the evidence was out, the substance of which appears in the opinion, the presiding justice, on defendants' motion, ordered a non-suit; and the plaintiff alleged exceptions.

L. Barker, T. W. Vose & L. A. Barker, for the plaintiff.

C. P. Stetson, for the defendants.

LIBBEY, J. Laws of 1869, c. 17, amending defendants' charter, among other things, provides that consolidated scrip may be issued in exchange for the scrip authorized and issued under the original charter; and made subject to the provisions and lien of the original charter; and it further provides that "when the business of said corporation shall be closed up and all its other liabilities discharged, as the final act of its existence, its remaining assets shall be divided among the holders of said consolidated scrip in proportion to the amount held by each." This consolidated scrip was irredeemable during the life of the corporation, but entitled the holder to semi-annual interest and to annual dividends, the same as are declared to policy holders; and the holders of it were members of the corporation.

By the charter, the corporate powers of the defendant company shall be exercised by a board of trustees. But the board of trustees can only exercise its corporate powers. It cannot surrender them, wind up the affairs of the corporation and divide its assets. That can be done by a vote of the members of the corporation only.

At the annual meeting of the members of the coporation, held January 15, 1872, the report of a committee of the trustees to examine the condition of the company was read, and thereupon it was "voted to recommend to the trustees that the sum of $177,400 be divided among the holders of consolidated scrip in proportion to the amount of scrip held by each; and the president is instructed to pay the proportion (which amounts to 200 per cent, or $200 for each $100) upon the presentation of the certificates, which shall be indorsed upon the certificates, and shall also embrace the agreement that no further interest shall be claimed under said certificates; and the holders of such certificates shall sign a receipt corresponding on the books of the com-

pany which shall embrace an agreement that, in case any claim shall arise against this company for which we are liable, which the assets of the company are not sufficient to meet, they will pay their proportion of such deficiency."

A form of the receipt and agreement to be indorsed upon the certificates, and also one to be signed on the books of the company, were prescribed by a vote of the meeting.

A committee was appointed to award to the secretary a fair compensation for services rendered and required in winding up the affairs of the company.

The defendants produced their dividend book, which was put in evidence by the plaintiff. It is headed by the form of receipt and agreement prescribed by the vote of the company, which is followed by the names of each scrip holder, the amount of his scrip and the dividend to which he was entitled; among them is the name of the plaintiff, his three pieces of scrip and the dividend on each. Each scrip holder had receipted on the book for his dividend, except the plaintiff for the one he seeks to recover in this suit.

The receipt recites that the dividend is "made by a vote of the trustees of said company, under date of January 15, 1872."

Here we have a vote of the members of the corporation dividing its assets; the dividend book, showing that the dividends were made in accordance with that vote; the receipt prescribed, reciting that the dividend was made by vote of the trustees, signed by all the members of the corporation except the plaintiff, showing that their dividends had been paid to them. This evidence is sufficient to authorize the inference that the corporation was winding up its affairs, and dividing its assets among the holders of its consolidated scrip, as provided in the act of 1869, and not making a dividend of its annual earnings merely. It is sufficient to show that the dividend was properly made; and the plaintiff, having demanded his dividend and payment having been refused, is entitled to maintain this action for it.

Exceptions sustained.

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

ELLEN H. BRIGGS *vs.* MIRIAM W. HAYNES.

Penobscot. Decided December 3, 1878.

Fences. Partition fences.

Two or more several owners and occupants of lands adjoining the land of another can not legally join in an application to fence viewers for a division of the partition fences.

To make valid the division and impose upon a party the burden of building the part of the partition fence assigned to him, within the time fixed by the fence viewers, it must appear that they delivered to such party their assignment in writing at the time it was made.

Before a legal demand can be made on a party for the value of the part of the partition fence assigned to him by fence viewers, which he failed to build in the time fixed by them, and which was built by the adjoining owner and occupant, it must appear that such fence has been duly adjudged by the fence viewers to be sufficient, and that they duly appraised the value thereof and gave the party to be charged due notice of such adjudication and appraisal.

ON REPORT.

CASE, under the statute regulating division fences, to recover double the value of a fence built by the plaintiff.

L. Barker, T. W. Vose & L. A. Barker, for the plaintiff.

C. N. Hersey, for the defendant.

LIBBEY, J. This action is brought under §§ 5 and 6, c. 22, R. S., to recover double the value of that part of the division fence between the lands of the parties, assigned to the defendant and built by the plaintiff.

To maintain the action, the plaintiff must show a compliance with the provisions of the statute.

I. It is objected that the applicants to the fence viewers were not joint occupants or owners of land adjacent to the defendant's land, and therefore had no right to join in the application. They were not joint but several occupants and owners of lands adjacent to the defendant's land; the plaintiff owning the front part of lot 71, seventy-seven feet and four inches in depth, and Seavey the

rear part, one hundred and fifty-four feet and two inches in depth; and the defendant owned lot 69, adjoining.

The applicants had no right to join in their application to the fence viewers. The statute does not authorize it. The plaintiff had no interest in the disagreement between Seavey and the defendant; nor had Seavey in the disagreement between the plaintiff and defendant. They had no more right to join in the application than they would have had if they had been several owners and occupants of land on opposite sides of the defendant's lot.

II. It is objected that the defendant had no notice of the division of the fence by the fence viewers.

The statute provides that the fence viewers, "after reasonable notice to each party, may, in writing under their hands, assign to each his share thereof, and limit the time in which each shall build or repair his part of the fence, not exceeding thirty days."

To make valid the division, and impose upon a party the burden of building the part assigned to him within the time fixed by the fence viewers, it must appear that they delivered to such party their assignment in writing at the time it was made, so that he may know the part he is required to build, and have the whole time limited by them in which to build it. It is not sufficient if they keep it till the last day before the time expires and then deliver it to him, or that it be recorded some days after it is made. The evidence fails to show that the defendant had any notice of the assignment other than that implied from the record made the day after the assignment was made. This was not sufficient. *Abbott* v. *Wood*, 22 Maine, 541.

III. It is further objected that the defendant was not notified of the adjudication of the fence viewers that the fence built by the plaintiff was sufficient, and of their appraisal thereof. She was entitled to notice of these facts before a legal demand could be made on her. *Abbott* v. *Wood*, *supra*.

The only notice of these facts, which the evidence tends to prove was given to her, was a copy of the adjudication and appraisal made by the plaintiff's attorney and delivered to her at the time the demand was made. The plaintiff's attorney had no

authority to make and certify a copy. The defendant was not charged with knowledge of the original by such copy, and was not required to act upon it.

Plaintiff nonsuit.

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

JOHN L. BROWN, petitioner for certiorari, *vs.* COUNTY COMMISSIONERS of Sagadahoc.

Sagadahoc. Decided December 9, 1878.

Certiorari. County commissioners.

A petition to the county commissioners to revise the doings of a town, upon an alleged unreasonable refusal to discontinue a townway, should be presented by one having an interest in the subject matter and in some way connected with the doings before the town, either in procuring the action of the town or being present and voting with the minority.

Neither the petition nor the proceedings thereon showed that the petitioners were interested or in any way parties to the proceedings. *Held*, it was error to rule that the county commissioners had jurisdiction.

ON EXCEPTIONS.

PETITION of John L. Brown, of Bowdoinham, for certiorari, representing that a town way was duly laid out in Bowdoinham, and that Robert C. Brown and eleven others petitioned the county commissioners for its discontinuance, and that the county commissioners granted the prayer of the petition, etc. It did not appear by the petition of Robert C. Brown and others, by the record of the commissioners, or otherwise, that Robert or any of the eleven had any interest in the subject matter. For that, and other reasons which in the opinion appear, the petitioner for certiorari contended that the commissioners had no jurisdiction. The justice presiding refused to grant a writ, ruling as matter of law upon the face of the papers and proceedings that the commissioners had jurisdiction in the premises; and the petitioner for certiorari alleged exceptions to that ruling.

W. Gilbert, for the petitioner.

H. Tallman & C. W. Larrabee, for the commissioners.

DANFORTH, J. A petition for a writ of certiorari to quash the proceedings of the county commissioners in discontinuing a town way in the town of Bowdoinham, which it was alleged the town had unreasonably refused to do.

The presiding justice refused to grant a writ, "holding as matter of law upon the face of the papers and proceedings that the county commissioners had jurisdiction in the premises." To this ruling exceptions were filed. Thus the only question presented is whether the papers and proceedings reported show upon their face jurisdiction in the county commissioners over the matter upon which they acted.

Their authority in such cases is found in R. S., c. 18, § 24, and is as follows: "When a town unreasonably refuses to discontinue a town or private way, . . the parties thereby aggrieved may . . present a petition to the commissioners," etc. As a prerequisite to their action there must not only be an unreasonable refusal on the part of the town, but "parties aggrieved" must present a petition. No other persons have the legal right to do so; no others have any claims for a hearing. There must then be a party to move, and that party must be aggrieved. To be a party entitled to a hearing, there must be an interest in the subject matter and some connection with the prior proceedings. This process is in the nature of an appeal from the doings of the town. There must be a previous action of the town, and it is a party to that action only who has the legal right to present the petition. It is difficult to perceive how any one not an inhabitant of, or the owner of taxable property in the town, can have any legal interest in their town roads. An inhabitant or owner of cultivated land therein must petition for a town or private way; and why should any other person be a legal party to a discontinuance of such?

As it is not necessary to present to the town a written petition for the discontinuance of a way, it is perhaps a sufficient connection with the prior proceedings that the petitioner was instrumental in bringing the matter before the town for its action, or that he was present and voted with the minority. Less than this cannot be a compliance with the language of the statute, nor can less put any

person in a position to be aggrieved in the legal sense. Unless he is to this extent a party, there can be no decision against him; and without such a decision he cannot in a legal sense be aggrieved. It is not the policy of the law in this class of cases to allow a person to take no part in a hearing before one tribunal, and after a hearing, appeal to another on the ground that he "considers himself aggrieved."

In this case it is not alleged in the petition to the commissioners, nor does it appear in their proceedings, that the petitioners were inhabitants of the town, or owners of taxable property therein, or that they had any interest whatever in the subject matter, or were in any way connected with the prior proceedings.

It is, however, suggested in the argument that "it may fairly be presumed that, if there are any informalities on the face of the papers, the proceedings remedied such defects." It may be that the "proceedings" did remedy the defects we have alluded to, but we cannot, as the case is presented, make any such presumption. The case is here on exceptions, and we are confined to the single question presented and the facts as they appear in the report.

The defects we have found are matters of fact; and, upon a further hearing, if they do not exist, it may be shown by an amendment of the record, or answer of the respondents duly filed, or in any other legal method. *Hebron* v. *Co. Commis.*, 63 Maine, 314. *Levant* v. *Co. Comm'rs*, 67 Maine, 429.

It is also said that the petitioner is not in a condition to except, as he has not shown any interest in the subject matter. The same answer may be given to this suggestion. No such question is raised by the exceptions. We are not now discussing the question as to whether the writ asked for shall issue, but simply the question raised by the exceptions; and in that ruling, for the reasons given, we think there was error.

Exceptions sustained.

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

SARAH E. KNEELAND *vs.* ISAIAH S. WEBB.

Cumberland. Decided December 11, 1878.

Exceptions. Trial. Law and fact.

When a cause is referred to the justice presiding, it is no part of his duty to report the evidence.

In such case, exceptions lie only to his rulings of law on facts found by him. His findings of fact are conclusive and cannot be revised on exceptions.

ON EXCEPTIONS from the superior court.

TROVER.

G. Hazen, for the plaintiff.

B. T. Chase, for the defendant.

APPLETON, C. J. This is an action of trover, brought by the plaintiff to recover damages for a wagon, attached by the defendant, a deputy sheriff, in a suit against her husband, and as his property.

The case was referred to the presiding justice, who, as his conclusion from all the evidence submitted, found "the wagon to have been the property, not of the plaintiff, but of her husband, and that she never had either actual or constructive possession of it," at the same time making a full report of the case, and ruled, as matter of law, that the testimony warranted the finding he had made.

The decision was that the defendant was not guilty.

The question is presented upon exceptions.

When a cause is referred to the presiding justice, it is no part of his duty to report the evidence upon which his judgment is based. His findings are conclusive as to the facts, and it is not for this court to revise his conclusions.

When the case comes before this court upon a report of the evidence, the material is furnished upon which to determine the facts and the law resulting from those facts. Not so when the cause is referred to the presiding justice; for in that case this court has nothing to do with the facts as found. Its only duty is to determine whether the law has been rightly applied to those facts as found by the judicial referee.

In the case before us, upon the facts as found by the justice, there is no question of law raised. If the plaintiff had neither title to nor possession of the wagon in controversy, assuredly she had no ground of action against the defendant.

But the defendant claims by his exceptions to present the question, whether the finding of the presiding justice is justified by the evidence. The justice saw and heard the witnesses ; and his judgment is the conclusion to which he arrived. The exceptions raise the question whether his judgment upon the evidence and the effect to be given to it is correct. But the evidence and its force and effect and the inferences to be deduced therefrom are precisely what were referred to him. The plaintiff claims that the justice drew erroneous conclusions from the facts submitted to his consideration, or else failed to give proper weight to portions of the testimony. If it were so, it is only what is incident to all tribunals ; but this is not a supervising tribunal with authority to correct the errors in the findings of fact of the justice, to whom the parties have referred their controversies.

It does not appear that the right of exception was reserved. If not reserved, there can be no exceptions.

If the right was reserved, there is nothing showing the plaintiff has any just cause of complaint, as to the findings of fact; but even if there was an erroneous finding of facts, it can not be heard on exceptions. The findings of fact by the presiding justice to whom a cause has been referred are final and conclusive, unless a new trial should be granted for newly discovered evidence or other good cause. *Randall* v. *Kehlor*, 60 Maine, 37, 43. *Curtis* v. *Downes*, 56 Maine, 24. *Haas* v. *Harrington*, 116 Mass. 135.

Exceptions overruled.

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

ELIZABETH M. DIXON *vs.* JOSEPH D. EATON, administrator of Jeremiah M. Eaton.

York. Decided December 11, 1878.

Mills. Flowage. Variance.

The allegation in a complaint for flowage, that the defendant's intestate did erect and maintain a water mill and a dam to raise water for working it, is not sustained by proof of a steam mill and a dam to raise water for floating logs.

Such a case is not within the mill act. R. S., c. 92.

ON REPORT.

COMPLAINT for flowage, inserted in a writ of attachment.

The land of complainant is flowed by water raised by a dam constructed across a stream by respondent's intestate on his own land in 1872. A former dam in the same place was standing in 1853. Two former mills, both worked by water from the pond, formerly stood at or near the spot where stands the present mill, which was erected in 1852, seven or eight rods below its last predecessor. The mill now in operation is not now, and never has been, worked by water from the pond raised by the dam, but stands adjacent to the dam, and is worked by steam generated from water taken from the stream below the dam. The only use which has been made of the pond, since the last dam was erected, is for floating logs. The respondent claims that this is not a dam, such as complainant can recover against, under the provisions of R. S., c. 92. The form of the complaint is indicated in the opinion. If complaint can be maintained, to stand for trial, otherwise to be dismissed.

G. C. Yeaton, for the complainant.

W. J. Copeland, for the respondent.

APPLETON, C. J. 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."

The complaint as originally drawn fails to allege that the dam was erected to raise water for the working of the defendant's

mill, and that the same was a water mill. It is not, therefore, within the statute. *Jones* v. *Skinner*, 61 Maine, 25. *Crockett* v. *Millett*, 65 Maine, 191.

Nor does the amendment, "that the respondent, on the first day of January, 1872, did erect and maintain, and has continued hitherto to maintain, and still does maintain a water mill, and dam to raise water for working it, on his own land, situated in Wells, upon and across a certain stream, not navigable, known and called as Ogunquit river," aid her. The proof negatives every material allegation in the amendment. The mill is propelled by steam and not by water. The dam is not to supply a head of water for the working of the mill, but to float the logs to be sawed there. The case is not within the provisions of R. S., c. 92.

Complainant nonsuit.

