REPORTS

OF

CASES IN LAW AND EQUITY

DETERMINED BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

By DAVID R. HASTINGS,
REPORTER TO THE STATE.

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JUDGES

OF THE

SUPREME JUDICIAL COURT,

DURING THE TIME OF THESE REPORTS.

HON. JOHN APPLETON, LL. D., CHIEF JUSTICE.

HON. CHARLES W. WALTON.

HON. WILLIAM G. BARROWS.

HON. CHARLES DANFORTH.

HON. WILLIAM WIRT VIRGIN.

HON. JOHN A. PETERS.

HON. ARTEMAS LIBBEY.

HON. JOSEPH W. SYMONDS.

ATTORNEY GENERAL,

HON. LUCILIUS A. EMERY.

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CASES

IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

JOHN N. STEWART *vs.* BELFAST FOUNDRY COMPANY.

Waldo. Opinion December 27, 1878.

New trial. Harmless error. Verdict. Exclusion of evidence.

A harmless error is no ground for granting a new trial.

A new trial will not be granted for the erroneous admission or exclusion of evidence, if the finding of the jury is such as to render the error harmless.

In an action to recover the contract price for covering a building with gravel roofing, a recoupment was claimed in defense for an alleged breach of warranty and for bad work. Evidence that the roof leaked having been introduced, an offer was made to show the effect of the leakage upon the machinery and other property in the building, and was excluded. The jury returned a verdict for the plaintiff for the full amount of the contract price. *Held*, that the finding necessarily negatived the plaintiff's liability for the leakage complained of, and evidence of its effect upon the building, or the property within it, or the chances for renting it, became immaterial and its exclusion harmless.

ON MOTION AND EXCEPTIONS.

ASSUMPSIT, for labor and materials on the roof of the defendants' foundry.

The plea was the general issue. The verdict was for the plaintiff, for the contract price and interest from the date of the writ.

The defendants moved to set the verdict aside, and also alleged exceptions stated in the opinion.

J. Williamson, with *A. G. Jewett*, for the defendants.

W. H. McLellan & G. E. Wallace, for the plaintiff.

WALTON, J. A harmless error is no ground for granting a new trial. A new trial will not be granted for the erroneous admission or exclusion of evidence, if the finding of the jury is such as to render the error harmless. If a defendant's liability for an injury is negatived, evidence relating solely to the amount of damage becomes immaterial, and its exclusion harmless. This rule applies to plaintiffs as well as defendants. If a defendant attempts to recoup the plaintiff's damages, and his right to recoup is negatived, the erroneous exclusion of evidence relating solely to the amount of the recoupment becomes harmless, and will be no ground for granting a new trial.

The error complained of in this case, is of this description: It is an action to recover the contract price for covering a building with what is called the New England Gravel Roofing. In defense a recoupment was claimed for an alleged breach of warranty and for bad work. Evidence that the roof leaked having been introduced, an offer was made to show the effect of the leakage upon the machinery and other property in the building, and the opportunities for renting it. The evidence was excluded. For what reason, does not appear. The question is whether its exclusion is sufficient ground for a new trial. We think not. The jury returned a verdict for the plaintiff for the full amount of the contract price of the work done by him, and interest from the date of the writ, deducting only what had already been paid. This finding necessarily negatives the plaintiff's liability for the leakage complained of, and evidence of its effect upon the building, or the property within it, or the chances for renting it, became at once immaterial and its exclusion harmless. The exceptions must therefore be overruled.

The motion for a new trial upon the ground that the verdict was against the weight of evidence, was expressly waived at the

argument of the case before the law court, and need not be considered. The exceptions only were relied upon.

Motion and exceptions overruled.
Judgment on the verdict.

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

JOHN R. VOTER *vs.* AMOS HOBBS *et als.*

Franklin. Opinion December 30, 1878.

Mills. Flowage. Dams.

A mill owner, having a twenty years prescriptive right to flow the land of another, has the right to keep up the water as high as it would be raised by a dam of the same height as the dam which he and those under whom he claims title have kept up and maintained for that period, even though the water is thereby kept more uniformly, and has flowed to a greater height than by the dam before it was repaired; and even though the land is flowed for a longer period of the year.

The claim of the mill owner depends upon, and is limited by the effective height of the dam according to its structure and operation when in repair, and in good order.

Variations in the water, produced by greater or less tightness of the dam, or greater or less economy in the use of the water, or changes or improvements in the machinery and in the wheels used, are not to be taken into account.

ON EXCEPTIONS.

COMPLAINT for flowage.

S. C. Belcher, for the plaintiff.

H. L. Whitcomb, for the defendants.

APPLETON, C. J. This was a complaint under the statute for the flowage of the plaintiff's land by the defendants' mill dam.

The defendants claimed by their pleading a prescriptive right to flow the land of the plaintiff in the same manner and to the same extent as they were flowed when this complaint was commenced.

The issue to the jury was on the defendants' right by prescription and it was found in their favor.

The court instructed the jury that the defendants "are entitled to keep up the water as high as it would be raised by a dam of the same height as the dam which they and those under whom they claim title had kept up and maintained for a period of twenty years before that time, even though the water was thereby kept more uniformly and flowed to a greater height than by the dam before it was repaired; and even though the complainant's land was flowed for a longer period of the year; that the claim of the mill owners depends upon, and is limited by, the effective height of the dam according to its structure and operation when in repair and in good order; and that variations in the water produced by greater or less tightness of the dam, or greater or less economy in the use of the water, or changes or improvements in the machinery and in the wheels used, are not to be taken into account."

The effective height of the dam is the height which flows. That is what is to govern, and that is precisely what the presiding justice instructed the jury was to govern. The amount of land flowed would depend on the effective height of the dam, and the right to flow would be limited by it.

Dams need repairing. They vary in tightness. The water may be used with more or less economy, at different times, depending upon the exigencies of business. As was remarked by Shaw, C. J., in *Ray* v. *Fletcher*, 12 Cush. 200, "although the water actually raised by it (the dam) may to some extent vary from one season, or one year, to another, owing to the tightness of the dam, the mode of using the water, the different seasons, as being dry or wet, and the like, yet these considerations are too variable and uncertain to be adopted or relied on, as the basis of a right acquired by grant or prescription."

The presiding justice further instructed the jury as follows: "When you come to acquire a right to maintain a dam for the purpose of ponding water to drive mills and the result is you flow somebody's else land, and you keep doing that for twenty years, then what is your right?

"Not the exact right of flowing just as much land as you do

absolutely flow, but just as much as the dam which you use, when in good condition, will flow; so much land as the dam which you maintained twenty years will in effect flow when it is in good condition."

The interrogatory proposed assumes an acquired right to flow by prescription as existing. The prescriptive right having been acquired, the right to flow with a dam of the prescribed effective height necessarily follows. It is not what the dam may absolutely flow at a particular time, but what the dam in good condition ordinarily will flow. The dam is assumed to be in good condition, and being in such condition, the flowage is what must result from such condition—unaffected by the changes of the seasons or the occasional leakage of the dam.

Exceptions overruled.

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

STATE *vs.* DANIEL M. GOSS.

Androscoggin. Opinion December 30, 1878.

Officer—de facto. Indictment—form of. Larceny. Embezzlement. Words. Officer.

An officer *de facto* is punishable for malfeasance in office, the same as an officer *de jure.*

A *de facto* collector of taxes is punishable for the embezzlement of money which comes into his possession by virtue of his office, the same as if his election or appointment was in all respects legal and formal.

An indictment which avers that the accused, "being a public officer, to wit: The collector of taxes of the town of M," did embezzle, etc., sufficiently describes the official character of the accused, without stating how he came into the office, or that he was duly qualified to act by taking the oath and giving the bond required by law.

The term "officer" is generic, and when used in a statute, and there is nothing in the context, or in reason, or authority, to indicate that it is used in a different sense, may properly be held to include all classes of officers —officers *de facto* as well as officers *de jure.*

The revised statutes of Maine (c. 120, § 7), declare that, if a "public officer" embezzles, etc., he shall be deemed guilty of larceny, and punished accordingly. *Held,* that the term "public officer" includes officers *de facto* as well as officers *de jure.*

Form of indictment held good on demurrer. See statement of the case.

ON EXCEPTIONS.

INDICTMENT, "that Daniel M. Goss, of Minot, in the county of Androscoggin aforesaid, on the first day of April, in the year of our Lord one thousand eight hundred and seventy-four, at Minot aforesaid, in the county of Androscoggin aforesaid, then and there being a public officer, to wit: The collector of taxes of the town of Minot aforesaid, did by virtue of his said office and whilst he was employed in said office have, receive and have in his possession and under his control certain money to a large amount, to wit: To the amount of fifteen hundred dollars, and of the value of fifteen hundred dollars, of the property of the inhabitants of the town of Minot aforesaid, and then and there the money aforesaid did unlawfully embezzle and fraudulently convert to his own use; and so the jurors aforesaid, upon their oaths aforesaid, do say that the said Daniel M. Goss in manner and form aforesaid the aforesaid money of the property of the inhabitants of the town of Minot

aforesaid, feloniously did steal, take and carry away, against the peace of said state, and contrary to the form of the statute in such case made and provided."

There was also a second count similar in form to the first, stating the time as January 9, 1874, and the sum as $2,200, and closing as follows: "And which said money did come into his possession and under his control by virtue of his said office, and of his employment as a public officer as aforesaid of the town of Minot; and then and there the money aforesaid did unlawfully and fraudulently embezzle, and unlawfully and fraudulently convert to his own use; and so the jurors aforesaid, upon their oaths aforesaid, do say that the said Daniel M. Goss in manner and form aforesaid, the money aforesaid, feloniously did steal, take and carry away, against the peace of said state, and contrary to the form of the statute in such case made and provided."

To this indictment, the defendant's counsel demurred specially, "because it" was "not alleged in said indictment that the said Goss was duly chosen a collector of taxes of the town of Minot, by a major vote of the qualified voters of said town, at a meeting thereof held in the month of March," and for other causes set out with similar fullness, in substance that it was not alleged that he was appointed collector, or received a warrant, or gave bond, or took the oath, or was duly qualified.

The presiding justice overruled the demurrer, and leave being granted to plead over, the defendant pleaded not guilty. Upon the trial, the state introduced the record of the town of Minot to prove the election and qualification of the respondent as collector of taxes, of which the following is all that is essential: "March meeting, 1873. To the inhabitants of the town of Minot. Greeting: In the name of the state of Maine, we hereby notify and warn the inhabitants of the town of Minot, qualified to vote in town affairs, to assemble at the hall of John D. Curtis in said town, on the tenth day of March inst., at ten o'clock in the forenoon, to act on the following articles, to wit: 4th. To choose all necessary town officers for the ensuing year. Given under our hands this 1st day of March, A. D. 1873. Wm. Lowell, S. J. M. Perkins, E. L. Bailey, selectmen of Minot.

"Return. Minot, March 10th, 1873. By standing vote of the town, we have notified and warned the inhabitants of said town, qualified to vote in town affairs, to assemble at the time and place and for the purposes therein mentioned, by posting up copies of said warrant at the post offices at Minot, West Minot, and Mechanic Falls, being public and conspicuous places in said town, on the 1st day of March inst., being seven days before the meeting. Wm. Lowell, S. J. M. Perkins, E. L. Bailey, selectmen of Minot.

"At a legal meeting of the inhabitants of the town of Minot, qualified to vote in town affairs, holden at the hall of John D. Curtis, in said town, on the 10th day of March, in the year of our Lord one thousand eight hundred and seventy-three, at ten o'clock in the forenoon, the following votes were passed: Voted to take from the table the election of collector of taxes and constable, and D. M. Goss was chosen, by ballot, collector of taxes of the town of Minot, and constable for the ensuing year. Androscoggin, ss. April 9, 1873. Personally appeared Daniel M. Goss and took the oath necessary to qualify him to serve as collector of taxes for the town of Minot for the ensuing year according to law. Before me, Gideon Bearce, town clerk."

No other record evidence relating to the appointment and qualification of the respondent was introduced.

No evidence was introduced to show that the town of Minot had appointed a different mode for warning its meetings from that prescribed by statute.

The state introduced the official bond of the respondent as collector of taxes of the town of Minot for the year 1873, also the warrant from the assessors to D. M. Goss as collector of taxes for 1873. There was evidence showing that the defendant had acted as collector of taxes for the year 1873.

The defendant requested the following instructions: I. That if the town of Minot has appointed by vote in legal meeting a different mode of notifying its meetings from that prescribed by statute, it is incumbent upon the government to show that the meeting of March 10th, 1873, was called in accordance with the mode appointed by said town.

II. That the return of the selectmen, upon the back of said warrant, is not evidence to show that said meeting was called in accordance with the mode appointed by said town.

III. That in the absence of proof that the town has appointed a "different mode," it will be presumed that the town has not appointed a "different mode."

IV. That the warrant and return of the Minot town meeting of March 10, 1873, was not in accordance with the statutory regulations, and do not show that meeting to be legal.

V. That whether the town of Minot has appointed a different mode of warning town meetings from that prescribed by statute or not, the warrant should have been directed to some constable of the town of Minot, or some individual by name, and that, not being so directed, the meeting was illegal.

VI. That the provision in R. S., c. 3, § 7, that towns may by vote in legal meeting, appoint a different mode, &c., does not refer back to § 6 of said chapter, stating to whom warrants may be directed; but only to the method by which such constable or individual shall notify such meetings.

VII. That, in order to make said meeting a legal one, the return on the warrant must show that an attested copy, &c., was posted, &c., and the return not showing the same, the meeting must be held illegal.

VIII. That a warrant directed to the "Inhabitants of the town of Minot," and signed by the selectmen of Minot, is not a legal warrant, and is void; and that the statute confers no authority upon the selectmen, as such, to warn a town meeting by a warrant over their hands, even if the town by vote, &c., appoint such a mode.

IX. That if the town of Minot had appointed a "different mode" to warn meetings from the one prescribed by statute, the government must show affirmatively what that "different mode" was, and that the meeting of March 10, 1873, was warned in accordance with such mode.

X. That the return upon the warrant must show what the mode appointed by the town was, and that its requirements have been particularly observed.

XI. That in order to convict this respondent upon the criminal charge of having embezzled, &c., the money of the town of Minot, in his possession or under his control by virtue of his office of collector of taxes of said town, (he being alleged to be collector of taxes) the government must show affirmatively that the respondent was legally appointed or chosen to the said office; and if chosen that it was at a March meeting of said town, in all respects, legally warned, notified and held.

All of which requested instructions the presiding justice declined to give. The verdict was guilty; and the defendant alleged exceptions.

A. R. Savage, of the firm of Hutchinson, Savage and Hale, closed an exhaustive argument, as follows: We say that this offense is one created by statute, which is to be interpreted strictly; that the offense as charged is one which can be committed only by a public officer; that the statute knows no public officer *de facto;* it presumes all the officers created by it to be officers *de jure;* that this respondent was either a public officer, or he was not; that there is no half way ground upon which the respondent can be placed, and still be liable as a public officer; that the respondent is not estopped from showing that he was not a public officer; and that being indicted upon a statute as a public officer, the indictment must state all the facts and circumstances which constitute the statutory offense; and upon the trial, the proof as well as the allegations must bring the case strictly within the statute. *Wood* v. *People*, 53 N. Y. 511. *Commonwealth* v. *Rupp*, 9 Watts, 115.

W. H. White, county attorney, for the state, said that he drew the indictment against a public officer under the statute and had followed the terms of the statute and the precedents; that it was sufficient that he was an officer *de facto;* that whether this was so or not, the indictment was good; that the evidence showed him an officer *de jure* as well as *de facto;* that assuming the meeting was legal, he was chosen by ballot, sworn, gave the necessary bond and received the assessor's warrant. To the point that there was no proof of an election, at a meeting duly called, because

there was no proof that the selectmen were authorized to serve and return the warrant, he replied there was no proof to the contrary; the presumption was that all things were correctly done according to R. S., c. 3, § 7. He stated, as matter of fact, that the town of Minot appointed that mode of calling its meetings more than twenty years ago, and so far as its records show, its meetings have been uniformly called in this mode down to the present time.

WALTON, J. This is an indictment against a collector of taxes for embezzlement. Two questions are presented; one, whether the indictment is sufficient; the other, whether an officer *de facto* is punishable for embezzlement, the same as an officer *de jure*.

The only objection made to the indictment is, that it does not allege that the defendant was duly elected or appointed a collector of taxes; or that he was duly qualified as such. The indictment avers that he was a "public officer, to wit: The collector of taxes of the town of Minot." And that, by virtue of his office, he received and had in his possession money, which he embezzled, etc. It is claimed that this is not sufficient; that it should be averred how he came into the office, and that he was duly qualified to act as collector, by taking the oath and giving the bond required by law. We think the indictment is sufficient as it is. It is conformable to approved precedents, and is the same in form as the one in *State* v. *Walton*, 62 Maine, 106. 1 Whar. Prec. Indictments, form 460. 2 Arch. Crim. Law, 1362-3.

The next question is whether an officer *de facto* is punishable for embezzlement the same as an officer *de jure*. The question arises in this way: The warrant for the town meeting at which the defendant was elected was posted by the selectmen, (not a constable) and they state in their return that they did so by virtue of a "standing vote of the town;" but the standing vote was not produced and read in evidence at the trial; and it is claimed that for this reason the town meeting does not appear to have been legally called; that the defendant does not appear to have been legally elected; that he must, therefore, be regarded as no more than an officer *de facto;* and that an officer *de facto* is not punishable for embezzlement. Passing over the question of the legal-

ity of the defendant's election, we come to the question whether an officer *de facto* is liable for embezzlement, the same as an officer *de jure*.

We think he is. The statute, which provides for the punishment of embezzlement, declares that, if a "public officer" embezzles, etc., he shall be deemed guilty of larceny, and be punished accordingly. R. S., c. 120, § 7.

The word "officer" is defined in Webster's Dictionary as "one who holds an office; a person lawfully invested with an office," etc. The latter branch of this definition would seem to embrace only officers *de jure;* but the first is clearly comprehensive enough to include officers *de facto*. "One who holds an office." An officer *de facto* as clearly holds an office as an officer *de jure*. The term "officer" is generic, and when used in a statute, and there is nothing in the context, or in reason, or authority, to indicate that it is used in a different sense, we think it should be held to include all classes of officers—officers *de facto* as well as officers *de jure*. There is nothing in the context of the statute cited to indicate that the word was used in a different sense. And, surely, no good reason can be given why an officer *de facto* should not be punished for embezzlement as well as an officer *de jure*. The moral wrong, the wickedness of the act, must be as great in the one as in the other; and if we punish the latter and allow the former to escape, we make it an object for men to obtain office by illegal rather than legal means; thus encouraging instead of repressing illegalities. Nor are we aware of any authority for such a distinction. It is said by Hawkins (and he has always been held as a very reliable authority) that an officer *de facto* is punishable the same as an officer *de jure*, "for that the crime is in both cases of the very same ill consequence to the public, and there seems to be no reason that a wrongful officer should have greater favor than a rightful officer, and that for no other reason but because he is a wrongful one." 3 Hawk. P. C. c. 19, §§ 23, 28.

And the law is so laid down by other text writers. 1 Arch. C. L. 413-4. Roscoe's Crim. Ev. 6. 1 Bishop's C. L. § 416. 2 Bishop's C. L. § 392.

And in the adjudged cases. *State* v. *Maberry*, 3 Strobh. 144. *State* v. *Sellers*, 7 Rich. 368. *Diggs* v. *State*, 49 Alabama, 311.

Exceptions overruled.

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

EBENEZER BRAGDON *vs.* WILLIAM T. HARMON.

Androscoggin. Opinion December 30, 1878.

Amendment of description of plaintiff.

The plaintiff in his writ described himself, executor of, etc., and declared on a promise to himself, not to his testator. *Held*, that it was a suit in the private and individual capacity of the plaintiff; that the words "executor,' etc., were but *descriptio personæ*, and that an amendment by striking them out did not change the legal status of the parties. *Held*, also, that to constitute a suit in his representative capacity, the plaintiff must not only describe himself as an executor, but he must aver that the promise was made to the testator, in his life-time, or that it was made to the plaintiff as executor. An averment that it was made to the plaintiff, executor, without saying as executor, is not sufficient.

ON EXCEPTIONS, from the municipal court of the city of Lewiston.

ASSUMPSIT, wherein the defendant was summoned to appear [etc.,] and answer to Ebenezer Bragdon of [etc.,] executor of the last will and testament of George Bragdon, late [etc.]. In a plea of the case [etc.,] then and there in consideration thereof, promised the plaintiff to pay him the same on demand. Then followed an account annexed for a lot of standing grass on the George Bragdon place, in Durham. The amendment allowed, and the exceptions are stated in the opinion.

L. H. Hutchinson, *A. R. Savage & F. D. Hale*, for the defendant.

A. P. Moore, for the plaintiff.

WALTON, J. This is an action of assumpsit to recover a balance claimed to be due for some grass which the plaintiff had sold to the defendant. The grass grew upon land which had

recently become the property of the plaintiff, under the will of George Bragdon; and, being executor of the will, the plaintiff so described himself in his writ, and in the account thereto annexed. At the trial, in the municipal court of the city of Lewiston, the judge found, as matter of fact, that the grass belonged to the plaintiff, in his individual, and not in his representative capacity. The plaintiff then moved for leave to amend by striking out the words which described him as an executor, and the amendment was allowed. The case is before the law court on exceptions to the allowance of this amendment. The defendant contends that the amendment changed the legal status of the parties, and required him to answer to Ebenezer Bragdon, instead of the estate of George Bragdon, and that such an amendment is not legally allowable.

The defendant is in error in assuming that the amendment changed the legal status of the parties. True, the plaintiff described himself in his writ as an executor, but the cause of action is described as one accruing to him in his own right. He does not aver that the promise, on which the action is brought, was made to the testator; nor that it was made to him, as executor. It is described as one made to the plaintiff himself, and upon a consideration moving from him. A suit, in which the cause of action is thus described, is a suit in the private and individual capacity of the plaintiff. To constitute a suit in his representative capacity, the plaintiff must not only describe himself as an executor, but he must aver that the promise was made to the testator, in his life-time, or that it was made to the plaintiff, as executor. An averment that it was made to the plaintiff, executor, without saying that it was made to him, as executor, is not sufficient. *Brigden* v. *Parkes*, 2 Bos. & Pul. 424. *Henshall* v. *Roberts*, 5 East. 150. *Webb* v. *Cowdell*, 14 M. & W. 820. *Spurgen* v. *Robinet*, 4 Bibb. (Kentucky), 75.

The words, which in the writ in this suit described the plaintiff as an executor, were as unimportant as if they had described him as a farmer, or a mechanic, or a justice of the peace. Striking them out in no way affected the cause of action, or the proof necessary to support it, or the capacity in which the plaintiff sued.

The amendment was therefore entirely harmless; and the defendant was not, and could not have been aggrieved by its allowance.

Exceptions overruled.

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

INHABITANTS OF ELLIOT *vs.* SYLVESTER SPINNEY *et al.*

York. Opinion December 30, 1878.

Tax.

The statute (R. S., c. 6, § 26,) declares that "the undivided real estate of any deceased person may be assessed to his heirs or devisees without designating any of them by name." *Held,* in construing the statute, that such estate may be taxed to the heirs without naming them when, and only when, it descends to them by operation of law; and that it may be taxed to devisees without naming them when, and only when, it comes to them by will.

In an action of debt for taxes to the heirs of Francis Spinney, the defense claimed that the tax should have been assessed to the devisee, and offered a certified copy of the will devising the real estate taxed, and claimed that the will, approved and allowed, without other notice to the assessors, of the diversion of any portion of the deceased's estate from his heirs, constituted a defense to the action. *Held,* on exceptions by the plaintiffs, that the ruling of the presiding justice sustaining the defense was correct.

ON EXCEPTIONS.

DEBT for taxes, as in the last head-note stated.

G. C. Yeaton, for the plaintiffs.

I. T. Drew, for the defendants.

WALTON, J. The only question is whether certain real estate in the town of Elliot was rightfully taxed to "the heirs of Francis Spinney."

We think it was not. It did not descend to his heirs. He disposed of all his real estate by will, and those to whom it was given took it as devisees, and not as heirs. True, the revised statutes (c. 6, § 26,) declare that "the undivided real estate of any deceased person may be assessed to his heirs or devisees, with-

out designating any of them by name, until they give notice to the assessors of the division of the estate and the names of the several heirs or devisees." But we do not think this means that the estate may be taxed to the heirs when it has been given to devisees. Certainly it could never have been the intention of the legislature to allow real estate to be taxed to devisees, when the deceased owner has died intestate and there are no devisees; and we think it would be equally unreasonable to suppose that the legislature intended to allow real estate to be taxed to heirs, which has been disposed of by will, and there are no heirs. An heir is one who takes by descent. A devisee is one who takes by will. To allow real estate to be taxed to devisees, when there are none, or to heirs, when in law and in fact there are none, would be to allow it to be taxed to nonentities,—a result which we cannot believe the legislature intended. We think the true construction of the statute is that the undivided real estate of a person deceased may be taxed to his heirs without naming them when, and only when, it descends to them by operation of law; and that it may be taxed to devisees without naming them when, and only when, it comes to them by will. Such, in effect, was the ruling of the judge at *nisi prius*, and we think it was correct.

Exceptions overruled.

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

GEORGE A. BACHELDER *vs.* SAMUEL W. LOVELY.

Penobscot. Opinion January 7, 1879.

Promissory notes. Consideration. Deed. Estoppel. Lis pendens.

Where one gives a warranty deed of land, and his title at the time of giving it is called in question and litigated, and a subsequent purchaser, who entertains doubts as to the force and effect of the covenants in his deed, voluntarily and without fraud enters into a contract by which he gives his note in contribution towards procuring a release from a litigating claimant, such note is for a valuable consideration.

The plaintiff and wife joined in a deed to B, with covenants of warranty of land, the description of which closed thus: "Intending to convey all the right, title and interest which the said L P (wife) derived as heir at law of her father." The land passed by subsequent intermediate deeds of warranty to the defendant, and from him to others. Before the plaintiff and wife gave their deed, R brought his bill in equity against them to recover the land, pending which, the plaintiff negotiated with R to purchase his claim, and the defendant, promising to contribute thereto, made his promissory note to plaintiff and deposited it with counsel to keep until the plaintiff should show to him a deed from R that would cure the defect which R's claim imposed upon the defendant's title, and then counsel was to deliver the note to the plaintiff. *Held*, that whatever might be the effect of the covenants in the deed of the plaintiff and his wife to B, the plaintiff's promise to remove the incumbrance imposed upon the defendant's title by R's claim, if performed, was a sufficient consideration for the notes. *Held*, also, that the giving of a quitclaim deed from R to plaintiff's wife was a performance of the condition upon which the notes were given, on the ground that the deed of plaintiff and wife to B, purported to convey an estate in fee and free from incumbrance, and therefore the plaintiff and his wife, with their grantees, would be estopped from setting up any claim under the deed from R. *Held*, further, that if this were not so, the deed of plaintiff and wife to defendant would make it so, the lateness of that deed being due to the fact that defendant did not make his objection to the first one, on the ground of its insufficiency, and to allow him now to make the objection would be a fraud upon the plaintiff.

ON REPORT.

ASSUMPSIT upon two promissory notes from the defendant to the plaintiff, dated November 29, 1875, for $50, on six months, and for $100, on nine months therefrom, given under the following circumstances:

The wife of the plaintiff is the daughter of Samuel Pratt,

deceased; in the division of whose estate certain landed premises in Oldtown were set off to her. She and her husband, the plaintiff, deeded the premises to James D. Burnham, by deed of warranty dated June 27, 1870, which deed, in full, is a part of this case, inasmuch as a question of construction arises upon it. Afterwards, on June 27, 1870, Burnham, by deed of warranty, conveyed to his wife. On June 14, 1871, Mrs. Burnham, by warranty deed, conveyed to Wm. M. Bean. On December 9, 1872, Bean, by deed of quitclaim, conveyed a divided portion of the premises to the defendant, retaining title to the remainder in himself. All the deeds were recorded.

Before the conveyance by the Bachelders to Burnham, a bill in equity had been instituted for the possession and title of the property by one Amos Rines, and a result was reached, stated in *Rines* v. *Bachelder*, 62 Maine, 95; the decision in which case and the facts therein recited were made a part of the present case.

After the decision in that case was announced, the plaintiff was engaged in negotiating for purchasing in the claim of Rines, in order to quiet the title of all concerned. While doing so he urged the defendant (as well as Bean,) to contribute something towards the amount necessary to be paid for that purpose and to defray the expense of that litigation. Question was made whether the deed to Burnham was or was not a warranty deed, on account of the closing words of the description of the premises, (as stated in the head-note). The defendant consulted counsel, who gave his opinion that it was doubtful how the deed should be construed. After the conveyance to Burnham, he and Bean, and the defendant, made improvements on the land.

Finally the defendant and plaintiff went to the office of George T. Sewall, where the notes in suit were made, and left with Sewall to keep until the plaintiff should show to him a deed from Rines and wife that would cure the defect which Rines' claim to the premises imposed upon the defendant's title, and then to deliver over to the plaintiff.

About ten days thereafter, and before any deed was shown to Sewall, the defendant demanded his notes of Sewall, claiming to rescind the arrangement, and forbade his delivering them to the plaintiff.

On the same day that the notes were given, but afterwards, the plaintiff got the delivery to himself of a quitclaim deed from Rines and wife, running to the plaintiff's wife, and covering the premises conveyed to Burnham, relieving his land from Rines' claim of title, and the very next day the deed was recorded, and the defendant was then, or soon after, notified of the fact. In about one month afterward, the same deed was exhibited to Sewall and a delivery of the notes demanded by the plaintiff.

Before this suit was commenced, the plaintiff tendered defendant, and left with Sewall for the defendant, his and his wife's quitclaim deed of the premises, dated December 7, 1876, (the writ in this case being dated February 16, 1877) and again demanded the notes of Sewall.

Sewall refused to deliver the notes to either party, produced them at the hearing, and left them in the care of the court.

The defendant was never disturbed or molested by any person in the possession of the premises, but has been in quiet and peaceful possession since the conveyance to him. The plaintiff purchased the Rines' claim, by giving his own notes therefor with an indorser. Another heir, and also the widow of Samuel Pratt, contributed something toward the sum paid.