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

STATE *vs.* WILLIAM W. RUBY *et al.*

Cumberland. Decided December 12, 1878.

Intoxicating liquors. Indictment.

Two persons may be jointly indicted, one for maintaining a liquor nuisance under R. S., c. 17, § 2, and the other for aiding in its maintenance, under § 5 of the same chapter.

In the indictment the jurors present that R [of, on, at, etc.] did [etc.] keep and maintain a common nuisance, to wit, a certain room, . . by him used for the illegal sale and illegal keeping for sale of intoxicating liquors. . . And the jurors further present that P [of, on, at, etc.] did knowingly and unlawfully permit the room aforesaid, in the building aforesaid, which said room and said building were then and there under the control of said P, to be then and there used by said R for the illegal keeping for sale of intoxicating liquors aforesaid, whereby and by force of the statute in such case made and provided, said P is deemed guilty of aiding in the maintenance of a nuisance, etc. *Held*, on demurrer, a good indictment against each of the two, and that it sufficiently alleges that R did use the room therein described for the illegal sale of intoxicating liquors.

Form of indictment in full held good on demurrer. See statement of the case.

ON EXCEPTIONS from the superior court.

INDICTMENT (omitting the formal heading and conclusion), "that William W. Ruby, of Portland, in the county of Cumberland, laborer, on the fourth day of August, in the year of our Lord one thousand eight hundred and seventy-seven, at said Portland, in said county of Cumberland, did knowingly and willfully, and without having any legal appointment or authority therefor, keep and maintain a common nuisance, to wit, a certain room in a building called Hotel de Ponce, there situate, then and there by him, the said William W. Ruby, used for the illegal sale and illegal keeping for sale of intoxicating liquors, to the great damage and common nuisance of all citizens of said state; and the jurors aforesaid, upon their oath aforesaid, do further present that Ernesto Ponce, of Portland aforesaid, laborer, on the day and year aforesaid, at Portland aforesaid, did knowingly and unlawfully permit the room aforesaid, in the building aforesaid, which said room and said building were then and there under the control of said Ernesto Ponce, to be then and there used by the said William W. Ruby for the illegal sale and illegal keeping for sale of intoxicating liquors as aforesaid, whereby and by force of the statute in such case made and provided, said Ernesto Ponce is deemed guilty of aiding in the maintenance of a nuisance, to the great damage and common nuisance of all citizens of said state, against the peace of said state, and contrary to the form of the statute in such case made and provided."

To this indictment the defendants' attorney demurred, specially assigning the three following causes in behalf of each and, in behalf of Ponce, adding the fourth:

"I. That said indictment charges two several, distinct and different offenses, one offense against one William W. Ruby, and the other offense against the said Ponce, for each of which offenses a different penalty is prescribed, and to sustain each of which different evidence is required.

"II. That said indictment contains two counts only, one count against William W. Ruby alone for maintaining a nuisance, and the other count against said Ponce alone for aiding in the maintenance of a nuisance, a distinct and different offense, requiring different evidence to support it, and to which a different penalty is affixed.

"III. That said Ponce is therein indicted jointly with one William W. Ruby for a distinct and different offense from that therein charged against said Ruby.

"IV. That the second count in said indictment contains the only charge against said Ponce contained in said indictment, and it is nowhere alleged in said second count that said room was used by said Ruby or by any other person for the illegal sale or for the illegal keeping for sale of intoxicating liquors, or for any other unlawful purpose."

The demurrer was joined by the county attorney and overruled by the presiding justice; and the defendants alleged exceptions.

M. P. Frank, for the defendants.

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

VIRGIN, J. The respondents are jointly indicted. Ruby, for maintaining a liquor nuisance under R. S., c. 17, § 2, and Ponce, for aiding in its maintenance, under § 5 of the same chapter.

The respondents severally filed a special demurrer to the indictment, therein alleging: (1) That one count charges Ruby with one offense, and the other charges Ponce with another distinct and different one, requiring different evidence and subject to a different penalty; and Ponce alleges further that the count against him does not allege that the room mentioned therein was used by Ruby or any other person for any unlawful purpose.

We think neither of these objections should be sustained. The same offense may be stated in different ways in as many counts as are deemed necessary. And every separate count is required to charge a distinct offense, upon the ground that the law allows the joinder of several distinct offenses. 1 Arch. Cr. Pl. (8th ed.) 293 note. 1 Bish. Cr. Pro. § 427. That is, offenses of the same nature. *State* v. *McAllister*, 26 Maine, 374, 376. *State* v. *Burke*, 38 Maine, 574. As larceny and the receipt of the stolen goods knowing them to have been stolen. *State* v. *Stimpson*, 45 Maine, 608. For other illustrations. *State* v. *Hood*, 51 Maine, 363. *Commonwealth* v. *Costello*, 120 Mass. 358, and cases cited.

So the law makes no objection to the joinder of several defendants as principals of the same offense, when it is such as can be

jointly committed. So principals in the first degree were indicted and tried jointly with those in the second. 2 Bish. Cr. Pro. § 5, and notes. Formerly, accessories before the fact could be tried only with the principal, or after his conviction, though that practice has been changed in England by the Stat. 7 Geo. IV, c. 64, § 9, and here by a statute of a similar purport now incorporated in R. S., c. 131, § 6. *State* v. *McAllister*, *supra*.

Moreover, a receiver of stolen goods, though not strictly an accessory after the fact, is now by force of certain English statutes made such, and is jointly indicted, tried and convicted with the principal felon. 3 Chit. Cr. Law, 380. 1 Arch. Cr. Pr. (8th ed.) 74. *Rex* v. *Austin*, 7 Car. & P. 475, and other cases on county attorney's brief. The same practice has long been in force in Massachusetts. *Commonwealth* v. *King*, 9 Cush. 284. *Com.* v. *Adams*, 7 Gray, 43. *Com.* v. *O'Connell*, 12 Allen, 451, 453. *Com.* v. *Finn*, 108 Mass, 466.

In misdemeanors there are no accessories. In the commission of any offense of that nature, all are principals whose relations to it are such as, were it a felony, would constitute them accessories before the fact.

The case at bar is a misdemeanor. Ruby is charged with keeping and maintaining a nuisance made criminal by the statute, and Ponce with aiding him. This, if a felony, would make Ponce a principal in the second degree. The mode of charging defendants in such cases is, after stating the offense of the principal in the first degree, immediately before the conclusion of the indictment, charge the principal in the second. 1 Arch. Cr. Pr. (8th ed.) 64. 2 Bish. Cr. Pro. (2d ed.) § 5. After calling attention to the fact that the indictment contains but one count when thus drawn, Mr. Bishop, in note 2 to § 5, says: "Therefore an indictment under a statute for a misdemeanor as well as for a felony is good, if in a single count it first sets out the offense of the principal in the first degree, then proceeds to state the presence, aiding and abetting of the principal of the second degree, and concludes against the form of the statute, though there is no such separate conclusion as to the offense of the principal of the first degree." The indictment at bar precisely conforms to the foregoing, unless the next point raised is well taken.

It is contended that there is no allegation in the second count that the room mentioned therein was in fact used by Ruby for any unlawful purpose, but only that such use was permitted.

As already seen, there is but one count. If there were two, however, one might, for the purpose of saving repetition, refer to another. *State* v. *McAllister*, *supra*. *State* v. *Nelson*, 29 Maine, 329. 1 Bish. Cr. Pro. (2d ed.) § 431. When there is but one count, of course all the allegations are to be construed together. Now, it is alleged that Ruby kept a nuisance, to wit, a room "then and there by him used for the illegal sale," etc. Also that Ponce did "permit the room to be used by Ruby for the illegal sale," etc., "as aforesaid." We think this reference carries with it the allegation of actual use by Ruby set out in the former part of the count.

Exceptions overruled.

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

INHABITANTS OF NOBLEBORO', petitioners for certiorari, *vs.* COUNTY COMMISSIONERS OF LINCOLN COUNTY.

Lincoln. Decided December 17, 1878.

Certiorari. County commissioners. Amendment.

The legal location of the way was properly alleged in the petition to the county commissioners, the allegation presenting a case within their jurisdiction. *Held*, that, after final judgment, it must be understood that these allegations were satisfactorily proved, although the proof may not be set forth in the record. *Held*, also, that it was too late for the town, after the result of the proceedings against it and after final judgment, to cause its records to be amended so as to show that the way was not legally accepted, and thereby make the amended records the foundation for a petition for a writ to quash the proceedings before the commissioners.

The alleged error of want of notice to the town of the time and place of hearing before the jury did not appear in the records of the county commissioners, but in the records of the supreme judicial court. *Held*, that when there is no error apparent in the record of the commissioners, and the error appears only in the records of the supreme judicial court, of the proceedings in that court, a writ of certiorari is not the proper remedy to correct such error. The remedy is by writ of error.

ON REPORT.

PETITION FOR CERTIORARI.

A. P. Gould & J. E. Moore, for the petitioners for the writ.

Converse, for Gowen & Knowlton, original petitioners.

Hilton, county attorney, for the county commissioners.

LIBBEY, J. This is a petition for a writ of certiorari, and involves the validity of the proceedings on petition to the county commissioners of John L. Gowen and Olivia M. Knowlton, for an increase of damages, caused by the location of a town way, by the town of Nobleboro', over their lands.

In their petition, the petitioners set forth two grounds on which they rely to show the proceedings illegal and that they should be quashed.

I. The county commissioners had no authority to issue a warrant for a jury to assess the damages upon said petition, because the town way described in the petition had never been legally

accepted by the town, and was not legally located, and therefore the county commissioners had no jurisdiction over the petition.

II. Because the sheriff who served the warrant gave no notice to the town of the time and place of the view and hearing before the jury.

The prayer of the petition is that the record of the proceedings before the county commissioners may be quashed; and that the adjudication of the supreme judicial court, confirming the verdict of the jury, and ordering the cost of the proceedings for the fees of the jurors and others to be paid out of the county treasury, and the judgment of that court in favor of the petitioners against the town for their costs, be reversed and annulled.

Upon the first ground it is objected by the counsel for the petitioners that the record of the county commissioners does not show that they found that the way had been legally located, and therefore it does not appear that they had jurisdiction to issue the warrant for a jury.

The legal location of the way is properly alleged in the petition. The allegations in the petition upon this point present a case clearly within the jurisdiction of the county commissioners. In *North Berwick* v. *York Commissioners*, 25 Maine, 69, in discussing a point somewhat similar to the one under consideration, Whitman, C. J., in delivering the opinion of the court, says: "One ground insisted upon is that the commissioners have not directly adjudged of record, that the refusal of the town to confirm the doings of their selectmen was unreasonable. But it is so alleged in the petition under which they acted; and after final judgment we must understand that allegations duly and necessarily made were satisfactorily proved, although the proof may not be set forth in the record." Applying the rule there decided to the case at bar, we must infer that it was satisfactorily proved to the commissioners that the way had been legally located by the town.

But, by the evidence introduced by the petitioners, it appears that the record of the town as it then stood showed a legal location of the way by the town. The record was the only evidence of the fact. It could not be impeached or contradicted by parol

evidence. This evidence, introduced by the petitioners, may be considered by the court, in the exercise of its discretion, in determining whether the writ should be issued as prayed for. *West Bath pet's*, 36 Maine, 74.

The record of the town showed a legal location, and the original petitioners and the commissioners might well act upon it.

It is said, however, by the petitioners that their record was not correct; and they introduce, under the objection of the respondents, an amended record which it is claimed shows that the way was not legally accepted by the town. The amendment was made by leave of court, at the October term, 1876, after this petition was filed, allowing the town clerk to amend his record according to the fact.

The question arises whether it is competent for the petitioners, by this amended record, to show that the way was not legally accepted, and thus deprive the county commissioners of jurisdiction of the petition for an increase of damages, and set aside their whole proceedings. We think it is not.

They were duly notified of the pendency of the petition for an increase of damages, that they might be present and be heard thereon. They knew that by their record it appeared that the way was legally located. They knew that the petitioners and commissioners were acting upon the evidence of that record. They knew that if it was not correct and the fact was as is now shown by it, they could cause it to be amended and thus put an end to the proceedings. They elected not to do so and to make no suggestion of the error, but to take their chances in the proceedings before the jury and court. It was too late for them, after they found that the result of the proceedings was against them, and long after final judgment, to cause their record to be amended, and make it the foundation of a petition for a writ to quash the proceedings, and thus deprive the original petitioners of the benefit of their judgments, and cast upon the county the expense of the proceedings upon the warrant for a jury. To permit them to do so would be manifestly against equity, and would violate the rule well established which does not permit a party, who has a good ground of defense known to him, to lie by and

not make it, but take his chances on other grounds, and, if not successful, to afterwards set it up to defeat the judgment against him. *Whately* v. *Franklin Commissioners*, 1 Met. 336.

Assuming the second ground relied upon to be well founded in fact, is a writ of certiorari the proper process to correct the error? Certiorari is a writ issued by a superior court to an inferior one commanding it to certify up its record of some proceeding, not according to the course of the common law, that it may be seen and determined whether there is any error therein for which the record should be quashed. The error must appear in the record of the inferior court. The error relied upon in this case does not appear in the record of the county commissioners put in evidence by the petitioners. The sheriff's return of his doings on the warrant for a jury does not appear in their records. It should not appear there. By the provisions of the statute he is required to return the verdict to the supreme judicial court at the next term thereof to be held in the same county, with his doings. The person appointed to preside at the hearing before the jury is required to return to that court a certified report of the evidence introduced before him; and also to certify the substance of any decision or instruction by him given, when any party shall request it. Either party interested therein may file a written motion to set aside the verdict for the same cause that a verdict rendered in court may be set aside. The court shall hear any competent evidence relating to the same, adjudicate thereon, and confirm the verdict or set it aside for good cause; reserving the right of exception as in other cases. The clerk of the court shall certify such verdict, with the final adjudication of the court thereon, to the county commissioners at their next meeting after such adjudication. R. S., c. 18, §§ 12, 13.

All the proceedings under the warrant for a jury are brought directly before the supreme judicial court; and all questions of law arising upon those proceedings may there be raised, and the court must adjudicate upon them, and a party aggrieved may, by exception, bring the questions before this court for revision. The record of those proceedings and of the adjudication thereon remain in that court. The clerk is to certify to the commissioners

the verdict and the final adjudication thereon only. The commissioners have no power to adjudicate upon such questions. They must obey the mandate sent down to them. They cannot certify up the record of the supreme judicial court. When there is no error apparent in the records of the county commissioners, and the error appears only in the records of the supreme judicial court, of the proceedings in that court, a writ of certiorari is not the proper remedy to correct such error. It must be by writ of error. *Williams petr.*, 59 Maine, 517.

Writ denied.

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

JAMES O'BRIEN *vs.* JAMES MCGLINCHY.

Cumberland. Decided December 19, 1878.

Trial. Law and fact. Contributory negligence. New trial.

It is a question of fact, and not of law, whether it be negligence on the part of parents to permit their child three and a half years old to be upon a public street unattended.

In an action by a child, *non sui juris*, for an injury caused by being run over upon a public street, it is immaterial that its parents negligently permitted it to be upon the street, provided the child at the time exercised for its safety that amount of care which the law would require of persons generally.

While it is generally a defense to an action of tort that the plaintiff's negligence contributed to produce the injury, still, where the negligent acts of the parties are distinct and independent of each other, the act of the plaintiff preceding that of the defendant, it is considered that the plaintiff's conduct does not contribute to produce the injury, if, notwithstanding his negligence, the injury could be avoided by the use of ordinary care at the time by the defendant.

But this test would not govern where both parties are contemporaneously and actively in fault, and by their mutual carelessness the plaintiff is injured; nor where the negligent act of the defendant takes place first and the negligence of the plaintiff operates as an intervening cause between it and the injury.

ON EXCEPTIONS AND MOTIONS from the superior court.

CASE by an infant three and a half years of age, by his father

and next friend, for negligence of defendant's teamster, Fitzgerald, declaring that he ran over the plaintiff with a horse and wagon, on Center street, Portland, November 2, 1875, and thereby the leg of the plaintiff was bruised and broken, etc.