The defense set up was that the defendant had been induced to give his notes upon a false representation by the plaintiff, and that Bean had also contributed to the same end. But the proof failed as to that. The statement was rather an expectation, than a deliberate assertion of facts, and the plaintiff was unreasonably disappointed by Bean, in that regard.

Upon the foregoing findings the law court were to order such judgment as may be proper in the premises.

A. W. Paine, for the plaintiff.

C. A. Bailey, for the defendant, to the point that the deed was one of warranty, notwithstanding the intended clause of the description, cited *Pike* v. *Monroe*, 36 Maine, 309. *Hubbard* v. *Apthorp*, 3 Cush. 419. *Howell* v. *Slade*, 4 Mason, 410. *Cutler* v. *Tufts*, 3 Pick. 272. *Drew* v. *Drew*, 28 N. H. 489. *Bates* v. *Foster*, 59 Maine, 157.

To the point that the plaintiff being under legal obligation to cure the defect in Rines' claim, the notes given as an inducement for him to do it, were a mere gratuity, cited *Shadwell* v. *Shadwell*, 99 E. C. L. 159, 177. *Cobb* v. *Cowdery*, 40 Vt. 25. *Farrington* v. *Boulard*, 40 Barb. 572. *Tilden* v. *New York*, 56 Barb. 340.

To the point that the court will not compel the performance of an executory contract, entered into in ignorance of what the law requires, if the law would not otherwise impose the obligation, counsel cited *Warder* v. *Tucker*, 7 Mass. 449. *Rowe* v. *Whittier*, 21 Maine, 545.

The first deed presented did not fulfill the conditions, and the second, dated after the maturity of the notes, was too late.

DANFORTH, J. The defense to the notes in suit is an alleged want of consideration and non-delivery. They were placed in the hands of a third person to be delivered on the performance of a certain condition by the plaintiff.

It seems that the plaintiff's wife inherited from her father a certain parcel of land, which she with her husband conveyed, by a deed with covenants of warranty, to James D. Burnham; a portion of which, through several mesne conveyances, came to the defendant. Before these several deeds, one Amos Rines had instituted a bill in equity praying for a conveyance of the premises, on the ground that the land was held by Mrs. Bachelder's father by virtue of a trust resulting in his favor, he having paid the consideration therefor. The court held that said Rines was entitled to a decree upon certain conditions. As the several deeds, including that to the defendant, were given while Rines' bill was pending, a defect in defendant's title was the result. 62 Maine, 95.

These notes were given on condition that the plaintiff should show to Sewall, in whose hands the notes were placed, "a deed from Rines and his wife that would cure the defect which Rines' claim imposed upon the defendant's title."

It is now claimed that the plaintiff, by virtue of the covenants of warranty in his deed to Burnham, was bound to remove the incumbrance arising from Rines' claim, which was all he promised

to do, or did do, as the condition on which the notes were given, and that, therefore, they were without a consideration.

But in this connection it is not material to inquire into the extent of the obligation imposed upon the plaintiff by virtue of his covenants. A doubt as to their force and effect had arisen, and the defendant voluntarily, uninfluenced by any fraud, preferred to, and did, enter into the contract by virtue of which he gave his notes to procure a release of Rines' claim, rather than depend upon the covenants in his deed for that purpose. Certainly it was competent for him to make this election, and having made it, the condition to be performed was a good consideration for his promise. If the conditions were performed, he obtains all for his promise that he expected to, all he bargained for, and whether worth much or little, a good bargain or otherwise, is not now the question. That there was a defect in his title is not denied. To have that remedied is worth something, and, in the absence of fraud, his own judgment, confirmed by his promise, is conclusive as to the amount.

The suggestion in the argument that the notes were given by defendant in ignorance of his legal rights and therefore not binding, is not tenable. Knowing the uncertainties of the law, if he must still rely upon them it would indeed be hard. The very fact that he was ignorant of the law and uncertain as to his rights under the covenants might be a strong reason for his adopting the safer and probably the less expensive course, but surely there can be no ground for repudiating his notes, after his election has been made.

It is undoubtedly true, as held in *Warder* v. *Tucker*, 7 Mass. 449, cited by counsel, that an acknowledgment of an existing debt is not binding. In other words, a mere admission of a liability, where by law there is none, will not create one. In this case the question is whether the plaintiff by his promise created a debt, and not whether it may be used as proof of one previously existing. The case of *Rowe* v. *Whittier*, 21 Maine, 545, also cited by counsel, depended upon the application of the statute of frauds. Here no such question is raised.

It only remains to ascertain whether the plaintiff fulfilled his part of the contract.

It seems that on the same day the notes were given, the plaintiff procured from Rines and his wife, running to his wife, a quitclaim deed of the premises, which was recorded the next day, notice given to the defendant, and, in about one month afterward, the deed was exhibited to said Sewall and the notes demanded.

The sufficiency of this deed to relieve the land from Rines' claim is not denied, but it is claimed that it does not enure to the benefit of the defendant. If at all, it must undoubtedly be by way of estoppel, and not by way of title. Mrs. Bachelder obtained no title by virtue of her deed from Rines, for he had none. His interest was simply an equitable claim to a title. He had not under his process in equity even obtained a decree for a conveyance; nor does the decision of the court show that he was entitled to one, except upon condition. 62 Maine, 95. That condition was to be ascertained upon the report of a master to be appointed. Whether he would choose, or be able to perform such as might be imposed, does not appear. His deed then, though in form a conveyance of the land, was in fact a discharge of his claim; or, at most, an assignment of it. If Mrs. Bachelder obtained any rights whatever under it she could enforce them only in equity. But was she in a condition to do that? She had jointly with her husband conveyed the land by a deed with covenants of warranty. Whether she was bound by these covenants to defend her grantee or his successors against this claim is not the question involved. It is whether she or her grantors can enforce the right obtained from Rines, if any, in equity.

Estoppels may be founded upon the deed itself, independent of any covenants which may be found in it. "When it has distinctly appeared in such conveyance, either by a recital, an admission, a covenant, or otherwise, that the parties actually intended to convey and receive, reciprocally, a certain estate, they have been held to be estopped from denying the operation of the deed according to this intent." Rawle on Covenants for title, 407. "The principle deducible from these authorities seems to be that, whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seized or

possessed of a particular estate in the premises, and which estate the deed purports to convey; or, what is the same thing, if the seizin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seized and possessed at the time he made the conveyance. The estoppel works upon the estate and binds an after acquired title as between parties and privies." Nelson, J., in *Van Rensselaer* v. *Kearney*, 11 How. 297, 325.

The deed of the plaintiff and his wife conveyed to Burnham a specific parcel of land, closing the description in these words: "Intending to convey all the right, title and interest which the said Lucy Pratt derived as heir at law of said Samuel Pratt, deceased."

The "said Lucy" derived as heir at law full legal title to the land, and that title she conveyed to her grantee, with a declaration in the form of a covenant that it was free of all incumbrances. Taking the deed as a whole it distinctly appears "that the parties intended to convey and receive, reciprocally," a complete title to the land, an estate in fee, free from all incumbrances whatever. Hence, upon authority as well as principle, she, and certainly the plaintiff, would be estopped from denying that her deed did convey such an estate. In any event she acquired no right under the deed from Rines which could be enforced in law, and an attempt to establish it in equity must prove equally abortive. Her grantees or assignees must be also estopped, for they are privies and would also be bound by the notice given by the records.

An estoppel of this kind is equally available to the defendant, whatever may be his rights under the covenants as such, as to the immediate grantee, for it is founded upon the estate purporting to have been conveyed, and that estate the defendant has.

It is not necessary to settle the question raised in the argument, whether this estoppel would come to the defendant without his consent, for the case finds not only a consent but that the notes were given for the express purpose of removing that incumbrance from the title.

But the plaintiff does not stop here. Before this action was commenced he tendered to the defendant a deed from himself and wife which, it is conceded, was sufficient to remove all incumbrances caused by Rines' claim. But this deed was refused, and it is now contended that it was too late, the time for the payment of the notes having long before expired. This would probably have been a valid objection if nothing previously had been done by the plaintiff in fulfillment of his contract. He had, however, in season obtained the discharge of Rines, which had been put upon record and the defendant notified of it. This step seems to have been taken in good faith, and thus all the expenses necessary to remove the incumbrance had been incurred. After this, the defendant, claiming to rescind the arrangement, demanded his notes of Sewall and forbade his delivering them to the plaintiff. This attempted rescission coming at the time it did cannot be allowed to prevail, for if so, it would be a fraud upon the plaintiff. He had not only incurred all the expense necessary to perform his part of the obligation, but was evidently relying in good faith upon what he had done as sufficient. Hence, if the objection of the defendant was that the deed was insufficient, honesty would have required him to so state when the defect could be so easily supplied. Not having done so, it is really his own fault that the second deed came so late, and he cannot, therefore, avail himself of that fact. As no other objection is now suggested the plaintiff is entitled to judgment upon his notes according to their tenor.

Judgment for plaintiff.

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

ROBERT SMART *vs.* INHABITANTS OF PATTEN.

Penobscot. Opinion January 7, 1879.

Bounties. Municipal obligations.

A soldier having received $300 as bounty under the act of 1864, c. 227, is not entitled to any money under the provisions of the act of 1868 for the equalization of municipal war debts, c. 276.

Canwell v. *Canton*, 63 Maine, 305, reaffirmed.

ON REPORT.

ASSUMPSIT, to recover share of funds paid by the state to the defendant town under the equalization act of 1868, c. 225.

J. Varney, for plaintiff.

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

APPLETON, C. J. The plaintiff was mustered into the service of the United States on February 29, 1864; on March 10, 1864, he received the state bounty of $300, and on June 26, 1865, he was discharged. He now brings this action to recover a share of the funds paid by the state to the defendant town under the equalization act of 1868, c. 225.

The plaintiff received from the state $300, under the provisions of the act of 1864, c. 227, and subject to the limitations therein expressed. This act is in force and has never been repealed.

By § 3, "No person shall be entitled to receive from this state or any town in it any sum in addition to the bounty provided for in this act."

By § 4, "Any sum paid as bounty from any source, except from the United States, shall be deducted from the amount to be paid from the state treasury."

By the terms of the receipt the defendant denies having received any other bounty, and if any has been paid he directs the disbursing officer of the United States army to deduct such amount from his wages and pay the same to the state treasurer or paymaster of Maine. *Canwell* v. *Canton*, 63 Maine, 304.

By § 6 "Any city, town or plantation is hereby authorized to make a temporary provision for and pay to its recruits such

bounty, under the aforesaid conditions, which shall be reimbursed to it from the state treasury, but payment of a greater sum than three hundred dollars per man shall operate as a forfeiture of the right to reimbursement in the case of each person so overpaid."

The prohibition is express against a bounty over three hundred dollars. The town may advance within that limit with a claim for reimbursement, but there is to be no reimbursement whenever the bounty exceeds that sum.

A few days later, in the same session, a "resolve relating to the state assuming liabilities of cities, towns and plantations in paying bounties" was passed, c. 368. The liabilities to be assumed were those then existing under the statutes of the state. By those statutes the payment of a bounty exceeding the limitation of three hundred dollars by a town would be a forfeiture of any claim to reimbursement. Further, whenever the state had paid this sum, the town having paid nothing, there could be no claim for reimbursement.

On March 7, 1868, a resolve providing for an amendment of the constitution so as to authorize "a limited reimbursement of municipal war expenditures by loaning the credit of the state" was passed, c. 276.

The reimbursement by the constitutional provision, art. 11, was to "be in full payment for any claim upon the state on account of its war debts by any such municipality." It is obvious that the defendant town had incurred no debt by reason of any bounty paid the plaintiff.

Under this amendment of the constitution "an act providing for the equalization of municipal war debts and a limited assumption and reimbursement thereof by the state" was passed in 1868, c. 225, by virtue of which the plaintiff claims to recover his share of the surplus under § 6.

But if the plaintiff receives any portion of the sum in the town's hands it will be in manifest violation of c. 227 of the acts of 1864. It would give him a bounty of over three hundred dollars, which would forfeit all the right of the town to reimbursement. It would take from those soldiers who had received a small bounty, or none, and give it to one who by the terms of his

receipt was to account for the same to the state. If the plaintiff were permitted to hold it, it would increase the inequality between him and other equally meritorious recipients of the state's liberality.

By the act of 1868, c. 225, § 6, "No money or bonds shall be paid to any city, town or plantation, when it is in evidence that said credit was granted by the state as a gratuity for which they have paid no consideration." The defendant town was not entitled to reimbursement on the plaintiff's account, for they had paid him nothing. They were not entitled to any money from the state on his account, for the money already received by the plaintiff ($300) "was granted by the state as a gratuity for which they have paid no consideration." The defendant town has paid no bounty to the plaintiff, it is burdened by no debts incurred for the common defense, so far as he is concerned, and there is no portion of its debts which the state (so far as relates to this claim) should, within the preamble of the act, assume. The plaintiff has received all the money to which he is entitled. If the defendant town has received money to which it is not entitled, that does not give the plaintiff any legal right to it. The money is not his. *Canwell* v. *Canton*, 63 Maine, 304, 305.

Plaintiff nonsuit.

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

STATE *vs.* DEXTER & NEWPORT RAILROAD COMPANY.

Penobscot. Opinion January 7, 1879.

Taxes—exemption from. Railroad. Corporation. Constitutional law.

The charter of the Dexter & Newport Railroad Company first states what taxes the corporation shall be required to pay, and then adds that no other tax than that therein provided for shall ever be levied or assessed upon the corporation, or any of its privileges or franchises, and that no other or further duties, liabilities, or obligations shall be imposed upon the corporation. *Held*, that these provisions create an express limitation upon the power of the legislature, in relation to taxation, and secure to the corporation a perpetual and irrepealable exemption from any other tax than that provided for in its charter. *Held*, further, that it is now too late to question the constitutionality of such exemptions, the supreme court of the United States, in recent decisions, having fully and repeatedly sustained their constitutionality.

ON FACTS STATED.

IN A PLEA OF DEBT, for that the said defendant, the Dexter & Newport Railroad Company, now is, and was, on the first day of April, A. D. 1874, a railroad corporation, existing under the laws of the state of Maine, and doing business therein, and whose lines of railroad are, and then were, wholly within the said state, and the governor and council of said state, at a session held at Augusta, the seat of government of said state, on the 24th day of April, A. D. 1874, did, according to the statute, in such case made and provided, ascertain the true market value of the shares of said corporation on the first day of April, A. D. 1874, to be sixty-five dollars per share. And did, then and there, estimate therefrom the fair cash value of all the said shares constituting the capital stock of said corporation on said first day of April, to be seventy-nine thousand three hundred dollars. And from this last sum did, then and there, deduct the value of the real estate and other property of said corporation actually subject to local taxation, to wit: none; and did, then and there, assess upon said corporation a tax of one and one-half per cent of said sum of seventy-nine thousand three hundred dollars, as a tax upon its corporate franchise, to be paid by said corporation into the treasury of said state, to wit: the sum of eleven hundred and eighty-nine dollars and fifty cents.

And thereupon, according to the statute, in such case made and provided, the secretary of state, of said state of Maine, at said Augusta, on said 24th day of April, A. D. 1874, did certify to the state treasurer of said state, all the aforesaid doings of the governor and council aforesaid, and the said treasurer, thereupon, to wit: On the 24th day of April aforesaid, did notify the said defendant corporation thereof. And by force of said proceedings of the said governor and council, and secretary of state, and state treasurer, and by force of the statute, in such case made and provided, the said defendant corporation then and there became indebted to the said state of Maine in said sum of eleven hundred and eighty-nine dollars and fifty cents, and liable and obliged to pay said sum into the treasury of said state, one-half thereof on or before the first day of July then next thereafter, and one-half thereof on or before the first day of January then next thereafter; and said first days of July and January aforesaid have long since past, whereby, and by force of the statute, in such case made and provided, an action hath accrued to said state of Maine, to recover from said defendant corporation said amount of said tax, to wit: eleven hundred eighty-nine dollars and fifty cents, with legal interest on the same from the time the same became payable, as aforesaid.

There were three other similar counts for taxes for the years 1875-6-7 respectively.

Plea, *nil debet*, with brief statement, as follows:

I. That they are protected from any such taxation as plaintiffs claim, by their original charter.

II. That they are further protected from such taxation by c. 395, of the private and special laws of 1867, and of the proceedings of defendants, and of the towns of Dexter and Corinna, and of defendant stockholders, in consequence of or subsequent to the passage of said act.

III. That they are not embraced or comprehended by the act, c. 258, public laws of 1874.

Statement of facts: This is an action to recover state taxes, assessed on the defendants' franchise, under c. 258, public laws of 1874. The defendant company is a railroad corporation, incor-

porated under the laws of Maine, holding their first meeting of the corporators August 20, 1866, and their first meeting of stockholders April 3, 1867, at which time the organization of the stockholders as a corporation was complete. The company own a railroad from Dexter to Newport, in Penobscot county, under their charter. All acts of the legislature, public or private and special, relating to defendant company, are made a part of the case. The declaration and plea are made a part of the case.

It is admitted that the valuations were made, the taxes assessed, and the company notified thereof, as alleged in the declaration; that defendants, on April 3, 1867, duly accepted the act, c. 192, private and special laws of 1867, and the towns of Dexter and Corinna duly accepted the same at their annual town meetings in March, 1867; the respective town clerks immediately made proper records, and the act took effect and went into full operation, all as provided in § 11 of said act. Subsequently and previous to, and on September 2, 1867, all the requirements of § 2 of said act, had been complied with. On that day the towns of Dexter and Corinna duly issued their bonds as contemplated in said act, Dexter to the amount of $125,000, Corinna to the amount of $50,000, (said towns having previously voted so to do at their previous annual town meetings) and took a mortgage of the railroad, etc., as provided in § 4 of said act.

Subsequently to the passage,—March 1, 1867,—of c. 395, private and special laws of that year—"an act to exempt from taxation the capital stock of certain railroad companies for a term of years," and previous to April 3, 1867, a large amount of the capital stock of defendants was subscribed. On that day, April 3, said act was duly and formally accepted by defendants, and subsequently thereto, and previous to September 2, 1867, an additional amount of $24,300 was subscribed, of which the town of Dexter duly subscribed $10,000, in accordance with a legal vote of the town at a legal town meeting held May 6, 1867; said $24,300 making 243 shares of the capital stock. One of the prominent considerations held out by the agents of defendants to the parties who became subscribers to induce them to subscribe, both from March 1st and from April 3, 1867, was the representations by the agents that the

capital stock was exempt from taxation for the term of ten years, in accordance with said c. 395, and these representations had a strong influence in inducing the subscribers to subscribe. The proviso in c. 395 was duly complied with.

The defendants have duly complied with all the requirements of §. 1, c. 258, public laws, 1874. The railroad of defendants was open for travel, commencing November 25, 1868.

All records of the Dexter & Newport railroad company, and of its directors, and of the town clerks of Corinna and Dexter, are admitted and may be referred to, and such copies may be made as either party requires.

Upon so much of the foregoing facts as would be legally admissible in evidence upon a trial, judgment is to be rendered as the same and admissible facts required.

L. A. Emery, attorney general, for the state, contended that c. 395 of the laws of 1867, exempting the shares of the capital stock of the company for ten years was unconstitutional. The company had been incorporated long before. This was an attempt not to create a new corporation, but to exempt the members of the corporation from their shares of the public burden. He recognized the right of the legislature to specify what classes and kinds of property shall be exempt from taxation, the right to enact that shares in incorporated companies, or shares in railroad corporations shall not be taxed; but whatever it does enact, must be general and apply to every individual of the class. *Brewer case*, 62 Maine, 62; c. 395 is repealable, it is not within the clause of the U. S. constitution prohibiting the impairment of the obligation of contracts. It is not a contract with anybody. He made a distinction; a tax may be on the franchise of a corporation, or upon the shares of corporation stock. In the one case the individual share holders would be liable; in the other, not. The tax act of 1874 does not infringe upon the act of 1867. The exemption is of tax upon shares; the tax imposed is upon the franchise. A tax upon shares does not prevent a contemporary tax upon the franchise. Cooley on taxation, 169, 170. The converse then is true. If the statute of 1867 is unconstitutional and irrepealable, no act of the parties can bolster it up.

Again, the act of 1867 is limited by the act of 1831, which makes all acts of incorporation liable to be amended, altered, or repealed, at the pleasure of the legislature, and the act of 1867 was virtually repealed by the act of 1874, there being no "express provision to the contrary." Implication is not express limitation. That limitation must be inserted in the act of incorporation, not looked for in a subsequent statute.

This reserved right of repeal takes this 15th section out of the provisions of the U. S. constitution, because by it the state has made the right of rescission and alteration a part of the contract, and in repealing or altering the 15th section the state has acted in pursuance of the contract, not in violation of it.

J. Crosby, for the defendants, admitted that there was a good and useful distinction in certain cases between taxation of shares of capital stock and taxation of a franchise, where the tax is sought to be assessed in the one case upon the whole property, and in the other upon the individual owners in their respective localities; but the counsel contended that a distinction is not to be allowed which kills the spirit of a contract, though it does not violate the letter.

To the point made by the attorney general that the charter was made subject to the act of 1831, because there was no "express provision to the contrary" therein, cited the closing sentence of section 15th of the charter, "but no other tax than herein is provided shall ever be levied or assessed on said corporation or any of their privileges or franchises," and intimated that the section was drawn by the late Judge Cutting, intending it to be an express limitation or provision to the contrary. He said it was the only section in their charter which was not subject to the act of 1831. It was the tender point of "taxation." The limitation was screwed on to the word itself.

WALTON, J. The question is whether the Dexter & Newport railroad company is exempt from taxation other than that provided for in its charter.

We think it is. Section 15 of its charter, after providing for a tax upon its real estate, and upon its shares, and upon its net

income above ten per cent, declares that "no other tax than that therein provided for shall ever be levied or assessed on said corporation or any of its privileges or franchises," and section 17, after stating that the legislature shall have the right to pass all laws necessary to compel a compliance with the provisions of the charter, adds these emphatic words, "but not to impose any other or further duties, liabilities or obligations."

But it is said that the legislature has a right to alter or repeal these provisions; that since the passage of the act of March 17, 1831, the legislature has the right to amend, alter or repeal all acts of incorporation, unless the act contains an express limitation to the contrary. True, but we think here is an express limitation to the contrary. The charter does not say in so many words that it shall not be amended, altered or repealed, as some of the charters granted in this state have done; but it does most clearly and explicitly place a limitation upon the authority of the legislature to add any new duty, liability or obligation. The language used will admit of no other rational interpretation. A new tax—one not provided for in its charter—would, in the opinion of the court, be not only a new obligation, but one which might be made a very burdensome one.

It is also claimed that the legislature has no authority to surrender the sovereign power of taxation,—that the attempt to do so was unconstitutional and void. It is now too late to contend for such a doctrine. The supreme court of the United States has decided that when no constitutional limitation upon the power of the legislature, in this particular exists, it may create a corporation and secure to it the right of perpetual exemption from taxation, which no subsequent legislature can impair; and while that court adheres to the doctrine, the state courts have no alternative, but submission; for it is a doctrine supposed to have its foundation in the federal constitution, which it is the duty of that court ultimately and authoritatively to interpret. The latest decisions of that court, and the only ones necessary to cite, for they cover the whole ground, are *New Jersey* v. *Yard*, 95 U. S. (5 Otto), 104, and *Farrington* v. *Tennessee*, 95 U. S. (5 Otto), 679.

The constitution of this state, as amended in 1875, declares that the legislature shall never, in any manner, suspend or surrender the power of taxation; but in 1853, when the charter of the Dexter & Newport railroad company was granted, it contained no such limitation upon the power of the legislature.

In *State* v. *Maine Central Railroad*, 66 Maine, 488, the court held that that road was liable to the tax assessed, under the act of 1874, c. 258, because its charter contained no express limitation to the contrary. We hold that the Dexter & New port Railroad is not liable to be taxed under that act, because its charter does contain an express limitation to the contrary.

Judgment for defendants.

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

CORDELIA P. AYER *vs.* JOHN PHILLIPS & others.

Somerset. Opinion January 7, 1879.

Entry. Disclaimer. Abatement. Pleading. Easement.

A plea of disclaimer, filed without leave of court, and after the time allowed for filing pleas in abatement, will not avail the tenant.

When the demandant, in a real action, has title in the premises in controversy, subject to an easement, the judgment will be for the land demanded subject to such easement.

EXCEPTIONS AND MOTION.

WRIT OF ENTRY, dated August 4, 1876, and returnable at the September term, 1876, for a strip of land six rods wide and about twenty-four rods long, covered by a location of the Somerset Railroad Company.

At the March term, A. D. 1878, the defendants filed a plea of *nul disseizin*, with two brief statements; the first claiming title in the said railroad, and setting out its location, and, in each, that the defendants were the servants and tenants of the railroad company, and were in possession of the demanded premises by its

authority, and clothed with all its rights, and that they disclaimed any other right, title or interest therein, not consistent with the rights of the company under the statute and its location.

The plaintiff put in deeds showing the fee in herself.

The defendants put in the location of the Somerset Railroad Company, dated November 27, 1875, from the office of the county commissioners.

John Ayer, president of the Somerset Railroad Company, called by the defendants, testified, subject to objection, that when the road was completed to North Anson Village, there was no public house or place of entertainment within a half mile of the depot; that he wanted a place of entertainment to stop at himself, and for other people, and more especially for the accommodation of the railroad; that he considered this a matter of great convenience, and, perhaps, of necessity; that he pointed out to the defendants where the house ought to be located, and they thereupon there located it; that it was built, without cellar, and rested upon posts, and not with company's money; that the company asked no rent, the house being for the use of the company.

The presiding justice ruled that, the action was maintainable, and directed the jury to find a verdict for the plaintiff; the jury thereupon returned that, " the defendants did disseize the plaintiff of the messuage with the appurtenances, as the plaintiff in his writ hath declared against them, and that the title to said land was in the plaintiff; " and the defendants alleged exceptions.

J. Baker, for the defendants.

The ground of the action is that the building erected, partly or mainly, on the premises sued for, and under the circumstances disclosed by the evidence, was for a purpose, or use, authorized by the charter of the railroad and the general laws of the state, and that the rulings of the presiding justice were erroneous; that even if the erection was not authorized, the verdict was bad as matter of form; that a judgment and execution, following the verdict, would dispossess the railroad and annul its legal location; that the verdict, judgment and execution should follow the rule in *Proprietors of Locks & Canals* v. *N. & L. Railroad Company*, 104 Mass. 1.

That, under the evidence, the building was personal property.

A. H. Ware, for the plaintiff.

APPLETON, C. J. The demandant, by her deeds, shows a legal title to the premises demanded. It is not pretended that the tenants have title to the fee. Whatever rights they may have are under the location of the Somerset Railroad Company.

No disclaimer has been seasonably filed. What was in the nature of a disclaimer was not filed within the time allowed for filing a disclaimer, nor has leave of court been granted to file it. The general issue having been pleaded, and the title being in the demandant, she must recover. *Chaplin* v. *Barker*, 53 Maine, 275. *Colburn* v. *Grover*, 44 Maine, 47.

The Somerset Railroad Company, by its location over the premises demanded, obtained only an easement. Undoubtedly, for any interference, the party aggrieved thereby may, in a proper action, recover appropriate damages. The right of the demandant to recover is unquestioned, so far as relates to the land demanded; but she is not entitled to have judgment and execution that would exclude the Somerset Railroad Company from complete possession and control of the premises for all purposes pertaining to the full exercise of its corporate franchises.

The tenants claim under the Somerset Railroad Company, and are in possession and occupancy under it, and have a right to all the protection its charter enables it to confer. *Proprietors of Locks & Canals* v. *N. & L. Railroad Company*, 104 Mass. 1.

The plaintiff is entitled to a judgment which shall establish her right as owner of the fee.

The buildings, from the evidence, would seem to be personal property, and judgment should go only against the land.

Exceptions overruled.

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

AARON B. CHAPMAN *vs.* INHABITANTS OF LIMERICK.

York. Opinion January 8, 1878.

Towns. Authority to raise money. Bounties. Stat. 1865, *c.* 298, § 6.

To exercise authority conferred upon a town by the legislature, the action of the town must, in point of time, succeed the date of the authority.

Before a town can take such action, a meeting, called for the purpose, is essential, followed by a vote expressing its will so to do.

Under an article, in a warrant to raise money, for the purpose of filling the town's quota, a tax was assessed to the plaintiff, among others of the inhabitants, in 1864, and afterwards collected. The statute of 1865, c. 298, § 6, confers authority upon towns to pay bounties to volunteers, and pay persons where they have advanced the bounty. *Held*, that § 6 was prospective only; that it granted power to the town to act thereafter, but did not ratify previous action.

ON REPORT.

ASSUMPSIT, for money had and received, to recover money assessed upon and collected of the plaintiff by the assessors and collector of taxes of the town of Limerick by virtue of a special tax. The case as presented to the law court is stated by Kent, J., in the opinion in 56 Maine, 390.

The selectmen called a town meeting to be held October 3, 1864, to act upon the following articles:

I. "To see what sum of money, if any, the town will vote to raise to be appropriated for the purpose of filling the town's quota under the present drafts.

II. "To see what method the town will adopt to raise said money, if voted."

At an adjourned meeting under the above call, held October 22, Voted, "To ratify the expenditures of H. H. Brown and I. S. Libbey in filling our quota of men.

Voted, "That the selectmen be instructed to assess by special tax $10,500, and collect the same in sixty days.

Voted, "That the selectmen be directed to furnish to each subscriber to the fund in filling the quota an order to the amount of subscription paid in.

Voted, "That the selectmen be directed to use the first money paid in, by paying the notes which have been used in the recruiting fund."

Libbey's account makes the defendant town debtor to him for various sums paid recruits, and a small sum to balance the account paid to A. A. Libbey, $8,525, and credits the town by sums received from Mitchell, Brown and Doughty, $8,525.

Brown's account charges himself with sums received in cash and note, $6,894, and credits himself by sums paid out to volunteers and expenses to balance that amount. There were minutes indicating a payment, by some one, of $525 to each of five volunteers, at five per cent discount, in state orders, and showing his personal expenses to Portland and Augusta of $28.75.

Other facts are stated in the opinion.

E. B. Smith & C. E. Clifford, for the plaintiff.

H. H. Burbank, L. S. Moore & I. T. Drew, for the defendants.

VIRGIN, J. At a meeting held in October, 1864, the defendants, under appropriate articles in the warrant, "voted that the selectmen be instructed to assess by special tax the sum of $10,500, and collect the same in sixty days." This sum, together with a legal sum as overlay, was soon afterwards duly assessed. The plaintiff declining to pay his tax, the collector, under a warrant from the assessors, duly distrained and sold his oxen; from the proceeds deducted the tax, which he paid over to the town treasurer, and restored the balance to the plaintiff, with a written account of the sale and charges. In the following June, the plaintiff brought this action to recover the money thus received by the town.

The action comes forward on report; the court to exercise jury powers as to the facts, and render such a decision as the law, upon so much of the evidence as is legally admissible, requires.

The report is very meagre in relation to the quota under the call of July, 1864. It is silent as to number and vague as to manner of filling it, if it was ever filled. It seems, however, that a fund was raised by the voluntary subscription of somebody, whom, how many or how much, does not appear. Whether the subscription was made at the suggestion, even, of the municipal officers; whether the fund was thus raised in behalf of the town

without previous authority; or whether it was intended as a gift, no subscriber or other person has vouchsafed to testify, and neither can we glean these facts from the report. This subject matter must of necessity be susceptible of full proof. However, certain money, it seems, which came from individuals, was placed in the hands of I. S. Libbey and H. H. Brown. All we are permitted to know further comes from their unexplained accounts, containing simple items of debt and credit and made a part of the report.

It nowhere appears that Libbey or Brown was any officer or agent of the town, or was employed by any officer of the town. As they expended the fund spoken of, we presume they were agents of the subscribers thereto.

Without any "distinct article" authorizing the action, the town, on October 22, passed the sixth and seventh votes, thereby directing the selectmen "to furnish to each subscriber to the fund an order to the amount of his subscription paid in;" and to "use the first money paid in in paying the notes which have been used in the recruiting fund."

The counsel for the defendants concede that, the town had no right, at the time these votes were passed, to raise and appropriate money in the manner and for the purposes indicated; but contend that the Stat. 1865, c. 298, validated the unauthorized acts.

Section one "made valid" five different species of the "past acts of towns," viz: "offering;" "paying;" "agreeing to pay;" "raising and providing means to pay bounties to" volunteers, etc.; and "all notes and town orders given by the municipal officers, in pursuance of a previous vote, for the benefit of volunteers." It is obvious that the sum of money voted October 22 was not raised for any of the purposes enumerated in section one.

There is no pretence that this case comes within any of the provisions of §§ 2, 3, 4 and 5. But it is contended that, c. 298 "explicitly authorized the refunding of money which had been advanced as bounty by persons or associations to volunteers;" and that "the money raised by the defendant town was appropriated to pay money which had been so advanced." Reference

must be had to § 6, which provides: "Authority is hereby conferred upon towns to offer, pay and agree to pay bounties to volunteers, . . and to assume and pay to persons or associations, where they have advanced the bounty, or have by private subscription given as bounty to such volunteer." Now taking it for granted that the fund in question was "advanced" as bounty by the subscribers or given as such, it appears to us equally obvious that the case does not come within the provisions of this section. The terms of § 6 do not, like those of §§ 1, 2, 4 and 5, purport to "make valid the past acts" therein enumerated; but simply to confer power upon the towns to do the acts specified. Such authority had not been given by any previous statute, and therefore had never before existed. The provision was prospective in its nature. It was in no sense a ratification, but a grant of power to act. Towns can act only in their corporate capacity, when empowered. To exercise the "authority conferred," the action of the town must, in point of time, succeed the date of the authority. Before the town could take such action, a meeting called for the purpose would be essential, followed by a vote expressing its will so to do.

This view being fatal to the defendants, we have no occasion to decide the other points raised in the case.

The action being against the town for money had and received, the plaintiff can recover only the sum which the town received, with interest.

Defendants defaulted for $51.80 *and int. from date of writ.*

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

MOSES A. MASON *vs.* SAMUEL D. PHILBROOK & another.

Oxford. Opinion January 8, 1879.

Writ of Entry. Bankruptcy. Evidence. Burden of Proof. Mortgage. Notice. Registration.

Where the right, title and interest of a bankrupt in certain real estate has been sold by his assignee, and there is a mortgage on record on the premises sold, in a suit by the mortgagee against such purchaser the burden is on the purchaser to show a payment or discharge of the mortgage.

When the mortgagee is present at such sale he is not estopped to enforce his mortgage by reason of his omitting to state his title at the sale, the same appearing of record.

ON REPORT.

WRIT OF ENTRY, brought on a mortgage deed from Mighill Mason to the plaintiff, his brother, of land in Bethel, dated November 14, 1859, and next day recorded in Oxford registry, to secure two notes of even date of $300 each payable with interest, one on demand, the other in one year.

Plea, *nul disseizin*, with brief statement in substance and effect that there was nothing due on the mortgage, and that the defendant was owner by purchase of Mighill's interest at an auction sale of his estate as a bankrupt. The brief statement also set out certain facts afterwards relied upon by way of estoppel; that at an examination of Mighill before Register Fessenden, October 25, 1876, plaintiff also appeared and stated that, Mighill owed him $166.25, and for one-half of thirty-two bales of hops, and for nothing more that he knew of; and afterwards, May 25, 1877, he appeared to prove his claim for hay, hops, flour and interest, amounting to $1323.33, not including the mortgage and notes in question; that he then and there stated that Mighill owed him nothing that he knew of except the claim for $1323.33 specified; that the property was struck off to defendant Philbrook by the auctioneer at the sum of $1295, free of all incumbrances except the taxes due thereon and the widow's prospective right of dower; that the plaintiff was present at the sale at auction and well understood the terms and conditions and that defendant bid off the premises at the sum aforesaid, and that plaintiff then did not

state or make known that he claimed any title or lien on the premises under or by virtue of the mortgage and notes.

The plaintiff introduced his mortgage and notes. The defendant introduced evidence tending to show the facts set out in his brief statement. The plaintiff, in rebuttal, testified that, the money secured by the notes and mortgage belonged to his brother Charles G. Mason, sent home by him from California in 1856; that he first used the money himself, and some three years afterwards let it to Mighill and took the notes and mortgage and kept them in a tin box belonging to Charles; that this money was never taken into account in his dealings with Mighill; that he was not present at the sale till after the property was bid off, and then Philbrook told him that he got it a thousand dollars cheaper on account of his mortgage.

Black & Holt and R. A. Frye, for plaintiff.

D. Hammons, E. Foster, Jr., for defendants, contended that, the evidence indicated that the mortgage, as now presented, was a fraud; that the mortgage notes had been paid and taken up and new ones substituted; and whether so, or not, the plaintiff, by his presence at the sale, by his acts and admissions there and elsewhere, was estopped from setting up the mortgage claim.

APPLETON, C. J. This is an action of ejectment on a mortgage given by Mighill Mason to the demandant, dated November 14, 1859, to secure the payment of two notes of hand, each for the sum of three hundred dollars.

Mighill Mason having become a bankrupt, the other tenant, Philbrook, claims the estate covered by the mortgage as a purchaser at an auction sale of the bankrupt's real estate. Assuming all the proceedings in the bankruptcy court correct and the sale in all respects valid, the assignee of Mighill Mason neither conveyed nor undertook to convey more than "the right, title and interest of the bankrupt" in the premises sold.

The real question is as to the payment or discharge of the mortgage in suit. The tenant's title is subject to the mortgage unless paid or discharged, and it is for them to show its payment or discharge; and we do not think the evidence shows either.

It is claimed that the demandant is estopped to recover because he did not disclose his mortgage claim at the time of the sale of the premises to Philbrook. The mortgage was on record. It is in dispute whether the demandant was at the place of sale until after the estate in controversy was sold Philbrook. If present, he is not so far estopped by reason of his omission to state his title as thereby to forfeit his estate—particularly where no inquiries were made of him, and where an examination of the records would have shown the existence of the mortgage, and when, in fact, the auctioneer was not attempting to sell anything more than the debtor's interest.

Judgment for the demandant.

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

CALEB HOLYOKE *vs.* HENRY W. LOUD & another.

Penobscot. Opinion January 10, 1879.

Pleading. Parties. Abatement. Motion. Principal and agent.

In actions on contracts, all the contracting parties must, as a general rule, be made parties to the suit, either as plaintiffs or defendants.

In assumpsit, the non-joinder of a co-promisor as defendant can only be taken advantage of by plea in abatement; but the non-joinder of a co-promisee as plaintiff is ground for a nonsuit.

ON REPORT.

ASSUMPSIT, wherein the defendants are attached, to answer to the plaintiff, "who sues out this writ for and in behalf of the owners of schooner Burmah, whose agent he is," on account annexed as follows: "1877, To cash collected by you belonging to me October 9, 1874, $406.63. Interest to date of writ, $67.09. To cash paid you twice by mistake, $166.90. Interest on same three years, $30.04,=$670.66. Credit, by cash sent me October 9, 1874, $260.57. Interest to date of writ, $43.00,=$303.57. Balance due, $367.09.

The plaintiff testified that, he was one-fourth owner of the schooner Burmah, and agent of the other owners, Baker, Doane,

Sabine and Dole, from 1870 to October 4, 1874. Captain Winslow was in charge all that time. The $406.63 was the balance of $550 paid by parties to a collision with the schooner, after paying the lawyers' fee.

The plaintiff put in the following letter from the defendants, dated New York, October 9, 1874, and addressed and directed to the plaintiff at Brewer, Maine: "Inclosed please find check, two hundred and sixty 57-100 dollars, on account of schooner Burmah as follows:

Collected,		$406.63
H. W. L. & Co. account,	$146.06	
Check,	260.57	
		$406.63"

The plaintiff also put in account made out by defendants against schooner Burmah and owners, debiting sixty-four items amounting to $1835.18. Interest, $9.52,=$1844.70.

On the credit side of the account were fourteen items of cash, the last of which was "$612 remitted from Brewer," amounting in all to $1698.64. Balance claimed by defendants, $146.06.

On settling with Captain Winslow afterwards, it was discovered that, he had paid to the defendants and held their receipts for four items amounting to $144.92, included in the general debit of $1844.70; and there was also found an overcharge by error in casting, and the interest of $9.52 not earned; the last two items added to the $144.92 amounting within a trifle to the sum sued for.

L. Barker, *T. W. Vose & L. A. Barker*, for the plaintiff.

Assumpsit to recover money paid to defendants which ought not to have been paid.

Plaintiff was owner of one-quarter of the schooner Burmah and agent for the other owners; and October 11, 1874, settled an account with the defendants, "with the said schooner and owner," which had been running from April 15, 1870, to said day of settlement.

Afterwards, when he settled with the master, Capt. Winslow, he found by the receipts of the defendants in the captain's possession, and errors in their bill of October, 1874, that he had paid the defendants more than was their due. The same items cov-

ered by the receipted bills being found charged in the defendants' bill to said Holyoke, with no corresponding credit, which, with the item of interest, $9.52, which could not have accrued, as nothing was due, makes up the account claimed.

In other words, the plaintiff settled with the defendants and by mistake overpaid them.

This action is brought to recover back that sum.

Dunlap's Paley on Agency, 4 (Am. ed.) c. 5, and notes and authorities there cited. Story on Agency, 7 Ed. § 398. Cowper, 805. *Elliott* v. *Swartwout*, 10 Pet. 137.

A. Sanborn, for the defendants.

The plaintiff was agent for the joint owners, and whatever he did in the premises was done for and by them, and the promise alleged, if any, was in legal contemplation made to and with them. *Robinson* v. *Cushing*, 11 Maine, 480.

Even if the money had been paid, as claimed by the plaintiff's counsel, it is submitted he could not maintain the action. But suppose in that case he could, he has not proved that he paid money to the defendants by mistake; he failed to testify that he paid a dollar to the defendants, by mistake or at all, even a dollar of the $612 remitted from Brewer. The letter of defendants to plaintiff was not addressed to him as agent. It shows that they retained $146.06 out of $406.63 collected for the owners. It was not paid by plaintiff to them by mistake or otherwise.

WALTON, J. It is familiar law that in actions on contracts all the contracting parties must, as a general rule, be made parties to the suit, either as plaintiffs or defendants. In assumpsit, the non-joinder of a co-promisor as defendant can only be taken advantage of by plea in abatement; but the non-joinder of a co-promisee as plaintiff is ground for a nonsuit. 2 Green. Ev., § 110, and authorities there cited.

The suit now under consideration is an action of assumpsit, and it is brought in the name of Caleb Holyoke alone. He is one of the former owners of the schooner Burmah, there being six in all. The evidence shows that the defendants' liability, if any, is by virtue of a contract with all the owners. All their accounts, and

bills, and receipts, are with the schooner Burmah and owners. The omission to join the other owners as plaintiffs in the suit is fatal to its maintenance, unless the omission is in some way excused.

It is said in argument that, the plaintiff was not only a part owner of the schooner, but also an agent for all the others; that, as such owner and agent, he settled with the defendants, and, by mistake, overpaid them; that this action is brought to recover back the sum so overpaid; and authorities are cited to the effect that when an agent pays money for his principal, by mistake or otherwise, which he ought not to pay, the agent, as well as the principal, may maintain an action to recover it back. The law is so stated in Story on Agency, § 398.

A fatal objection to this argument is that the proof does not sustain it on a matter of fact. The evidence fails to show that the plaintiff ever paid the defendants any money, by mistake or otherwise. It shows that, at the time of the alleged settlement, the defendants were indebted to the owners of the schooner Burmah, and that, by mistake or otherwise, they neglected to pay the full amount of their indebtedness. No money passed from the plaintiff to the defendants. The difficulty, if any, was that, by reason of errors or mistakes in their account, they did not pay enough to him. And, as the debt was originally due to all the owners of the schooner jointly, so the balance, if any, still due upon it, must be owing to them all jointly; and, if sued for, must be sued for in the name of all. The action, in its present form, is not maintainable.

Plaintiff nonsuit.

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

AXEL HAYFORD *vs.* CITY OF BELFAST.

Waldo. Opinion January 10, 1879.

Highway. Money tax. Notice by surveyor. Appropriate remedy.

Highway taxes payable in labor, remaining unpaid and assessed as money tax, and paid under protest, cannot be recovered of the town in an action for money had and received, if the assessment was legal, for a legal purpose, and was not an over assessment, although there was no notice as required by R. S., c. 18, § 45.

Notice on the part of the surveyor, and his proper return to the assessors, are conditions precedent to their authority to assess a highway tax as a money tax.

But, if they so do, and without a compliance with this condition, it is an error of theirs, which, by R. S., c. 6, § 114, does not render the assessment void, but might subject the surveyor or town to a different form of action for the damages caused by such error.

ON REPORT.

ACTION OF ASSUMPSIT, for money had and received, to recover the sum of eighty-five dollars and twenty-two cents, being the amount assessed upon the plaintiff in Belfast for highway taxes for 1873, and paid by him to the collector of taxes under protest.

69 63
94 495

Plea, the general issue. It was admitted that, the tax was assessed in labor and in money, and that the assessors and collector were duly sworn; that the assessment was legal, and the officers duly qualified.

It was in evidence that this sum was assessed to the plaintiff as a highway tax, payable in labor, and was in the lists delivered by the assessors to the highway surveyor for collection; that said lists were returned by the surveyor to the assessors, indicating that the plaintiff's tax was uncollected, but no formal, or any return signed by the surveyor, was made; that no notice as reqnired by R. S., c. 18, § 45, was given by the surveyor to plaintiff. Thereupon the assessors put this deficiency of highway tax into the money tax of 1873, and committed it, with their warrant, to the collector of taxes of Belfast for collection. That the collector called upon the plaintiff for the same, and notified him that unless he paid the tax he should arrest him or seize property sufficient to satisfy the

tax; and that thereupon the plaintiff paid it under protest. Having collected the tax the collector paid the money into the city treasury, and this suit is brought to recover it of the defendants.

The full court to order such judgment as the law and evidence required.

Joseph Williamson, for plaintiff.

I. Before a warrant authorizing the enforcement of the plaintiff's highway tax for 1873, could legally issue, he must have neglected or refused, upon proper notice, to work out the amount of such tax, when the assessors should have issued a second warrant to the surveyor or collector, "in substance like warrants for the collection of other town taxes," as provided by R. S., c. 18, § 57. *Cheshire* v. *Howland*, 13 Gray, 321. Or, upon rendition by the surveyor of his name among a list of delinquents, the assessors should have placed the amount due in their next assessment, in accordance with § 48 of same chapter. None of these requirements were observed. The warrant was the general one for that year, and issued prematurely, so far as the highway tax was concerned. There was no notice given, and no opportunity afforded the plaintiff to work to the amount of his tax. Such notice was indispensable to fix his delinquency. *Dearing* v. *Heard*, 15 Maine, 247.

II. Even if notice had been given, no legal list was rendered by the surveyor. The list testified to by one of the assessors, failed to comply with the requirements of the statute. It did not contain the names of such persons as had not worked out their taxes, and did not bear the official signature of the surveyor. The last omission was fatal. *Patterson* v. *Creighton*, 42 Maine, 367. *Smith* v. *Readfield*, 37 Maine, 145. *Look* v. *Industry*, 51 Maine, 375. *Hathaway* v. *Addison*, 48 Maine, 440.

W. P. Thompson, city solicitor, for Belfast.

DANFORTH, J. This is an action for money had and received, to recover the amount of a tax alleged to have been illegally collected.

The legality of the assessment is conceded. This necessarily includes the legality of the purpose for which the tax was assessed. If such is the case, it clearly follows that the city has no money in its treasury, by reason of this payment, which does not in good conscience belong to it. It would seem, then, that whatever other cause of action the plaintiff may have, this is not open to him.

But he claims that the defendant has his money, when it is only entitled to his labor. It is true that the tax was assessed, in the first instance, as a highway tax, and assigned to a surveyor for collection. If it were payable in labor, the plaintiff would be entitled to notice and demand, as required by R. S., c. 18, § 45, and it is alleged that this notice was not given. Were this so, it does not affect the legality of the tax. The omission might render the surveyor liable, and if the city could be holden for his misdeeds, it would not be in this form of action.

If this omission appeared in the surveyor's return, then the assessors erroneously inserted it in the lists of money taxes, where the case finds it. It would be equally erroneous to insert it in the money tax of the same year in which it was assessed.

The assessment of a highway tax, to be paid in labor, is one thing, to convert it into a money tax is another. The former is a step, and a necessary one, to the latter; still, it is only a step. To enable the assessors to make the money assessment, they must have the return of the surveyor showing who are the delinquents, and then assess the highway tax of such in the money list of the next year. R. S., c. 18, § 48. *Patterson* v. *Creighton*, 42 Maine, 378.

The complaint of the plaintiff rests upon the alleged errors of the assessors in putting his tax into the money list; or in other words, assessing it as a money tax. If all his allegations are true, the tax does not become void. The errors, or omissions, of the assessors do not affect the tax, but having paid that, he is entitled to an action,—not to recover his money back—but for his damages sustained by reason of such errors or omissions, if any. R. S., c. 6, § 114. *Rogers* v. *Greenbush*, 58 Maine, 390. *Gilman* v. *Waterville*, 59 Maine, 491.

Judgment for defendant.

APPLETON, C. J., WALTON, BARROWS, LIBBEY and PETERS, JJ., concurred. 5

HENRY L. MITCHELL *vs.* WILLIAM H. SMITH.

Penobscot. Opinion January 10, 1879.

Practice. Trial. Exceptions. Writ of entry.

The law court sent down an order, that, upon amendment of the writ so as to exclude from the description of the premises demanded all that portion south of the true dividing line between the premises of the parties as determined and described by the court, the entry will be judgment for demandant.

An amendment was filed by the demandant precisely in accordance with the order of this court, and the presiding judge at *nisi prius* ordered judgment for demandant. *Held*, that to such order exceptions do not lie.

ON EXCEPTIONS.

WRIT OF ENTRY, in a case stated, between the same parties, 67 Maine, 338.

A. W. Paine, for the defendant.

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

LIBBEY, J. This case came before this court at the June law term, 1875, on report of the evidence with the following stipulation: "This case is continued on report for the consideration of the full court, who are to render judgment, or otherwise dispose of the case as the legal rights of the parties require." It was ably argued by counsel, and fully and carefully considered by the court, and the true dividing line between the premises of the parties was determined according to the true construction of their deeds. As the line was settled by the court it was found that the description in the demandant's writ embraced a small strip south of that line not owned by the demandant; and, instead of ordering a special judgment in accordance with the dividing line as settled by the court, an order was sent down that, "Upon amendment of the writ so as to exclude from the description of the premises demanded all that portion south of the true dividing line as we have described it, the entry will be judgment for demandant." *Mitchell* v. *Smith*, 67 Maine, 338.

This the court had full power to do under the stipulation in the report. It only remained for the court at *nisi prius* to execute

the order sent down. An amendment of the writ was filed by the demandant as required by the order. It is not claimed by the counsel for the defendant that it is not precisely as required by the order.

After the amendment was filed there was nothing for the presiding judge to do but to enter up judgment for the demandant. The defendant's objections and motion, if sustained, required the judge to disregard the order of this court. That he could not rightfully do. To the order of the judge overruling the defendant's objections and motion, and entering up judgment in accordance with the order of this court, exceptions do not lie. Otherwise there would be no end to litigation, as the losing party might move, at *nisi prius*, to set aside the mandate of this court, order ing judgment, and, if his motion is overruled, bring the case back to this court on exceptions; and this might be repeated as often as a mandate was sent down.

If the exceptions were based upon the ground that the presiding judge entered up judgment not in accordance with the order of this court, a different rule would prevail, and we should be required to determine whether they were well founded; but there is no such claim in this case.

Exceptions overruled.

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

Inhabitants of Glenburn *vs.* Inhabitants of Naples.

Penobscot. Opinion January 10, 1879.

Pauper. Insane Persons. Statutes, construction of. Husband and Wife.

By R. S. of 1857, c. 143, § 20, any town chargeable in the first instance and paying for the commitment and support of the insane in the hospital, may recover the amount paid of the town where his legal settlement is, as if incurred for the ordinary expenses of any pauper. By the same section, "no insane person shall suffer the disabilities incident to pauperism, nor be hereafter deemed a pauper by reason of such support." *Held*, that "such support" of the wife will not interrupt the five years residence of the husband in any town, so as to prevent his gaining a settlement under R. S., c. 24, § 1, Rule 6. *Held*, also, that as the husband in this case had resided more than five successive years in the plaintiff town, without receiving pauper supplies, before the support sued for had accrued, the action was not maintainable.

In order to interrupt a residence, it is not sufficient for a person in need of relief to make application for aid to the overseers of the poor where he is residing; the aid must be furnished as pauper supplies.

The act of 1870, c. 127, provides that, the time during which the insane person is supported in the hospital shall not be included in the period of residence necessary to change his settlement. *Held*, that the act having been passed after the settlement acquired in the plaintiff town can have no effect in this case.

On report.

Assumpsit for pauper supplies.

W. H. McCrillis, for the plaintiffs.

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

Danforth, J. An action to recover the amount paid to the Insane Hospital for the commitment and support of Clarissa Pendexter from October 16, 1871, to May 31, 1873. It is conceded that if the said Clarissa had her legal settlement in the defendant town at the former date, the plaintiffs are entitled to recover; otherwise not.

The alleged pauper has since 1847 been the wife of Oliver Pendexter, whose settlement was in Naples previous and up to April 29, 1859, when he with his wife removed to Glenburn where he has resided up to the present time without receiving any supplies as a

pauper, unless a payment by Naples for a previous support of the wife at the hospital shall be deemed such.

In October, 1862, the wife became insane, "and in consequence of said insanity, the said Oliver fell into distress and stood in need of immediate relief and applied to the town for aid." The selectmen of Glenburn, on due proceedings had, immediately sent the wife to the insane hospital, where she remained until her discharge July 10, 1869. During this period Naples, upon notice from Glenburn, paid for her support, except what was paid by the state, and neither the wife nor husband received any other supplies from either town.

The sole question presented is whether the support thus rendered to the wife was such as would interrupt the husband's residence in Glenburn, so as to prevent his acquiring a settlement there.

The mere fact that he fell into distress and made application to the town for aid would not be sufficient; aid must be actually rendered; there must be supplies received as a pauper. R. S., c. 24, § 1, Rule 6, the rule being the same under the revision of 1857 and 1871. *Hampden* v. *Bangor*, 68 Maine, 368.

Was the support thus rendered received as pauper supplies? The R. S. of 1857 answers this question in the negative. By c. 143, § 20, after providing in certain cases for the recovery of the expenses of a support in the hospital, of the town where the patient has his legal settlement, as if incurred for the ordinary expenses of any pauper, it is enacted that, "No insane person shall suffer any of the disabilities of pauperism, nor be hereafter deemed a pauper by reason of such support." Such support clearly refers to that provided for in the preceding part of the section, to be recovered of the town wherein the insane person has his legal settlement, and the provision is as distinct as language can make it, that such support so rendered shall not make a pauper of the person receiving it; or, in other words, it is not to be deemed supplies received as a pauper. Such appears to be the construction incidentally given to the statute in *Jay* v. *Carthage*, and *Pittsfield* v. *Detroit*, 53 Maine, 128, 442.

It is clear that the wife could not be made a pauper by such

support, and if she was not, her husband could not be through her, and his residence in Glenburn could not thereby be interrupted.

The argument of counsel seems to have assumed that, during the stay of the insane person in the hospital his residence is suspended. As the statute now reads there would be no doubt as to such suspension, and quite probably the court might come to the conclusion that the assistance rendered by Naples after the discharge would not come within the provisions of the statute. But this amendment was not made until 1870. For the first time the statutes of that year, c. 127, provides that, "the time during which the insane person is so supported shall not be included in the period necessary to change his settlement." But long before this act took effect the necessary five years had passed; it was therefore too late to affect this case. The husband's settlement had become fixed under existing laws, and if the legislature could by a subsequent act change it, or any of the grounds upon which it was acquired, there is no evidence in the terms of this act that it was intended to have a retroactive effect; and without such it must be considered as applicable to the future only.

Besides, it is not applicable to this case. It is the residence of the husband that settles it, and not that of the wife. His residence fixes his settlement and hers follows that. True, the presumption in ordinary cases is that the home of the wife is that of her husband. But this presumption ceases to operate where she has no home, as in this case, and we must look to that which he has made for himself to find where his residence is.

It is, however, contended that although such support as was furnished the wife does not by law affect her or her husband's rights, or reduce them to pauperism, yet as between the towns it has the same effect as pauper supplies, and as between them prevents a change in the husband's settlement. But it is difficult to see how it can affect the towns without affecting the person. The settlement is an incident to the person as much as to the town, and if it is unchanged as to the one it is so as to the other. But a more conclusive answer to this is found in the statute fixing settlements. R. S., c. 24, § 1, Rule 6, (and it is the same in the

revisions of 1857 and 1871) provides that, "a person of age, having his home in a town five successive years without receiving, directly or indirectly, supplies as a pauper, has a settlement therein." To interrupt the residence, then, the supplies must be received as a pauper ; they must reduce the person so receiving to the condition of a pauper, subject to the disabilities incident to pauperism ; while by the express provision of another statute, as we have seen, no such effect shall be attached to an insane person in consequence of a support in the hospital, under any circumstances.

There is no occasion for discussing the liability of Naples for the support of the wife during the time of her first stay there. If it attached in consequence of her settlement in that town at the time of her commitment, it would cease at her discharge. If it continued only so long as her settlement continued, then Naples has paid more than the law required ; and in either event, though under certain circumstances of doubt as to settlement, these acts of the town might be used as testimony, they cannot avail to change the settlement. And in this case, where there is no dispute as to the material facts, these acts are useless for any purpose whatever.

As the action is not maintainable, by the somewhat peculiar provisions of the report, it is to stand for trial.

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

JOHN FARRELL *vs.* INHABITANTS OF OLDTOWN.

Penobscot. Opinion January 10, 1879.

Way. Defect. Obstacle outside of wrought part. Notice.

It is not required that a highway, in its whole width as located, should be fitted for travel. It is enough if there be a wrought road in good condition and of suitable width for all the needs of the public.

Objects outside the traveled way, and not near enough to the line of public travel to interfere with or incommode travelers, are not to be deemed defects.

When objects are left, temporarily and rightfully, outside of the traveled way, which may constitute a defect by remaining there an unreasonable time, the town, to be liable, must have knowledge that they are there under circumstances constituting them defects. *Nichols* v. *Athens*, 66 Maine, 413, and *Bartlett* v. *Kittery*, 68 Maine, 358, reaffirmed.

ON EXCEPTIONS, AND MOTION for new trial.

CASE for damages sustained by plaintiff while traveling on the highway in defendant town, by reason of an alleged defect. A motion to set aside the verdict, as against evidence, the weight of evidence and against law, and exceptions being filed, in order to simplify the case, it was agreed that the verdict, which was for plaintiff, should be accepted as conclusive on all points involved, except as it is controlled by the fact that the accident was occasioned by the fright of the horse as herein stated.

And on this point it was agreed that the horse and carriage did not come in contact with any obstruction in the highway, nor receive any injury from any such cause, but the whole injury resulted from fright which the horse received at the sight of two or three blocks of split granite, about four or five feet long and some twelve or fifteen inches square, lying outside of the traveled path of the road, in approaching which the horse took fright, turned suddenly around, overturned the carriage and ran home, doing damage to both horse and carriage. The accident happened September 13, 1876. Writ dated February 6, 1877.

The presiding justice instructed the jury on all points relating to liability and duty of the parties in a manner not objected to by either party, except on the single point following:

Defendants requested the court to instruct the jury that, if the

object of fright was simply a piece or pieces of granite of usual form and appearance, lying outside the traveled path, without any frightful features other than those usually pertaining to such objects, the action cannot be maintained. This request the court refused, but left it to the jury to decide whether the stones were, as a matter of fact, a defect such as to render the road unsafe for travel, by reason of their being objects calculated to frighten horses that were well broken and suitable to drive.

To the above ruling and refusal the defendants excepted.

J. Varney, for plaintiff.

A. W. Paine, for defendants.

APPLETON, C. J. A person receiving a bodily injury, or suffering damage in his property, "through any defect or want of repair, or sufficient railing, in any highway, townway, causeway, or bridge," may recover for the same in an action on the case, etc.