There was evidence tending to show that Center street was one of the most frequented streets in Portland; that its width was about forty-five feet, and that the plaintiff was run over or against and hurt as alleged. Two witnesses, Angus McMillan and George L. Jordan, testified that just before noon of the day alleged they witnessed the catastrophe. McMillan testified that the wagon looked like one he painted for defendant; and Jordan that the driver said it was the defendant's team.

John Fitzgerald, called by the defendant, testified that he drove the defendant's team three days in November, 1875; that he knew nothing at the time about running over any boy, nor until about three weeks afterwards. A writing of the following tenor, dated January 6, 1876, signed by the witness' mark, and witnessed by Alfred L. Oxnard, was put in evidence by the plaintiff: "I was driving James McGlinchy's team the second day of last November, and ran over a small boy in Center street, but did not stop to see how bad he was hurt." The witness on cross-examination testified that he had been thrice in jail, twice for stealing.

The defendant's counsel requested the following instructions: "I. If a child is of too tender age to be permitted to go in the streets without the attendance and supervision of those having him in charge, their negligence and want of due care will have the same effect in preventing the maintenance of an action for an injury occasioned by the neglect of another, as would plaintiff's want of care if he were an adult.

"II. A child of the age of this child at the time of the alleged accident was of too tender an age to be permitted to go in the street unattended, within the meaning of the last instruction.

"III. That plaintiff cannot recover for the negligence of defendant's agent under the circumstances of this case, because of the negligence of its parents in allowing it to go unattended in the street, under the circumstances of this case.

"IV. Proof that team driven by defendant's agent ran over

plaintiff and caused the injury would not alone be sufficient to entitle plaintiff to recover; but in order to recover, he must also prove that the running over was caused by negligence of defendant's servant, and that neither the negligence of plaintiff, nor of his parents, or whoever had charge of him, contributed thereto; and that the burden is on the plaintiff to prove both such negligence on part of defendant's agent, and such want of contributory negligence on part of himself or of those who had charge of him."

The presiding justice gave the first and fourth requested instruction, but declined to give the second and third. The verdict was for the plaintiff for $1,100, which the defendant moved to set aside; and he also alleged exceptions.

The defendant afterwards filed a motion for a new trial on the ground of newly discovered evidence, under which he produced evidence tending to show that the witness, Jordan, was not at Portland on the day alleged; that he was then an operative at work in the Continental mill, Lewiston; that John T. Oxnard, of Freeport, who Jordan testified was the first to talk with him about being a witness for the plaintiff, had before the trial written the following letter to the defendant, dated June 20, 1876, signed "From a friend," mailed Freeport, Maine, June 21:

"Dear Sir:—I was to your place of business last week, but as you was away, I had some little conversation with your book-keeper in regard to the case now pending in superior court against you for your team running over a little boy on Centre street. Your book-keeper wished me to write you or come and see you.

"Now I have reason to believe the whole thing to be a fraud; that your team never run over the boy, and think I can show you how to get out of it. I will come to Portland and see you if you will send me $3.00 (three dollars) to pay expenses, as I told your book-keeper I would do, and then if you think I can do you any good, why then I shall expect you to pay me a fair thing to help you out of it, as I think I can do it without any trouble. If, after you talk with me, you think I cannot help you any, why then the $3.00, three dollars, that you send me will pay me in full. Please let me know by return mail, as I shall be looking

after the letter. Don't send any postal cards or any envelopes with your name on the outside (be sure); also return this letter with the money you send me, as I do my business right on the square. I will send you an envelope directed to me for you to send this letter back and the $3.00, three dollars. Please state what day you want me to come, giving me a few days notice, also you will find me up to just what I tell you. I do not wish my name known at present."

There was also evidence on the last motion that John T. Oxnard with the witness, McMillan, after the trial, met the defendant, when Oxnard said to the defendant, "If you and Putnam had taken my advice, I would have got you clear; and as the case is now, I think I can get you clear, if you will go according to my directions."

W. L. Putnam, for the defendant.

B. D. Verrill, for the plaintiff.

PETERS, J. This case is before us upon motions to set aside the verdict as against evidence and for newly discovered evidence, and upon exceptions to the rulings of the presiding judge.

The defendant contends that the judge at *nisi prius* should have ruled, as a matter of law, that it was negligence on the part of the parents of the plaintiff to permit their child three and a half years old to be unattended upon a public street. The judge allowed the jury to decide whether it was negligence or not. Our judgment is that it was not a question so free of doubt as to require the court to take it from the jury. Facts and circumstances in explanation of the presence of the child upon the street were to be considered, and different minds might draw different conclusions from them. It would be difficult to fix any standard of years as a test for the decision of cases of this kind. Of course there may be extreme cases either way, where the judge's duty would be to pronounce upon the facts himself instead of submitting them to the jury. But where the line is doubtful between the two extremes, it is usually the vocation of the jury to determine the question, under such instructions from the court as may be proper and suitable to the case before them. *Kellogg* v. *Cur-*

tis, 65 Maine, 59. *Hobbs* v. *Eastern Railroad*, 66 Maine, 572, 577. *Mulligan* v. *Curtis*, 100 Mass. 512. *Lynch* v. *Smith*, 104 Mass. 52. *Brooks* v. *Somerville*, 106 Mass. 271, 275. *Patrick* v. *Pote*, 117 Mass. 297. *Drew* v. *6th Avenue Railroad*, 26 N. Y. 49. *Mangam* v. *Brooklyn Railroad*, 38 N. Y. 455. *Eckert* v. *Long Island Railroad*, 43 N. Y. 502. *Ihl* v. *Railroad*, 47 N. Y. 317. *Blanchard* v. *Steamboat Co.*, 59 N. Y. 292. Proffatt on Jury Trial, §§ 263, 298.

The defendant next contends that this court should decide, under the motion for a new trial, as a matter of fact, in view of all the testimony in the case, that the child was negligently permitted by its parents to be upon the street unattended at the time of the accident. But if the parents were guilty of such negligence, and it be admitted (as it is) that the child is chargeable with the negligence of its parents, still it does not necessarily follow that the child is thereby debarred from a recovery for the negligence of the defendant. That would depend upon whether the act of the parents, in a proper sense, contributed to the injury or not. In a certain sense, it undoubtedly did contribute to it. That is, the accident could not have happened without it. It made the accident possible. But whether in a legal sense it contributed to it would depend upon all the facts and circumstances.

If the child, at the time of the accident, exercised as much care and caution as any person of the years of discretion could exercise under the same circumstances, then the parental negligence did not contribute to the injury. It matters not whether the plaintiff was three or thirty years of age, if he managed for his safety while upon the street with the amount of care which the law requires of persons generally. And to this point there are several direct authorities. In *McGarry* v. *Loomis*, 63 N. Y. 104, the head-note of the case is this: "In an action to recover damages for injuries to a child, *non sui juris*, occasioned by the negligence of defendant, negligence on the part of the parents is no defense, where it appears that the child has not committed or omitted any act which would constitute contributory negligence in a person of years of discretion. Negligence can only be imputed to the child through the parents, but where the child has

done no negligent act the conduct of the parents is immaterial." *Lynch* v. *Smith*, 104 Mass. 52, and other cases are to precisely the same effect. See Bigelow's Cases on Torts, 730.

In the case supposed, the negligence of the defendant and that of the parents would not operate conjunctively. The conduct of the parents would not be a part of the transaction through which the injury befel the plaintiff, but another transaction prior thereto and distinct therefrom. It may have been the "agency" or "medium" or "opportunity" or "occasion" or "situation" or "condition," as it is variously styled, through or by which the accident happened; but no part of its real and controlling cause. The fault of the parents would be the remote cause, while that of the defendant would be the proximate or the more proximate cause, the *proxima causa* or *causa causans*; the one a passive and the other an active agency; the one having but a casual and the other a causal connection with the ultimate event.

Generally, it is a defense to an action of tort that the plaintiff's negligence contributed to produce the injury. But in cases falling within the foregoing description, where the negligent acts of the parties are distinct and independent of each other, the act of the plaintiff preceding that of the defendant, it is considered that the plaintiff's conduct does not contribute to produce the injury, if, notwithstanding his negligence, the injury could have been avoided by the use of ordinary care at the time by the defendant. This rule applies usually in cases where the plaintiff or his property is in some position of danger from a threatened contact with some agency under the control of the defendant when the plaintiff cannot and the defendant can prevent an injury. Lord Ellenborough, in *Butterfield* v. *Forrester*, 11 East, 60, a much quoted case, declared that "one's being in fault will not dispense with another's using ordinary care." Blackburn, J., in *Radley* v. *Railroad Co.*, L. R. 10 Ex. 100, expresses the idea in this wise: "A man is bound, when he puts himself in a place where he knows other persons are coming, not only for his own safety, but for that of his neighbors, to take reasonable care of himself and of his property; but, whether he does this or not, it does not relieve anybody else who comes there from the duty of

also taking reasonable care." The following are pertinent authorities hereto. *Bigelow* v. *Reed*, 51 Maine, 325. *Baker* v. *Portland*, 58 Maine, 199. *Garmon* v. *Bangor*, 38 Maine, 443. *Keith* v. *Pinkham*, 43 Maine, 501. *Norris* v. *Litchfield*, 35 N. H. 271. *State* v. *Railroad*, 52 N. H. 528. *Trow* v. *Vt. Central*, 24 *Vt.* 487. *Isbell* v. *Railroad*, 27 Ct. 393. *Steele* v. *Burkhardt*, 104 Mass. 59. *Smith* v. *Conway*, 121 Mass. 216, 219. *Mayor, etc.* v. *Brooke*, 7 Q. B. 377. *Lygo* v. *Newbold*, 9 Ex. 302, 303. Sher. & Red. on Neg. §§ 25, 36, *et passim.* Wharton's Neg. § 300, *et seq.*; and numerous citations in notes. But this principle would not govern where both parties are contemporaneously and actively in fault, and by their mutual carelessness an injury ensues to one or both of them; nor where the negligent act of the defendant takes place first and the negligence of the plaintiff operates as an intervening cause between it and the injury.

And there may be other exceptions. It is impossible to establish rules under which all cases can be arranged, considering the variety of circumstances under which the question of negligence arises. Bigelow's Torts, 724. *Murphy* v. *Deane*, 101 Mass. 455. *Barnes* v. *Chapin*, 4 Allen, 444. *Hibbard* v. *Thompson*, 109 Mass. 286. See, also, cases and authorities before cited.

The defendant, however, does not admit that the plaintiff stands in the favorable attitude supposed. He claims that upon this point the plaintiff's case fails. It is true, as contended, there is no evidence of a direct character as to how the accident happened. No one testified to seeing the occurrence. The driver of defendant's wagon swears that he has no knowledge whatever of running over the child. The jury must have found this testimony to be untrue, or the plaintiff could not have got the verdict. So finding, they were justified in drawing inferences of fact therefrom unfavorable to the defendant. They would have a right to believe that the witness (called by defendant) was wholly in fault in causing the injury, as an explanation of his concealing the truth about it. Therefore it became the important question of the case to decide whether the defendant's team did actually run

over the boy or not. Upon that point the newly discovered evidence satisfies us that a new trial should be granted.

Exceptions overruled; motion sustained.

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

WILLARD W. PULLEN *vs.* JAMES S. GLIDDEN.

Waldo. Decided December 20, 1878.

Malicious prosecution. Evidence. Law and fact. Trial. Party as a witness. Exceptions.

In an action for malicious prosecution it is competent for the defendant to prove, as having some bearing upon the questions of want of probable cause and malice in fact, that prior to the prosecution complained of, it was the common report in the neighborhood of the parties that the plaintiff had committed the crime for which he was prosecuted.

Such common report is not of itself sufficient to show probable cause, but in connection with other criminatory facts or information that came to the knowledge of the defendant before he commenced proceedings, it may tend to show it and to negative malice.

The unexplained neglect of the plaintiff, in a suit for malicious prosecution, to appear or testify at the trial of his case is a matter competent for the consideration of the jury upon the question of want of probable cause.

Either party in such case has a right upon request therefor to a direct and specific ruling as to whether the facts proved or admitted taken together do or do not show a want of probable cause.

But in order to enable the court to determine whether the excepting party was aggrieved by a refusal to give such specific ruling, it must appear by his exceptions that all the vital facts or evidence bearing upon the question are therein stated, or so much of the same as may enable the court to determine that the ruling ought to have been in his favor.

ON EXCEPTIONS.

CASE for malicious prosecution, for an alleged forgery of an order on Eaton Shaw of Portland, state commissioner, for four barrels of rum, in the name of N. G. Bryant, agent of the town of Palermo. The plaintiff, Pullen, after a three days' hearing before a trial justice, was discharged on motion of L. M. Staples, the attorney for the complainant, Glidden, and afterwards brought this action.

The undisputed facts are that Glidden was one of the selectmen who had appointed Bryant agent, and gave him an order on Shaw for all the liquors he called for on account of the town; that Shaw received an order under the name of Bryant for four barrels of rum which he directed to Bryant; that he afterwards sent his bill to the selectmen which they showed to Bryant, who denied that he wrote or authorized any one to write such an order; that the selectmen went to Portland, and after conference with Shaw, paid his bill; that they afterwards went to Augusta, and were told by the depot master that he delivered the rum to a man he supposed was Bryant, and afterwards learned was Bryant; that they were also informed by teamsters that Pullen was seen about that time on Augusta bridge with a horse drawing barrels which he called rum, and was afterwards on the same day seen driving in the direction of his home and also of Bryant's; that afterwards they called on Pullen as to who wrote the order, and he declared he knew nothing about it; that subsequently the defendant called on lawyer Staples and told him all the above facts, and was by him advised that the defendant would be justified in commencing a prosecution; that thereafter the defendant made the complaint.

Neither Pullen nor Bryant were present at the trial. There was also evidence tending to prove other facts. The defendant testified that at the time he consulted Staples he exhibited to him the disputed order and another order of like kind known to be genuine, and also a letter for a comparison received from one Foye purporting to be written by Pullen; that he left the letter with the trial justice, and it was afterwards lost. The existence of the letter was denied, and there was evidence both ways.

Witnesses were asked by the plaintiff "do you know what the common report was as to whether Pullen forged the order in question?" and answered, against the defendant's objection, "I do, and it is thought Pullen did forge the order." The presiding justice, against the plaintiff's objection, permitted the defendant's counsel to comment to the jury upon the fact that the plaintiff was not present to testify at the trial and did not testify in the case.

The attorney for the plaintiff admitted every material fact as stated by the defendant except the existence of the Pullen letter, which he denied, and the presiding justice refused his requested instruction to the jury as matter of law, that if they should find there was no such letter, all the other facts being admitted, there was no probable cause. He also refused the further requested instruction, that if all the facts claimed by the defendant were true there was no probable cause.

The verdict was for the defendant; and the plaintiff alleged exceptions.

J. W. Knowlton, for the plaintiff.

L. M. Staples, for the defendant.

BARROWS, J. A former verdict for the defendant in this case was set aside and a new trial granted, upon plaintiff's exceptions to an instruction given by the presiding judge, which seemed to require the jury to find that the defendant in prosecuting the plaintiff was actuated by express malice in the popular sense of the term, which is distinguishable from malice in fact in its true legal import. *Pullen* v. *Glidden*, 66 Maine, 202.

The plaintiff now excepts: 1. To the admission, against his objection, of the testimony of several witnesses from the town where the parties lived that it was the common report there that plaintiff committed the crime for which the defendant instituted the prosecution here complained of. 2. To the permission given by the presiding judge to defendant's counsel to comment to the jury upon the fact that the plaintiff was not present at the trial and did not testify in the case, and to the comments made by the judge in his charge upon this and other facts appearing in the case. 3. To the judge's refusal to instruct, upon plaintiff's request, that all the facts in the case as presented by the defendant, including the existence of a certain letter purporting to be signed by the plaintiff (but which was denied by him) did not amount to probable cause for the original prosecution; and his refusal to instruct that if they should find there was no such letter, all the other facts being admitted to be as claimed by defend-

ant, there was no probable cause, and to his submitting the question of probable cause to the jury.

I. Was the testimony objected to admissible? There was no specific objection to the questions put to the witnesses, as being too indefinite as to the time when or the place where it was commonly reported that the plaintiff was guilty of the crime for which the defendant caused him to be prosecuted. Nor was any objection interposed on the ground that it did not appear that the defendant was informed of these reports, or that they in any way originated with or were put in circulation by him. To make such objections available they should have been specifically stated so as to give the defendant an opportunity to obviate them if they were capable of being obviated. The objection being a general one to the competency of the evidence under any circumstances, the question presented is whether the fact of the existence of such common reports in the town where the parties lived, at a time prior to the prosecution alleged to be malicious, and made known to the prosecutor, though not originating with him, has any legitimate bearing upon the present contention. In distinguishing between hearsay evidence and that which should be deemed original and material, Professor Greenleaf well says: "Thus, where the question is whether the party acted prudently, wisely or in good faith, the information on which he acted whether true or false is original and material evidence. This is often illustrated in actions for malicious prosecution."

In actions of this sort it is necessary to determine whether the defendant instituted the proceedings against the plaintiff without probable cause and maliciously. The propositions are not identical nor absolutely interdependent. It is true that it is competent for the jury to find that the defendant acted maliciously as an inference from the want of probable cause. But the malice necessary to maintain this action is not implied by law from the want of probable cause. It is incumbent upon the plaintiff to prove the existence of malice in fact to the satisfaction of the jury. And, on the other hand, the existence of malice does not establish a want of probable cause. The defendant then is at liberty upon his plea of not guilty to offer any evidence which fairly tends to

show either that there was probable cause for the prosecution which he commenced, or that in what he did he was acting honestly without malice. Does the fact, if it exists, that it was the common report in the town where the parties lived that the plaintiff was guilty of the offense before the defendant, having knowledge thereof, instituted the prosecution, have any bearing upon either of these points?

We think it was competent upon both, though not perhaps of the highest importance.

That the general bad reputation of the plaintiff may be proved in such an action as this was long ago held in *Rodriguez* v. *Tadmire*, 2 Esp. 721. It is true that in *Newsam* v. *Carr*, 2 Starkie, 69, Wood, B., ruled that the defendant should not be permitted to prove that the plaintiff was a suspicious character, and that his house had been searched on a former occasion, saying that, although such evidence was admissible in slander for the purpose of mitigating damages, such evidence in this case would afford no proof of probable cause to justify the defendant. But, with this case before him, Shaw, C. J., remarks in *Bacon* v. *Towne*, 4 Cush. 217, 240: "We are inclined to think that evidence of the general bad reputation of the plaintiff should have been admitted, to rebut the proof of want of probable cause as well, as in mitigation of damages. . . The same facts which would raise a strong suspicion in the mind of a cautious and reasonable man, against a person of notoriously bad character for honesty and integrity, would make a slighter impression if they tended to throw a charge of guilt upon a man of good reputation." The remark is quoted approvingly by our own court in *Fitzgibbon* v. *Brown*, 43 Maine, 169, 175. The same doctrine seems to have been held in *Israel* v. *Brooks*, 23 Ill. 575, and *Miller* v. *Brown*, 2 Mo. 127.

The weight of authority is decidedly in favor of the admission of evidence of the plaintiff's general character, and for the reason adverted to in the remarks of Shaw, C. J., above quoted. The discrepancy in the decisions has arisen from a neglect to make the proper discrimination between the issue presented by a plea of not guilty in an action for malicious prosecution and that which

arises on the same plea in actions of libel and slander. The similarity in the injuries complained of in these classes of suits has led to confusion in the decisions touching the pleadings and the evidence applicable to them. With something of a general likeness there are important differences in the contentions liable to arise upon a plea of the general issue in suits for malicious prosecution and those for slander, verbal or written, and sufficient care has not always been taken in reporting the cases to designate the purpose for which the evidence was offered and the state of the pleadings. For instance, in slander, the speaking of actionable words raises the implication of malice in law, which is all that is necessary for the maintenance of the suit, though malice in fact may be proved to enhance the damage. *True* v. *Plumley*, 36 Maine, 466. *Jellison* v. *Goodwin*, 43 Maine, 287. Hence common reputation and other evidence not amounting to a justification, though tending to negative malice in fact, was not admitted for that purpose in *Taylor* v. *Robinson*, 29 Maine, 323, though why it should not be competent upon the question of damages is perhaps not altogether clear. See *East* v. *Chapman*, 2 Car. & P. 570.

But as we have already seen, in actions for malicious prosecution where the question for the jury is whether the defendant, upon all the information he had, whether it was in fact true or false, acted as a cautious, reasonable man not influenced by malice would act, the general reputation of the plaintiff is a proper subject of inquiry upon the question of probable cause. And, since malice in fact may be inferred from the want of probable cause, it follows that it is pertinent also upon the question of malice.

Here, however, the precise question is whether evidence of common repute in the neighborhood that the plaintiff was guilty of the particular offense for which he was prosecuted was rightly received. Judge Redfield, in *Baron* v. *Mason*, 31 Vt. 201, says emphatically that such evidence ought to be regarded as one proof, though no sufficient one in itself, of probable cause. We think he was right. Not only the facts which the defendant knew, but the information he had received, in fine, the circumstances under which he acted, even his own consultations with counsel

learned in the law, if he took the advice of such, are competent evidence upon these questions of probable cause and malice in fact. The man who claims an investigation according to law, of the charge he makes against another, stands on a different footing from him who indulges his tongue in slanderous babble which can result in nothing but mischief. This last must make his charges good by establishing their truth. But the first, whose doings may, in some contingencies, be serviceable to the community, is not responsible for his mistakes, if he acts with reasonable caution and an honest purpose. While the prevalence of reports that a man had committed an offense would be no sufficient cause in itself for proceeding against him, it cannot be said that their existence would not lend a force even in the mind of a cautious and candid person to any criminatory facts or information which they would not have as against one whom the neighboring public did not believe to be guilty. It is one of the great possible variety of facts and circumstances that may have a bearing upon the questions whether the defendant was acting "prudently, wisely and in good faith."

II. Another of these facts and circumstances which appears in the present case is that the plaintiff in a suit involving his character, and where necessarily he must have been the person who could best explain his possession of the rum procured on the order alleged to be forged, did not attend at the trial nor offer his testimony as he might have done by deposition.

It is set out as a ground of exception that the judge permitted defendant's counsel to comment upon this, and referred to it as proper for the consideration of the jury in his charge. Herein he did right. Had there been any cause for his non-appearance and failure to testify, such as is now suggested by his counsel in argument, it could have been shown at the trial, and the unfavorable inference obviated. But the fact is one proper for the consideration of the jury even in criminal cases, and in civil cases we do not see a shadow of an objection to it. *State* v. *Bartlett*, 55 Maine, 200. Abundant reasons are assigned for the rule in *State* v. *Cleaves*, 59 Maine, 298, 300, 301. See also for further instances and illustrations, *State* v. *Reed*, 62 Maine, 129. *Blan-*

chard v. *Hodgkins*, *id*, 119. *Robinson* v. *Blen*, 20 Maine, 109.

The motive of the plaintiff in omitting to testify here was as much a matter for the jury as the motive of the party for a like omission in *Taylor* v. *Willans*, 2 Barn. & Adol. 845.

III. A somewhat extended statement of evidence offered and facts proved precedes the plaintiff's request for instructions touching the question of probable cause, but it does not appear that it embraces all the facts proved or admitted or all the evidence. Hence it is impossible for us to say whether the plaintiff was aggrieved by the refusal of the presiding judge to instruct as requested, or by his submitting the question to the jury. Some facts are stated which tend to create a suspicion, at least, that by some collusion between the town's agent for the sale of spirituous liquors and the plaintiff there was some misappropriation of liquors, which the defendant as one of the selectmen of the town might be in duty bound to investigate. It does appear that the town agent denied the making of the order and that the plaintiff had at least a temporary possession of the rum, though he denied all knowlege of it when inquired of by the defendant. And besides the controverted fact of the defendant's possession of a letter written by the plaintiff capable of being used in comparison with the order alleged to be forged, the case seems to show that the defendant acted in the institution of the prosecution under the advice of one who held the responsible position of county attorney in a neighboring county. As this last matter is stated in the exceptions it would seem to have justified an instruction had such been given that if the defendant, with an honest wish to ascertain whether the facts and evidence in his possession would authorize a prosecution against the plaintiff, made a full and fair statement of them all to the lawyer and solicited his deliberate opinion thereon, and received one favorable to the prosecution, and thereupon commenced it in good faith, it would suffice in the absence of anything decisive to the contrary to show probable cause, and would be fatal to the plaintiff's suit. *Ravenga* v. *Macintosh*, 2 Barn. & Cress. 693. *Stone* v. *Swift*, 4 Pick. 389. *Wilder* v. *Holden*, 24 Pick. 8. *Stevens* v. *Fassett*, 27 Maine, 266. If any one was liable to be aggrieved by the want of more specific instruc-

tions on the question of probable cause, it was apparently the defendant.

Moreover, it is obvious that the plaintiff did not really admit the condition of things which the defendant claimed. The exceptions show that the defendant was claiming and arguing, against the plaintiff's objection, that the non-production by the plaintiff of his own testimony and that of Bryant the agent who had denied the giving of the order, was caused by a consciousness on the part of the plaintiff that they could not testify without showing probable cause; whether this was the real motive or not was a question for the jury. In *Taylor* v. *Willans*, *ubi supra*, the finding of the jury, as to the motive of the original defendant in not appearing to give testimony upon the hearing of the complaint he had instituted, was made by the judge's instructions the vital one upon which the question of probable cause was to turn. It is certainly true, as observed by Walton, J., in *Humphries* v. *Parker*, 52 Maine, 502, that the parties in a suit of this description upon request therefor "are entitled to a direct and specific instruction from the presiding judge as to whether the alleged facts set up in defense, if proved, did or did not show a want of probable cause." But in making their requests they must see to it that they cover the vital points upon which the question depends. Where the requests are couched, as in the present case, in general terms, in order to show that the excepting party has been aggrieved, all the facts or evidence embraced in the request must be stated; and in any case enough should be laid before the full court to enable them to say what the rulings ought to have been in view of all the matters that were of importance in the decision of the question. We have no such foundation in the present case to base a conclusion upon. We see nothing in the case as stated in the exceptions that would justify us in sending it back for a third trial.

Exceptions overruled.

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

DAVID S. REED, petitioner for partition, *vs.* JONATHAN L. REED.

Lincoln. Decided December 21, 1878.

Partition. Improvements.

A tenant in common, on a division of the estate, is entitled to the benefit of the improvements made by him.

If such improvements are made on a part of which he has the exclusive possession with the consent of his co-tenants, his share should be assigned from such part or including it.

If such possession was without consent, he is entitled to the benefit of their actual value to the estate in the share to be assigned to him, though that share may be otherwheres.

ON EXCEPTIONS.

PETITION FOR PARTITION of a farm in Dresden, formerly owned by Peter Puchard, who died in 1827, leaving a will which gave a life interest therein to his daughter, Mary Reed, with a life interest over to his daughter, Nancy Parks. The will provided "if Jonathan L. Reed shall continue on the farm and carry on the same for his mother, Mary Reed, that at her decease he shall have all the stock then on the farm, . . and after the decease of my daughters, Mary and Nancy, I give all my estate to my grand children then alive to be divided equally among them."

Mary died in 1858 and Nancy in 1866. At her death there were living seventeen grand children of Puchard, including this petitioner. Before the date of the petition the petitioner purchased and became the owner of the shares of fifteen of the grand children, so that he then owned 16–17 of the title, and the respondent the other 1–17.

The respondent in his brief statement says the petitioner ought not to have partition as prayed for, because in the year 1856 he put upon the premises a dwelling-house of great value, in the south-west corner thereof, by the consent of the persons then owning the premises; that he has ever since occupied the same as sole owner, and has had exclusive possession of the house and so much of the land on which it stands as is necessary to the reasonable enjoyment thereof, by the consent of the petitioner and those under whom he claims; and that he is entitled to have his share

assigned him from and including the part on which he has made improvement, and that the value of the improvements shall be considered and the assignment of shares made in conformity therewith.

The case was submitted, with right of exception, to the presiding justice, who found the facts as before stated, and also that the respondent continued on the farm and carried it on for his mother during her life; that in 1856, with the knowledge and consent of his mother, he erected the main part of the dwelling-house now on the farm, attaching it to the other portion then standing thereon. The whole house is underpinned with stone; but there was no cellar under the main part built by the respondent in 1856, there being a cellar under the part previously erected. The respondent lived in the house during his mother's life, and after her death had the exclusive occupation of it, but made no improvements thereafter.

Upon the foregoing facts the presiding justice ruled, as matter of law, that the respondent was not entitled to have his share of the premises assigned from and including the part of the premises on which the house stands, and was not entitled in the partition to have the value of his improvements considered and the assignment made in conformity therewith, and ordered judgment for partition as prayed for.

The respondent alleged exceptions.

S. C. Whitmore, for the respondent.

W. T. Hall, for the petitioner.

DANFORTH, J. This is a petition for the partition of certain land described, with the buildings thereon. The respondent admitting the petitioner's title to the land as claimed, sets up title to the dwelling-house as an improvement made by him while in the exclusive possession of that part of the land upon which it stands, with the consent of the other owners, and "that he is entitled to have his share assigned him from and including the part on which he has made improvements." He further claims "that the value of the said improvements made by him shall be considered and the assignment of shares made in conformity

therewith." The case was referred to the presiding justice, and comes before this court upon exceptions to his rulings.

It is contended in the argument that the building, which is the improvement claimed, is personal property. Were this so, we should have no occasion to consider any of the questions raised; for the jurisdiction of the commissioners to be appointed extends to real estate only, and their division of personal property would be of no effect. *Allen* v. *Hall*, 50 Maine, 253, 265. Nor do the pleadings in this case present any such question. The house is claimed as an improvement upon, and of course as a part of the realty. The facts reported, though not directly stating that the building is a part of the real estate, leave no possible doubt that it is so.

The case presents two questions for consideration. 1. Is the respondent entitled, as claimed in his brief statement, to have his share set off so as to include his improvements without considering their value? To authorize an affirmative answer to this question, the burden of proof is upon the respondent to show "that by mutual consent he had the exclusive possession of a part of the estate, and made improvements thereon." This he has failed to do; for, though it appears by the report that he had the exclusive possession, it does not appear that it was by the consent of his co-tenants. True, he had the consent of the tenant for life, but whether it was continued after her decease with or without the consent of the tenants in common does not appear. The question must therefore be answered in the negative, in accordance with the ruling.

2. Is the respondent entitled in the partition to have the value of his improvements considered, and the assignment made in conformity therewith? By R. S., c. 88, § 16, it is provided that "the value of the improvements made by a tenant in common shall be considered, and the assignment of shares be made in conformity therewith." This is distinct from the provision in the first of the section. That provides what shall be done where there is an exclusive possession "by mutual consent." This provides for the disposition of the improvements simply, and gives the maker the benefit of them irrespective of possession or con-

sent. In the one case, the place of the improvements is to be set off; in the other, the benefit of the improvements is to go to him who made them, though in the division some other part shall fall to him. This construction was put upon the statute in *Allen* v. *Hall*, above cited, and seems to be decisive of this case.

The facts show that the respondent occupied exclusively and made the improvements. True, he did not make them after the termination of the life estate; nevertheless, he made them; and giving him the benefit of them works no injustice to his co-tenant.

It is contended that these improvements, being made during the existence of the life estate, and attached to the land at the termination of that estate, became the common inheritance of the remainder-men. This, by the common law, is undoubtedly true. But the statutes have made a change in this respect. If the statute already referred to is not sufficient for the purpose, the act of 1843, c. 6, continued and now found in R. S., c. 104, § 23, would seem to supply all deficiencies. By that act, in a writ of entry against the grantee or assignee of a tenant for life, the tenant shall have the benefit of all the improvements made during the tenancy for life. No adverse possession or possession for any particular period is required. *Austin* v. *Stevens*, 24 Maine, 520, 527, 528. If these improvements had been made by the tenant for life and assigned to the respondent, unquestionably he would have been entitled to them under the statute. But the case shows that they were made by him, for his benefit, with her consent, and clearly with the expectation that he was to be the owner. He is, then, virtually the assignee of the tenant for life.