In the case before us it is not denied that the traveled portion was safe and convenient. The road in its whole width, as located, need not be fitted for travel. It is enough if there be a well wrought road in good condition, and of sufficient width for all the needs of the public. The public are to travel over that portion prepared for that purpose, and not over that not so prepared. Towns are not insurers against the possible and infinite idiosyncracies of the various horses which may travel over a road. Its duty is done when ample space, a road smooth and well conditioned, in good repair, is open for the public.

The injury complained of arose from no defect or want of repair in a road of ample width, but from a fright of the horse occasioned by "two or three blocks of split granite, about four or five feet long and twelve or fifteen inches square, lying outside of the traveled path."

These pieces of granite may have been needed for the repairs of a bridge, and may have been temporarily left there while in their progress to the bridge for the repair of which they may have been needed. They were articles of utility. They were not in the traveled way. They did not, *per se*, obstruct or interfere with the public travel.

The defendants had a right to the use of the highway for their removal. If the plaintiff's horse had taken fright while in the process of their removal, the town would not have been liable. *Davis* v. *Bangor*, 42 Maine, 522. Still less should the town be liable while they are at rest, and outside the traveled path. Neither are they articles which could be expected to frighten a well trained horse, and against which the town was to be on its guard. In *Card* v. *Ellsworth*, 65 Maine, 547, the object of fright was, *per se*, a defect in the road. In *Nichols* v. *Athens*, 66 Maine, 402, the body of a common riding wagon, left outside of the traveled road, by which a horse was frightened, was held not to be such an incumbrance or defect as would render the town liable for a defective highway. "There is no doubt," observes Peters, J., "that a town would be liable in damages in many cases where horses become frightened by objects within the traveled way, when the same objects could not reasonably be regarded as constituting a defective road if situated outside the traveled way." In *Perkins* v. *Fayette*, 68 Maine, 152, an instruction that, towns were not required to render a 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, was held correct. It was there held that the town had the right, in making or repairing roads, to remove stones and stumps on the sides of the way, and leave obstructions there, provided the same were situated so far from the traveled path, that persons passing over the road with teams might pass without danger of collision. In *Rounds* v. *The Corporation of Stratford*, 26 Up. Can. Com. Pleas, 11, it was held that the existence of a broken-down wagon, with a bright red board sticking to it, on the side of a highway and partly in the ditch, where it had been hauled by the owner, some eight or ten feet from the traveled path, leaving plenty of room to pass, and remaining there for ten days, did not constitute evidence of actionable negligence on the part of the corporation. "It is not pretended," observes Hagurty, C. J., "that it produced any ill effect beyond frightening of the horse. . . It was not that it encroached on the road, or narrowed the

road way, but that it presented an appearance likely to cause a horse to shy. . . I cannot for a moment understand how the presence of a broken-down country wagon on the side of the road, in no way interfering with the fullest privilege of passing or repassing, can, in and of itself, give a cause of action to any person. It must be rested wholly on the wagon being an object likely to frighten horses. . . If liable here, they would be liable for the most trivial matters; far more startling objects are to be seen in and along the sides of streets. Must a corporation insist, at its peril, on the removal of everything as likely to startle as an old country wagon with cross pin or board standing upon it, hauled completely out of the traveled way?" So in *Bartlett* v. *Kittery*, 68 Maine, 358, it was held that a thing rightfully in the highway might constitute a defect by remaining there an unreasonable time; but to hold the inhabitants liable, they must not only know the thing is there, but that it is there under circumstances which constitute a defect. In the case before us, the stones were procured for the purpose of repairing the highway, and had not been at the place where they were left but a few hours. They in no way obstructed the public travel. The town was in no fault for their being on the side of the road. Ample space was left for the public travel without coming in contact with the stones.

According to the weight of authority the defendants are not legally responsible for the accident and consequent injury.

Motion sustained. New trial granted.

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

LORENZO HINCKLEY, in equity, *vs.* WILLAM H. HAINES & others.

Aroostook. Opinion January 11, 1879.

Equity. Injunction. Cloud upon title. Real property. Deed. Settler's certificate. Adverse possession.

The holder of a settler's certificate may transfer by deed his interest in the lot described in such certificate.

After payment and performance of all the duties required of a settler, the state holds the land as trustee.

The grantee of the holder of a settler's certificate, the settler's duties having been performed, acquires a title to the settler's lot deeded him after and by twenty years open, notorious and exclusive occupation of the same under a recorded deed.

When one having a settler's certificate conveyed the lot therein described, and the settler's duties were performed, and the grantee and those under him have been in adverse possession of the same under a recorded deed for more than twenty-five years, one taking a conveyance from the original settler, after and with knowledge of these facts, and by way of gift and without consideration, will be perpetually enjoined from setting up his pretended title against that first derived from such original settler.

BILL IN EQUITY.

A. W. Paine, for the plaintiff.

J. Madigan & J. P. Donworth, for the defendants.

APPLETON, C. J. On October 30, 1843, Joseph W. Haines had a certificate from the state of Maine, under the settlement act, for the conveyance of lot No. 130.

On September 18, 1844, he conveyed this lot to Daniel Haines. This deed transferred all the right of the grantor to a conveyance of lot 130 to the grantee. It was an assignment of his interest in the right acquired by virtue of his certificate. After that date he ceased to have any interest in the certificate, or in the land thereby agreed to be conveyed.

On December 1, 1847, the settling duties were paid. It does not distinctly appear by whom, but the payment may fairly be presumed to have been made by the party holding title by deed. It nowhere appears that it was made by Joseph W. Haines, to whom the original certificate was given.

On April 15, 1847, Daniel Haines conveyed lot 130 to John

Hodgdon, who, on August 5, 1859, conveyed seventy acres off the south end of the lot to George W. Haines, being the land in controversy.

On April 15, 1865, George W. Haines conveyed the seventy acres thus acquired to John W. Haines, by whom they were, on December 27, 1872, by deed of warranty conveyed to this complainant.

The settler's duties having been paid on December 1, 1847, the state ceased to have any equitable interest in the lot.

The lot had been occupied before George W. Haines went on in 1859, for Stevens says it was considerably run out. There is no evidence showing or tending to show that there has been any occupation of the disputed premises otherwise than in accordance with the deeds to which we have made reference. If the grantor remained in possession of the premises conveyed, (of which there is no proof) the presumption of law is that he was there rightfully and as the tenant of the grantee. *Sherburne* v. *Jones*, 20 Maine, 70. If he quits the premises conveyed, the possession is in the grantee, in accordance with his recorded title. The land has been cleared, taxes have been paid and buildings erected by the grantees of the deeds above mentioned, so that when this complainant took his deed of warranty on December 27, 1872, there had been an open and adverse, notorious and exclusive occupation of the premises by his grantor and those under whom he claims for more than twenty-five years.

The defendants, William Henry Haines and Hannah E. Haines, claim title under a deed from the land agent, dated September 9, 1875, more than thirty years after the settler's certificate had been given to Joseph W. Haines, and more than twenty years after he had conveyed the land mentioned in the certificate, and after the settling duties had been paid. It does not appear that, during this long period he had ever set up any title to the premises or interfered with the grantees under his deed. The state, too, had no claims to assert, and had asserted none.

By R. S., c. 105, § 11, "No real or mixed action for the recovery of any lands shall be commenced in behalf of the state unless within twenty years after the time its title accrues." The title of

the state accrued more than twenty years ago, and the state, when it conveyed to the defendants, had neither legal nor equitable title in the premises conveyed.

Joseph W. Haines had no interest in the certificate, for he had assigned and transferred his right to the same thirty-two years before he applied for a deed, having never during all that time interfered with the possession, the rights or the title derived from his deed of September 18, 1844. Yet during that period his certificate was, by R. S., c. 5, § 3, sufficient to enable him to maintain any action relating to the land specified therein against any party but the state or one claiming under the state. So that for thirty years or more he allowed a title derived from him, and adverse, to ripen by lapse of time into a perfect one, without let or hinderance on his part.

The grantees in the deed from the state received this deed in a letter, without any application for it, and without having paid anything for the conveyance. The purpose and object of Joseph W. Haines are unmistakable. They were to defeat the right and title of the complainant, derived under his own deed and for which a full and adequate consideration had been paid. The grantees, William Henry Haines and Hannah E. Haines, hold under a voluntary conveyance, procured by their grandfather to enable them to defraud a creditor of their father's. The conveyance cannot give them, after so long acquiescence on the part of all concerned, any title as against a *bona fide* purchaser as the plaintiff is. *Laughton* v. *Harden*, 68 Maine, 208.

In *Cary* v. *Whitney*, 48 Maine, 517, no rights whatever were acquired by adverse possession, except to betterments. There was no such palpable and ostentatious fraud as is attempted in the present case. That, too, was a case at law, and the legal title only was in issue, denuded of all questions of fraud or of adverse possession. The R. S., c. 105, § 11, was not and could not have been invoked in aid of the defense.

The complainant may well object to a cloud, even though somewhat transparent, resting upon his title. A bill will be sustained to remove that cloud. The bill may be amended by adding a prayer for an injunction, and the defendants enjoined against interfering

with the title of the complainant, or setting up their pretended title in any way adversely to him. *Clouston* v. *Shearer*, 99 Mass. 209. *Russell* v. *Deshon*, 124 Mass. 342.

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

PATRICK McGEE & another *vs.* JOHN McCANN.

Penobscot. Opinion January 15, 1879.

Intoxicating liquors. Assignment. Parties. Pleading. Declaration. Demurrer. Amendment. Costs.

Under the statute of 1872, c. 63, § 4, the cause of action is the causing or contributing to the intoxication, whether done by selling intoxicating liquors, or owning the building in which the liquors are kept for illegal sale, with the knowledge of the owner.

The cause of action in such case is not assignable, and so there can be no assignee of it, as contemplated in R. S., c. 82, § 115, providing for an indorsement of the writ.

An allegation of the use of the building for the selling of intoxicating liquors in violation of law, with the knowledge of the owner, is sufficient; other counts declaring against the defendant, as owner of the building, and not the seller, without such allegations, *held* defective.

The cause of action in such case, as well as the damages to be recovered, is not joint but several. Where, therefore, the parents, though husband and wife, are joined as plaintiffs, declaring for damages to both, there is a misjoinder, amendable under act of 1874, c. 197. In this case, the law court allowed the amendment, upon payment of costs from the time the demurrer was filed.

ON EXCEPTIONS.

CASE by plaintiffs, parents of James McGee, under act of 1872, c. 63, § 4, in amendment of R. S., c. 27, § 32. The first count commences, "for that whereas," and recites § 4 entire, and proceeds: "And whereas, the plaintiffs allege that they have a son, James McGee, a minor under the age of 21 years, who is their sole and only means of support; and whereas, they further allege that on the 3d day of March, 1876, said James McGee left his home and proceeded to the store of one John McCann, (the defendant) in said Bangor, where the said James bought, paid for, and drank on the premises and in said store, two glasses of whis-

key, by reason whereof he became intoxicated, and in trying to return home became insensible and fell across the European & N. A. Railroad track, and while lying there in that insensible condition, a passing train ran over him and cut off his left arm at the shoulder, maiming him for life, and rendering him utterly unfit for manual labor, by reason whereof his said parents, the plaintiffs, are deprived of their only means of support. Wherefore they claim to recover of the said John McCann the sum of ten thousand dollars under the above statute."

The second count set out the substance and effect of the statute, and alleged injuries similar to the first count, and claimed to recover both actual and exemplary damages.

The action was entered at the April term, 1876, and continued from term to term to the January term, 1877, when the plaintiffs had leave, subject to the defendant's exceptions, to amend their writ by adding a third count, containing an allegation of the use of the building for selling intoxicating liquor in violation of law, with the knowledge of the owner.

After the exceptions had been filed and allowed, the action was continued from term to term without trial to the April term, 1878, when the defendant moved that the writ be indorsed by Messrs. Barker, Vose & Barker, for the alleged reason that they then had from plaintiffs an irrevocable power of attorney as to the prosecution of the suit, and that by virtue of said power of attorney they controlled the suit, and that such facts constituted them assignees of such interest in the case as entitled defendant to their indorsement of the writ. Upon this motion the presiding justice ruled that, regardless of the power of attorney, its contents or its intended effect by the parties thereto, the writ need not be indorsed, because such a cause of action as this is not legally assignable. The defendant then filed a general demurrer to the writ, which was joined by the plaintiffs and overruled by the presiding justice.

The defendant alleged exceptions.

J. Varney, with W. H. McCrillis, for the defendant, contended that the first and second counts, containing the words "to the store of one John McCann," declared, if they declared anything,

that John McCann was the keeper of the store, not the owner, and that the third count, declaring against him as owner, introduced a new cause of action; that the plaintiffs' counsel should have indorsed the writ; that to allow them the benefit of the assignment such as it was to them as parties to it, and to release them from the obligations imposed by the statute because of such assignment, on the ground that it was illegal, was to allow them to take advantage of their own wrong. Under the demurrer, they contended that, although at common law the husband's name must be joined with the wife's in an action of tort to enable her to collect her own damage, yet the wife's name cannot be used as plaintiff in a writ in which the husband's damage is claimed, even if that damage to the husband arises from injury to the wife, where the husband is at the same time injured.

L. Barker, T. W. Vose & L. A. Barker, for the plaintiffs.

DANFORTH, J. The amendment allowed in this case was unobjectionable. In the first two counts the liability of the defendant is placed upon the ground that the intoxication from which the injury complained of resulted, was caused by liquor bought and drank by the plaintiffs' minor son, in the store of John McCann (the defendant). There are no allegations that the defendant sold or gave to the son the liquors which produced the intoxication, therefore the charge against the defendant is not for having caused or contributed to the intoxication under the provisions found in the first part of the section of the statute relied upon. On the other hand, the language used is such as is applicable to him as owner of the store. True, they may be applicable to one who is the keeper; but taken in connection with the absence of other allegations, it is clear that under these two counts the defendant must be holden as the owner, if at all. But for this purpose the counts are clearly defective, and hence the third count is inserted by way of amendment. This count is more full and more clearly places the defendant's liability upon his ownership, making certain the very thing which was before uncertain, and there is no incongruity between this count and the previous ones in respect to the cause of action set out.

But if the first counts put the liability upon a sale and the last upon ownership, it does not follow that they are for two different causes of action. The terms of the Stat. 1872, c. 63, § 4, upon which the action is founded, must determine this. The action may be maintained "against any person who shall, by selling or giving any intoxicating liquors, or otherwise, have caused or contributed to the intoxication of such person." Further on it is provided that, the owners of buildings, "having knowledge that intoxicating liquors are sold therein in violation of law, shall be liable, severally and jointly, with the person selling or giving," etc. Hence under these provisions the owner's liability is evidently put upon the same ground as that of the seller, which is that each have caused or contributed to the intoxication, in different ways perhaps, but each working to the same result. The causing or contributing to the intoxication is the cause, and the only cause, of action provided for, and makes the guilty party liable, whatever be the means resorted to.

A motion was made by defendant's counsel that the writ be indorsed by Messrs. Barker, Vose & Barker as the assignees of the claim in suit, which was refused, on the ground that the cause of action is not legally assignable. This motion was made under the provisions of R. S., c. 82, § 115, which leaves no discretion in the court, but is peremptory that, when an action is commenced in the name of an assignor, the name and place of residence of the assignee, if known, shall be indorsed, by the request of the defendant, on the back of the writ. The terms assignee and assignor necessarily imply an assignment, and there can be no assignment within the meaning of the statute, whatever may be the form of words used, unless the subject matter is such as can be legally assigned. If, then, the cause of action in this case is such that it could not be legally transferred in this way, there can legally be no assignee, and the able and ingenious argument of counsel is not applicable. If the power of attorney referred to has the effect claimed for it, the suggestions made would be entitled to consideration upon a motion for nonsuit, for if the plaintiffs of record have parted with all their interest in the subject matter of the suit, and no one has legally acquired such interest,

it might be difficult to perceive upon what ground the action can be maintained. But the simple question now is, whether the attorneys are assignees, and, under the ruling, that must, for the purpose of settling the question raised by the exceptions, depend, as already suggested, upon the question as to whether the claim is assignable.

The claim is for an injury, not to property, but to the plaintiffs' means of support derived from their minor son. Nor is there any question growing out of a contract or a breach of one. It is an action of tort, purely and entirely so. It is not necessary even that the loss of the means of support should depend upon a legal right. It is sufficient if voluntarily rendered. So, too, the damages to be recovered do not depend entirely upon the actual injury, but may be exemplary as well. It would seem to follow that the cause of action is not only a tort but a personal wrong and injury, as much so as that of an assault and battery.

Whatever may be the result of the great variety of decisions of different tribunals, and the different and apparently conflicting principles upon which some of them rest, so far as relates to the legal right to assign causes of action growing out of wrongs or injuries to property, or of the violations of contract, it seems to have been universally held that claims for personal injuries, and those in which damages may be reeovered for wounded feelings, cannot be transferred.

Besides, in this case there is nothing upon which an assignment can be based. The claim is not for any particular thing, but for damages to be recovered. It would hardly be contended that a right to support from any particular person, even if founded in law, could be transferred to another. No more so could a claim for damages resulting from an injury to that right. Even if such damages could be appropriated by such a contract as would be enforced in equity after a recovery, that would not be an assignment of a thing in existence such as is contemplated in the statute. There must be something more than a mere right to litigate. These principles are illustrated and sustained in 2 Story's Eq. Jur., § 1040, and note. 3 White & Tudor's Lead. Cas. in Eq. 334. *Mulhall* v. *Quinn*, 1 Gray, 106, 107. *Rice* v. *Stone*, 1 Allen, 566. *Averill* v. *Longfellow*, 66 Maine, 237.

Another question arises under the general demurrer to the writ. The objection here is a misjoinder of plaintiffs, and this objection we think must prevail.

The act of 1872, c. 63, § 4, gives to every parent, "who shall be injured in person, property, means of support, or otherwise, by any intoxicated person, or by reason of the intoxication of any person, a right of action in his or her own name against any person or persons who shall . . have caused or contributed to the intoxication of such person."

There is nothing in the statute which in any degree tends to change the ordinary principles of law as applicable to the maintenance of an action of this kind. Hence a joint action in the name of two can be maintained only when their joint interest is invaded, or where they are jointly interested in the damages to be recovered. This seems to be a universal rule, and the apparent exceptions are not real ones.

In *Coryton* v. *Sythebye*, 2 Saund. 115, cited in 1 Chit. on Plead., and approved in *Wilber* v. *Baker*, 2 Wils. 423, the action was maintained expressly on the ground of a joint interest in the damages. It is true the plaintiffs were severally interested in the mills injured, but the damage was joint; though each owned a mill, yet each had a right to grind the defendant's wheat and barley. That right belonged as much to the one as to the other; and as it is said in the opinion of the court, "they might well join in the action, for, though their interests are several, yet the not grinding at any of their mills is an entire joint damage to both of the plaintiffs, for which they shall have their joint action."

In the case at bar the interest as well as the injury is several. The damage complained of is not to property, but to support. The support of the one cannot be that of the other. The injury to the one in this respect cannot be a direct injury to that of the other. Though, in the case of husband and wife, it may be an indirect injury, but one for which an action would not lie.

Here the plaintiffs do not declare as husband and wife, but as parents. As such, the injury to the one and the amount to be recovered might be very different from that of the other, for both the real and the exemplary damage might be very different.

The language of the statute, so far from changing this principle of law, tends very decidedly to confirm it. "Every parent" thus injured shall have a right of action "in his or her own name," and the amount recovered by the "wife or child shall be his or her sole and separate property."

If the parents may join, just as well might the children, for in the same sense they all have community of interest.

Nor would it avail to so amend the writ that it should appear that the plaintiffs are husband and wife, as they presumably are, for the declaration does not show that the action is for the wife's damage as such, and she could not join with her husband to recover his damage. Nor would such an allegation show a joint interest in the damage, and relieve the case from the provision of the statute that the amount recovered by the wife "shall be her sole and separate property."

Where too many plaintiffs join, the objection need not be taken by plea in abatement. It is only where there is an omission of one who ought to have joined that such a plea is required. 1 Chit. on Plead. 66.

This defect in the writ is amendable under the provisions of the act of 1874, c. 197, which the plaintiffs may have leave to do, "upon the payment of cost from the time when the demurrer was filed."

It is also objected that there is no allegation in either count that the liquor was sold in violation of law. In the first two counts there is no such allegation, and for that, as well as for other reasons, they are defective. There is under the statute no cause of action against the defendant, unless it appears that his building, with his knowledge, was used for the sale of intoxicating liquors in violation of law. As this fact must appear, it must be alleged. It may be true that upon proof of sales the legal inference is that they are unlawful until the contrary appears. But this is a matter of inference from the testimony, and does not relieve the plaintiffs from setting out in their declaration all the facts necessary to secure a conviction. The court cannot assume that a person is not an authorized agent where he is not so described.

The third count contains the necessary allegation. It is not

necessary that defendant should know that the liquor was unlawfully, or in any way, sold to the minor son. It is sufficient for him to know that intoxicating liquors were unlawfully sold in his building.

Exceptions sustained.

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

ELI F. LITTLEFIELD *vs.* INHABITANTS OF GREENFIELD.

Penobscot. Opinion January 18, 1879.

Town. Action. Balance of judgment. Assessment. Remedy, choice of. Scire facias. Debt.

An action will lie against a town to recover a balance due on a judgment, even though a portion of it has been paid by individuals under an assessment made in accordance with the act of 1858, c. 53.

The remedy by *scire facias* provided in R. S., c. 82, § 128, is permissive by its terms, and leaves it optional with the creditor to pursue the remedy there provided, or by action of debt.

ON FACTS STATED.

DEBT ON JUDGMENT.

At the January term of this court, 1868, the plaintiff recovered judgment against the defendants for $639 damage and $27.94 costs of suit.

On this judgment an alias execution was issued in May, 1868, and put into the hands of G. S. Bean, an officer, who immediately notified the assessors of the town of Greenfield thereof, who forthwith after said notice assessed the same, together with the officer's fees, on the inhabitants and estates within the town.

The defendants can prove by parol, if the testimony is admissible, that immediately after the assessment, the assessors gave notice of the same in the manner in which town meetings for said town are notified, specifying in the notice the amount of the execution, and the fact that it had been assessed, and the several amounts assessed upon the several inhabitants, and non-resident property;

that the municipal officers of the town have made diligent search for said notice and cannot find the same or any record thereof.

On June 1, 1868, the assessors delivered to Bean a certificate by them signed of the assessment and notice.

After the notice, divers persons, then and now inhabitants of the town, and divers other persons, then and now proprietors of lands therein, and whose names are mentioned in the list of the assessment and also in the return of Bean on the execution, respectively paid to Bean the several sums and amounts assessed upon them in the list as their due proportion of the execution and fees thereon, as appears by said officer's return; and receipts were severally given the persons paying as aforesaid in the form following:

"$12.32. Received of James Doyle twelve and 32-100 dollars on Ex'on E. F. Littlefield vs. Inhabitants of Greenfield, Penobscot ss., January term, 1868, amount of assessment as per certificate of assessors. June 4, 1868. G. S. Bean, Dep. Sh'ff."

The whole amount thus collected and received was $360.85, and on June 6, 1868, said Bean returned the execution, as satisfied in part, to the clerk of this court.

On June 9, 1868, a pluries execution was issued for the balance then due, to wit, $318.14, and placed it on the same day in the hands of the same officer, who thereafterwards collected from a part of the remaining inhabitants of the town and proprietors of lands therein, who had been assessed, the amounts and sums assessed against them respectively, aggregating in all the further sum of $269.78. And on September 8, 1868, said Bean returned the execution satisfied in part for the amounts aforesaid. A portion of the judgment is now unsatisfied.

If, upon the foregoing facts, this action can be maintained, the defendants are to be defaulted; if not, the plaintiff is to be nonsuit.

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

G. P. Sewall & J. A. Blanchard, for the defendants, contended that, the plaintiff had mistaken his remedy, which should have been "*scire facias*," under R. S., c. 82, § 128, and not "debt."

II. That each person and piece of property that has paid his or its proportion of the assessment at any time is discharged, and this, even if such property is now held by persons who have not so paid.

III. That the requisites of the law of 1858 have been complied with, and that all such persons and property as paid on or before June 10 are discharged.

IV. That, to protect the rights of such persons and property, this judgment should be limited so as to run only against those inhabitants and pieces of property as have not paid their respective proportions within the proper time or under such circumstances as the court shall determine to have been properly paid.

Wilson & Woodard in reply.

This remedy of debt on the judgment is at common law. R. S., c. 82, § 128, is only cumulative and permissive by its own terms.

DANFORTH, J. At the time the judgment in suit was recovered, the act of 1858, c. 53, was in force, and under that law certain proceedings, intended to be in compliance with its provisions, were had, and a part of this debt collected from individuals then assessed. It is now claimed that such individuals, or a portion of them, are exempt from further payments. Whether they are so or otherwise is a question not involved in this case. For the balance due on the judgment remains in full force. That an action of debt will lie in such case is too well established to admit of a doubt. It is true that, under R. S., c. 82, § 128, *scire facias* may be maintained. But this is not imperative. It is, by the language used, left optional with the creditor. Were it otherwise, no other remedy, when the time within which an execution might issue had elapsed, except *scire facias*, would be left for any judgment creditor, for the provisions of the section apply to all judgments alike.

Nor can there be any difference in the result whether the one remedy or the other is chosen. In either case, the execution must issue for the balance due, without any designation of the several sums paid or by whom paid.

The remedy which any person who has paid has, if any, comes only after an attempt to collect of him again, and as this second judgment is founded upon the same original debt, the exemption from further payment applies to that the same as to the first.

The defendants' argument rests upon an erroneous basis. The judgment, though nominally against the inhabitants, is really against the town as a corporation. The town, as such, is the only party defendant. None of the several inhabitants are named, therefore none are parties. The right to levy upon them or their estates does not accrue by virtue of their being parties to the suit, but is given by statute, as members of the corporation, and can only be enforced in accordance with the provisions of the statute. It comes after the judgment and pertains to its collection only.

The question involved in this suit is the amount due from the town. If any individuals, members of the corporation, are exempt from liability, by virtue of a compliance with any provisions of law, they can avail themselves of that exemption under an execution issued upon a new judgment, as well as under one issued on a *scire facias* upon the old one.

Defendants defaulted for the amount due upon the judgment sued.

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

CHARLOTTE PARSHLEY *vs.* FRANCIS E. HEATH, executor.

Piscataquis. Opinion January 18, 1879.

Promissory notes. Waiver of demand and notice.

Where the payee of a negotiable promissory note indorses upon it a general unconditional waiver of demand and notice, to which he subscribes as part of his indorsement, subsequent indorsers who append their signatures beneath his, in the absence of anything to indicate the contrary, must be held to adopt the written waiver and make it part of their contract. This is the fair presumption, and the natural construction of the words preceding their signatures.

Since the passage of the Stat. of 1868, c. 152, now embodied in R. S., c. 32, § 10, such waiver is valid only when in writing signed by the indorser or his lawful agent.

ON REPORT.

ASSUMPSIT, on the following note; "$272.00. Atkinson, Maine, September 1, 1874. One year after date I promise to pay to the order of C. B. Mahan, agent, two hundred and seventy-two dollars, at Savings Bank at Dover, Maine, value received. Byley Lyford."

The following is indorsed on the note in Mahan's handwriting: "Waiving demand and notice. C. B. Mahan, agent, Granite Agricultural Works, Lebanon, N. H."

About an inch below and at the right is the indorsement: "S. Heath," written there by him, as the evidence tended to show, in May, 1875.

It was admitted that, Solyman Heath died June 30, 1875, and there was evidence tending to show that his duly appointed executor was not notified of the demand upon the maker and of the non-payment until about November 10, 1875. But the ground taken in the opinion renders the evidence in regard to the failure of the notice or otherwise immaterial.

J. Crosby, for the plaintiff, contended that *prima facie*, the presumption was that, the "waiving demand and notice" was binding on Heath as well as on Mahan; and that there was nothing in the case against such presumption.

E. F. Webb, for the defendant, contended that the long time which had elapsed between the signing of Mahan and that of Heath, and the position of Heath's signature, negatived the plaintiff's theory, and that the presumption was the other way.

BARROWS, J. Since the passage of the Stat. of 1868, c. 152, now embodied in R. S., c. 32, § 10, no waiver of demand and notice by an indorser of any promissory note or bill of exchange is valid unless it is in writing, signed by such indorser or his lawful agent. The note here sued bears the following indorsements:

"Waiving demand and notice, C. B. Mahan, agent, Granite Agricultural Works, Lebanon, N. H.

"S. Heath."

We think that where the first indorser of a piece of negotiable paper, instead of restricting his written waiver of demand and notice to himself, uses language which may fairly be understood to apply to all the successive parties, those who merely append their naked signatures beneath his must be held to adopt the written waiver and be bound by it. Writing such a waiver above his own signature by an early indorser, without the knowledge and consent of subsequent indorsers, has been held in this state to be a material alteration of their contract which vitiated it altogether. *Farmer* v. *Rand*, 14 Maine, 225.

If either indorser desired to make his contract differ from that which a natural construction of the words preceding his signature would import, it would be easy for him to exclude himself from their operation by placing before his own signature the words "requiring demand and notice," or something equivalent. If he neglects this, the fair presumption is that he intends to adopt the language of the previous signer and make the same contract.

If it should be regarded as competent for the indorser, upon the strength of certain decisions touching the character of the contract evidenced by a blank indorsement, to go into parol evidence to rebut the presumption naturally arising from the appearance of his signature under such an indorsement, this case is barren of any testimony tending that way. On the contrary, if parol evidence on the point is admissible to reinforce the presumption, it is

clear that a man of the known and approved probity and intelligence of Solyman Heath never would have held such language as he did to the plaintiff to induce her to receive the note for his accommodation unless he fully intended to adopt the waiver and make himself and his estate holden for the note, provided the plaintiff had it at the place where it was payable when it fell due, and the maker failed to pay it.

Judgment for plaintiff for the amount of the note, and interest from September 4, 1875.

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

WILMOT E. CUNNINGHAM *vs.* ASHBEL T. WEBB & wife.

Waldo. Opinion January 20, 1879.

Deed. Pleading. Words,—barn.

A deed of that portion of a farm lying on the north side of the road excepted one-half of a house and barn thereon, the grantor owning the residue of the farm on the other side. *Held*, that the term barn included the sheep-shed connected with it; and that the land on which it stood and the barn-yard, fenced and used with the barn, were within the exception under the general term barn, as applicable to the purposes for which the building and land were used at the time of the grant.