Under these statutes, the latter confirming our construction of the former, we think the ruling upon this point was erroneous, and upon the facts as reported, the interlocutory judgment should be that the commissioners in their division shall consider the improvements made by the respondent, and give him the benefit of their value to the estate.

Exceptions sustained.

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

AMERICAN BIBLE SOCIETY *vs.* EBENEZER WELLS, executor.

Cumberland. Decided December 26, 1878.

Will. Interest. Action.

When interest is recoverable merely as damages, an action cannot be maintained for its recovery, after payment of the principal.

Thus, where a bequest or contract is silent as to interest, so that, if it can be recovered at all, it can only be recovered as damages, an action to recover it cannot be maintained, after payment of the principal.

DEBT for interest on a legacy, after payment of the principal.

ON AGREED STATEMENT, the substance of which appears in the opinion. The writ was dated November 23, 1877.

The estate was inventoried at $19,207.82; and the residue, after payment of the $13.000 to the societies, was bequeathed to relatives. The personal estate, to the amount of $12,200, was in notes, which matured and were paid in November and December, 1876. The societies were all paid the principal of their bequests at various dates between July 28 and November 23, 1876.

L. Pierce, for the plaintiffs.

Legacies are payable in one year from decease of the testator, even where directed to be paid as soon as convenient, and also where the estate is so situated that it becomes impracticable to convert the assets into money at that time. 2 Redfield on Wills, 471, 3d ed. *Smith* v. *Lambert*, 30 Maine, 137. *Rice* v. *Boston Port & Seamen's Aid Society*, 56 N. H. 191. *Kent* v. *Dunham*, 106 Mass. 586. *Martin* v. *Martin*, 6 Watts, 67. *Pearson* v. *Pearson*, 1 Sch. & Lef. 10.

It makes no difference if payable out of real estate. 22 W. R. 748.

And though not demanded. *Birdsall* v. *Hewlett*, 1 Paige, 32.

Interest should be computed with annual rests. *Miller* v. *Congdon*, 14 Gray, 114.

M. Butler & C. F. Libby, for the defendant, contended that the testatrix having, after making the will, renewed and given time on the notes, the proceeds of which were necessary to the

payment of the large legacies to the societies, it was unreasonable to demand payment of the executor before the notes became due and payable.

WALTON, J. Sarah Ann Hobart, by her last will and testament, bequeathed $2,000 to the American Bible Society. She also made bequests to other charitable societies, amounting in all to $13,000; and directed that these legacies be paid as soon after her decease as her executors could "conveniently make the necessary arrangements for so doing." The testatrix died April 28, 1874. The legacy to the Bible Society was paid November 23, 1876. The Society claims that after the expiration of a year from the death of the testatrix they were entitled to interest on the legacy; and this action is brought to recover it.

We think the action cannot be maintained. It seems to us that the legacy was paid as soon as the executors could "conveniently make the necessary arrangements for so doing." Besides, when, as in this case, interest is recoverable, if recoverable at all, merely as damages, an action cannot be maintained for its recovery, after payment of the principal. If, by the terms of a contract or a bequest, a party is entitled to interest, undoubtedly an action may be maintained to recover it, even after the principal has been paid. But when the contract or the bequest is silent as to interest, so that, if it can be recovered at all, it can only be recovered as damages, an action to recover it cannot be maintained, after payment of the principal. *Fake* v. *Eddy*, 15 Wend. 76. *Tillotson* v. *Preston*, 3 John. 229. Sedgwick on Damages, 5th ed. 445.

In the case last cited the court say that "if the plaintiff has accepted the principal he cannot afterwards bring an action for the interest."

Judgment for defendant.

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

GEORGE N. BLACK *vs.* WILLIAM W. ROGERS.

Penobscot. Decided December 27, 1878.

Promissory notes. Attestation.

Whether an attestation upon the face of a note should apply to a signature upon the back of it, unless the attestation clause expressly so states, *quære.*

ON MOTION of plaintiff to set aside the verdict against him, on the ground that it was against law and evidence.

ASSUMPSIT, on a note dated Ellsworth, March 15, 1859, signed Nathaniel Moor; attest, Isaac A. Murch, and of the following tenor: "Value received I promise to pay G. N. Black, or order, fifty dollars, in six months from date, and interest." The defendant's name was written on the back of the note. There was also indorsed a payment of ten dollars, under date of May 8, 1860.

The plaintiff and the subscribing witness testified that the defendant's name was written at the same time the witness signed. The defendant testified that in his settlement with Murch it was agreed that Murch should pay the amount of this note to Black; that sometime after the note was written he signed on the back, as surety for six months. Nathaniel Moor testified that he had charged against Black, from July 20, 1859, to January 14, 1862, $20.65, understanding that all the rest of the charges were to go towards payment of the note, as well as the $10 charge indorsed; that the note was written by Black and handed to the witness to get Rogers' name on as surety; that witness signed it; that Rogers signed it in witness' office; that witness handed the note to Black in Hopkins' store; that Rogers was merely surety, and that he had no recollection that Murch signed as witness to either signature.

F. A. Wilson & C. F. Woodard, for the plaintiff.

C. P. Stetson, for the defendant.

WALTON, J. We do not feel quite clear that an attestation upon the face of a note should be held to apply to a signature upon the back of it, unless the attestation clause expressly so

states. But, however that may be, we do not think the verdict is so clearly against the weight of evidence as to justify us in setting it aside.

Motion overruled. Judgment on the verdict.

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

EDWARD R. SOUTHARD *vs.* ARTHUR B. SUTTON *et als.*

Penobscot. Decided December 27, 1878.

Mortgage. Parties. Estoppel.

All the owners of a right in equity to redeem real estate under mortgage must be made parties to a bill to redeem. If any one of them refuses to become a party plaintiff, he must be made a party defendant.

The fact that one of the parties having an interest in an equity of redemption resides out of the state, is no excuse for omitting to make him a party to a bill to redeem.

If one having a right to redeem real estate under mortgage assures a proposed purchaser of the fee that he will not redeem, and this assurance is given for the purpose of inducing such purchaser to buy, and he is thereby induced to buy, the owner of the right will be estopped afterward to enforce it against the purchaser or his assignees; and if one afterward purchases the right of redemption, with notice of the facts which create the estoppel, he also will be estopped to enforce such right.

ON REPORT.

BILL IN EQUITY to redeem real estate under mortgage, referred to Samuel F. Humphrey, who reported in substance that John Dean, on March 3, 1854, mortgaged the premises to W. & J. Colburn, who assigned to Arthur B. Sutton; that the mortgage remained unpaid in Sutton's hands till the death of John Dean, intestate, insolvent, April 8, 1868; that Sutton then held another mortgage on other real estate, the homestead of Dean; that, in addition to the two mortgages, Sutton held unsecured debts against Dean, on whose estate there was never administration; that Dean left a widow and eight children, one of whom was in California; that the widow and such of the children as were at home desired such settlement of the estate as would secure to the

widow the homestead; that Sutton proposed to the widow that he would assign to her the mortgage of the homestead and cancel his unsecured claims against the estate, provided good title should be given him of the premises in suit, and also a note of $150 belonging to the estate; that, after negotiations extending to December 16, 1870, a settlement between Sutton and the estate was concluded upon the basis of Sutton's offer, and that the children (at home), so far as they were consulted and could know about the matter, desired that the settlement should be made in that way; that the plaintiff was then the adviser of Mrs. Dean, and knew the intentions of Sutton and Mrs. Dean, and that they were in accordance with the desire of the children to secure to their mother a homestead, and that Sutton should be the absolute owner of the mortgaged premises in question, as well as that Mrs. Dean should become the owner of the homestead; that the premises were conveyed by warranty deed by Sutton to Garland & Cassidy, March 10, 1869, and by G. & C. to Leclair by quitclaim April 26, 1869, G., C. & L. being the other respondents; that the plaintiff, in 1873, purchased the right to the mortgaged premises of seven of the eight children of John Dean and took the conveyance thereof to himself.

The report continued: "Upon the foregoing facts found by me, I find and decide as matter of law, subject, however, to the ruling of the court thereon, that said Southard is entitled to redeem the said mortgaged premises; that Sutton took possession thereof May 7, 1868, and that he and his grantees have held the same ever since; that Mrs. Dean did, on December 16, 1870, convey by quitclaim her interest in the premises to Sutton; and that her interest so conveyed was the right to have dower assigned her in the premises, worth, on December 16, 1870, $143.10."

The further findings of the referee as to the mortgage debt and the costs are, by the opinion, rendered immaterial.

F. A. Wilson & C. F. Woodard, for the plaintiff.

J. Varney, for the defendants.

WALTON, J. All the owners of a right in equity to redeem real estate under mortgage must be made parties to a bill to

redeem. If any one of them refuses to become a party plaintiff, he must be made a party defendant. "A person having a partial interest in the equity of redemption, in the absence of the other parties interested therein, cannot maintain a bill to redeem." Story's Equity Pleading, § 187. The fact that one of the parties having an interest in the equity of redemption resides out of the state, is no excuse for omitting to make him a party to the bill to redeem. *Chamberlain* v. *Lancey*, 60 Maine, 230.

In this case, the equity of redemption, owned by John Dean, at his death descended to his eight children. The plaintiff has purchased the interest of seven of the heirs, and, without making the other heir a party to the bill, either as a plaintiff or a defendant, claims the right to redeem the whole estate, and to have an account of the whole of the rents and profits, to aid him in so doing. This the law will not allow. The other heir has a right to his share of the rents and profits, and a right to be heard in the determination of the amount thereof. He also has a right to redeem his share at the same time that the other joint owner redeems his. He has a right to be consulted before the fee and the right of possession are transferred to a new party, for his interests may be thereby seriously compromised. The new party may be less responsible for the rents and profits, less likely to keep the estate in repair, and less likely to avoid strip and waste.

The defendants also have an interest in having the other heir made a party to the bill. In view of the conveyance made by his mother, he may decline to redeem his share, or to require the defendants to account for his share of the rents and profits, and thus the defendants may be left in possession of valuable interests of which it is now proposed to deprive them. In other words, the other joint owner of the equity of redemption is an interested, and therefore a necessary party to the bill, and one, without which, the court cannot rightfully make the decree prayed for. The fact that he resides out of the state, as already stated, is no excuse for omitting him. If his residence could not be ascertained, so as to serve him with personal notice, such other service as the court might order would then be sufficient.

Another difficulty. The facts reported by the referee are not

sufficiently full and explicit to enable the court to determine the rights of the parties now before the court.

If one having a right to redeem real estate under mortgage assures a proposed purchaser of the fee that he will not redeem, and this assurance is given for the purpose of inducing such purchaser to buy, and he is thereby induced to buy, the owner of the right will be estopped afterward to enforce it against the purchaser or his assignees; and if one afterward purchases the right of redemption, with notice of the facts which create the estoppel, he also will be estopped to enforce such right. *Fay* v. *Valentine*, 12 Pick. 40. *Chapman* v. *Pingree*, 67 Maine, 198.

Hence it is important to know how many and which of the heirs of John Dean were consulted and desired the defendant (Sutton) to purchase the estate in question, of their mother, and what assurances, if any, they gave him, and what knowledge, if any, the plaintiff had of these assurances when he purchased of the heirs, to the end that the court may see how far they and he may be estopped. In these particulars the report of facts is fatally defective.

Bill dismissed, with costs.

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

CHARLES M. WHITE *vs.* GEORGE A. GRAY *et al.*

Penobscot. Decided December 27, 1878.

Contract. Promissory notes. Defense. Accord and satisfaction.

A defense based on an alleged accord and satisfaction can be sustained only when the accord has been completely executed. Neither an offer to perform, nor an actual tender of performance, is sufficient. Nothing short of actual performance—meaning thereby, performance accepted—will sustain such a defense.

The debtor's remedy, if the creditor has wrongfully refused to accept performance, is a separate action upon the agreement.

The distinction between an agreement which is, *per se*, to satisfy and extinguish an existing debt, and an agreement, the performance of which is to have that effect, must not be overlooked. The former operates as an immediate satisfaction of the debt. The latter, only when performed.

ON FACTS AGREED, stated in the opinion.

G. T. Sewall, for the plaintiff, submitted without argument.

C. A. Bailey, for the defendants.

WALTON, J. Plaintiff held a note against defendants for $800. Defendants were insolvent and were endeavoring to compound with their creditors. In consideration of which, the plaintiff agreed that, if their efforts were successful, he would take in payment of his note a lot of land, and new notes for $500, payable, one-half in one year, and one-half in two years. Defendants' efforts were successful, and they offered to settle with the plaintiff upon the terms stated in the agreement; but he refused, denying all liability under his agreement, and claiming the full amount due upon his note. No deed of the land was ever executed, nor were the notes mentioned in the agreement ever made or tendered to the plaintiff.

The question is whether these facts constitute a valid ground of defense to an action on the note. We think not.

It is settled law in this state that a defense based on an alleged accord and satisfaction can be sustained only when the accord has been completely executed. Neither an offer to perform nor an actual tender of performance is sufficient. Nothing short of actual performance—meaning thereby, performance accepted—

will sustain such a defense. The debtor's remedy, if the creditor has wrongfully refused to accept performance, is a separate action upon the agreement. *Young* v. *Jones*, 64 Maine, 563. *Bragg* v. *Pierce*, 53 Maine, 65. *Cushing* v. *Wyman*, 44 Maine, 121.

The agreement which, in the case first cited, failed as a ground of defense, was successful when made the ground of a separate action. *Mattocks* v. *Young*, 66 Maine, 459.

The distinction between an agreement which is, *per se*, to satisfy and extinguish an existing debt, and an agreement, the performance of which is to have that effect, must not be overlooked. The former operates as an immediate satisfaction of the debt. The latter, only when performed. The agreement set up as a defense in this case is clearly of the latter kind.

Judgment for plaintiff.

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

INHABITANTS OF BURNHAM *vs.* INHABITANTS OF PITTSFIELD.

Waldo. Decided December 27, 1878.

Pauper.

An absence from a town will defeat the running of the five successive years' residence necessary to acquire a pauper settlement therein, if made with the intention on the part of the pauper not to return, though he does in fact return after a brief absence.

ON MOTION AND EXCEPTIONS.

ASSUMPSIT, for pauper supplies furnished Dorcas T. Farrington.

The verdict was for the plaintiffs, which the defendants moved to set aside. They also filed exceptions.

C. A. Farwell & W. H. McLellan, for the defendants.

W. H. Fogler, for the plaintiffs.

WALTON, J. The court is of opinion that the verdict in this case is clearly wrong. It is an action by the town of Burnham against the town of Pittsfield to recover for supplies furnished

one Dorcas T. Farrington, a pauper, alleged to have her settlement in the defendant town. That the pauper once had a settlement in Burnham is not denied; but it is claimed that she afterwards acquired a settlement in Pittsfield by having her home there for five successive years. But upon this point the plaintiffs' proof fails. True, the evidence shows very clearly that from the time when she first moved into Pittsfield to the time when she last moved out of it, more than five years had elapsed. But the evidence is equally clear and conclusive that twice during that time she left the town of Pittsfield with a fixed and openly expressed determination never again to return to it as to the place of her home; and that on each of these occasions she did in fact stay away for a considerable length of time; and that when she returned to Pittsfield it was by virtue of a change of purpose, and not in pursuance of an existing intention to do so when she left.

Upon this point the pauper testified as follows: "I thought when I came away I never would go back again; I really thought so; I intended never to go back; . . I made up my mind to leave and not go back; . . and when I came down to Burnham I told the people I was not going back; . . when I told the people in Burnham so I did not intend then, at that time, ever to go back there again."

And Mrs. Hodgdon, the woman with whom the pauper lived in Pittsfield, testified that when the pauper left on two occasions she left saying she would never return, and that she actually staid away several months.

These witnesses are uncontradicted. And there is nothing in the case which renders their statements improbable. The plaintiffs have not only failed to show that the pauper had a continuous home in Pittsfield for five successive years, but they have actually shown the contrary.