In an action by writ of entry, the plea was *nul disseizin*, with a brief statement, filed after time allowed for pleas in abatement, that the parties, tenants in common, had made a parol partition, and the defendants had thereafter occupied their half with the consent of the plaintiff. *Held*, that, under the pleadings, the parol partition was no defense, especially it not appearing that the defendants, with whom the partition was made, owned the fee.

ON REPORT.

WRIT OF ENTRY, returnable at the October term, 1877, for a parcel of land, "Situate in Swanville, northerly of the road leading from the town-house to Nickerson's Mill, being a portion of the homestead farm upon which the plaintiff's sheep-house now stands, and a parcel of land adjacent to and bounded northerly

by said land, occupied by said sheep-house, and occupied by the defendants as a barn-yard."

Plea, general issue, with a brief statement, filed at the April term, 1878, of title in defendants; that they have a deed of an undivided half of a barn adjacent to the demanded premises, and that the demanded sheep-house is so connected with the barn that it is properly a part of it, and cannot be separated without damage to the freehold; that the barn-yard demanded is an appurtenance to the barn; that, in June, 1876, the plaintiff and defendants by agreement divided the shed and barn-yard, and that the plaintiff permitted the defendants to take and use, as their own, part of the sheep-house and barn-yard, being same that are sued for, and assisted in making the dividing partition walls and fences.

The plaintiff put in a deed to himself, admitted to cover and convey the demanded premises, unless included in one of the reservations, to wit: "one undivided half part of the barn at the easterly side of the house."

The defendant husband testified that the property was formerly occupied by Jacob Cunningham, and after his death by his son, the plaintiff; that Jane Cunningham, widow of Jacob and mother of the plaintiff and of the defendant wife, joined in the deed to plaintiff, which contains the exception under which the defendants claim; that Jane and the heirs deeded to defendant wife; that the defendants came to live with her in June, 1876, taking possession of one-half of the house and barn, under her, or the deed to the wife, he hardly knew which. He also testified to the division of the disputed premises by the plaintiff and himself, in the manner set forth in the brief statement, and of his occupancy thereafter of the part partitioned off to him.

W. H. Fogler, for the plaintiff, contended that, by the pleadings, the plaintiff had a right to recover, the defendants admitting that they were in possession of the premises demanded, of the land upon which the sheep-house stands, and the land occupied by defendants as a barn-yard, claiming a freehold and filing no disclaimer, and the plaintiff having proved that he was entitled to such estate as he has alleged, and that he had a right of entry therein when he commenced his action; that, at any rate, there

was no question of his right to recover one-half; that the exception in the deed should be taken most favorably for the grantee; that the term barn should not include barn-yard and sheep-house; that the brief statement did not amount to a disclaimer, and even if it did, it was too late, not being filed within the time allowed for pleas in abatement; that the plaintiff could recover a specific part of the undivided portion of the premises to which he proves title. He cited, under various positions taken, the following cases: *Treat* v. *Strickland*, 34 Maine, 234. *Perkins* v. *Raitt*, 43 Maine, 280. *Colburn* v. *Grover*, 44 Maine, 47. *Blake* v. *Dennett*, 49 Maine, 102. *Chaplin* v. *Barker*, 53 Maine, 275, 276. *Cooper* v. *Page*, 62 Maine, 192. *Wyman* v. *Richardson*, *id.* 293. *Howard* v. *Wadsworth*, 3 Maine, 471, 473. *Wyman* v. *Farrar*, 35 Maine, 64. *Blake* v. *Clark*, 6 Maine, 436. *Sanborn* v. *Hoyt*, 24 *Maine*, 118. *Grover* v. *Howard*, 31 Maine, 546, 551. *Hammond* v. *Woodman*, 41 Maine, 177, 201. *Grant* v. *Chase*, 17 Mass. 443. *Allen* v. *Scott*, 21 Pick. 25. *Stockwell* v. *Hunter*, 11 Met. 448, 455.

W. P. Thompson & R. F. Dunton, for the defendants, contended that the parties were tenants in common of the demanded premises prior to the parol partition; that the partition was valid and binding; that, by a fair construction, an undivided half part of the barn included an undivided half part of sheep-house and barn-yard, and under various positions cited *Jackson* v. *Hardee*, 4 Johns. 202, 212. *Jackson* v. *Vorburgh*, 9 Johns. 276. *Corbin* v. *Jackson*, 14 Wend. 619. *Keay* v. *Goodwin*, 16 Mass. 1, 3. *Torry* v. *Cook*, 116 Mass. 163. *Shepard* v. *Rinks*, 78 Ill. 188. 3 Central Law Journal, 507. *Wood* v. *Fleet*, 36 N. Y. 499. *Allen* v. *Scott*, 21 Pick. 25. *Grover* v. *Howard*, 31 *Maine*, 551. *Bacon* v. *Bowdoin*, 2 Met. 591. *Blake* v. *Clark*, 6 Maine, 436. *Reed* v. *Prop. of Locks & Canals*, 8 How. 274. *Hunter* v. *Heath*, 67 Maine, 507.

LIBBEY, J. Jane Cunningham and others owned a farm, situated in Swanville, called the homestead of Jacob E. Cunningham; and on the 24th day of April, 1874, they conveyed to the demandant that part of the farm lying north of the road running

through it, with the following exception: "Reserving and excepting the buildings on said premises westerly of the center of the main house, and the land on which they stand, and the privilege of going in and out of the same, and driving around the same, and one undivided half part of the barn on the easterly side of the center of the main house, and the right for the said Jane Cunningham to take for her own fire, during her natural life, what wood she may need for said fire from the wood lot on said premises." At the time of the conveyance there was a building, which was erected about fifteen years before, attached to the main barn, with a passage way from the barn into it, used in connection with the barn for storing hay and keeping sheep, called the sheep-shed. A barn-yard was fenced, adjacent to the barn and shed, and used with them.

The tenants claim and occupy the premises excepted in said deed under Jane Cunningham. In 1876 the demandant and tenants made a parol partition of the barn, sheep-shed and barn-yard, by which a part of each was set apart for the sole use of the tenants.

The contention between the parties is, I. Whether an undivided half of the sheep-shed and the land on which it stands and the barn-yard were excepted from the grant by the deed.

II. If so, whether the parol partition is a defense to the action.

Upon the first point the court is of opinion that the shed must be regarded as a part of the barn (*Hilton* v. *Gilman*, 17 Maine, 263); and that the land on which it stands and the barn-yard are within the exception, under the general description of barn, as applicable to the purpose for which the building and land were used at the time of the grant. This construction rests upon the sound and reasonable rule that, "whenever land is occupied and improved by buildings or other structures designed for a particular purpose which comprehends its practical beneficial use and enjoyment, it is aptly designated and conveyed by a term which describes the purpose to which it is thus appropriated." *Johnson v. Rayner*, 6 Gray, 107.

A grant of a house standing on a lot of land, fenced and used with the house as a yard and garden, conveys not only the house

but the lot of land on which it stands, unless it appears from the deed, or the facts and circumstances existing at the time, applicable to the estate, that that was not the intention of the parties. *Moor* v. *Fletcher*, 16 Maine, 63. *Sanborn* v. *Hoyt*, 24 Maine, 118. *Derby* v. *Jones*, 27 Maine, 357. *State* v. *Burke*, 66 Maine, 127. *Whitney* v. *Olney*, 3 Mason, 280. *Allen* v. *Scott*, 21 Pick. 25. *Amidown* v. *Ball*, 8 Allen, 293. *Corporation* v. *Chandler*, 9 Allen, 164.

There is nothing in the deed, or the facts and circumstances applicable to the property, which shows that the parties intended to limit the legal effect of the language used, but the contrary. It could not have been their intention to except the barn as personal property, to be removed by the grantor, as an undivided half only is excepted. Then the defendant's grantors were the owners of the farm, having all of the buildings on the north side of the road running through it. They conveyed to the demandant that part only lying on the north side of the road, excepting a part of the buildings, to be used and to go with the other part of the farm. It must be inferred that the parties intended that the land used in connection with them, and necessary to their beneficial use and enjoyment as farm buildings, was embraced in the exception; and soon after the conveyance they so construed it by the parol division.

As to the second point relied on in defense, we think it clear that, under the pleadings, the parol partition is no defense to the action; especially as it does not appear that the tenants, with whom the partition was made, owned the fee.

Judgment for the demandant for an undivided half of the demanded premises.

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

DORWIN E. WARE *vs.* BUCKSPORT & BANGOR RAILROAD COMPANY.

Hancock. Opinion January 20, 1879.

Judgment. Chose in action. Scire facias.

A judgment is a chose in action within the meaning of Stat. of 1874, c. 235.

Where the return of an officer on a trustee execution was dated before the return day, and the return was amended by leave of court, showing that the execution remained in the hands of the officer for three months after its date: *Held*, sufficient.

Scire facias against a trustee may be maintained in the name of an assignee of the original judgment, under the provisions of c. 225.

ON REPORT.

Scire facias against the Bucksport & Bangor Railroad Company, as trustees of one John E. Gowen.

It appeared by the writ that Benjamin P. Ware and John Q. A. Clifton, executors of the last will and testament of John Clifton, recovered judgment at the April term, 1876, for $4,136.23 damages, and $22.81 costs of suit, in the hands of these defendants as trustees of John E. Gowen; that execution was issued July 17, 1876, and put into the hands of one J. W. Patterson, deputy sheriff, who, on July 21, 1876, made demand upon the defendants; that, as appears by the amended return of the officer, the execution was returned three months after its date; that on December 23, 1876, the judgment creditors duly assigned in writing said judgment to the plaintiff, a copy of which assignment was filed with the writ.

The defendants filed a general demurrer, which was joined. Thereupon the case was continued on report.

The return of the officer was as follows:

"State of Maine. Hancock ss. October 15, 1876. By virtue of this execution, on the 21st day of July, A. D. 1876, I demanded of the Bucksport & Bangor Railroad Company, trustees within named, to wit: of Parker Spofford, treasurer thereof, and Sylvanus T. Hinks, president thereof, to pay over and deliver to me any goods, effects or credits belonging to the within named debtor, John E. Gowen, in the hands and possession of the said Bucksport & Bangor Railroad Company, which the said Bucks-

port & Bangor Railroad Company then and there neglected and refused to do. And, after diligent search, I could find neither the property nor the body of the within John E. Gowen within my precinct. I therefore return this execution in no part satisfied. October 10, 1877. By leave of court I hereby amend the above return as follows: This execution remained in my hands from July 21, 1876, until three months from the date thereof had elapsed. J. W. Patterson, Dept. Sheriff."

E. Hale & L. A. Emery, for the defendants, contended: At common law this action cannot be maintained in the name of an assignee of the original judgment. *Baker* v. *Ingersoll*, 37 Ala. 503. *McKinney* v. *McChoffay*, 7 Watts & S. (Pa.) 273.

Stat. of 1876, c. 102, permitting an assignee in certain cases, does not include this.

Stat. of 1874, c. 235, does not authorize the maintenance of this action of the plaintiff. Plaintiff might maintain an action on the judgment against the judgment debtors, but his action must be a new one—an original one. This statute was never intended to permit the assignee to have proceedings, already begun by his assignor, changed over and finished in his own name. There is no provision in the statute for the altering of writs and processes after assignment. The assignee cannot carry on any of the intermediate or final proceedings in his own name, unless he has begun them in his own name.

Scire facias is not an original action, "brought and maintained," to recover a chose in action. It is a judicial process, issued in the course of an action previously began. It is not based on any chose in action, nor is it issued to recover any chose in action; but upon a record of court; it must be issued by the court having the record, and the writ must follow the record.

Writs of *scire facias* do not describe or recite any contract, tort or other cause of action, but simply recite the record; they are issued as a subsidiary kind of process to further an action before brought to enforce a contract, or redress a wrong.

No record is made up; these proceedings are to be recorded as a part of the record of the suit, *Ware* v. *Gowen & Trustees.* These defendants are not new defendants now, but defendants in

the original suit of which these proceedings are a part. The cause of action having been assigned, *pendente lite*, the action should go on as began in the name of *Ware* v. *Clifton*. *Adams* v. *Rowe*, 11 Maine, 89.

It is otherwise in *scire facias* against bail and indorsers. *Scire facias* against a trustee is not an "action" within the statute, but the contrary. *Gray* v. *Thrasher*, 104 Mass. 373.

The return of the officer was dated October 15. That is, the return of the execution. No return can be made before return day. *Austin* v. *Goodale*, 58 Maine, 109. *Roberts* v. *Knight*, 48 Maine, 171. *Adams* v. *Cummiskey*, 4 Cush. 420.

The question was not raised in *Storer* v. *Haynes*, 67 Maine, 420.

L. Barker, *T. W. Vose & L. A. Barker*, for the plaintiff.

APPLETON, C. J. Benjamin P. Ware and John Q. A. Clifton, as executors of the last will and testament of John Clifton, having obtained judgment against the defendants as trustees of John E. Gowen, assigned their judgment to this plaintiff, who brings *scire facias* against the defendants as trustees.

Execution was seasonably issued and placed in the hands of an officer, by whom a demand was made on the defendants to pay over and deliver to him "any goods, effects and credits" belonging to said Gowen, which they neglected and refused to do.

I. It is claimed that this process cannot be maintained in the name of an assignee.

By the act, c. 235, approved March 3, 1874, "assignees of choses in action, not negotiable, assigned in writing, are hereby authorized to bring and maintain actions in their own name," etc.

Generally all causes of suit for any debt, duty or wrong are to be accounted choses in action. Jacobs' Law Dictionary—Chose.

In case of the death of the plaintiff in the original action, *scire facias* against the trustee must be in the name of the executor or administrator. In *Winter* v. *Kretchman*, 2 D. & E. 45, it was held that the assignees in bankruptcy might bring *scire facias* to revive a judgment. "I cannot," observes Ashurst, J., "distinguish

between a *scire facias* and an action brought by the assignees of a bankrupt." "It has been held in a variety of cases," remarks Buller, J., "that a *scire facias* is an action." In delivering the opinion of the court in *Ensworth* v. *Davenport*, 9 Conn. 392, Williams, J., says: "A *scire facias* is a judicial writ; but still it is an action." *Fenner* v. *Evans*, 1 T. R. 268. It may be pleaded to as an action. *Grey* v. *Jones*, 2 Wils. 251. *Pultney* v. *Townson*, 2 W. Bla. Rep. 1227. 2 Tidd, 1046. It may be released by a release of all actions. Co. Litt. 290. "Every *scire facias* is a new and independent action, referring to the former proceedings, but wholly distinct from them." *Greenway* v. *Dare*, 1 Hals. N. J. 305.

In *Murphy* v. *Cochran*, 1 Hill (N. Y.), 339, a judgment was held to be a chose in action, and that assignees, under a statute authorizing them to bring actions in their own names, might sue out *scire facias quare executionem non*, to revive the judgment.

But reliance is placed on the distinction taken in *Adams* v. *Rowe*, 11 Maine, 89, that in trustee process *scire facias* against the trustee is not so much a new action as a continuation of the original suit, when it is used to carry into effect a former judgment against a party to it. It is conceded that *scire facias* against bail or indorsers on the writ would be new actions. But while it may be conceded that, in the trustee process, *scire facias* may well be considered in one view as a continuation of the original suit, yet it is difficult to see why it is not a new process, by which a new and different judgment is obtained against a defendant as principal who in the former one was merely a trustee. The judgment in the second action differs from that obtained in the first, and the same is true of the execution issuing thereon.

II. Taking the whole return of the officer together, we think it apparent that the officer made a seasonable demand on the trustee, and the execution remained in his hands until its expiration, and that at that time it was unsatisfied.

Judgment for plaintiff.

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

HARRISON BERRY *vs.* BAXTER C. PULLEN & another.

Kennebec. Opinion January 25, 1879.

Statute of frauds. Promissory notes. Surety. Extension of time.

An oral agreement between the payee and principal maker of a promissory note, that the former will extend the time of payment so long as the latter will pay eight per cent interest, is not valid, and will not discharge the surety, though made without his knowledge and consent.

ON MOTION to set aside the verdict as against law and evidence.

ASSUMPSIT on the following promissory note: "Palermo, December 23, 1870. For value received, we jointly and severally promise to pay Harrison Berry or bearer one hundred dollars, in one year from date, with interest. B. C. Pullen. Surety, E. W. Pinkham." The defendant Pullen was defaulted. The other defendant, Edward W. Pinkham, pleaded the general issue, with a brief statement that he signed the note declared on as surety only; that he received no consideration therefor; that he signed it for the accommodation only of Baxter C. Pullen, as the plaintiff well knew; that, subsequent to the time when he so signed, the plaintiff, without the knowledge or consent of said Pinkham and for a valuable consideration, extended the time of payment thereof to a certain definite time, after the time of payment specified in the note, and after the maturity thereof, whereby the said Pinkham was released.

There was evidence tending to show that there was an oral agreement between the payee and the principal maker that the former would extend the time of payment so long as the latter would pay eight per cent interest; that some time thereafter elapsed before bringing the suit, and that nothing was paid on the note. The material part of the evidence on the point raised is stated in the opinion.

The verdict was for the defendant; and the plaintiff moved to set it aside as against law and evidence.

E. W. Whitehouse, for the plaintiff.

S. & L. Titcomb, for the defendant.

VIRGIN, J. Probably no principle has ever been in substance more frequently repeated by courts than that, a surety is entitled to have his contracts performed according to its terms; and that if any alteration, either in substance or time of performance, is made therein, without the surety's consent, by parties knowing his relation to it, he thereby becomes absolved from all further liability thereon.

The rights and liabilities of sureties are well defined. Whether or not a note, executed by two makers, discloses the fact that one of them is a surety for the other, their respective liability to the payee finds expression in the terms of the note,—each being alike liable to pay it according to its tenor. Moreover it is not only the legal duty of the surety to pay the note at its maturity, but it is also his legal privilege to do so, for then he may at will seek indemnity from the principal. For whenever the surety has paid the note to the holder, he has the right forthwith to sue and recover it of the principal, in an action at law, and be subrogated to all the rights of the holder in equity, among which is a suit by the latter against the principal. If, therefore, the holder has by any act precluded or estopped himself from demanding payment of the principal, or has entitled the principal to claim exemption from payment during a single day beyond the time of the maturity of the note, his rights and remedies thereby become prejudiced, and he is thereby discharged. For while it is the privilege of the surety to become subrogated to the rights of the holder by paying, that is the extent of his rights. Therefore if the holder has bound himself, without reservation, not to receive payment from the principal, the latter may enjoin him from receiving it from the surety, who will thereby be prevented from asserting his legal and equitable rights against the principal and consequently be discharged.

One of the most common modes by which creditors let sureties off from their liability, is by giving time to their principals. Thus if the holder of a promissory note, knowing one of the makers to be a surety for the other, agrees with the principal, without the knowledge and consent of the surety, to enlarge the time of payment thereof even for a day, the surety's liability is

thereby terminated. Mere gratuitous forbearance of whatever duration inside of the limitation bar, will not discharge; for it is not the forbearance, but the contract which operates the discharge. *Page* v. *Webster*, 15 Maine, 249. But before a surety, whose name was deliberately and understandingly placed upon a note to give it credit, can be thus absolved from liability, the law as well as justice and equity requires that, there shall be a valid, binding contract—one founded on a sufficient consideration, and the effect of which shall be to give further definite time to the principal, without the consent of the surety.

The matter of consideration and time in such contracts is copiously illustrated by a large number of cases, English and American, collated in the notes to Lead. Cas. Eq. under *Rees* v. *Berrington*, pp. 1867 *et seq.* and Brandt on Sur. and Guar. c. 14, 401, *et seq.*

Thus, it is said, the true question is whether the agreement to give time, or to vary the contract in any other particular, could have been enforced against the creditor, or as a cause of action. *Draper* v. *Romeyn*, 18 Barb. 166. Approved in *Wheeler* v. *Washburn*, 24 Vt. 293. *Turrill* v. *Boynton*, 23 Vt. 293. *Greeley* v. *Dow*, 2 Met. 176.

Again the test is expressed a little differently, being whether the creditor would have made himself liable to the principal by proceeding against him immediately after giving the promise of forbearance; for if he would not, the legal relation of the parties is unchanged and there is no equitable ground for exoneration of the surety and therefore there can be no discharge. Lead. Cas. *supra*. *Leavitt* v. *Savage*, 16 Maine, 72.

"By a valid agreement to give time," say the court in *Veazie* v. *Carr*, 3 Allen, 14, "is meant an agreement for the breach of which the maker has a remedy either at law or in equity." And the authorities generally concur in holding that the requisites of a valid agreement are essential, otherwise the creditor is not bound, and the rights of the parties not changed; and if not changed, the original contract is in force and may be performed.

There are numerous cases above referred to holding that, while the absolute payment by the principal and acceptance by the

creditor of usurious interest is a good consideration for an enlargement of the time of payment, an executory contract to pay such interest is not, and that therefore it will not absolve a surety. Among the cases in point is the early, well considered case of *Tudor* v. *Goodloe*, 1 B. Mon. 322. See also *Vilas* v. *Jones*, 10 Paige, 80. *Burgess* v. *Darcy*, 33 Vt. 618. *Smith* v. *Hyde*, 36 Vt. 303. *Myers* v. *First Nat. Bank*, 78 Ill. 257. In a word all concur in holding that the contract must be binding to effect the release. This rule must exclude oral contracts which the statute of frauds requires to be in writing. And so it has been expressly held. Thus, where the executrix of the acceptor of a bill of exchange orally promised to pay the holder out of her own estate, provided he would forbear to sue, and he did forbear in consequence, it was held that the drawer was not discharged, the promise being within the statute of frauds. Best, C. J. said: "If the promise made by the executrix be considered a promise to pay the debt with interest out of the assets, it gave no claim to the holder beyond what the bill gave him. . . If it is to be taken to be a personal promise of the executrix, it is void under the statute of frauds, not being in writing," *Philpot* v. *Bryant*, 4 Bing. 719.

To the same point is *Agee* v. *Steele*, 8 Ala. 948; the promise there being within another section of the statute of frauds,—one relating to an interest in land.

The application of these rules to the facts in the case at bar is decisive of the case in favor of the plaintiff. The principal (Pullen) is the witness who testified to the agreement. His testimony on this point is, in brief, that a short time after the note was due he saw the plaintiff, when the plaintiff told the witness that the note was due and wanted to know what he wanted to do about it. Witness answered, "I told him I hadn't the money. He told me that if I would give him eight per cent I might have that money. Said he, you can have it as long as you want it. I told him I would do it."

The intention of the parties, as shown by this testimony, is that from that time forward, so long as Pullen kept the money, he should pay eight per cent interest. If the agreement had been reduced to writing and signed it would have been a valid contract

and one which could be enforced; and as the parties then would have substituted another contract for the original, without the knowledge or consent of the defendant, he would have been discharged. But the contract not being binding, the rights of the parties were in nowise changed and the surety would not be thereby discharged. The verdict being against law must be set aside.

Verdict set aside.

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

JAMES BELL, executor, *vs.* HARRIET A. PACKARD.

Somerset. Opinion January 26, 1879.

Promissory note. Lex loci. Married woman.

A promissory note, written in this state, but signed in Massachusetts by citizens there, and then returned by mail to the payee in Maine, is a note made in Maine and to be construed by the laws thereof.

Thus, where one of the makers of such a note, thus written and signed, was a married woman, who signed it as surety for her husband, and by the laws of Massachusetts she could not thus bind herself there, the note is to be construed by the laws of this state, which authorize her to contract for any lawful purpose.

ON REPORT.

Writ dated July 3, 1877. Assumpsit on a note of which the following is a copy:

$495.74. Skowhegan, March 12, 1873. For value received we jointly and severally promise to pay James Bell, ex'r, or order, four hundred and ninety-five dollars and seventy-four cents, in one year, with interest. (Signed) Alvin Packard. H. A. Packard.

It is agreed that at the time of the signing of the note in suit, the defendant was a married woman, having separate estate and property, and living with her husband, Alvin Packard, the other maker of the note, in Cambridge, Mass., and the note was made under the following circumstances: The defendant's husband, Alvin Packard, had for a long time previous to the making of this

note, been indebted to James R. Batchelder, of Readfield, Maine, which indebtedness was represented by a note given by said Alvin Packard, at said Readfield, to said Batchelder, which note came into possession of the plaintiff, as executor of Batchelder's will.

The note being long overdue, the plaintiff wrote a letter from Skowhegan, Maine, directed to said Alvin Packard, Cambridge, Massachusetts, and there received by said Packard, requesting payment of said note, and proposing to said Alvin Packard, to give a new note, with good surety, and the plaintiff would accept such note for the old one, and give time thereon. The plaintiff, at the same time wrote the note in suit, at said Skowhegan, and enclosed the same in said letter, agreeing therein to surrender and deliver up to said Packard the old note upon the delivery of the new note with such surety. This new note, which is the note in suit, covered the principal and interest of the old note, and was signed by the said Alvin Packard and the defendant in said Cambridge, and enclosed in an envelope deposited in the post office, at Cambridge, aforesaid, directed to the plaintiff, Skowhegan, Maine, and there received by him.

Upon its receipt the plaintiff immediately enclosed the old note in an envelope, deposited in the post office at said Skowhegan, and directed to said Alvin Packard, Cambridge, Massachusetts, and the same was duly received by him.

In June, 1874, the said Alvin and H. A. Packard resided in Readfield, Maine. He was in failing health, and the parties were then and there called upon by the plaintiff, and the note in suit presented for payment. The defendant was asked by the plaintiff what means she or her husband had with which to pay the note, or if she or her husband had any property by which the payment of the note could be secured, and the plaintiff was informed that there was no property to secure the note with; then plaintiff said to defendant, "there are policies on your husband's life, payable to you at his death," and he, plaintiff, presumed that she, defendant, would pay the note out of that fund, and defendant replied to plaintiff, that she would not pay the note if she could help it, but supposed she would be obliged to.

The consideration of the note in suit was a debt due by the defendant's husband to the plaintiff's testator, for which she was not liable, and it was a contract not made in reference to her separate property. She signed the note as surety for her husband, without any consideration received by her, or any benefit to her separate estate.

It is agreed that at the time of the signing of the note in suit, by the laws and decisions of the courts of Massachusetts, a joint and several promissory note, given by a husband and his wife, for a consideration received only by the husband and given to pay her husband's debt, and without any consideration received by her or any benefit to her separate estate, was not, in law, a valid contract against her there.

The law court is to render such judgment as the law and facts require.

James Bell & E. O. Bean, for the plaintiff.

E. F. Webb, for the defendant.

The case involves the consideration of two questions: 1. The *lex loci contractus*; 2. The interpretation of the contract.

I. As to the place of contract.

The note is written and dated at Skowhegan, Maine; it was signed and executed at Cambridge, Massachusetts, and there deposited in a letter in the post office, directed to plaintiff at Skowhegan; all this at request of plaintiff.

The contract was made in Massachusetts, and should be interpreted by the laws of that commonwealth, where the defendant resided when they signed the note. The note was payable in law at Cambridge. If it had gone to protest, the demand would have been made on the defendant at Cambridge. The place of performance was there. If a question of usury arose about the note, it would have to be determined by the laws of Massachusetts. It is true the old note was to be returned by plaintiff from Skowhegan to defendant at Cambridge. But that is no part of the contract whatever. Defendant had performed every act required of her, and which she could perform, when she mailed the letter containing the note at Cambridge, post paid. When the letter

was mailed neither the plaintiff nor defendant could rescind the contract without the consent of the other. A contract is complete upon the posting by one party of a letter addressed to the other, accepting the terms offered by the latter, notwithstanding such a letter never reaches its destination. *Duncan* v. *Topham*, 65 E. C. L. 225.

Where an offer is made by letter, an acceptance by written reply takes effect from the time when the communication is sent, and not from the time when it is received by the other party. *Levy* v. *Cohen*, 4 Geo. 1.

An acceptance of a contract is made when the party receiving the offer puts into the mail his answer accepting it. 1 Pars. on Con. 407.

A person putting into the post a letter declaring his acceptance of a contract offered has done all that is necessary for him to do, and is not answerable for casualities occurring at post office. *Dunlop* v. *Higgins*, 1 H. of L. Cases, 381.

The contract is closed by mailing the letter of acceptance, although it never reached its destination. *Duncan* v. *Topham*, 8 C. B. 225.

And if the contract be made by letter, then it is made when the party receiving the proposition puts into the mail his answer accepting it, or does an equivalent act. 2 Pars. on Con. 95.

In this case the plaintiff appointed the U. S. mail as his agent or carrier to take the note from Cambridge to Skowhegan. The same principles will apply as if the plaintiff had ordered goods at Cambridge by letter and directed them to be delivered to a railroad corporation for transportation. A delivery to the carrier designated by plaintiff has the same effect as a delivery to the plaintiff himself. *Murchant* v. *Chapman*, 4 Allen, 364. *Hunter* v. *Wright*, 12 Allen, 550.

It is not necessary that the purchaser employ the carrier personally. *Ib.* 6.

Where one party proposes by mail a contract with another residing at a distance, and the latter accepts it and deposits his acceptance in the post office, addressed and to be transmitted to the former, the contract is complete. *Vassar* v. *Camp*, 11 N. Y. 441.

And the same doctrine is held in *Weston* v. *Genesee Mut. Ins. Co.* 12 N. Y. 258, which was a contract for insurance by the plaintiff, a resident of Canada, with the defendants doing business in New York.

The fact that the note is dated at Skowhegan is immaterial.

An agreement for a loan of money was made in New York and the money advanced there. A note dated in Nebraska, payable in New York, and a mortgage on lands in Nebraska, were given to secure the debt. *Held*, that the fact that the note was made and dated in Nebraska was immaterial, for the note was but an incident to the agreement, and the contract was to be governed by the laws of New York. *Sands* v. *Smith*, 1 Neb. 108.

Where a proposal to purchase goods is made by letter, sent to another state, and is there assented to, the contract of sale is there made in that state. *McIntyre* v. *Parks*, 3 Met. 207.

When defendant mailed the note at Cambridge, she assented to the proposal made by plaintiff. After the letter was mailed neither party could revoke the contract.

An offer by underwriters to insure property on certain terms, sent to the owner by mail, cannot be revoked after it has been received by him, and accepted by a letter deposited in the post office the next day, and addressed to the underwriters. Such acceptance makes a complete contract to insure, which a court of equity will enforce by compelling the underwriter to pay the amount agreed to be insured. *Tayloe* v. *Insurance Co.*, 9 How. 390.

The fact that the old note was to be returned or sent from Skowhegan to Cambridge does not affect the place of contract. As in *Abberger* v. *Marrin*, 102 Mass. 70, plaintiff gave an order for merchandise in Massachusetts to defendant, whose place of business was in New York; defendant delivered the merchandise on the cars in N. Y.; plaintiff paid freight in Massachusetts. *Held*, an executory contract in Mass., and completed in N. Y.

II. As to the interpretation of the contract. It must be interpreted according to the law of the place where made. *Lindsay* v. *Hill*, 66 Maine, 212.

By the report, the defendant at the time she signed the note

was a married woman, and had received no consideration, or any benefit to her separate estate, and is not bound as a surety on a note given by her husband; and her promise was wholly void. Gen. Sts. of Mass. c. 108, § 3. *Athol Machine Co.* v. *Fuller*, 107 Mass. 437. *Willard* v. *Eastham*, 15 Gray, 328. *Heburn* v. *Warner*, 112 Mass. 271. *Burns* v. *Lynde*, 6 Allen, 313.

VIRGIN, J. On or before March 12, 1873, the plaintiff, a resident of Skowhegan, holding an overdue note against the defendant's husband, then a resident of Cambridge, Mass., wrote the note in suit and inclosed it in a letter addressed and mailed to the latter in Cambridge, therein agreeing to surrender the old note upon the delivery of the new one signed by him with a good surety. Accordingly the new note was signed by the defendant's husband and herself and mailed to and received by the plaintiff at Skowhegan; who, thereupon, inclosed the old note to Packard at Cambridge.

The case also finds that, when the note was signed by the defendant, she was a married woman; and that, by the law of Massachusetts, she could not thus bind herself there.

In this state, however, a married woman may contract for any lawful purpose. R. S., c. 61, § 4.

Upon these facts the principal question for determination is, where was the note in suit made or to be paid. For although the personal incompetency of the defendant to contract as surety for her husband in Massachusetts, will, so far as all such contracts made there are concerned, follow her everywhere, still it will not be regarded as to such contracts made or to be performed here, where no such disqualification is acknowledged. *Polydore* v. *Prince*, Ware 402. Story Conft. of Laws, §§ 101, 102.

Our opinion is that the note was made and intended by the parties to be paid in Skowhegan. For although it was signed in Cambridge, it was delivered to the payee in Skowhegan; and it was not a completed contract until delivered. This proposition needs no citation of authorities, still we cite *Lawrence* v. *Bassett*, 5 Allen, 140, as precisely in point.

But even if this were not conclusive, we should have no hesitation in deciding that the construction and legal effect of the note

declared on must be determined by the laws of this state, on the ground that, no contract must be held as intended to be made in violation of the law, whenever by any reasonable construction it can be made consistent with the law, and which it was competent for the parties to adopt. Story Conft. of laws, § 305 *a.*

The plaintiff's letter called for a "good surety" to the note. By the execution and delivery of it, the makers must be presumed to have intended a *bona fide* and not a *mala fide* compliance with the proposition. But if the note was made in Massachusetts, and intended to be payable there, then it was illegal and void and an intended fraud by the makers, since they must be presumed to have known the law of their domicile; whereas, if made or intended to be paid in this state, it would be legal and valid. It should therefore in the absence of any legal principle forbidding it, be considered as intended by the parties to have been made with reference to the law of the place where legal.

Judgment for the plaintiff for the amount of the note.

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

NOTE.—See, to same effect, *Milliken* v. *Pratt*, 7 Rep. 390, decided in Massachusetts since this opinion was announced. REP.

STATE *vs.* JAMES M. SAVAGE.

Kennebec. Opinion January 28, 1879.

Evidence. Instructions. Waiver.

Objections to evidence should be stated at the time it is offered, and with sufficient definiteness as to apprise the court and the opposite party of the precise grounds of the objection; and all objections not thus specifically stated, should be held to be waived.

When in the trial of an indictment for manslaughter, wherein the accused is charged with the killing of his wife, a conversation of the accused with his wife, on Friday before her death on the following Thursday, is simply "objected to," exception will not be sustained.

And when such declarations and conduct of the accused have some tendency to prove the assault charged in the indictment, exceptions will not be sustained for admitting them.

Nothing appearing to the contrary, this court will presume that all proper and needed instructions were given.

Where a single sentence only from the charge is incorporated into the bill of exceptions, and is excepted to because of its inapplicability to the case on trial, exceptions will not be sustained, if the proposition be correct in the abstract.

ON EXCEPTIONS.

INDICTMENT for manslaughter, charging the defendant with feloniously and wilfully killing Eliza A. Savage, on November 15, 1877.

The deceased was the wife of the accused. There was evidence tending to prove that both had been intemperate in their habits for years, and that he had been in a state of intoxication, more or less, for some ten days prior to the death of the wife, which occurred on Thursday, and that she had drank some; that on Friday previous they came to Augusta together. Testimony in regard to what was said between them at that time, was admitted, against the objection of defendant's counsel, as follows:

Harriet N. Cummings, called by the government: "I saw Mrs. Savage the Friday before she died; saw her come out of the house and get into a wagon; Mr. Savage was with her; Mr. and Mrs. Savage had conversation at that time; he seemed to be harnessing the horse."

Ques. "You may state what the conversation was." [Conversation the Friday before is objected to by counsel for the respondent.]

The court: "It will depend upon what it is. I cannot say until we hear it. You may put it in."

Witness: "She stood waiting for him, and told him she did not feel as if she could go down there. She said she had not eaten a mouthful of victuals to-day, and the pig hadn't been fed and the horse hadn't had anything to eat, and she did not want to go. He said, 'G—d d—n you, you have got to go.' He seemed to be harnessing the horse. He was nearly an hour harnessing his horse. When they got in the first time she told him to get out, that he did not know enough to harness a horse; told him to get out and fix the harness in some way. He got out and got in again. She then told him something was wrong, and he got out again. I am not sure whether he got out the third time. At any rate, she thought it was not right the third time. He said, 'By G—d, I am going to drive now.' Then they started out."

There was other testimony tending to prove that the accused had assaulted and ill-treated the deceased prior to her death; that she was affected with a disease known as *bleeding purpura* at the time they started to come to Augusta on Friday, and up to the time of her death, and that the accused neglected and refused to provide her with proper care, attendance, necessaries and medical treatment to restore her health, but there was no evidence that the accused, his wife or anyone else knew at the time that she was affected with that or any other dangerous disease.

The presiding judge instructed the jury, in his charge, as follows:

"If a husband should, by his control, refuse and prevent the proper measures being taken to restore his wife to health, and through that gross carelessness or wickedness on his part in depriving her of the necessaries of life, death was brought about, he would be just as guilty as though it was a positive act of violence."

To the ruling of the presiding judge in admitting the testi-

mony, and instructions to the jury quoted, the respondent excepted.

E. F. Webb, county attorney, for the state.

E. F. Pillsbury, for the defendant.

WALTON, J. The defendant has been tried and convicted of manslaughter, and the case is before the law court on exceptions to the admission of evidence, and to a portion of the judge's charge to the jury.

The evidence, to the admission of which exception is taken, was a conversation between the prisoner and his wife a few days before her death. The evidence tended to show that the husband was then considerably intoxicated, and that he compelled his wife to go to Augusta with him, at a time when she was sick and unable to go. It is contended that the evidence was inadmissible, because it had no tendency to prove the offense set forth in the indictment, and because it tended to prove a cause of death other than that alleged. We think these objections are not open to the defendant. Objections to evidence should be stated at the time it is offered, and with sufficient definiteness to apprise the court and the opposite party of the precise grounds of the objection; and all objections not thus specifically stated, should be held to be waived. This is a well settled and salutary rule of practice, and should be strictly adhered to. *Bonney* v. *Merrill*, 57 Maine, 368. *Longfellow* v. *Longfellow*, 54 Maine, 240. *White* v. *Chadbourne*, 41 Maine, 149. *Holbrook* v. *Jackson*, 7 Cush. 136. The only objection made to this evidence, at the time it was offered, appears to have been based on the idea that it was too remote in point of time. The stenographer's note of the objection is as follows: "Conversation the Friday before is objected to by counsel for respondent." No other or more specific objection appears to have been made. The objection thus noted was clearly insufficient, and was properly overruled. The objections now relied upon in argument, cannot be sustained, for the reason, if for no other, that they do not appear to have been made at the time the evidence was offered. But we are also of opinion that the objections could not be sustained if they had been seasonably made.

The prisoner's declarations and conduct are clearly admissible upon general principles, and we think that in this instance they had some tendency to prove the assault charged in the indictment. They showed harsh treatment of his wife, and that he was in a frame of mind, and in a condition, likely to result in an assault. This exception must, therefore, be overruled.

The only remaining exception is to a portion of the judge's charge to the jury. The portion excepted to is in these words:

"If a husband should, by his control, refuse and prevent the proper measures being taken to restore his wife to health, and through such gross carelessness or wickedness on his part, in depriving her of the necessaries of life, death was brought about, he would be just as guilty as though it was a positive act of violence."

As an abstract principle of law, this statement of the presiding judge was undoubtedly correct. It is the precise proposition affirmed in *State* v. *Smith*, 65 Maine, 257. Where, then, is the error? It is claimed that it was erroneous in this case because it authorized the jury to find the defendant guilty upon proof of carelessness, when he was charged in the indictment with an assault. We think this proposition cannot be maintained. If we were at liberty to assume that what is quoted from the judge's charge was said, and that nothing more was said, the argument would have great force. But we are not at liberty to do so. The exceptions do not purport to give the whole of the judge's charge. They do not purport to give all that was said upon this particular point. For aught that appears, the jury may have been instructed, in so many words, that, while this rule of law, with respect to gross carelessness, was true in the abstract, it would not apply to this particular case, because of the averments in the indictment; that, to find the defendant guilty in this case, an assault must be proved, because it was an assault, and not carelessness, that was charged in the indictment. The single sentence from the judge's charge, which is incorporated into the exceptions, is in no way inconsistent with such instructions; nor do the exceptions state that such instructions were not given. Nothing appearing to the contrary, it is the duty of the court to presume that all proper

and needed instructions were given. Error cannot be presumed. It must be made affirmatively to appear or it will be presumed not to exist. No error, either of omission or commission, is made to appear in the bill of exceptions now before us. Everything therein stated may be true, and yet no such errors have occurred. It is, therefore, our duty to presume that no such errors did in fact occur.

Exceptions overruled.

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

ROBERT DAVIDSON *vs.* CITY OF PORTLAND.

Cumberland. Opinion January 28, 1879.

Lord's day. Defective way. Contributing cause.

Walking on the Lord's day for exercise in the open air is not a violation of R. S., c. 124, § 20.

If, while thus walking, one enters a shop, purchases and drinks a glass of beer, and then, after resuming his walk, is injured by a defect in the highway, he may recover therefor, unless the beer contributed to produce the injury.

ON EXCEPTIONS to the rulings of the superior court, and motion to set aside the verdict.

CASE, to recover damages for personal injuries received by reason of an alleged defect in the sidewalk on Congress street, in Portland, on Sunday, January 7, 1877.

The plaintiff testifies, in substance, that having staid in the house all day until half past one o'clock in the afternoon, he started out to take a walk for recreation—not to meet or visit anybody, or to go to any particular place; that after walking along different streets named, he stepped into a store on the corner of Maple and York streets and took a glass of beer and a cigar; that he then started homeward, and when opposite Fluent block on Congress street, he fell on a ridge of ice on the sidewalk; that it was partly covered with snow and ice; that he turned his ankle, fell and broke his leg; that he was looking across the street when he fell, and did not see the ridge until he slipped.

Among other instructions not objected to, the judge of the superior court instructed the jury as follows:

"Suppose a man was traveling on Sunday to visit the sick for purposes of charity, that would be for a legal purpose. Suppose, as he was driving along for that purpose, he should come to a tavern and should subsequently form the purpose of going in and purchasing liquor; suppose he did go in, purchase the liquor, drink it, return to the carriage, resume his journey to visit the sick and subsequently should be injured. I see nothing in that case to prevent him from recovering. That is, assuming that his use of the liquor did not contribute to produce the injury. I am putting this illustration merely with reference to the Sunday law.

"That would be a case where a man started with a lawful purpose, proceeded up to a certain point, then formed an unlawful purpose which he executed, then returned to the point where he left his original lawful journey and went on with that. The only way in which the unlawful act or unlawful purpose affects his journey is in the matter of time,—the going in and coming out would affect it in the matter of time—but for the purposes of this case I should say the plaintiff would be entitled to recover so far as that consid eration was concerned."

"If a man is walking for exercise in the open air, and while pursuing that walk goes into a shop for the purchase of liquor, comes out, resumes his original walk, not varying his walk except so far as it varies in point of time, I think that fact does not prevent his recovering."

W. L. Putnam, for the plaintiff.

H. B. Cleaves, city solicitor, for the defendants, contended that the decision of *O'Connell* v. *Lewiston*, 65 Maine, 34, should not be extended, and cited the following authorities: *Dennett* v. *Pen. Fair Grounds*, 57 Maine, 425. *Towne* v. *Wiley*, 23 Vt. 355. *Lewis* v. *Littlefield*, 15 Maine, 233. *Hall* v. *Corcoran*, 107 Mass. 251. *Morton* v. *Gloster*, 46 Maine, 520.

APPLETON, C. J. Walking on the Sabbath for exercise in the open air is not against the Statute c. 124, § 20. This is what the

plaintiff did, as the jury have found, and nothing more. *O'Connell* v. *Lewiston*, 65 Maine, 34.

Stepping aside, while walking, for a glass of beer may have been a violation of law. If it was and it had nothing to do with causing the accident, it offered no excuse for a defective highway. To exonerate the city from liability, it must appear that the plaintiff's violation of law contributed to the accident. *Norris* v. *Litchfield*, 36 *N. H.* 271. *Baker* v. *Portland*, 58 Maine, 199. The jury found it did not.

Whether the road was defective, and whether the defect was the sole cause of the injury, was submitted to the determination of the jury and the parties must abide their judgment.

We find no sufficient cause for disturbing the verdict.

Exceptions and motion overruled.

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

ABNER G. GILMORE *vs.* M. P. WOODCOCK.

Waldo. Opinion January 29, 1879.

Betting. Gambling. Forfeiture. Stakeholder. Locus penitentiæ.

Money deposited with a stakeholder on a bet upon the election of the President of the United States may be recovered, by the party depositing it, from the stakeholder, provided he gives notice to the stakeholder of his purpose to reclaim it before it has been actually paid over to the winner.

While the money remains in the hands of the stakeholder, there is to this extent a *locus penitentiæ* for the contrite gambler, which his liability to forfeit the amount wagered to the city or town of his residence will not deprive him of so completely as to prevent his withdrawing the money from the hands of the stakeholder, when nothing has been done by the city to enforce the forfeiture.

ON EXCEPTIONS.

Writ dated March 29, 1877.

ASSUMPSIT on money count, and account annexed to writ, as follows:

"M. P. Woodcock, to A. G. Gilmore Dr. To two hundred dollars put into his hands as a bet on election with Asa A. Howes,

which said $200 I demanded of said Woodcock as my money, he then saying that he had the money and should pay it to Howes, said Howes having told me at one time that he would not pay the bet."

Plea, the general issue.

Abner G. Gilmore, plaintiff, called by counsel, testified: "At one time I deposited with this defendant $200, on a bet. I demanded the money March 2d, that would be Friday. Mr. Woodcock did not give me the money. He said he had not paid it over."

Cross examined. "I put the money into defendant's hands for him to keep till I called for it. I put it in to make a bet on the presidential election of 1876. The bet at that time was on the electoral vote, on the result of the election. I cannot tell particularly what was said between Howes and myself when I put the money into defendant's hands. I bet $200 that Tilden would be elected president of the United States. I suppose Tilden was a candidate. I put the $200 into Woodcock's hands as stakeholder. Mr. Howes bet that Hayes would be elected."

Ques. "What did you tell Mr. Woodcock to do in case Hayes should be elected?"

Ans. "Probably I told him to pay it to Howes; I do not recollect. If Tilden was elected, the money was to be paid to me."

No other testimony was put into the case, and thereupon the court, on motion of the defendant, ordered a nonsuit; and the plaintiff excepted.

W. H. McLellan, for the plaintiff.

Thompson & Dunton, for the defendant.

If the plaintiff is entitled to recover, it must be by virtue of some statute. R. S., c. 4, § 69, is the only statute against betting or wagering on the result of any election.

The above statute is penal and should be strictly construed. *Beals* v. *Thurlow*, 63 Maine, 9. Esp. on Pen. Stat. c. 1.

The clause in the 69th section, R. S., c. 4, "under penalty of forfeiting," prescribes the condition under which the parties made

the bet or wager, to wit: the loss of the money or property bet or wagered.

Forfeiture is a punishment annexed by law to some illegal act, or negligence, in the owner of lands, tenements, or hereditaments, whereby he loses all his interest therein, and they become vested in the party injured, as a recompense for the wrong sustained. To lose the right to by some fault, offense or crime. 2 Black. Com. 267. Webster's unabridged dictionary.

When the conditions of the bet were agreed upon and the money deposited in the hands of the defendant as stakeholder, the bet or wager was consummated; and the money so bet was forfeited or lost to the plaintiff and at the same time it became vested or fixed in the city. The money then was the property of the city of Belfast, and the city, through its mayor, could have maintained an action for its recovery. R. S., c. 4, § 70.

Unless the statute means what it says, and the city is entitled to the money forfeited and can recover it by action, as prescribed in § 70 *id.* then the said statute is practically inoperative.

If the city is entitled to and can recover the money, then certainly this plaintiff cannot prevail in this action, for two cannot maintain separate actions at the same time for the same money.

BARROWS, J. It was long ago settled in this state that all betting is illegal; yet the losing and therefore penitent gamester has never been denied a remedy, either by the courts or the legislature. It seems to have been thought that his folly and ignorance were sufficiently punished by the direct penalties to which he was liable, and by his being compelled to base his claim to retrieve his loss upon grounds generally regarded as derogatory both to his honor and his understanding.

It is plain that there can be no legal objection to permitting a party to an illegal transaction to withdraw from it while it is still incomplete. Hence the stakeholder has been held liable to the loser for the money deposited in his hands, where he has been notified by him not to pay it over to the winner at any time before it was actually paid, even though the stakeholder was an infant, his infancy being held not to be a bar to an action of trover for the wrongful conversion of the plaintiff's money under such circumstances. *Lewis* v. *Littlefield*, 15 Maine, 233.

Nor does it make any difference in such case that the notice to the stakeholder and demand upon him for the money were subsequent to the happening of the event on which the wager depended. *Stacy* v. *Foss*, 19 Maine, 335.

It is true that, when the money has once been paid over to the winner, it cannot be recovered, unless a remedy is given by stat ute. But that is not this case. Betting on elections is declared illegal by R. S., c. 4, § 69. It is placed on the same footing with other gambling, and is certainly not less mischievous.

Under the original statute, (c. 172, approved April 16, 1841,) the parties betting each forfeited " a sum equal to " the wager, to the use of the city or town where he resided, to be recovered by an action of debt in any court competent to try the same. No transformation which the statute has undergone in the process of revision indicates any intention on the part of the legislature to change the substance of the forfeiture, though the form of action has been changed to case. It is not merely the identical money wagered which may be pursued; it might not always be possible to identify or trace it. The action by the city must, in any event, be brought within a year, according to the provisions of R. S., c. 81, § 90, and it must be against a party making the bet. The liability of the plaintiff to a judgment in favor of the city against him for an equivalent amount cannot affect his right of action against the stakeholder, when it does not appear that the fund has been in any way impounded in the stakeholder's hands to meet the city's judgment. Unless the necessary legal steps have been taken to enforce a forfeiture, a man whose money or property is liable to forfeiture under the law is still entitled to all the remedies that the law gives him for the protection of his rights in it.

It is no part of the duty of the stakeholder to enforce the penalty in favor of the city, nor can he avail himself of the plaintiff's liability to the city as a defense to this action, upon any testimony here developed.

Exceptions sustained. Nonsuit set aside. New trial granted.

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

GUSTAVUS S. BEAN *vs.* ARIEL S. AYERS & others.

Penobscot. Opinion January 29, 1879.

Declaration. Amendment. Repugnancy. Demurrer. Waiver.

Where the declaration sets out a written promise according to its tenor, wherein the defendants promised the plaintiff that they would keep the property delivered to them "and return the same to him, or his order, or successor in office, or to any person lawfully authorized to receive the same, on demand" and closes with the allegation "whereby said defendants then and there became liable to return" said property to the plaintiff on demand, "and then and there promised so to do;" *Held*, that this is not repugnant to, nor inconsistent with, said promise or contract, and on special demurrer is a sufficient allegation of the promise.

After a special demurrer to the declaration in a writ is sustained by the court as being bad for one cause alone, and overruled as to others, and leave is granted to amend on the point, or cause, so adjudged bad, the only part of the declaration thereafter subject to new demurrer is the amended part.

ON EXCEPTIONS. Assumpsit on a written contract set out in the plaintiff's amended declaration as follows:

"Also for that the said plaintiff was on the first day of August, A. D. 1872, and ever since has been a deputy sheriff of said County of Penobscot; that as deputy sheriff in and for said county, by virtue of seventeen certain writs dated," &c., returnable, &c., and "in which said writs the following named persons were plaintiffs; one in each writ respectively, and Daniel E. Ireland of," &c., "as also certain logs then in the Penobscot river in said county, marked NXVIIXI were defendants, viz:" &c. "He attached (1945) nineteen hundred and forty-five spruce and hemlock logs then in the Penobscot river, marked as aforesaid, as in said writs he was commanded to do, and took possession of the same, and thereafterwards, to wit: on the twenty-third day of August, 1872, at the request of the said defendants, he delivered to them, said Ayers, Babb, Pillsbury and Darling, the said logs so by him attached as aforesaid, and thereupon the said defendants executed under their hands and delivered to the plaintiff an agreement in words and figures as follows, to wit:

"Penobscot, ss. August 23, 1872. Received of G. S. Bean, deputy sheriff, the following described logs, which were attached by said Bean, by virtue of seventeen certain writs against Daniel

E. Ireland, and logs therein described, wherein said officer is especially commanded to attach certain logs in the Penobscot river marked NXVIIXI, to wit: nineteen hundred and forty-five spruce and hemlock logs marked as aforesaid and of the value of nineteen hundred and forty-five dollars, whereon the plaintiffs in said writs claim each a lien for personal labor and services in cutting and hauling the same, which lien said writs were sued out to enforce."

The writs above referred to are all dated August 14th, 1872, returnable to the supreme judicial court next to be holden at Bangor, in and for the county of Penobscot, on the first Tuesday of October, A. D. 1872, and the names of the several plaintiffs therein, and the sums which said officer is in said writs severally commanded to attach by virtue thereof, are as follows, to wit:

"Writ in favor of John Sheridan, two hundred dollars; E. B. Melvin, fifty dollars; Henry Melvin, eighty dollars; Silas Estes, one hundred and fifty dollars; Charles Miller, one hundred dollars; Mark Lombard, ninety dollars; Nathan McGray, one hundred and fifty dollars; George Pease, one hundred dollars; Sheldon C. Ireland, one hundred dollars; Ira Barker, one hundred and fifty dollars; A. McPheters, one hundred dollars; H. Peavy, one hundred and fifty dollars; Henry Murphy, one hundred dollars; A. Williams, one hundred dollars; Wm. Pullen, one hundred dollars; Wm. Bond, one hundred dollars; James S. Dearborn, one hundred and twenty-five dollars.

"And we hereby (in consideration of one dollar paid to us by said officer) jointly and severally promise and agree to keep said property safely and return the same to him or to his order or successor in office, or to any person by law authorized to receive the same, on demand, in like good order as at present, free from expense to the officer or creditors, and we further jointly and severally agree that a demand on any one of us for said property shall be binding on the whole, and also agree that in case of any failure on our part to deliver said property when demanded, in good condition, that we will indemnify and save said officer harmless from all damage, loss, trouble and expense that may in any way accrue to him on account of such failure to deliver, reserving

the right to show that the plaintiffs above named have no lien on said logs, and that the same are not liable to attachment.

"[5 ct. U. S. Int. Rev. Stamp. A. S. Ayers.] A. S. Ayers, Andrew M. Babb, F. A. H. Pillsbury, J. O'B. Darling."

"Whereby said defendants then and there became liable to return said logs to said plaintiff on demand, or on failure so to do, to indemnify and save said plaintiff harmless from all damage, loss, trouble and expense that might accrue to him on account of such failure to deliver, and then and there promised so to do. And the said plaintiff avers," &c.

At the April term, S. J. court, 1878, said amended declaration was filed and allowed, and thereupon the defendants demurred, and assigned the following causes:

I. The promise of said defendants set forth in said amended declaration as being merely "to return said logs to said plaintiff on demand, or on failure so to do, to indemnify" him as set forth, based upon, by direct reference to said defendants' alleged agreement therein previously recited and set forth in words, figures and signatures, as made by them, is inconsistent and repugnant with the terms of said agreement as therein previously recited, in this that the promise is not as alleged, but is, with other alternative terms, "to return the same (said logs) to him (plaintiff) or his order or successor in office, or to any person authorized by law to receive the same," on demand, and in case of failure to deliver said property, to indemnify and save him harmless.

II. The averment that said defendants then and ever since have neglected and refused to restore said logs "to the plaintiff or to any person authorized by law to receive the same," is insufficient to cover, negative and preclude the performance, and there is no averment of any breach of the other alternative terms of the agreement as recited therein, to wit: to return said logs to "his (plaintiff's) order, or successor in office," and is insufficient, inconsistent and repugnant, as an averment of a breach of said agreement, with the alternative terms pointed out as set forth in said defendants' agreement previously recited in words and figures in said declaration; which demurrer was duly joined by the plaintiff.

The presiding judge overruled the demurrer and adjudged the declaration as amended, good; and the defendants alleged exceptions.

L. Barker, T. W. Vose & L. A. Barker, for the plaintiff.

W. S. Clark & W. H. McCrillis, for the defendants.

1. The first objection to the plaintiff's declaration specified in the demurrer, is the inconsistency and repugnance, upon the face of the declaration, as to the defendants' promise.

The averment as to the promise is, "to return said logs to said plaintiff on demand, or on failure so to do, to indemnify and save said plaintiff harmless," omitting wholly to declare or allege the alternative terms in the promise as set out in the agreement on the previous page, which are a material part of the promise, and which qualify and enlarge essentially the scope and substance of the promise, to wit: "or his order or successor in office, or any person by law authorized to receive the same."

The averment as to the promise, by direct reference to the agreement just previously recited, attempts to allege the defendants' promise in the agreement; but misstates it essentially, in the respects pointed out, in scope and substance. The effect of this is, plainly and obviously, an inconsistency and repugnance on the face of the declaration. 1 Chit. on Plead. (Am. ed.) 316.16 Gould's Plead. c. 111, § 182, 1 Saund. on Plead. & Ev. 121. *Tate* v. *Wellings*, 3 Term. R. 531. *Penny* v. *Porter*, 2 East. 2. *Howell* v. *Richards*, 11 East. 633. *White* v. *Wilson*, 2 Bos. & Pul. 116. *Connolly* v. *Cottle*, Breese. 286. *Mulford* v. *Bowlen*, 4 Halst, 315. *Miles* v. *Sherward*, 8 East. *Willoughby* v. *Raymond*, 4 Conn. 130. *Trask* v. *Duval*, 4 *Wash.* C. C. 97. *Stone* v. *Knowlton*, 3 Wend. 374. *Russell* v. *So. Britain*, 9 Conn. 508.

II. As to effect of repugnance and inconsistency. Stevens on Plead. 377. 1 Chit. on Plead. 255. Gould's Plead. c. 111 § 173-176. *Sibley* v. *Brown*, 4 Pick. 137.

III. The declaration does not sufficiently aver, or set forth any breach of the defendants' agreement. There is no averment that the logs have not been restored to the plaintiff's "successor in office." 1 Chit. on Plead. (Am. ed.) 342. *Murdock* v. *Caldwell*, 10 Allen, 299.

LIBBEY, J. This case has been before this court before on special demurrer to the declaration, which set out the written agreement of the defendants with the plaintiff in words and figures according to its tenor; and one of the causes of demurrer assigned was that the declaration contained no allegation of a promise by the defendants to do and perform the things stipulated in the agreement, according to its legal effect. The demurrer was sustained on the ground that the promise itself should be alleged, and not the evidence of it merely. The other causes assigned were overruled. *Bean* v. *Ayers*, 67 Maine, 482.

The plaintiff had leave to amend, and did amend, and thereupon the defendants filed a special demurrer to the declaration as amended, assigning two causes of demurrer.

The first cause assigned is as follows: "The promise of said defendants, set forth in said amended declaration as being merely "to return said logs to said plaintiff on demand, or on failure so to do, to indemnify" him as set forth, based upon, by direct reference to said defendants' alleged agreement therein previously recited and set forth in words, figures and signatures, as made by them, is inconsistent and repugnant with the terms of said agreement as therein previously recited, in this that the promise is not as alleged, but is, with other alternative terms, "to return the same (said logs) to him (plaintiff), or his order or successor in office, or to any person authorized by law to receive the same," on demand, and, in case of failure to deliver said property, to indemnify and save him harmless.

What would be a variance between the allegations in the declaration and the evidence produced to sustain them, is a repugnancy when such evidence is set out in the declaration, and there is a like variance between it and the allegations which follow it.

Is there a fatal variance between the promise evidenced by the written agreement and that alleged in the amended declaration?

In *Fay* v. *Goulding*, 10 Pick. 122, the court held that in an action by the payee on a promissory note, alleged in the declaration to be payable to the plaintiff, and the note produced was payable to the plaintiff, or his order, there was no material variance.

In *Alvord* v. *Smith*, 5 Pick. 232, the action was upon a contract for the sale of a sixteenth part of a distillery, and the declaration alleged that the defendant promised to satisfy and discharge any arrearages which were then or might thereafter become due upon it. The evidence was of a promise to satisfy and discharge the arrearages, and to pay one hundred dollars. The court held that it was not a fatal variance. Parker, C. J., says: "A proof of a promise beyond what is averred, but embracing that also, cannot prejudice the defendant. It is not setting forth a different promise, but failing to set forth the whole, to the prejudice of the plaintiff only. It is in this respect like an action of covenant, in which, though there are many covenants, the plaintiff may sue for the breach of one. *Non constat* that the other branch of the promise has not been performed."