Motion sustained, verdict set aside, and a new trial granted.

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

APPENDIX.

OPINIONS OF THE JUSTICES OF THE SUPREME JUDICIAL COURT.

The legislature has authority under the constitution to assess a general tax on the property of the state, for the purpose of distribution, under an act to establish the school mill fund for the support of common schools, approved February 27, 1872.

On a question proposed by the House of Representatives.

Ordered. That the justices of the supreme judicial court be required to furnish for the information of this house an answer to the following question:

"Has the legislature authority under the constitution of the state to assess a general tax upon the property of the state, for the purposes of distribution, under "An act to establish the school mill fund for the support of common schools," approved February 27, 1872?"

BANGOR, February 9, 1876.

Sir:—To the question proposed by the house of representatives, we have the honor to answer as follows:

By the constitution of this state, art. 4, part 3, § 1, the legislature has "full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this state, not repugnant to this constitution, nor to that of the United States."

In the constitution, it is declared that a general diffusion of education is essential to the preservation of the liberties of the people. By its very language, it would seem that the "general diffusion of education" was to be regarded as especially a "benefit" to the people. If so, then the legislature has "full power"

over the subject matter of schools and of education to make all reasonable laws in reference thereto for the "benefit of the people of this state." The power existing, its reasonable exercise, having due regard to the several provisions of the constitution, is subject only to legislative discretion.

The power of taxation "for the defense and benefit of the people" is limited only by the good sense and sound judgment of the legislature. If unwisely exercised, the remedy is with the people. It is not for the judicial department to determine where legitimate taxation ends, and spoliation by excessive taxation begins.

Education being of benefit to the people, and taxation being incidental and essential to its successful promotion, the mill tax, being for educational purposes, must be regarded as constitutional, unless in some other portions of the constitution there be found a clause restricting or forbidding the raising of money by legislative action for educational purposes, thereby limiting the power naturally inferable from § 1, which has been already quoted. The limitation must be upon that section; for the money being raised, there is no where to be found, an express or implied inhibition of the appropriation of money when raised, to educational purposes.

By article 8, "to promote this important object"—education—"the legislature are authorized, and it shall be their duty to require the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools." But this article is mandatory, not prohibitory.

It imposes duties upon the legislature. It is affirmative, not negative in its character. The legislature cannot avoid the discharge of this duty. It cannot constitutionally absolve the towns from making at their own expense suitable provision for this primary and indispensable foundation of all good government. The legislature are by proper enactments to require the towns to make suitable provision for the support of public schools, and the towns are, at their own expense, to comply with those enactments. Neither can escape from the performance of their several and respective obligations.

But what is making "suitable provision" by the towns, "at

their own expense, for the support and maintenance of public schools?" By whom is the amount for that purpose to be fixed? Not by the towns; for, if left to them, there would be no uniform and definite rule. The "suitable provision" in such case would be a variable quantity, an indefinite and contingent provision, dependent upon the varying wealth of the respective towns and upon the fluctuating views of their voters, or the majority of their voters. It is manifest that a general law upon the subject is required. Accordingly, from the first institution of the government to the present day, the general control of schools, and the determination of what shall be a suitable provision by the towns for their support, has been fixed by legislative enactment. In 1821, by c. 117, § 1, towns were required annually to raise and expend for the maintenance and support of schools therein, "a sum of money, including the income of any incorporated school fund, not less than forty cents for each inhabitant, the number to be computed according to the next preceding census of the state, by which the representation thereof has been apportioned." In the revision of 1840, c. 17, § 6, the amount required was not to be less than forty cents for each inhabitant, the number to be ascertained as in 1821; but this was to be "exclusive of the income of any corporate school fund, or of any grant from the revenue or funds from the state, or of any voluntary donation, devise or bequest, or of any forfeiture accruing to the use of" the town. In the revision of 1857, c. 11, § 5, the amount required was not less than the sum of sixty cents for each inhabitant upon the mode of ascertaining the number of inhabitants, and exclusive of other sources of revenue, as in 1840. In the revision of 1871, c. 11, § 5, not less than one dollar for each inhabitant, to be ascertained as in the two preceding revisions, and subject to the exclusion of all other sources of revenue, whether from the revenue or funds of the state, or from any other source whatever. In 1872 the sum for each inhabitant was reduced to eighty cents.

A "suitable provision" must be one general in its character, and having regard to all the people of the state, in the aggregate. A "suitable provision" is not necessarily a sufficient provision. A sufficient provision must be one adequate to meet the educa-

tional demands of the people. It may therefore become necessary to supplement what is a suitable provision by adding thereto what will make it a sufficient one. Have, then, the legislature the right to do this? There is no express prohibition to their so doing. The right to do so exists by art. 4, p. 3, § 1, and no prohibition to the contrary is to be found in art. 8.

By recurring to the debates of the convention by which the constitution was framed, it will be seen that it was anticipated that state aid was to be granted for the support of schools, in addition to the suitable provision to be required by art. 8, of towns. In considering the question presented for our opinion, the views of the framers of the constitution and the subsequent practical construction of its provisions are entitled to much weight. Perley's Debates, 206, 207. It will be seen by recurring to the legislature of the state that what was expected to be done was done, and that right speedily.

In 1828, c. 403, "an act providing for the support of education" was passed. By this act twenty townships were to be sold, and the avails were to constitute a permanent fund to be reserved for the benefit of primary schools. At the same time, and by the same act, any moneys arising from the Massachusetts claim, so called, after paying the debts of the state, were to be added to the school fund. Now whether the lands of the state, or the moneys of the state are appropriated for the benefit of the primary schools, can make no difference in principle. In either event, the "suitable provision" established by the legislature is supplemented by the funds of the state.

In 1850, twenty-four half townships of the undivided lands of the state were reserved, the proceeds to be "appropriated as a permanent fund for the benefit of common schools."

In 1833, c. 82, with the exception of one thousand dollars for Parsonsfield Academy, the tax on the several banks in the state was "appropriated to the support of primary schools."

It will thus be perceived that a school fund in addition to, and in aid of, the "suitable provision" required by the constitution, derived from various sources, and acquired at different times, was established, almost contemporaneously with the existence of the

state, and has continued to the present time. It matters not, whether this fund was derived from the sale of the lands of the state, from taxes on its chartered banks, from state funds already in the treasury, or to be raised by taxation upon the real and personal estate of its inhabitants. Neither does the general expediency of this legislation as regards the well being of schools, nor whether due provision has been made to guard the funds thus acquired from being diverted from the object for which they are raised, affect the question of constitutionality. It is for the legislature to provide the necessary security that the bounty of the state be not misapplied, and to impose sufficient penalty in case of its misapplication.

The tax in question is like that for the support of government. It is for the benefit of the whole people. All the property in the state is assessed therefor according to its valuation. All contribute thereto in proportion to their means. It is a tax for a public purpose, not one, by which one individual is taxed for the special and peculiar benefit of another. All enjoy the beneficial results of education, and the better order and government arising therefrom, irrespective of the amounts respectively contributed by each to these most important objects.

All acts of the legislature are presumed to be constitutional till the contrary is clearly shown. No court will declare an act unconstitutional, when its constitutionality is a matter of doubt.

In relation to the question proposed, we answer that the legislature has authority under the constitution to assess a general tax upon the property of the state for the purpose of distribution under "An act to establish the school mill fund for the support of common schools," approved February 27, 1872.

JOHN APPLETON,
C. W. WALTON,
J. G. DICKERSON,
WILLIAM G. BARROWS,
CHARLES DANFORTH,
WM. WIRT VIRGIN,
JOHN A. PETERS,
ARTEMAS LIBBEY.

The governor and council, in the performance of their duty to ascertain what county officers are elected at the general election in September, can not lawfully count the votes of a town, the return of which bears the proper signature of one of the selectmen, and the names of the two other selectmen written by other hands than their own.

Nor in such case can they lawfully count the votes of a town, the return of which is not attested by the town clerk.

On questions proposed by the executive council.

"Ordered. That the opinion of the supreme judicial court be requested on the following questions:

"I. Can the governor and council, in the performance of their duty to ascertain what county officers were elected at the general election in September, lawfully count the votes of a town, the return of which bears the proper signature of one of the selectmen, and the names of the two other selectmen written by other hands than their own?

"II. Can the governor and council, in the performance of their duty in counting the votes for county officers, lawfully count the votes of a town, the return of which is not attested by the town clerk?"

BANGOR, Dec. 22, 1877.

The undersigned, justices of the supreme judicial court, have the honor to submit the following answer to the interrogatories proposed:

Wherever the constitution or the statutes of the state requires the official signature of a public officer, he must personally affix his signature or mark. This duty cannot be executed by attorney or delegated to another. By R. S., c. 1, § 4, rule 18, "the words 'in writing' and 'written' include printing and other modes of making legible words. When the signature of a person is required he must write it or make his mark." In *Chapman* v. *Limerick*, 56 Maine, 390, this question came before the court. Mr. Justice Kent, in delivering the opinion of the court, says: "It requires no argument to show that it was never in the contemplation of the law makers, that official certificates or returns, which the law requires of those holding certain offices, might be signed by

attorney or agent, or that they could have any legal validity, unless signed by the officers so that they should bear his own hand-writing." The selectmen are required to sign the returns, but if all save one were permitted to sign by attorney, there would be no reason why the same permission should not be extended to all, and if this were allowed there might be returns counted to which none of the officers have affixed their signatures as required by law.

It is to be regretted that votes are lost by the negligence or ignorance of town officers, but the obvious remedy is to choose such as know their duty, and knowing it, will legally perform it.

To the first question proposed we answer in the negative.

The town clerk is the recording officer of the doings of the town, and without his attestation there is no legal evidence that any vote has been cast. His attestation is a prerequisite, to any action on the part of the governor and council in counting votes.

Indeed, the power of the governor and council in relation to the proof upon which they are authorized to act is confined to legal returns duly transmitted, except in the special cases where enlarged powers have been conferred by statute. 64 Maine, 590.

The second question proposed we answer in the negative.

JOHN APPLETON,
C. W. WALTON,
J. G. DICKERSON,
WILLIAM G. BARROWS,
CHARLES DANFORTH,
WM. WIRT VIRGIN,
JOHN A. PETERS,
ARTEMAS LIBBEY.

The treaty concluded at Washington, August 9, 1842, confers the elective franchise on the subjects of the queen of Great Britain, residing on the disputed territory in the north-eastern portion of the state, at the time of the treaty and not otherwise naturalized.

Persons born on the disputed territory within the present limits of this state have the same elective franchise as persons born on territory within the state over which the British government made no claim.

On a question proposed by the senate, February 16, 1878.

Ordered. That the justices of the supreme judicial court be requested to give their opinion on the following question; and in case it is found impracticable to give such opinion before the adjournment of the present legislature, to report the same to the governor, to be by him promulgated:

"Question. Does the treaty concluded at Washington, August 9th, 1842, for the purpose of determining the boundaries between the territories of the United States and the possessions of Her Britannic Majesty, in North America, confer the elective franchise on foreign born persons residing on the disputed territory in the north-eastern portion of this state, at the time of the treaty, and not otherwise naturalized?"

BANGOR, February 25, 1878.

To the question proposed, we have the honor to answer as follows:

The preamble to the treaty of Washington recites that "certain portions of the line of boundary between the United States of America and the British dominions in North America, described in the second article of the treaty of peace of 1783, have not yet been ascertained and determined, notwithstanding the repeated attempts, which have been heretofore made for that purpose; and whereas it is now thought to be for the interest of both parties, that avoiding further discussions of their respective rights in this respect, under said treaty, they should agree on a conventional line in said portions of the said boundary, such as may be convenient to both parties, with such equivalents and compensations as are just and reasonable."

It is obvious that there was no definite and ascertained boun-

dary on that part of the line which divided the territory of the United States from the province of New Brunswick; for the first article of the treaty defines and establishes the boundary by a conventional line. The boundary as described in the treaty of 1783 gives place to a new and conventional line for agreeing to which there are to be such equivalents and compensations "as are deemed just and reasonable." The preamble to the treaty concedes that no line had been "ascertained and determined." It ignores the line of 1783 and establishes a new one. The line thus agreed upon is the line established by the treaty. It is the line and the only line recognized by both nations. Whatever portion of the disputed territory which had been under the jurisdiction of one government and became by the conventional line the acknowledged territory of the other, is territory acquired by the treaty, the right to which was thereby first and conclusively determined.

This view is further confirmed by the fourth article of the treaty, which provides that "all grants of land heretofore made by either party within the limits of the territory, which by this treaty falls within the dominions of the other party, shall be held valid, ratified and confirmed to the person in possession under such grants to the same extent as if such territory had by this treaty fallen within the dominions of the party by whom such grants were made." If, as the treaty admits, the line between the two countries from the monument to the river St. John had not been "ascertained and determined," whatever territory falls within the United States by the line agreed upon by the treaty of Washington, becomes by that treaty the territory of the United States, though it had previously been in the occupation of and under the jurisdiction of the British government. The jurisdiction of each government till changed by the treaty is acknowledged and its grants are confirmed. *Little* v. *Watson*, 32 Maine, 214. The rights of each party, as to the boundary line, are for the first time determined, and they are fixed and determined by this treaty alone.

No line having been previously "ascertained and determined," the conventional line thus agreed upon fixes the portion of the

disputed territory which each party shall acquire under the treaty. So far as it may have been under foreign jurisdiction, the right of such foreign government is now ceded to and acknowledged to be in that of the United States. Each nation cedes so much of its territory to the other as falls to the share of such other in accordance with the new line.

The territory in question being acquired by treaty, the government transferring it ceases to have any jurisdiction over it. It no longer owes protection to those residing upon it, and they no longer owe it allegiance. The inhabitants residing upon the territory transferred have the right of election. They may remove from the territory ceded if they prefer the government ceding the territory. If they elect to remain, their allegiance is at once due to the government to which the cession has been made, and they are entitled to the corresponding right of protection from such government. From being subjects of the queen of Great Britain they become citizens of the United States. The inhabitants of territory ceded from one government to another are collectively naturalized, and have all the rights of natural born subjects by mere force of the cession of the soil without the necessity of anything being expressed to that effect. Westlake Private International Law, 28. Thus, all persons who were citizens of Texas at the date of annexation became citizens of the United States by virtue of the collective naturalization effected by the joint resolution of congress of March 1, 1845, though no allusion to citizenship is found therein. These views, whenever the questions discussed have been involved, have been uniformly sustained. 13 Opinions of Attorneys General, 397.

By "foreign born persons," we understand are meant the inhabitants residing upon the disputed territory, subjects of the queen of Great Britain and owing allegiance to her, who by the treaty are now within the jurisdiction of the United States and subject to the government of Maine. Persons born within the actual territory of the state can hardly be regarded as "foreign born," and, if born within the territory of Maine under the temporary jurisdiction of a foreign government, their rights as American citizens would not be affected by such temporary jurisdiction, but upon its termination would be revived in full force.

We answer, therefore, that the treaty concluded at Washington, August 9, 1842, confers the elective franchise on the subjects of the queen of Great Britain residing on the disputed territory in the north-eastern portion of the state, at the time of the treaty and not otherwise naturalized.

JOHN APPLETON,
C. W. WALTON,
J. G. DICKERSON,
WILLIAM G. BARROWS,
CHARLES DANFORTH,
WM. WIRT VIRGIN,
JOHN A. PETERS,
ARTEMAS LIBBEY.

On a question proposed by the senate, February 19, 1878.

Ordered. That the justices of the supreme judicial court be requested to give their opinion upon the following question, in addition to the question asked in the order passed by the senate on the 16th instant, and to report the same to the governor, to be by him promulgated, to wit:

"Whether persons born upon said disputed territory within the present limits of this state, have or not the same elective franchises as persons born upon territory within the state over which the British government made no claim?"

BANGOR, March 11, 1878.

To the question proposed, we have the honor to answer as follows:

The territory in question belonged of right either to the jurisdiction of the government of Great Britain or to that of the United States.