In *Bank* v. *McKenney*, 67 Maine, 272, this court held that, when, in an action against one of several signers of a promissory note or contract, the declaration describes it as made by the defendant alone, there is no variance. See cases there cited.

So in an action by A, as treasurer of a corporation, on a note made payable to him, or his successor in office, the promise may well be alleged as made to the plaintiff. It is necessary to allege the promise to pay to the successor in office of the promisee, only when the action is brought in the name of such successor.

Applying these rules to the point under consideration, we think there is no repugnancy in the declaration. The action is brought by the promisee. The contract is set out according to its tenor, followed by the allegation that the defendants thereby became liable to deliver said logs to the plaintiff, on demand, and then and there promised so to do. This allegation is not repugnant to the promise contained in the contract. By the contract the plaintiff had the right to require the defendants to deliver the logs to him on demand. The allegation contradicts nothing contained in the contract. It is all that is necessary to show the plaintiff's right to recover. True, it is not alleged that the defendants thereby promised to deliver the logs to the plaintiff, or his order, or his successor in office, or to any person authorized by law to receive the same; but the answer is that no claim is asserted by

any person other than the plaintiff. To show the plaintiff's right to recover, it is no more necessary to notice this part of the promise than it is to allege the promise as made to the plaintiff or his order, in an action by the payee on a promissory note.

The second cause of demurrer assigned, is the want of proper averment of demand, and refusal by the defendants to deliver the logs. The declaration in this respect is precisely the same as it was at the time of the former special demurrer. The cause of demurrer now assigned was not then assigned, nor was it presented to the consideration of the court. *Bean* v. *Ayers, supra.* By not then assigning it as cause of special demurrer, or relying upon it as ground of general demurrer, the defendants waived any right of objection for that cause, to the same extent as if they had pleaded over instead of demurring. Gould's Plead. c. 9. part 1. §§ 21 & 22. Otherwise if there are several defects in form, in the declaration, the defendant might have as many special demurrers as there are defects, pointing out only one defect at a time, thus unnecessarily protracting litigation, and unjustly enhancing the costs.

We think the only causes of demurrer which can be assigned, or relied upon, in the second demurrer, are such as appear by the amendment.

The docket entry shows that the plaintiff's amendment was filed at the April term, 1878, and that the demurrer was filed at the same term; and the same facts are asserted in the exceptions. The demurrer being to the amendment, and having been filed at the term when the amendment was made, must be regarded as made at the first term. The defendants have the right to plead anew on payment of costs from the time of filing the demurrer.

Exceptions overruled.

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

JOSEPH D. LEACH *vs.* JOHN W. DRESSER & others.

Hancock. Opinion January 29, 1879.

Patent. Patentee. Improvement,—sale of.

A patent for an improvement of a machine already patented, gives to the latter patentee no rights to use the invention of the former patentee.

Hence, a conveyance by deed of all the right, title and interest of and to the improvement, conveys no interest in the original patent.

ON REPORT.

ASSUMPSIT. Writ dated July 20, 1875. Declaration and cause of action are sufficiently recited in the opinion. Plea, general issue.

The deed of the patent, referred to in plaintiff's declaration and in the opinion, which otherwise sufficiently states all the facts, is as follows:

"United States of America. Know all men by these presents. [U. S. rev. stamp, 5 cents.] Whereas, I, Joseph D. Leach, of Penobscot, in the state of Maine, have invented certain improvements in Navigator's Bearing Indicator, and have applied for and obtained letters patent, of the United States of America, therefor, which letters patent bear date April 26th, 1870, and are numbered 102,281. And, whereas, F. D. Harriman and H. Harriman, of Stockton, and S. K. Whiting, S. S. Warner, S. K. Devereux and J. W. Dresser, of Castine, all of the state of Maine, are desirous of acquiring one-half of all the right, title and interest which I have in said invention and letters patent.

"Now this indenture witnesseth, That, for and in consideration of the sum of six thousand dollars to me in hand paid, the receipt of which is hereby acknowledged, I have assigned, sold and set over and do hereby assign, sell and set over unto the said F. D. Harriman, H. Harriman, S. K. Whiting, S. S. Warner, S. K. Devereux and J. W. Dresser, one half of all the right, title and interest which I now have, and which I acquired in said invention by the grant of said letters patent, hereby also conveying one-half interest in said letters patent, and I hereby convenant and agree to and with said grantees that I have conveyed no part of the grant herein

made, to any person or persons whatsoever, the same to be held and enjoyed by the said Harrimans, Whiting, Warner, Devereux and Dresser, and their legal representatives, to the full extent and manner, and for the full end of the term for which said letters patent have been granted, as fully and entirely as the same would have been held and enjoyed by me had this assignment and sale never been made. The above granted and conveyed interest being the same which was conveyed by said Leach to said grantees as above named, by a deed which has been lost or stolen, in transmittal to the patent office for record, and said previous deed is hereby, by mutual consent of all parties, cancelled, annulled and made of no effect, and this deed conveys to said grantees the half interest which was intended to be conveyed to them by said lost or stolen deed, and leaves said Leach the owner of half interest in said invention and letters patent, the same as if but one deed had been executed.

"In testimony whereof I hereunto set my hand and affix my seal this twenty-ninth day of August, A. D. 1870. Signed, sealed and delivered in presence of James Leach. J. D. Leach, [L. S.]

This deed was duly recorded.

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

C. J. Abbott and Wiswell & Wiswell, for the defendants.

VIRGIN, J. Having invented a Navigator's Bearing Indicator, and applied for a patent therefor, the plaintiff, by his deed of April 13, 1869, duly recorded in the patent office, assigned his right to himself, Sabin Hutchins and Sewell Leach, to whom, on July 6, 1869, letters patent were duly issued. Moreover, the plaintiff subsequently invented an improvement in the original invention, and on April 26, 1870, letters patent of that date, No. 102,281, were issued to him alone for "Improvement in Navigator's Indicator."

Soon afterwards, the plaintiff and Hutchins began to negotiate for a sale of one-half interest in the patent to the defendants. One bargain was "thrown up" because of some misunderstanding as to some of its terms. Subsequently the terms of a sale were agreed upon by the parties, which the plaintiff claims he

has performed so far as he is concerned, and now seeks to recover payment of the defendants in accordance with their alleged stipulations. The defendants deny both the terms as claimed by the plaintiff and also performance on his part.

The declaration contains four counts on the special contract. The first alleging, in substance, that, in consideration that the plaintiff would assign to the defendants one-half interest in the "patent right of a certain invention called a Patent Bearing Indicator, patented under the laws of the U. S., the defendants then and there promised to pay the plaintiff $3,500;" and that he did thereupon assign one-half of said patent to the defendants, who received and accepted the same in full of his promise, but that they refused to pay as they agreed. The three other counts set out the same special promise with performance on the part of the plaintiff, but with a promise of a different amount and mode of payment, together with a refusal of performance, on the part of the defendants.

To sustain these counts, the plaintiff and Hutchins testified, in substance, that one-half of the whole patent, including the original and improvement, was to be assigned to the six defendants; and, in consideration of such assignment, the defendants were to pay $1500 cash down and $2000 in notes, in manner following: The Harrimans, instead of paying their share ($500) of the cash, were to be allowed that sum for their personal services in introducing the machine to the public; $1000 to be paid in cash by the remaining four defendants on delivery of the assignment; and the six defendants to give their note for $2000, to be deposited with the treasurer of the company to the credit of the owners of the other half; that $500 were paid before the delivery of the deed; that a deed, executed by the plaintiff on August 29, 1870, was delivered to the defendant Dresser, who acted as agent of all his co-defendants; that the defendants have refused to pay the remainder of the cash or deliver the $2000 note; and that the Harrimans have never rendered their personal services stipulated and for which they were to be allowed $500.

But on examination of the deed of assignment, it does not assign one-half of the whole patent, nor does it purport to do so.

On the contrary, the assignment is expressly limited to one-half of Dresser's right, title and interest in the "Improvement in Navigator's Bearing Indicator," secured by "letters patent bearing date April 26, 1870, and numbered 102,281."

This was all of the patent improvement which the plaintiff was bound to assign. He was the sole inventor, had never before assigned (as he covenants in this deed) to any other persons, and could alone assign it by his sole deed. But this deed did not assign one-half of the whole patent, including the original and improvement. For a patent for an improvement of a machine already patented gives to the latter patentee no right to use the invention of the former patentee—the original invention—without his license. *Foss* v. *Herbert*, 2 Fish. Pat. Cas. 31. *Goodyear Dent. Vul. Co.* v. *Evans*, 3 Fish. Pat. Cas. 390. Curt. Pat. § 24, and notes. The plaintiff could not assign one-half of the original patent, without which the improvement would be of no avail to the defendants, for he owned but one third, originally, being one of three joint patentees, and they had sold parts of that to numerous persons in Penobscot prior to this attempted sale to the defendants. And there is no pretense that any deed of any portion of the original patent was ever executed by any of its owners to the defendants.

It is said, however, that the plaintiff's deed of the improvement alone was accepted by the defendants in full performance of the plaintiff's part of the contract of sale. And *Foss* v. *Richardson*, 15 Gray, 303, is cited as an authority to sustain the legal position. While we do not question the law laid down there, the testimony does not satisfy us that the plaintiff's deed was accepted by the defendants. The fact is the contract was never fully completed. The minds of the parties never met upon the same proposition. They were never all together except once, and then the contract of sale was not completed. But taking it for granted that a sale was completed, the plaintiff has failed to show that he has complied with its terms. If there were any doubt in relation to this point, we are of the opinion that the plaintiff could not succeed in this action for want of other plaintiffs.

Judgment for defendants.

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

STATE *vs.* JOHN MCNAMARA, appellant.

Kennebec. Opinion January 31, 1879.

Cider. Construction of c. 215, laws 1877.

The laws of this state do not class cider as an intoxicating liquor, except only "when kept or deposited, with intent that the same shall be sold for tippling purposes."

When cider is sold for "tippling purposes," as the term is used in c. 215, § 22, laws of 1877, the place of drinking and the place of sale must be the same.

ON EXCEPTIONS.

COMPLAINT AND WARRANT on a search and seizure process, on appeal from the municipal court of Augusta. The respondent admitted that he had sold cider to be carried away from his premises, and through his counsel claimed that the words "tippling purposes" meant "drinking upon the premises;" and that c. 215, Pub. Laws 1877, permitted the sale of cider, if not to be drank on the premises of the seller.

Upon this point the presiding judge charged the jury as follows: "What does the word tipple mean? A well accepted definition is to drink of spirituous liquors in luxury or excess. Another definition which I will give you is, to drink for the excitement produced by the stimulating qualities of the liquor; not for medicine, not for healthful purposes, but for the stimulus produced by the liquor.

"A man may as well tipple in the street as in a building; in his own house as in the shop where the liquor is sold. It is not necessary, in order to constitute liquor in this case an intoxicating liquor within the meaning of the act, that the government should prove that the respondent intended to sell it to be drank in his house or in his building. If he intended to sell it to be drank for tippling purposes, under the rule that I have given you, that is sufficient."

To which ruling and charge the defendant excepted.

E. F. Webb, county attorney, for the state.

The defendant's objection involves the construction of c. 215,

laws of 1877. Cider is here classed among intoxicating liquors, when kept or deposited, with intent to use the same for tippling purposes, and as such its sale is forbidden. The only distinction the statute creates between cider and other liquors is that it is lawful to sell cider for all purposes except tippling.

The place of tippling is immaterial. The offense is selling it to be drank. The place of drinking is no part of the offense. The offense created by statute is not keeping a "tippling shop," that is defined in § 31, c. 27. Some of the definitions of the word tipple are as follows: Bouvier defines a tippling house to be "a place where spirituous liquors are sold and drank in violation of law." Sometimes the mere selling is considered as evidence of keeping a tippling house.

Webster defines tipple, "to drink spirituous or strong liquors habitually; to indulge in the frequent and improper use of spirituous liquors; especially, to drink frequently without absolute drunkenness. To drink, as strong liquors, in luxury or excess." He defines a tippling house to be "a house in which liquors are sold in drams or small quantities, and where men are accustomed to tipple."

Worcester defines tipple, "to drink to excess, the habitual practice of drinking spirituous liquors."

The definitions and rules of law given by the judge were correct. The statute is of course to receive a reasonable construction.

H. M. Heath, for the defendant.

VIRGIN, J. Unadulterated cider is not contraband, except so far as it is made so by the provisions of the statute. The only statutory provisions pertaining to the subject are R. S., c. 27, §§ 22, 23 and 24, as amended by St. 1877, c. 215, §§ 1, 2 and 3, and R. S., c. 27, § 25. By these provisions cider is to be classed as an intoxicating liquor only "when kept or deposited with intent that the same shall be sold for tippling purposes." When thus kept or deposited, it is liable to seizure; and its actual sale for such purpose is prohibited, as is the simple sale of all other intoxicating liquors. But when not kept, deposited or sold for

the specific purpose mentioned, it is not contraband, but an article of free commerce.

Such being the status of cider, as defined by the statute, the material inquiry is, what meaning did the legislature intend should be given to the phrase, "sold for tippling purposes?" When, under this statute, can cider be considered as sold for tippling purposes? The object aimed at by the legislature becomes apparent from the history of the legislation upon this subject since the revision of the statutes, together with its practical operation, which is familiar to every citizen of the state.

In 1872 the legislature amended R. S., c. 27, § 22, by including "wine and cider" among the enumerated "intoxicating liquors;" and, at the same session, amended § 25, by providing that the provisions of chapter 27 shall not extend to the "manufacture and sale of unadulterated cider by the manufacturer;" thereby impliedly permitting the "manufacturer" to sell indiscriminately. The result was that numerous dealers, by dint of small hand presses, became manufacturers of cider, while every seller, by the glass, of cider, who could not afford to buy his press and apples and manufacture, became the duly appointed agent of a manufacturer, and cider dram-drinking flourished as before the statute of 1872, c. 63, took effect. To suppress this kind of tippling-shop, by manufacturers as well as all others, the legislature in 1877, while they did not prohibit its manufacture or sale generally by grocers and others, did enact c. 215, therein providing, in effect, that cider, new or old, whether intoxicating in fact or only by construction, should not be sold by the glass, in such manner as would constitute the place where sold a "tippling shop." A "tippling shop," literally, is a place where liquor is drank habitually, in small quantities, without reference to the place where purchased. But such is not the well understood legal definition, (Bish. Stat. Cr. § 1065); nor is it in accordance with the statutory definition. R. S., c. 27, § 31. On the contrary, to constitute a drinking house or tippling shop, the liquor must be drank on the premises where purchased. *State* v. *Inness*, 53 Maine, 536, 539. So, when cider is sold for "tippling purposes," as the term is used in § 22, the place of drinking and the place of sale must be the same.

This meaning had already been expressed by the legislature in 1873, when c. 152 of that year was enacted, and wherein the provisions of R. S., c. 17, are made applicable to any house, shop or place where intoxicating liquors are sold for "tippling purposes," that is, sold to be drank on the premises.

This view is consistent with the definition of lexicographers. See Webst. Dict., under the intransitive verb.

Exceptions sustained.

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

LIBBEY, J., did not concur.

ANN G. BLACKINGTON *vs.* MAYNARD SUMNER & others, administrators.

Knox. Opinion February 3, 1879.

Instructions. Presumption. Jury. Line. Possession. Evidence.

The force and effect of the testimony of a witness, and how far his testimony on direct examination is modified by his cross examination, are questions for the jury to determine.

Thus, where, in trespass *quare clausum*, a line was in dispute, and one party claimed that a certain wall was on the true line, and a witness testified on direct examination that he was present when it was taken away; that he thought a stake was driven down at the corner between the lots, and that his father drove it; and, on cross examination, he testified that he did not know that he saw the stake driven, or that he had seen it since a boy, or had ever seen it; *Held*, the refusal of the presiding justice to instruct the jury that the witness' whole testimony should be disregarded, affords no ground for exception.

And where the wall, as originally built, differed, as the plan showed, but slightly from the line as claimed by the defendants, and was the line on which the plaintiff built as the true line; it is no ground of exception, upon the part of the defendants, for the presiding justice to call the attention of the jury to the wall and stake, state the positions of the respective parties thereto, together with the testimony bearing thereon, and then submit the whole question to the jury as to the evidential force and effect of the wall and stake upon the true line between the parties' land.

If the wall was in existence when the deed was given, and the deed does not call for it, there is no presumption of law that the wall was or was not, intended for a line; any inference from the fact is for the jury.

In ascertaining where the line was originally run, the instruction that the jury must be governed by the calls in the deed from whom the title is derived as primary evidence, but that the jury are to consider also the other evidence in the case bearing on the result, affords no ground of exception.

Where only the kind of possession that constitutes a disseizin is requested, a correct instruction in that regard, and omitting all mention of the length of time necessary for such possession to continue, affords no ground of exception.

ON EXCEPTIONS, AND MOTION to set aside the verdict, and for new trial.

TRESPASS, *quare clausum*, for removing a small piece of fence belonging to plaintiff.

Plea, general issue, with brief statement of soil and freehold, and that the fence was wrongfully erected by the plaintiff upon the land of defendants' intestate, and lawfully removed. The real question was the true line between adjoining lots of the parties. The facts are sufficiently stated in the opinion. The defendant requested the following instruction, among others:

"Even if George W. McKenney did testify, on direct examination, that the stake was driven in the ground when the wall was removed, but, on cross examination, testified that he did not see it put there, and did not see it afterwards, and had never seen it, his whole testimony about the stake must be disregarded."

This instruction was not given except as appears in the opinion, which recites other exceptions alleged by defendants.

L. M. Staples, for the plaintiff.

A. P. Gould & J. E. Moore, for the defendants, in a very elaborate argument, among other things, contended that the wall, which the plaintiff set up as the true line, had no significance, and furnished no legal evidence touching the case. It had been put upon the ground when the land upon both sides of it was owned by one party, and for no purpose disclosed by the evidence in the case; that, when the first deed was given, creating the dividing line in dispute, one monument, now agreed by both parties to be correct, was named in the deed, and then the line, by compass and actual survey, was projected across the tract therein divided, and no wall nor any other monument was mentioned, and

the deed called for this line, which could be ascertained with mathematical certainty; that there is no dispute about this line being the true line, if it could be found. Why was not the wall named in the deed, if intended to be the boundary? There is not only no evidence that the compass line, named in the deed, was to conform to the wall, nor is there any evidence that the defendant, or any of his grantors, ever recognized the wall or the stake as a monument. There was not one word of legal evidence how the stake came there. McKenney is the only witness and his testimony utterly fails.

The evidence relating to the stone wall was competent only as bearing upon the propositions of the plaintiff that she and her grantors had acquired a title by adverse claim up to the wall, and if the evidence failed to show this, then the wall was out of the case and the jury should not have been allowed to consider it. *Worthing* v. *Worthing*, 64 Maine, 335.

The only question was, where is the line called for in the deed? There was no claim of latent ambiguity, and nothing requiring extrinsic evidence, to locate the land described, and the plain language of the deed must control. *Allen* v. *Kingsbury*, 16 Pick. 235. *Jenks* v. *Morgan*, 6 Gray, 448. *Bond* v. *Fay*, 12 Allen, 86. 2 Wash. Real Prop. 674 [631.]

There was no evidence that the owners of the adjoining lots had concurred in considering the wall the dividing line, or had ever acted upon such understanding; but if they had, their conduct, or admissions, could not vary the calls in the deed, or enlarge or diminish the grant, and where there are no monuments referred to in the deed, the courses are to govern. *Robinson* v. *Miller*, 37 Maine, 312. *Linscott* v. *Fernald*, 5 Maine, 496. *Wiswell* v. *Marston*, 54 Maine, 270. *Henshaw* v. *Mullins*, 121 Mass. 143.

The plaintiff's land is bounded upon that of the defendants, and the deed giving the dividing line is to govern. Defendants' parcel is a monument, which determines the boundary and limit of plaintiff's land, and true line of ownership. 2 Wash. Real Prop. 675 [632]. *Sparhawk* v. *Bagg*, 16 Gray, 583. *White* v. *Jones*, 67 Maine, 20. *Cleaveland* v. *Flagg*, 4 Cush. 76.

The evidence as to the stake was admitted, under objection, not to show where the wall originally stood, but as evidence of the line between the lots. This was wrong. "It (stake) was driven down at the end where the line was, I suppose," says witness.

The request in regard to McKenney's testimony should have been granted. The only way of doing justice to a party against whom fraudulent evidence has been given, under pretense that the witness has knowledge, when he has none, is to strike out his evidence when it discloses the fact that he has no knowledge, and that his testimony was hearsay merely. The jury were left to base their verdict on hearsay evidence, and this in regard to a stake which neither the defendant nor any of his grantors ever recognized as a monument, or ever heard of before the trial.

The other instructions complained of were erroneous. There was no evidence in the whole case to warrant the judge in instructing the jury to give such force to the location of the wall. No evidence that the wall or stake was either of them ever recognized as monuments, or intended to mark the boundary line, by either word or acts of defendants, or any of his grantors, nor is either of them anywhere mentioned in any deed of either defendants' or plaintiff's lot, down even to the latest grant.

The jury were substantially required to find the location of the wall and stake, and instructed that it was competent for them to find that there was the true boundary between the plaintiff's and defendants' lot, notwithstanding these pretended monuments were inconsistent with the deed, and act of parties and all their grantors.

The damages given by the jury were excessive. The jury either acted upon wrong premises, or were governed by gross partiality, passion or predjudice.

APPLETON, C. J. This is an action of trespass, *quare clausum fregit*, for cutting down a fence built by the plaintiff on land in her possession and to which she claims title.

The defendants justify as owners of the premises upon which the fence was erected.

Both parties derive title from the same source, but the defendants' is the elder. The only monument recognized by the parties

is at a point marked red B on the plan. Beginning at this point and following the courses and distances given in the deeds, and assuming a proper allowance for the change in the variation of the needle to have been made, and that the running in 1846 (which is the date of the deed under which the defendants derive title), was with the same accuracy and skill as that by the surveyor appointed by the court in this case, the land in controversy belonged to Wm. A. Farnsworth, whose title the defendants represent.

The plaintiff offered evidence tending to show that there was a stone wall in 1847 between her and the defendants' lots when the deed under which she derives title was given; that, when the house now occupied by her was built (about twenty-seven years ago), a portion of the wall was taken for the cellar of the house; that, after the removal of that portion, a stake was driven down at its termination on the street; that the house then erected was built parallel with the wall or line claimed by the plaintiff, and not with that claimed by the defendants; that the place where the wall had been could still be seen by a depression in the land; that the wall was in fact the dividing line between the plaintiff's and defendants' lots, and that the fence which the defendants' testator removed was on that line.

A view was had of the premises by the jury who returned a verdict for the plaintiff.

Exceptions to the ruling of the presiding justice, and a motion for a new trial, were duly filed.

During the progress of the trial a stake was found at the end of the line on Pleasant street, as claimed by the plaintiff.

George W. McKenney, whose father built the house occupied by the plaintiff, in his direct examination, testified that he was present when the wall was taken away twenty years ago; that he thought a stake was then driven down at the corner between the lots on Pleasant street; that his father drove it down, and that there was a large rock left beside the stake. On cross examination, he said he did not know that he saw the stake driven down, or that he had seen it since a boy, or that he had ever seen it,—saying, however, that he thought he had seen it, and that the stake was put there.

I. The counsel for the defendants requested the court to instruct the jury that, "even if George W. McKenney did testify, on direct examination, that the stake was driven in the ground when the wall was removed, but, on cross examination, testified that he did not see it put there, and did not see it afterwards and had never seen it, his whole testimony should be disregarded."

This requested instruction was properly refused. The force and effect of McKenney's testimony was for the jury. They had seen and heard him. They had observed his manner and appearance. It was for them to determine what his whole testimony was, how far this evidence on his direct examination had been modified or changed by his cross-examination, and what reliance could be placed upon it. It was not for the court peremptorily to instruct the jury to disregard it. It would be an assumption of their province to have done so.

II. It was not questioned that there had, some thirty or more years ago, been a wall between the plaintiff's and the defendants' lot. This wall as originally built differed, as the plan shows, but slightly from the line as claimed by the defendants, and was the line on which the plaintiff built her fence as the true line.

In reference to this, the following instruction, to which exceptions are taken, was given:

"Now the first question is, was there a wall there? With regard to this you have certain evidence,—evidence that there was a wall (one of the witnesses says thirty-two years ago—thirty, thirty-one or thirty-two years ago); that the wall was there before the house (plaintiff's) was erected. Then they find a stake. It is for you to say how long that stake was there and for what purpose it was put there. The plaintiff's position is, that that stone wall from red B (on the plan) to that stake was originally the line of these lots located by the parties themselves. The wall, if there, was there for some purpose; the monument, if honestly there, was there for some purpose. Did the wall originally exist? They say there is a depression in the ground. You have seen it and know how it is. The plaintiff says this wall was the dividing line between these parties; that it was built for that purpose, and that it run to that stake, and that this was the line twenty-seven

years ago—thirty-one years ago—and the buildings were built parallel to that line, and hence she asks you to infer that the parties agreed upon the wall as a line and put down monuments, and therefore she has a right to claim to it. On the other hand, the defendants deny that there were any monuments there, and deny the wall, and the plaintiff asserts its existence. What was the wall between these lots for? Was it for a line between these parties? Or for what purpose? Did they at the time place monuments there? There are none referred to in the deed. The wall, so far as its existence is established, is a fact evidential to determine where the true line is. Now, gentlemen, take the evidence. You have heard the various testimony. It is for you to say where this lot was originally run out, and whether the wall was built upon the line and a monument put at the end of it. If you find where the line was originally laid out, that is the true line between the parties, though there may have been a variation of three degrees. The only important fact is to determine where is the true line, as laid out, between these lots."

These instructions left the whole question as to the wall to the jury,—whether it was on the line between the parties or not, as one side asserted and the other denied. If the wall was there before the plaintiff's or the defendants' lot was run out, its existence would render it improbable that any other line was adopted; or such a line as the defendants'. With a wall between two lots, it would be little likely that the owner on selling would create a new line, leaving the wall partly on one lot and partly on the other. But however that may be, the whole was submitted to the jury, and no erroneous legal position is perceived in this portion of the charge.

III. Another portion of the charge to which exception is taken is as follows: "The only question is, what was the original line of the plaintiff's lot, or, rather, of the defendants', for the plaintiff's is bounded by the defendants' lot. And, to determine what the original line was, you are to look at all the evidence in the case; the wall, so far as it has any bearing, the monument, if you find it, so far as it has any bearing. The force of the whole it is for you to determine. One witness, I believe, testified originally

that a stake was driven in the ground when the wall was removed, and, on his cross-examination, that he never saw the stake. So far as his testimony goes, so far as the testimony of the other witnesses go, you are to take their whole testimony as originally given, and as affected, more or less, by cross examination, as to the facts in the case."

It was for the jury to weigh the whole evidence, and the whole was left to their sound judgment. No error is perceived in the instruction given.

IV. The counsel for the defendants requested the court to instruct the jury "that, in ascertaining where the line was originally run, they must be governed by the calls in the deed to Keizer," from whom they derive their title.

This proposition was affirmed, the court adding that the calls in the deed were primary evidence, but that the jury were to consider the other evidence as bearing on the result, and give their verdict accordingly.

The general proposition of the defendants' counsel was sustained, but there was other evidence, and the jury were directed to consider that, so far as it bore on the case; and properly so directed.

V. The jury were instructed that the stake claimed by the plaintiff as a monument could not affect the defendants' title unless assented to by Farnsworth or his grantors.

VI. The counsel requested the charge in respect to what constituted disseizin.

In answer to this request the court declined to say anything one way or the other as to the facts of possession. But charged the jury that to constitute a title by disseizin, there must be open, notorious and exclusive and adverse possession.

Whether there was adverse possession was for the jury and not for the court, and it was not for the court to say whether there had been adverse possession or not.

That open, notorious, exclusive and adverse possession will constitute a disseizin is well settled. *Winthrop* v. *Benson*, 31 Maine, 381. *Chadbourne* v. *Swan*, 40 Maine, 260. The request of counsel did not relate to the length of time necessary for the

acquisition of title by adverse possession, it referred only to the kind of possession required to constitute it adverse.

VII. The court was requested to instruct the jury that, if the wall was there when the deed was given, and the deed does not call for it, there is no presumption that it was intended for a line bound. This the court declined to do, and left the effect of the wall to the jury.

There is no presumption of law one way or the other on this subject. Any inference from the fact assumed in the request was for the jury, to whose consideration it was properly submitted.

VIII. A motion has been filed for a new trial. The facts were for the jury. They did not think that, if there was a stone wall between the two lots in controversy, that a grantor would be likely to run a new line between them, varying slightly from the existing boundary, having part of the wall on one lot and part on the other; or that a grantor, building within a year or two from the date of his deed, and when the true line could not but be known, would be likely to build a house otherwise than parallel with the lines of the lot. The jury saw the premises, and the stake, and the place where on the face of the earth it was found. They saw and heard the witnesses, and were the appointed judges of what they said and of the reliance to be placed on their testimony.

The value of the property in dispute is trivial. The damages given were excessive, considering what was done and that it was in assertion of a supposed legal right.

Exceptions overruled. New trial granted, unless the plaintiff will remit all but ten dollars; in which case the motion is overruled.

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

CYRENE E. DUNN, appellant from the decree of judge of probate,
vs. JOHN KELLEY & others.

Oxford. Opinion February 5, 1879.

Probate. Appeal. Judicial discretion. Exceptions.

The amount of a widow's allowance, and the kind of property of which it shall consist, are matters of judgment and judicial discretion; and to these, exceptions do not lie.

R. S., c. 77, § 21, allowing exceptions to the party aggrieved, relates only to opinions, directions and judgments upon questions of law, but does not include those which are the result of evidence or the exercise of judicial discretion.

APPEAL from the decree of the judge of probate of Oxford county, granting an alleged inadequate allowance to the appellant, widow of Samuel S. Dunn, and which appeal came before the law court on exceptions to the decree of the presiding justice at *nisi prius*.

The allowance made to the appellant by the judge of probate was the sum of $600, outside of $404 which she received from the Masonic Relief Association on account of the death of her husband.