If to the government of Great Britain, then its cession to that of the United States transferred the territory and the inhabitants residing thereon subjects of that government, who chose to remain, to the jurisdiction of the United States with all the rights of citizenship.

If the disputed territory belonged to the United States, then

the jurisdictional occupation of territory by a government to whom it does not rightfully belong ceasing, the latent right of the rightful government at once revives. The restoration by treaty, of territory wrongfully or erroneously occupied to its rightful sovereign carries with it by its silent operation the restoration of all rights of persons, which may have been in abeyance.

In other words, persons born upon the disputed territory within the present limits of this state have the same elective franchises as persons born upon territory within the state over which the British government made no claim.

JOHN APPLETON,
C. W. WALTON,
J. G. DICKERSON,
WILLIAM G. BARROWS,
CHARLES DANFORTH,
WM. WIRT VIRGIN,
JOHN A. PETERS,
ARTEMAS LIBBEY.

IN COUNCIL, February 12, 1878.

Ordered. That the opinion of the supreme judicial court be requested on the following questions:

"I. Is a person found in an unincorporated place, in need of relief, having no home or place of residence in said unincorporated place, but being there for some temporary purpose only, within the meaning of section twenty-two, chapter twenty-four, of the revised statutes?

"II. If such person is relieved by the oldest adjoining incorporated town, and he has no legal settlement in the state, and he has not lived in the town furnishing relief, is such town entitled to be reimbursed by the state for the relief furnished under the statute aforesaid, and act of 1874, chapter two hundred and thirty?"

BANGOR, June 20, 1878.

I have the honor to announce the following answers as the opinion of a majority of the justices of the supreme judicial court on the questions proposed:

I. A person found in an unincorporated place, in need of relief,

having no home or place of residence in such unincorporated place, but being there for some temporary purpose only, is not within the meaning of section 22, chapter 24, of the revised statutes.

II. If such person is relieved by the oldest adjoining incorporated town, and he has no legal settlement in the state, and he has not lived in the town furnishing such relief, such town is not entitled to be reimbursed by the state for the relief furnished under the statute aforesaid, and act of 1874, chapter 230.

JOHN APPLETON,
Chief Justice of Sup. Jud. Court.

IN COUNCIL, February 15, 1878.

Ordered. That the opinion of the justices of the supreme judicial court be requested on the following questions:

"Is a trial justice or a justice of the peace and quorum to be considered a justice of an inferior court, under the provisions of section two, of article nine, of the constitution of this state?

"Can a register of deeds properly be commissioned by the governor as a trial justice or a justice of the peace and quorum?"

BANGOR, June 20, 1878.

I have the honor to announce the following answers as the opinion of the majority of the justices of the supreme judicial court:

I. A trial justice or a justice of the peace and quorum is not to be considered a justice of an inferior court, under the provisions of section 2, of article 9, of the constitution of the state.

II. A register of deeds can properly be commissioned by the governor as a trial justice or a justice of the peace and quorum.

JOHN APPLETON,
Chief Justice of the Sup. Jud. Court.

IN MEMORIAM.

PROCEEDINGS OF THE WALDO BAR IN RELATION TO THE DEATH OF

HON. JONATHAN G. DICKERSON,

A JUSTICE OF THE SUPREME JUDICIAL COURT, HAD BEFORE THE COURT AT THE OCTOBER TERM, IN BELFAST, ON SATURDAY, OCTOBER 26, 1878.

HON. JOSEPH WILLIAMSON'S REMARKS.

May it please your Honor:—Since the last session of the court in this place, a sad bereavement has been sustained by the legal profession and by the public. The Honorable Jonathan Garland Dickerson, who was long a prominent member of this bar, and for fifteen years past an associate of your Honor upon the bench, died at his residence in this city on the first day of September, at the age of sixty-six years. Since the organization of our state, this is the first instance in which we have been called upon to mourn the removal by death of a judge of the supreme judicial court while in office. All the vacancies which have occurred have been caused by resignation.

Judge Dickerson was a native of New Chester, New Hampshire, where his father, a leading democratic politician of that state, always resided. He graduated at Waterville College, now Colby University, in 1836, taking high rank as a scholar, and as a ready and forcible debater. He was fortunate in his college instructors and contemporaries, several of whom have since attained high rank in the state and nation. After graduating, he taught school

in Bath, for a year, meanwhile pursuing the study of law with the Hon. Benjamin Randall of that city, which was completed with the Hon. Wyman B. S. Moor, at Waterville. He was admitted to the bar of Lincoln county in 1839, and commenced practice at Thomaston, then the residence of the distinguished advocates, Holmes, Ruggles and Farley. Subsequently he removed to West Prospect, now Searsport, in this county, from which, in 1842, he was chosen a member of the legislature. Through his influence the flourishing town of Searsport was incorporated from portions of Belfast and Prospect. From 1845 to 1849 he resided in Frankfort, now Winterport, having been appointed to an office in the custom house. In the fall of the latter year he became a citizen of Belfast. Under President Buchanan he was collector of this district from 1858 to 1861.

After establishing his residence in Waldo county, Judge Dickerson rose rapidly to a high position at the bar. He twice held the office of county attorney, once by executive appointment, and once by election. In 1862, he was appointed as a justice of the supreme judicial court, an appointment which was repeated in 1869, and again in 1876. He received the honorary degree of Doctor of Laws from his Alma Mater in 1865.

At the time of his death Judge Dickerson had completed nearly sixteen years of judicial life. During that period he was faithful and indefatigable in the discharge of his duties. Among the list of able and upright men who have honored the bench of Maine, his name will always be eminent.

At the request of the members of this bar, where our deceased brother so long and so successfully practiced, I now present resolutions which express their appreciation of his character as a man and as a magistrate, their respect for his memory, and their sympathy for his surviving family.

RESOLUTIONS.

WHEREAS, the members of the Waldo bar desire to record their appreciation of the estimable character and eminent services of our deceased brother, Jonathan Garland Dickerson, who for nearly forty years was a member of this bar, and for sixteen years

was an associate justice of the supreme judicial court of this state, and also to express our deep sense of the loss sustained by his sudden and lamented death, not only by his relatives and personal friends, but by the legal profession, the judiciary, and the people of the state; therefore

Resolved, That in the death of Judge Dickerson we recognize the loss of one who was an upright, patriotic and public spirited citizen, always ready to openly and vigorously espouse any cause which had for its purpose the public good, and whose life was an illustration of independence of character and devotion to country; who, as a lawyer, was a wise and safe counselor, an eloquent and earnest advocate, whose career at the bar was characterized by devotion to his clients, fidelity to the courts, and honor to himself; who, as a judge, was learned, able and independent; who, in the trial of causes, was actuated by the desire that justice should prevail; who brought to the investigation of legal questions great industry, keen powers of research and analysis, and the desire to decide rather upon principle than by precedent; and whose written opinions are models of rhetoric and legal learning.

Resolved, That to the family of the deceased we offer our sincere sympathy for the loss of one who was so faithful and affectionate in the relations of husband and father.

Resolved, That these resolutions be presented to the court for its concurrence, and that a copy thereof be transmitted to the family of the deceased.

REMARKS OF HON. ALBERT G. JEWETT.

At the request of my brethren of the bar and from the impulses of my own heart, I rise to second the motion of my brother Williamson, and will speak of the late Judge Dickerson as I think his life entitles him.

Although we graduated at the same college, he several years after me, I had no personal acquaintance with him until I met him at Augusta, a member of the house of representatives. Having myself professional engagements with the legislature, I had occa-

sion to remain there for some time, and during the session saw much of Judge Dickerson. The first I ever knew of him was in this wise: As I entered the house one morning, I heard a clear ringing voice and an effective utterance. Casting my eyes to the opposite side of the hall, I saw standing there a young man speaking in a manner to hold the attention of his associates and the entire assembly. I had occasion during my stay to make his acquaintance; and thence, to the day of his death, the most perfect intimacy and confidence existed between us.

He was then one of the strongest men in the house. There were questions before that body that engaged and developed his powers. There, too, I met brother Abbott for the first time, and learned that those two gentlemen represented the county of Waldo; two of the strongest men in that body, and as much respected as any there.

I there learned from Judge Dickerson that he had married the sister of my most intimate friend in college, and one of the best men of the country, Hon. George C. Getchell, of Waterville, in whose father's house I had almost felt myself at home while in college.

I knew his wife to be one of the most estimable young ladies of that beautiful village, and of that very excellent society. It was an additional link of friendship between us; for I had been treated in that family almost as an adopted son, growing out of my intimacy with George C. Getchell, who is now my only classmate living; and I believe that he and myself are the two oldest living graduates of that now flourishing institution.

When I commenced practice in this city, some eighteen years since, it was through the civility of Judge Dickerson that I was associated with him in my first cause, on the opposite side of which was Bro. Abbott.

It is, perhaps, not inappropriate for me to say that when the question of Judge Dickerson's appointment came up, it was made known to me by Governor Washburn, with whom I had been associated in Penobscot county as a member of the bar for many years, that he would be pleased to have a personal interview with me at Augusta; and I will now state the opinion I then expressed

to the governor, which events have confirmed: That Judge Dickerson was a high toned gentleman, of excellent private character, a good lawyer, a powerful advocate, with habits of industry and temperance (for that was a particular matter with the governor), which would cause him, in my judgment, to discharge the duties of that office in a manner creditable to himself, to the executive, to the bench and to the state. That opinion has been fully confirmed by the last sixteen years of Judge Dickerson's life upon the bench.

When Fort Sumpter was fired into, Judge Dickerson and myself had been members of the democratic party,—never had voted with any other. And that was an additional link between us, he as well as myself, as I understood, having voted for Douglass. We then changed our political relations, and I found him, regardless of every consideration except that of duty, prepared to rally with me in support of a man we did not vote for, and to sustain Abraham Lincoln under all circumstances in his efforts to break down the rebellion and to prevent the dissolution of the Union. He aided publicly in forming what was termed "The Union Republican Party;" a party pledged to crush out the rebellion; to preserve the union and its flag. Faithfully he performed that duty, and gave his voice, his influence and his efforts, in every way practicable, to the support of the country during the war.

As a judge, he developed those qualities of mind and character which might well have been anticipated from his position at the bar. He was not only able upon the bench, but he was faultlessly courteous to the bar. He was eminently industrious and laborious; and, in the words of Webster, died "with harness on." In plain phrase, I think Judge Dickerson died of overwork in his judicial labors of the sixteen years he sat upon the bench.

Some three years ago I discovered his failing health, and suggested to him that he was overworking; that his countenance indicated it, and asked him to spare himself. He had the idea that his constitution would bear him up.

While I speak in commendation of Judge Dickerson, there was one peculiarity that might be regarded by some members of the bar as a fault. He had an ardent nature and fixed convictions,

and growing out of this, I think there was a constitutional tendency in his mind to disclose, by way of argument, the impressions which he had in a case,—unconsciously; and I do not know but that was a merit. One of the ablest men I ever saw upon the bench was Judge Whitman, who never hesitated to present the views which he entertained, either in civil or criminal causes. Whether that is meritorious and wise, is not a question for me now; but no man was ever upon the bench who commanded my respect more fully than Judge Whitman. He was a living monument of integrity; but he had decided opinions, and like Judge Dickerson, had the courage to express them, and sometimes severely.

Judge Dickerson's death is a public calamity; a great loss to this city as well as to the state; and a loss to his family that no language can well express, it is irreparable. He leaves a widow, a lady by eminence of character, by education and by intercourse with society.

He was happy in his domestic relations; a kind husband and father. With his children he was playful as a child—a child among children. And as neighbors and citizens, himself and wife had no superiors among us.

In social relations, I know of no gentleman whom I should more miss than Judge Dickerson, or whose death I should more deeply lament.

I am gratified that the members of the bar have taken action upon this matter. Most of them are younger than he; still they have lived here long enough to understand and appreciate the personal and judicial character of the judge whose decease we all deplore.

COL. WILLIAM H. FOGLER'S REMARKS.

May it please the court:—Were I to speak of Judge Dickerson's eminent ability at the bar, or of his distinguished services as an associate justice of this court, or of his high merit as a citizen, I should only affirm what has been much more ably expressed than I could hope to do by my brethren of the bar who have preceded me. I desire, however, on this occasion to add my tribute to the memory of one who, for many years, was my friend.

It was my good fortune to be for several months a student in the office of Judge Dickerson; and I can never forget how much I owe to him for his faithful instruction, his wise counsel and his eminent example; and for these I shall always remember him with feelings of the most profound respect and gratitude. But it will be as a friend that I shall most cherish the memory of Judge Dickerson. He had the qualities in a remarkable degree which attached to himself friends, and retained their friendship ever after. From the time I entered his office as a student to the day of his death, I always knew him as one to whom I could freely go for counsel and aid, not only in matters pertaining to my profession, but in all the affairs of life; and in his death I mourn not only the loss of an eminent member of the legal profession and the judiciary, and a high-minded, public spirited, patriotic citizen, but the loss also of a warm hearted, sympathetic, personal friend.

By the younger members of this bar will his loss be especially felt. For them he was ever ready to open the rich stores of legal information which he had at command, and to assist them by his counsel in the intricacies of the profession.

While his death is so great a loss to the legal profession, to the state, to the judiciary and to the public generally, the members of this bar will miss, by his death, the presence of a good and wise counselor, a warm and generous friend, and the people of this city will lose one who took always the deepest interest in everything pertaining to the public good.

JUDGE BARROWS' REMARKS.

A little more than three months ago, when our associate and friend, to whom your resolutions relate, came to sit with us at the last law term in the Western District, it was plain that disease had laid a heavy hand upon him with depressing effect. Yet, for two weeks he was punctually in his seat at the hearing of arguments, and participated in our consultations with much of his customary vivacity; and when he was forced by increasing illness to return home before the close of the term, while I felt that a

painful and perhaps protracted season of suffering and weakness was before him, I did not dream that his official labors were ended, or that his fate was fixed to sink so rapidly to the grave. But the truth was, a deep seated and insidious malady had long been bearing him with resistless force and rapid strides towards "the house appointed for all living."

After his return home early in August he languished here surrounded by his affectionate and anxious family, who ministered to him in his last days with untiring devotion until the closing scene,

Unde neque exaudit voces, neque noscere vultus
Illorum potis est, ad vitam qui revocantes
Circumstant, lacrymis rorantes ora genasque.

Born in New Chester, N. H., November 5, 1811. Died in Belfast, September 1, 1878.

"Between two breaths what crowded memories lie:
The first short gasp, the last and long drawn sigh!"

The busy and teeming brain, the active energy in all that concerned the public good, the moral force and vigor of will that made him for a third of a century a man of note in this community and state, are no longer present with us.

The work which they were well fitted to accomplish has ceased. The rest by him well earned is already won. His record is made up. To us remains the privilege of reviewing the lessons taught by his life, and the duty of doing what we can to guard his memory from the tooth of time by placing upon record here, where so much of his life was passed, some testimony to his worth and our regard, so that haply those who succeed us may find therein incentives to like honorable effort for the common good.

You, brethren of the bar of Waldo county, have performed that duty faithfully and well. I have little to add except my cordial concurrence in your resolutions and remarks. Touching the manner in which he discharged the varied trusts confided to him you have spoken fully and unequivocally.

His temperament was ardent and impulsive, and he had a ready command of choice language and apt illustrations. Hence his success as an advocate was speedily assured. If it be true that

he was by nature best fitted for a successful career at the bar, it is also true that successive reappointments to the judicial office have proved that his adopted state did not the less recognize his discrimination and uprightness on the bench.

It is much to his credit that he commanded the most respect and the warmest regard where he was most familiarly known. In consultation his associates found him always frank, positive and independent in the expression of his opinions, but never discourteous. He took an honest pride and pleasure in a full discussion of the questions that were presented, and of the points that had impressed him, and enjoyed a little friendly and wholesome opposition. In the composition of written opinions his style was easy and unaffected, without sacrificing perspicuity to ornament. Among his early opinions, often cited and constantly affirmed, I call to mind those in *Davis* v. *Winslow*, vol. 51, p. 264, and *Small* v. *Danville*, *id.* 359. Other examples of his general style and the thoroughness of his research, which occur to me, may be found in vol. 54, pp. 55, 487, 581; vol. 57, pp. 100, 442; vol. 61, pp. 372, 388. Among the later cases in which he took much interest and upon which he bestowed efficient labor, may be mentioned that of *The Penobscot Bar* against an offending member, vol. 64, p. 140, and that of *Larrabee* v. *Sewall*, vol. 66, p. 376.

He was not merely, as the phrase goes, "liberally educated," but well educated, with a thorough practical training and mental discipline, such as I sometimes think the more vaunted recent systems of education fail to furnish.

He graduated at Waterville, in 1836. His Alma Mater recognized his abilities and attainments by conferring upon him the honorary degree of LL. D., in 1865.

He has fallen in the midst of his work—the first judge of the supreme court of this state who has died before the expiration of his term. Though he had a constitution naturally vigorous, and though until within a short time he moved with the quick and elastic step of youth, his years fall short of the time allotted in scripture to man. His sons, not yet grown up to man's estate, are bereft of the support and guidance which it was his delight to bestow; and the state loses a well-tried and faithful servant.

It is in vain to question the decrees of a Higher Power. "Thou changest his countenance and sendest him away,"—but what, or why the change, who can tell?

The questions propounded by the old poet-philosopher, Lucretius, have never been answered—

Cur anni tempora morbos
Apportant? Quare Mors immatura vagatur?

The doubtful refrain of the poet himself throws no light upon them.

Immutabile enim quiddam superare necesse est
Ne res ad nihilum redigantur funditus omnes.
Nam quodcunque suis mutatum finibus exit
Continuo hoc mors est illius quod fuit ante.

And the summing up of the Hebrew sage—"then shall the dust return to the earth as it was, and the spirit unto God who gave it"—is hardly more definite.

But this much we know full well. When a man has faithfully sought to do that which is right, and to improve the talents God gave him for the benefit of his kind, there remaineth about his memory a fame as well as a fragrance that no amount of success in the accumulation of the riches, so eagerly sought by most men of to-day, can ever give.

To his bereaved family Judge Dickerson leaves the best inheritance, an unspotted name; and to his friends, the pleasant memory of his kindly virtues.

"Time takes them home that we loved, fair names and famous
To the soft long sleep, to the broad sweet bosom of Death;
But the flower of their souls he shall take not away to shame us,
Nor the lips lack speech forever that now lack breath.
For with us shall the music and perfume that die not dwell
Though the dead to our dead bid welcome, and we, farewell."

Let the clerk enter the resolutions of the bar upon the records of the term; and in token of respect to his memory let the court stand adjourned for the day.

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DRAINS AND COMMON SEWERS.

1. **Damages.** To determine a plan of drainage and what drains shall connect in the streets of a city, is a judicial act of the officers for which the city are under no common law liability; though if the connection be unskillfully made, it is a ministerial act for which the city is liable in damages to a party injured thereby. *Darling* v. *Bangor*, 108.
2. **Implied grants** are not to be favored, and will not be held to exist except in cases of clear necessity. Thus, a right of drainage through the grantor's adjoining land will not pass by implication (the deed being silent upon the subject), unless such right is clearly necessary to the beneficial enjoyment of the estate conveyed, though a drain has already been constructed through the adjoining land, and is in use at the time of the conveyance. *Dolliff* v. *Boston & Maine*, 173.

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EASEMENT.

The non-user of an easement for twenty years is evidence of intention to abandon; but it is open to explanation, and may be controlled by proof that the owner had no such intention while omitting to use it. *Pratt* v. *Sweetser*, 344.

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2. **Notice by lis pendens.** Nor does the pendency of a real action in the name of the creditor against the debtor to recover the premises levied upon, the declaration containing the same erroneous description and none other, operate as a notice to a subsequent purchaser, that 32 instead of 29 was levied upon. *Ib.*

3. **Amendment.** The statute requires an execution against a town to run against the real estate situated therein, and against the personal property of its inhabitants. If issued only against real and personal property owned by the inhabitants of the town, the land of a non-resident proprietor cannot be legally sold thereon. The court can, in its discretion, render such sale valid by permitting an amendment of the execution. *Hayford* v. *Everett*, 505.

4. **Money collected** by an officer on legal process, while it remains in his hands is to be regarded as *in custodia legis* and not the subject of levy or attachment in any form. *Thus*, an officer, who has collected money on an execution, cannot apply it in satisfaction of another execution, although the latter is against the party for whom the money was collected, and both executions are in the officer's hands for collection at the same time.
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By the presiding justice. In an action against a sheriff for seizure of oxen, where the defense was a waiver by the plaintiff of the statute right of exemption, the presiding justice instructed the jury: "If the plaintiff gave his consent and said to the officer, 'there, all that property in that yard, comprising these oxen and those cows are mine, and you can take the oxen or any of the rest of them you see fit,' that would be a waiver, the action cannot be maintained," followed by a statement of the plaintiff's denial of this and of his version of the matter and "If this was all he said the jury would probably come to the conclusion there was no consent." *Held*, that this instruction was not a decision by the judge of any question of fact within the province of the jury. *Fogg* v. *Littlefield*, 52.

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EXTORTION.

Threatening letter. The respondent sent to the complainant a letter reading thus: "Freeport, Sept. 31 you may if you pleas you can enclose ten dollers in an letter cend it to Joseph Boothby Yarmouth me or els you will be enbited next tuesday or complained of me no fool —— demacratt head quarters." *Held*, that the letter is, *prima facie*, a "communication threatening to accuse another of a crime or offense with the intent to extort money," and that "enbited" may be regarded as written for the word "indicted."
State v. *Patterson*, 473.

FALSE DESCRIPTION.

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When an action will lie. Damages. D had a contract with the city, made while he was a member of the city government for renewing a bridge which necessitated the removal of the old structure, and had collected his materials at the point where they were to be used. A controversy arose between D and the city authorities as to the suitableness of the materials; and the defendant, who was city marshal, by direction of the city authorities, for this reason, notified D and his men not to remove the old bridge or proceed with the work. The defendant knew that the plaintiff was in the employ of D, but on his refusal to desist from the work, arrested him without a warrant, committed him to jail until a warrant could be procured, and took him before the municipal court on a charge of obstructing the highway by removing the planking from the bridge. *Held*, that, inasmuch as the city authorities at the time of the arrest had not claimed that the contract was void because D was a member of the city government, or given any notice to that effect, but were insisting on its performance, the contract could not be regarded as an absolute nullity, and that although the use of so much force as might be necessary to prevent the plaintiff from proceeding with the work might be justified, the arrest and imprisonment of the plaintiff without legal process was not justifiable. But *Held*, further, that under all the circumstances of the case, the damages assessed ($500) were grossly excessive. *Moore* v. *Durgin*, 148.

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1. **Division by fence viewers.** Two or more several owners and occupants of lands adjoining the land of another can not legally join in an application to fence viewers for a division of the partition fences. *Briggs* v. *Haynes*, 535.
2. To make valid the division and impose upon a party the burden of building the part of the partition fence assigned to him, within the time fixed by the fence viewers, it must appear that they delivered to such party their assignment in writing at the time it was made. *Ib.*
3. Before a legal demand can be made on a party for the value of the part of the partition fence assigned to him by fence viewers, which he failed to build in the time fixed by them, and which was built by the adjoining owner and occupant, it must appear that such fence has been duly adjudged

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1. **Justification.** A defendant in a libel suit may justify as to a part of the libel without justifying all of it, for the purpose of reducing the damages recoverable against him. *Stacy* v. *Portland Publishing Co.* 279.
2. **Interpretation.** A statement in a libelous article, that the plaintiff was "arrested for drunkenness," is not an assertion that he was in fact drunk, but only that he was arrested upon a charge of drunkenness. *Ib.*
3. **What is libelous.** There is a well settled distinction between written or printed and mere verbal slander in respect to its actionable character. Much, which if spoken would not be actionable without averment of extrinsic facts or allegation and proof of special damage, when written or printed is in itself a substantial cause of action. *Tillson* v. *Robbins*, 295.
4. **Averments.** In a suit for libel in a newspaper, though no special damage is alleged, and no averment of such extrinsic facts as might be requisite to make the article published import a charge of crime against the plaintiff are made, the action is nevertheless maintainable if the published matter is such as, if believed, would naturally tend to expose the plaintiff to public hatred, contempt or ridicule, or deprive him of the benefits of public confidence and social intercourse. *Ib.*
5. The defendant published in a newspaper the following words: "The Hurricane Vote. Again we have to chronicle most atrocious corruption, intimidation and fraud in the Hurricane island vote, for which Davis Tillson is without doubt responsible, as he was last year." *Held*, that the publication was actionable without extrinsic averments to communicate its precise import, and without any allegation of special damage. *Ib.*

LIEN.

Against an heir. The lien created by R. S., c. 75, § 11, can be enforced only "by suit and attachment of the share within two years after administration granted" on the estate from which the share descends.
Fenderson v. *Belcher*, 59.

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1. **Death of party.** An action of assumpsit, for the price of goods sold and delivered, commenced more than six years after the cause of action accrued, and more than two years after the administrator against whom it was commenced was appointed, is barred by the provisions of R. S., c. 81, § 88, whether such administrator has given notice of his appointment or not.
Lancey v. *White*, 28.
2. The time within which such action must be commenced may be shortened in many cases, if the representative of the deceased debtor gives the legal notice of his appointment; but it cannot be indefinitely prolonged by his failure to give it. *Ib.*

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1. **Powers of court.** Under the act of 1877, c. 218, § 36, this court has no power to proceed and reduce the deposits of a savings bank, if it appears, upon an examination of its assets and liabilities, and from other evidence, that it has exceeded its powers, or failed to comply with the rules, restrictions and conditions provided by law for its government in the management of its affairs; notwithstanding such violation of law has not caused nor contributed to its insolvency. *Newport Savings Bank Case*, 396.
2. A violation of the rules, restrictions and conditions provided by law for the investment of the funds and deposits of the bank, by the trustees, is a violation of such rules, restrictions and conditions by the corporation, within the meaning of said act. *Ib.*
3. The court has no power to order the sums to which the deposits are reduced to be paid by installments. *Ib.*
4. Form of a decree. See statement of case. *Ib.*
5. **Taxation of.** The trustees of the defendant bank, on April 29, 1876, voted to close the bank to paying or receiving deposits for the present, and arranged with the depositors to scale down their deposits 12½ per cent, the depositors exchanging their books for new ones, and to credit them with 87½ per cent on their deposits, as of April 29. These arrangments being consummated, the bank, on November 14, 1876, resumed business; and its treasurer returned the reduced amount to the state treasurer, upon which a tax was assessed. *Held*, that the assessment was valid and binding; that the tax having been legally assessed and due, a right of action existed by statute for its recovery, and that the repeal of the act, under which the assessment had been made, did not vacate a previous assessment duly made under then existing statutes, for the recovery of which a right of action was given.

Maine v. *Waterville Savings Bank*, 515.

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See CONSTITUTIONAL LAW, 1.

SEAMEN.

Fishermen. Although the amount which a seaman is to receive for his labor is made to depend upon the amount of fish caught, still, he is not on that account a partner in the enterprise, and need not join any of the crew with him as plaintiffs in an action to recover his share of the proceeds. *Holden* v. *French*, 241.

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SET-OFF.

Where it equals the demand. In an action on account annexed, where a set-off was filed by defendant and a counter set-off by plaintiff, the presiding justice instructed the jury, "If, upon the whole account, you find as much due the defendant as there is due the plaintiff, your verdict will be for the defendant." *Held*, erroneous, and that the verdict should be, "nothing due either party." R. S., c. 82, § 60. *Morgan* v. *Hefler*, 131.

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1. **Debts.** The owners of a vessel are liable *in solido* for its debts. *Robinson* v. *Stuart*, 61.
2. **Fishing vessel.** When a fishing vessel is let to the master on shares, and he mans her, and victuals her, and has the possession and control of her, he is *pro hac vice*, her owner, and liable, as such, to the seamen for their wages. *Holden* v. *French*, 241.

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TAX.

1. **Notice to bring in lists.** Since the passage of the statute, R. S. of 1841, c. 14, § 88, defining the remedy for a party illegally assessed, which is now embodied in R. S. of 1871, c. 6, § 114, the requirement in R. S., c. 6, § 65, that the assessors shall give notice to the inhabitants of a town to bring in their lists of taxable property before proceeding to make an assessment, is no longer a condition precedent to a valid assessment. *Boothbay* v. *Race*, 351.
2. An action may be maintained by a town against a tax payer to recover the amount of his tax without proof that this direction with regard to the proceedings of the assessors has been complied with. *Ib.*
3. **Sale for non-payment.** The proceedings which work a forfeiture of lands to the state for non-payment of taxes and the steps in making a sale by the state are to be construed strictly, in a controversy between a purchaser from the state and the original owner. *Tolman* v. *Hobbs*, 316.
4. A record of the state treasurer that reads thus: "Previous to said sale, I caused notice of the time and place of sale, and lists of said tracts intended for sale, with the amount of said unpaid taxes, interest and costs, on each parcel, to be published three weeks successively as follows, viz: 1. In the Kennebec Journal, the state paper, a list of all said tracts. 2. In the Ellsworth American, a newspaper printed in the county of Hancock, a list of all said tracts which lie in that county," does not show that he published in such papers the amount of such taxes, &c., &c., but only a list of the lands taxed. *Ib.*
5. **Alabama claims.** An award by the committee of arbitration on the Alabama claims does not constitute a debt due to be taxed, under the provisions of R. S., c. 6, § 5, until an appropriation is made by congress for the payment of the award. *Bucksport* v. *Woodman*, 33.

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8. The will says: "I place in the hands of M bank shares to hold in trust until my son arrives at the age of thirty-five years, when my son comes in full possession of said bank stock." *Held*, that the shares vested in the son on the death of the testatrix to be held in trust for his benefit till he should arrive at the age named. *Verrill* v. *Weymouth*, 318.
9. The will gives M two dollars per week for life and makes B residuary legatee, and says: "Should B die without issue, all my property is to be equally divided between my mother, brothers and sister." B died leaving a wife and only son, who also died before any distribution of the estate. *Held*, that the personal property in the hands of the administrator vested in B on the death of the testatrix, charged with the annuity to M. *Ib.*
10. The will says: "I give my house to A during her life; after her decease to B during his life; and after his decease to his children, if any he have; otherwise, to my legal representatives." B died leaving a wife and an infant son, who died before any settlement of the estate. *Held*, that the infant son took a vested remainder in fee simple, in the house, and on his death it descended to his mother. *Ib.*
11. The will says: "I give and devise my estate, real and personal, as follows: To each and all my children an equal part or proportion of all and singular my property; to (naming two sons and five married daughters) one-seventh part to each of them and their heirs, with the proviso, that the parts and proportions hereby devised and bequeathed to (naming four of the daughters) and their heirs, instead of paying into their hands, is to go into the hands of J S and G M P, whom I hereby appoint trustees, to hold, manage and dispose of said parts, and the property received therefor, for the use and benefit of said (naming the four daughters) and their heirs, according to the discretion of said trustees. *Held:* 1, That the trust for the use and benefit of the heirs of his daughters indefinitely, as well as for the use and benefit of his daughters, was void for perpetuity; 2, That, the trust being void, the absolute gift remained in full force and unimpaired. *Slade* v. *Patten*, 380.
12. A devise, if limited to vest within a life or lives in being and twenty-one years, adding, however, in case of an *enfant en ventre sa mere*, sufficient to cover the ordinary period of gestation, is good; but such limitation, to be valid, must be so made that the estate devised not only may, but must necessarily, vest within the prescribed period. *Ib.*
13. In a subsequent clause, the will says: "In case that S E (one of the daughters named) should die before her husband and leave no children, I will that her part, after the expiration of six years, be transferred by the trustees over to the parties of the six other heirs, and be equally divided between them." *Held:* That this special clause is so connected with and dependent upon the trust clause, if that fails, this will fail with it; that any other construction would defeat the prevailing purpose and manifest intent of the will, which was to give to each and all of his children "an equal part and proportion of all and singular his property." *Ib.*

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