The allowance decreed, on appeal, by the justice at *nisi prius* was $2,000, and also that she "have and retain all the homestead furniture claimed by her, not appraised in said inventory, which was in the dwelling-house of said deceased at the time of his death."

To this decree the appellees, who were heirs at law of deceased, allege the following exceptions:

I. Because the allowance, made by the presiding justice in favor of the appellant, was not necessary according to the degree and estate of her husband, and not authorized by law, she having no family under her care.

II. Because, by said decree, he allowed her a large amount of household furniture and personal property, the amount and value of which he could not have known, except by the evidence in the case, as it was not appraised or returned by the appellant in her inventory as administratrix.

III. Because the presiding justice attempted to settle and determine by said decree, without the intervention of a jury, the title to a large amount of property in controversy between the parties.

E. Foster, Jr., for the appellant.

D. Hammons, for the appellees and heirs, contended as follows:

The authority for these proceedings and this distribution of an estate is R. S., c. 65, § 21. C. 63, §§ 21 and 26. C. 77, § 21.

I. The amount of an allowance is not an arbitrary matter entirely within the discretion of the justice at *nisi prius*. It is a result fixed by fact, equity and law. He can reverse or affirm, pass any decree which the appellate court ought to have passed; but in all this he must be governed by what "law and justice" both require. He is bound to consider the age, health, ability of the petitioner, condition of her family, source whence the property was derived, the amount she has contributed, her condition in life, what property she has in her own right, the degree of consanguinity of the heirs, and their ages, health, education, needs, wealth, poverty, and divers other considerations; and for a careful, disinterested consideration of all these, he is bound by both law and equity.

The decree of the probate judge ought not to be disturbed. He had the better opportunity for knowing what was just to both widow and heirs; and here the remarks of the court in *Kersey* v. *Bailey*, 52 Maine, on bottom of page 200 and top of page 201, are applicable.

II. The decree is a singular one. Can it be a legal one? She "shall have and retain all the household furniture claimed by her, not appraised in said inventory," etc. No schedule of furniture, or property claimed by her, was ever filed, or appears in this case. No schedule of furniture in the house at the death of the husband appears. Of what did it consist, and of what value? She can know, for she is the widow and the administratrix. How can the heirs determine whether or not she faithfully administers the estate? She is to have what "she claims." Can such a decree

have a legal foundation? And, if so, what inducement to bad administration this kind of quieting decree must afford.

WALTON, J. Cyrene E. Dunn applied for an allowance out of the personal estate of her deceased husband. The judge of probate allowed her $600 out of the property inventoried, and $404 drawn from the Masonic Relief Association, amounting in all to $1,004. Being dissatisfied with this allowance, she appealed. At the hearing at *nisi prius* in this court the presiding judge allowed her $2,000, and all of the furniture claimed by her, not inventoried, which was in the dwelling-house of the deceased at the time of his death. To this allowance the heirs except; and the question is whether the exceptions can be sustained.

We think not. The amount of a widow's allowance, and the kind of property of which it shall consist, are questions which must be determined by an exercise of judgment and judicial discretion; and it is well settled that to such decisions exceptions do not lie. True, the R. S., c. 77, § 21, declare that, when the court is held by one justice, "a party aggrieved by any of his opinions, directions or judgments" may except; but this provision has always been construed to include only opinions, directions and judgments upon questions of law, and not to include such opinions, directions or judgments as are the result of evidence, or the exercise of judicial discretion. *Scruton* v. *Moulton*, 45 Maine, 417. *Crocker* v. *Crocker*, 43 Maine, 561. *Call* v. *Call*, 65 Maine, 407. *Higbee* v. *Bacon*, 11 Pick. 423.

Exceptions overruled.

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

WILLIAM B. TAYLOR, administrator *de bonis non*, *vs.* ARTHUR SEWALL.

Sagadahoc. Opinion February 6, 1879.

Review. Administration de bonis.

An administrator *de bonis non* cannot maintain a petition to review a judgment recovered against his predecessor for any cause. He is neither a party to such judgment, nor in privity with any one who is.

The remedy given to an administrator *de bonis non*, in R. S., c. 87, §§ 45, 46, does not include that of review.

PETITION FOR REVIEW, brought by the petitioner, William B. Taylor of said Bath, administrator *de bonis non* of the estate of Jonathan H. Crooker, late of said Bath, deceased, setting out that George W. Duncan was duly appointed and took upon himself the office and trust of administrator of the estate of said deceased on the first Monday of August, 1870, and continued in said office until the first Tuesday of February, 1877, when he resigned his said trust, and his resignation was accepted by the judge of probate for said county, and the petitioner was on that day appointed by said judge of probate, and duly qualified in his stead.

That, at the August term of said supreme judicial court, 1871, and on the 17th day of the term, being the second day of September, 1871, Charles Crooker of said Bath, then living, but since deceased, and upon whose estate administration had been committed to Arthur Sewall of said Bath, recovered a judgment against the goods and estate of said Jonathan H. Crooker in the hands and possession of said George W. Duncan as administrator, as aforesaid, for the sum of three thousand four hundred and ninety-six dollars and two cents, debt or damage, together with the costs of suit, and that said judgment was obtained for an unjust and illegal claim and for interest on said unjust and illegal claim, by reason of said Duncan not appearing and answering to the suit of said Charles Crooker, on said illegal claim, and suffering himself to be defaulted therein.

That said Duncan was made to believe, by the representations

of said Charles Crooker, and by his accounts previously exhibited by said Charles to him, that the claim of said Crooker was much less then the claim set out in his writ in said action, and that the same did not exceed the sum of twenty-five hundred dollars, and that said Charles did not claim any interest in his said action, and said Duncan was therefore misled and mistaken as to the amount claimed by said Charles in his writ in said action, in which he allowed himself to be defaulted as aforesaid.

And that said Duncan colluded with said Charles Crooker to allow himself to be defaulted in said action, and by reason of said collusion, said Charles fraudulently obtained said judgment.

That, by reason of the mistake and fraud aforesaid, justice has not been done, and that a further hearing in said action would be just and equitable.

Wherefore, he prays that, after due notice to said Sewall, as administrator of said Charles Crooker, a review in said case may be granted.

Upon the hearing of said petition, the defendant moved that the same be dismissed, because the court had no authority to grant a review between the parties named in said petition, for the causes therein assigned.

Which said motion was overruled by the presiding justice, who held, as matter of law, that the court had authority to grant a review between the said parties for the causes named in said petition, and so granted a review as prayed for.

To the overruling of which motion, and to the ruling in matter of law, the defendant excepted.

F. Adams, for the petitioner.

N. Webb, *T. H. Haskell & C. W. Larrabee*, for the defendant.

DANFORTH, J. This is a petition by an administrator *de bonis non*, asking a review of a judgment obtained, as he alleges, through fraud and collusion, against his predecessor.

In *Elwell* v. *Sylvester*, 27 Maine, 536, it was held that a review can be granted only upon petition of a party to the judgment, or some one representing his interest. In this case the

petitioner is neither; certainly not a party. Nor does he represent the interests of the party, but may be in a position antagonistic. True, he is the successor of the former administrator, but derives no right to the property to be administered upon from or through him, but takes it directly from the decedent. He is "appointed to administer upon that portion of the estate of a deceased person not before administered upon." 2 Red. on Wills, 89. He may even maintain an action against his predecessor, as his title dates from the death of the testator or intestate. *Id.* 91.

There can therefore be no privity between them, nor can the one in any sense be said to represent the other. *Nowell* v. *Nowell*, 2 Maine, 75–80. *Grant* v. *Chamberlain*, 4 Mass. 611. Freeman on Judgments, § 163.

This principle of the common law seems to be conceded in the argument, but it is contended that it has been changed by the provisions found in R. S., c. 87, §§ 4, 5, 6.

If this statute is to have the effect claimed for it; if by it the administrator *de bonis non* is, as regards the judgment, made a privy with his predecessor, the result must be that on the principal cause alleged for a review, that of collusion, the petition must fail. The party himself could hardly take advantage of his own wrong, and his privies would be equally bound with him.

But such is not the effect of the statute. The remedies there provided, after judgment obtained, are *scire facias*, an action of debt and a writ of error. Neither of these changes the title to the property involved. The administrator *de bonis non* still claims under the decedent, takes his title and not that of his own predecessor. In neither of these remedies can the original judgment, or execution issued thereon, be satisfied by a levy upon the property in the hands of the new administrator. It can only be the foundation for a new process, under which, for the reason that the present petitioner is not a party or privy, he may set up the alleged fraud and collusion as a defense. If judgment is obtained under a proceeding in debt, or *scire facias*, then to such the new administrator becomes a party, but only when the original judgment becomes merged in the new one.

It is true that, under a writ of error, the original judgment is not merged in a new one, but is either affirmed or reversed. If affirmed, it stands as before, and if unsatisfied, these same remedies are open to the plaintiff; if reversed, he must resort to such legal remedies as are prescribed for recovering his original claim.

Thus, while under these remedies supplied by the statute the administrator *de bonis non* may be brought into privity with the claim established by the original judgment, yet it is not with the judgment itself, but another in which that is merged after due process of law.

It is a very significant fact as bearing upon this question that, in this enumeration of remedies provided for the administrator *de bonis non*, that of a petition for, or a writ of review is not mentioned. As the statute is in derogation of the common law, and cannot be extended beyond the meaning derived from a fair construction of its terms, this would seem to be conclusive. This appears to be in accordance with the principle established in *Paine* v. *McIntire*, 32 Maine, 131. When that decision was made the statute provided for all the remedies now authorized except that of debt, and it was there held that debt would not lie; although the result must be substantially the same in *scire facias* and debt, yet, as the latter was not specifically mentioned, the remedy must be under the former only. Much less can we, by construction, extend the statute so as to cover review, a remedy so entirely different in its procedure and results from any authorized by its terms.

Exceptions sustained.

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

DANIEL W. BAKER & another *vs.* DAVID B. FULLER, JR., administrator.

Waldo. Opinion February 6, 1879.

Action. Parties. Promise,—personal and representative. Jury. Nonsuit.

A writ against A, describing him as administrator of B, and commanding the attachment of the property of A, and that he be summoned, etc., is an action against him in his private capacity, and not against the estate of which he is administrator.

And, if he promises the plaintiffs, in his representative capacity, to pay them for their services, provided they would render them, he renders himself personally liable.

Where the evidence is sufficient to authorize a jury to find such a promise in his own right, a nonsuit cannot be ordered.

ON EXCEPTIONS.

ASSUMPSIT,—one count upon the following account annexed:

David B. Fuller, Jr., administrator of the estate of David B. Fuller, late, etc., to Daniel W. Baker and Fred Thornton, Dr.

To carrying the U. S. mail from Palermo post office in China to Belfast, and back to China, for the quarter ending March 31, 1874,	$200
To same for quarter ending June 30, 1877,	200
	$400

And a second count as follows: "And, also, for that, whereas, the said David B. Fuller, in his life time, entered into a contract with the plaintiffs and David F. Sanborn and William B. Baker, then both of . . to carry the United States mail from Augusta to Belfast and back to Augusta, for four years, ending on the thirtieth day of June, A. D. 1877, for the sum of twelve hundred and fifty dollars a year; that, subsequently, the said plaintiffs entered into an arrangement with the said David F. Sanborn and William B. Baker, by which the said plaintiffs were to carry the said United States mail from Palermo post office to Belfast and back to said Palermo post office, as their part of the contract

above mentioned, for the sum of eight hundred dollars a year, which said agreement and arrangement last above mentioned was well known to the late David B. Fuller in his life time, and which said arrangement he agreed to and ratified, and promised the said plaintiffs for carrying the said mail from said Palermo post office to Belfast and back to Palermo post office again, as their part of the contract first above mentioned, the sum of eight hundred dollars a year, to be paid in quarterly payments of two hundred dollars each quarter, and which said arrangement between the plaintiffs and said David F. Sanborn and William B. Baker, as above stated, was well known to the said defendant, David B. Fuller, Jr., after his appointment as administrator on the estate of D. B. Fuller, deceased, and which he, in his said capacity of administrator, ratified and agreed to, and, in his capacity as administrator aforesaid, promised said plaintiffs to pay them the sum of eight hundred dollars a year, to be paid in quarterly payments of two hundred dollars each quarter, from the date of the death of his intestate, which occurred on the——day of————, A. D.——; and said plaintiffs aver that they faithfully performed their part of said contract according to said arrangement to the end of said term, to wit: to the thirtieth day of June, A. D. 1877; that they have been fully paid for all said service, except for the quarter ending March 31, 1874, and also for the quarter ending June 30, 1877, for which quarters there remains due to them the sum of four hundred dollars, and which sum the said plaintiff, in his said capacity as administrator, in consideration of said service, promised the plaintiffs to pay them as above specified, yet," etc.

The writ orders the officer "to attach the goods and estate of David B. Fuller, Jr., administrator of the estate of David B. Fuller, late of," etc., and closes, "yet, though often requested, the said defendant the same has not paid, but neglects," etc.

Plea, general issue, with brief statement denying any contract between defendant's intestate in his life time and the United States, or with the plaintiff, or by himself in his capacity as administrator; and that, if it were so, such contract was not in writing, and therefore void.

The facts are sufficiently stated in the opinion. The presiding

justice ruled that the action could not be maintained and ordered a nonsuit; and the plaintiff alleged exceptions.

J. W. Knowlton, for the plaintiff.

W. P. Thompson, for the defendant.

The action is properly against defendant as administrator, and a judgment against the goods and estate of his intestate would be good. *Piper* v. *Goodwin*, 23 Maine, 251.

An administrator cannot create a debt against the estate of his intestate. *Davis* v. *French*, 20 Maine, 21. And to hold him individually to pay the debt of another, or the debt of his intestate, the promise must be in writing. R. S., c. 111, § 1, spec. 2. *Walker* v. *Patterson*, 36 Maine 273.

LIBBEY, J. This action is against the defendant in his private capacity, and not against the estate of which he is administrator.

The evidence introduced by the plaintiffs tends to prove the following facts: D. B. Fuller, the defendant's intestate, contracted with the United States to carry the mail from Augusta to Belfast from July 1, 1873, to June 30, 1877. He afterwards made a parol contract with the plaintiffs to carry it over a part of said route, from Palermo to Belfast, during the time covered by his contract, for $800 per year, to be paid quarterly. He died in the summer of 1874. The defendant, after his appointment as administrator, requested the plaintiffs to continue to carry it as they had agreed to do with his intestate, and agreed to pay them therefor the same sum and in the same manner that he was to pay them. The plaintiffs performed the services as agreed on their part, and the defendant paid them in full therefor, excepting for the last quarter, ending June 30, 1877.

It is claimed by the defendant that his promise was to pay the debt of another, and not being in writing, is within the statute of frauds, and void. If it was to pay a debt against the estate of his intestate, it is not binding upon him. Was it to pay the debt of the estate? The contract between the plaintiffs and the defendant's intestate was for services not to be performed within a year. If it was not in writing, as the evidence tends to prove, it was within the statute of frauds, and could not be enforced. The

plaintiffs might maintain an action against his estate for services rendered under it prior to his death, but not for services rendered after it. His death put an end to the employment. The defendant could not create a legal liability against the estate by any undertaking on his part in his capacity as administrator. *Davis* v. *French*, 20 Maine, 21. *Baker* v. *Moor*, 63 Maine, 443.

There was, then, no debt against the estate which he represented, to which his promise was collateral. If he promised the plaintiffs, in his representative capacity, to pay them for their services if they would render them, inasmuch as he could not thereby create a legal liability against the estate, he rendered himself personally liable. *Davis* v. *French*, *supra*.

We think the evidence is sufficient to authorize the jury to find a promise by the defendant, in his own right, to pay the plaintiffs for their services.

Exceptions sustained.

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

ABIGAIL BLAKE & others *vs.* GEORGE W. COLLINS.

Penobscot. Opinion February 6, 1879.

Trust. Title. Damages.

J B and E B by their deed appearing to own in common an undivided one-half each of a tract of land containing six hundred acres, the latter gave to the former a writing signed by him, wherein he certified that J B owned seven-tenths thereof, and J B having thereafter duly acquired the title to the remaining three-tenths part; *Held*, that this certificate was a sufficient declaration of trust, as to the two-tenths part, and left E B a mere naked, passive trustee, having no interest or estate therein.

Hence, the plaintiffs, having all the rights and title that J. B. had, have sufficient title to enable them to maintain their action, for the full value of the timber cut on said tract, against the defendant, who is a wrong doer,—having no title in himself or any one under whom he claims.

ON REPORT.

Writ dated September 13, 1876.

ACTION OF TROVER, to recover the value of certain logs alleged to have been cut on lot of land, Block 20, Letter E, Aroostook county.

Plea, the general issue. The verdict was for the sum of $137.30. The question at issue was, whether the plaintiffs should recover for the whole or any part of the lumber cut upon the lot; and for the purpose of expediting the trial, it was agreed before argument, that the only question to be submitted to the jury should be one of damages, and that upon the testimony to be reported, the full court should determine whether the plaintiff could recover all or any part of said damages, and render judgment accordingly. Facts in the opinion.

D. F. Davis, for the plaintiffs.

J. B. Hutchinson, for the defendant.

LIBBEY, J. In this case a verdict was taken for the value of the timber cut by the defendant on the land claimed by the plaintiffs, and the case was reported for the determination of this court whether upon the evidence the plaintiffs are entitled to the whole or any part of the verdict.

Leave was granted to amend by adding new parties plaintiff, and the amendment was made.

It appears by the deeds, and the will of James Blake, that Joseph W. Blake had the title to eight-tenths of the land on which the timber was cut; and it appears by the evidence that he died in 1870, leaving the plaintiffs his only heirs at law.

The land in controversy is lot numbered twenty, in the half of township Letter E, Aroostook county, containing six hundred acres, and was conveyed by the state of Maine to John Blake in 1838. John Blake died, and his heirs conveyed the lot to James Blake and Elias Blake in 1844. By this deed James and Elias were tenants in common of the lot, each owning an undivided half.

February 22, 1847, Elias Blake gave to James a certificate, by him signed, declaring that James owned four hundred and twenty acres of the lot; two-tenths, or one hundred and twenty acres, undivided, which it appeared by their deed was owned by Elias.

Elias Blake died, and in 1849 his widow, as administratrix on his estate, by virtue of a license from the judge of probate authorizing her to sell the real estate of her intestate, sold and conveyed to James Blake three-tenths of the lot, which it appeared by said deed and certificate was owned by said Elias at the time of his death.

The main contention between the parties is as to the plaintiffs' rights in the two-tenths not embraced in the deeds to James Blake.

What effect has the certificate of Elias Blake upon the rights of the parties? Is it a sufficient declaration by Elias that he holds the two-tenths, or one hundred and twenty acres covered by his deed, in trust for James? By his deed it appears that he owned it. By this writing he declared that James owned it.

To show a declaration of a trust no formal writing is required. Any writing, however informal, from which the existence of a trust in the estate and the terms of it can be sufficiently understood, whether it was intended by the signer as such or not, is sufficient. *McLellan* v. *McLellan*, 65 Maine, 500.

We think this writing a sufficient declaration of trust by Elias

in favor of James, and that Elias was a mere naked, passive trustee, having no interest in the estate and no duty to perform in regard to it.

Under the statute of uses, 27 Henry VIII, c. 10, which is a part of the common law of this state, by such a declaration of trust, the fee passes directly to the *cestui que trust.* He has the right to the possession and control of the estate and may convey it in fee. Even at law the trustee cannot maintain a writ of entry against him for the land. *Sawyer* v. *Skowhegan*, 57 Maine, 500. *French* v. *Patterson*, 61 Maine, 203.

The defendant is a mere wrong-doer. He shows no title in himself or anyone under whom he claims. We think it clear that the plaintiffs, having all the rights and title that James Blake had, have sufficient title to enable them to maintain their action for the full value of the timber.

Judgment on the verdict.

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

BENJAMIN HILL *vs.* LUCIUS PACKARD.

Androscoggin. Opinion February 6, 1879.

Verdict. New trial.

Although evidence of request is necessary to entitle one to recover for services performed, yet the law does not require direct evidence. It may be proved by circumstances.

A verdict will not be set aside on the ground of being against the weight of evidence, unless it is clearly so.

ON MOTION, to set aside the verdict, and for new trial.

ASSUMPSIT upon account annexed.

The action was commenced by Benjamin Hill in his lifetime. Since his decease administration upon his estate has been commenced, and Rufus Prince, the administrator, comes in and prosecutes this suit.

The case shows that all the items of the plaintiff's account

annexed to the writ, pro and con, are admitted, except the item for hauling 51,357 feet of hemlock logs, at $3.50 per thousand= $179.75.

Other facts are sufficiently stated in the opinion.

N. Morrill, for the plaintiff.

G. C. & C. E. Wing, for the defendant.

WALTON, J. This is an action of assumpsit upon an account annexed to the writ. The only controverted item in the plaintiff's bill of particulars is the charge of $179.75 for hauling hemlock logs. The defendant claimed, at the trial, that this labor was performed under a special contract that the plaintiff should be paid by having half the logs at the mill. But the plaintiff being dead, and the administrator knowing nothing of the facts, and not offering himself as a witness, the defendant could not testify; and the evidence of such a special contract was very shadowy. The defendant's counsel then contended, and the jury were instructed by the court, that the plaintiff could not recover for this item, unless he had satisfied them that the labor was performed at the defendant's request; and, there being no direct evidence of such a request, the defendant moves to have the verdict (which was for the plaintiff for this item as well as the others) set aside and a new trial granted, upon the ground that the verdict is clearly against the weight of evidence; and the only question is whether the motion ought to be sustained.

We think not. The law does not require direct evidence of a request. It may be proved (as many other facts in the trial of causes may be proved) by circumstantial evidence. The relations of the parties, the kind and amount of labor performed, and whether with or without the defendant's knowledge, will ordinarily furnish satisfactory proof upon this point. We suppose the jury could not believe that a laboring man would voluntarily and unsolicited haul fifty thousand feet of lumber from the woods to a mill, a distance of three or four miles, or that the owner of the logs would allow him to do so, unless there was some contract or agreement between them that would be tantamount to a request; and we are not prepared to say that their finding upon this point

was not correct. Certainly the verdict is not so clearly against the weight of evidence as to require us to set it aside.

Motion overruled. Judgment on the verdict.

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

DIANTHA H. WOODSIDE *vs.* OWEN HOWARD & others.

Cumberland. Opinion February 6, 1879.

Trespass. Justification. Evidence.

Where the parties are at issue upon the question of possession, whether in the husband or in the wife, they living together as such, evidence of acts of the officer, under a writ of possession against the husband, is admissible in an action of trespass by the wife against the officer for removing her from the premises described in his process.

Where plaintiff claimed possession by virtue of a parol license from defendant's grantor, the deed of said grantor to defendant is admissible to rebut the license.

No right to impeach a deed, on the ground that it is fraudulent as to creditors, is given one who claims no title, but only a parol license to enter and occupy from the grantor, and this made after execution of his deed.

ON EXCEPTIONS.

ACTION OF TRESPASS to land, and assault and battery. Writ dated October 1, A. D. 1877.

The writ contains three counts, one for breaking and entering the plaintiff's close and assaulting her, another for breaking the plaintiff's dwelling-house and assaulting her; the two first counts for putting her household stuff from said house. Another for assault and battery, etc. The close was described by metes and bounds in the writ, and the said dwelling-house was upon it.

To maintain her possession and right of possession, the plaintiff testified that she was in possession of the premises described in her writ at the time of the alleged assault, by virtue of a license and permission in unwritten words from one John H. Woodside, about the first of September, 1875, the said alleged assault having been in October of the same year, if committed.

The defendants, Owen Howard, Albert Potter and George W. Wagg, filed separate pleas of not guilty; the said Potter justifying by virtue of a writ of possession in an action of forcible entry and detainer issued from the municipal court for the town of Brunswick, for the possession of the said premises, in favor of the said George W. Wagg against one James Woodside, the plaintiff's husband, who with her lived on the premises when the alleged trespass was done, (there being evidence tending to show that the personal property, consisting of furniture and household stuff, in said house, was the plaintiff's property) said Potter justifying as a constable of Brunswick, and by virtue of said precept in favor of said Wagg against said James Woodside, and said Howard as aid to said Potter.

The plaintiff objected to the admissibility of said precept as justification of the defendants, or as evidence against her in this action; but the justice presiding admitted it as evidence for the defendants against the plaintiff's objection.

The defendants also offered a deed of warranty of the premises described in the plaintiff's writ from the said John H. Woodside to the said George W. Wagg, dated August 9, 1875, to the admission of which the plaintiff objected, but the justice presiding admitted it to be read in evidence.

The plaintiff offered to show a record of a judgment of this court, rendered in an action tried at the April term, 1877, wherein this plaintiff was plaintiff, and this defendant Wagg was defendant, wherein it was alleged and decided that the said conveyance from said John H. Woodside to the said George W. Wagg was made in fraud of this plaintiff to cheat and defraud her out of a debt justly due the plaintiff from the said John H. Woodside at the time when said conveyance was made, but the presiding justice rejected the same, and disallowed it as evidence.

Said record was of an action brought under R. S., c. 113, § 51, against said Wagg alone; and the judgment rendered in favor of the plaintiff in said action had been fully satisfied and paid before the commencement of the present suit.

Verdict was for defendants.

To which rulings, admitting the said evidence objected to and rejecting the said evidence offered, the plaintiff excepted.

H. Orr, for the plaintiff.

W. Thompson, for the defendants.

LIBBEY, J. This is trespass *quare clausum*. The plaintiff is the wife of James Woodside, and was living with him upon the premises upon which the defendants entered and committed the alleged acts of trespass. She claimed that she was in the possession and occupation of the premises in her own right, under a parol license from John H. Woodside, given about the first of September, 1875. The defendants claimed that James Woodside, her husband, was in the possession and occupation of the premises.

The defendant Potter justified the alleged trespass as constable of Brunswick, in the execution of a writ of possession issued by the municipal court for the town of Brunswick, in a process of forcible entry and detainer, in favor of the defendant Wagg and against said James Woodside; and the defendant Howard justified as aid of said Potter. The defendant Wagg justified the alleged trespass on the ground that the acts done by him were done in receiving possession of the premises from said officer, in the excution of said process.

The plaintiff excepts to the admission in evidence of the writ of possession, on the ground that she was not a party to the judgment on which it was issued, and her right could in no way be affected by it. But the parties were at issue upon the question whether the possession of the premises was in her or her husband. If the husband was in possession, and she was living with him as his wife, then, unquestionably, the judgment against him for the possession of the premises would be conclusive against her, and the officer in executing the writ might remove her and her goods with her husband. This being the position of the parties, the writ was admissible; and, in the absence of anything to the contrary, we must assume that the court gave to the jury proper instructions as to its legal effect as a justification.

The plaintiff also excepts to the admission of the deed of the premises from John H. Woodside to the defendant Wagg, dated

August 9, 1875. The plaintiff claimed the possession of the premises, as against Wagg, by parol license from said Woodside, given to her about the first of September, 1875. The deed was clearly admissible to show that Woodside could give the plaintiff no rights in said premises, as against Wagg, at the time of her alleged license.

Exception is also taken to the exclusion of the record of the judgment in favor of the plaintiff against said Wagg, in an action under the statute for fraudulently aiding said John H. Woodside in concealing his property from her as a creditor, by taking the deed aforesaid.

The plaintiff claimed no title under said Woodside which gave her the right to impeach the deed. A parol license from Woodside to her, after he gave the deed, to enter upon and occupy the premises, gave her no right to impeach the deed, on the ground that it was fraudulent as against Woodside's creditors. The record was properly excluded.

Exceptions overruled.

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

STATE *vs.* CHARLES B. GILMAN.

Kennebec. Opinion February 7, 1879.

Indictment. Intent. Presumption. Defense of Property.

Where one discharges a loaded gun into a crowd, intending to kill A, but kills B, he is guilty of murder.

So, if intending to kill and murder A, and, missing him, he wounds B, he may be convicted of an assault with intent to kill and murder B.

A sane man must be presumed to intend the necessary and natural consequence of his own acts; where one discharges a loaded gun at another, the instruction that it is not a presumption of law that he intends to kill, but that the jury are to judge of the intent, is an instruction sufficiently favorable to the accused.

An assault with intent to kill cannot be justified on the grounds of its necessity in defense of property.

ON EXCEPTIONS.

This was an indictment charging the defendant in the first count with an assault upon one John Flood, with a dangerous weapon, with intent to kill and murder; in the second count, an assault with intent to kill, and in the third count an aggravated assault.

At the trial, the defendant's counsel seasonably requested the presiding judge to give the following instructions to the jury, to wit:

"I. That it is incumbent upon the government, in order to sustain the charge under the first and second counts in the indictment, to prove beyond a reasonable doubt, that the specific intent there charged actually and in fact existed in the mind of the defendant, at the time he committed the act; that it is incumbent upon the government, if it would establish an intent to kill, to prove beyond a reasonable doubt, that, at the time he committed the act, the defendant in fact intended and designed to take life.

"II. It is not sufficient to establish the intent charged that the act might have been manslaughter or murder, in case death had ensued from it; and no legal presumption arises that the defendant actually and in fact intended to kill or murder, from the fact that it might have been manslaughter or murder, in case death had ensued.

"III. The principle of law that every person is presumed to contemplate the ordinary and natural consequences of his own act, is applicable to cases where death actually ensues; if death does not ensue, then there is no presumption of law arising from the act alone that death was intended; and if no consequences at all follow the act, there is no presumption of law that any consequences at all were intended or contemplated.

"IV. That, if the defendant in fact intended to kill Mr. Noyes, no presumption arises from that fact that he intended to kill John Flood.

"V. From the fact that the defendant inflicted a wound with a shot-gun upon the lower part of the leg of John Flood, no legal presumption arises that he intended to wound John Flood in a vital part.

"VI. From the fact that defendant pointed and discharged a shot-gun at the legs of John Flood, no legal presumption arises

that he actually intended any other consequences than those which in fact resulted from his act.

"VII. Whether, under the circumstances and exigencies of this case, the defendant was justified in discharging a shot-gun at the legs of John Flood, upon the ground that said Flood and the body of men with him were in the act of taking possession of this close by force and violence, and for the purpose of expelling said body of men from said close, is a question of fact for the jury.

"There is no rule of law which absolutely and under all circumstances prohibits the use of firearms in expelling from a close a body of men in the act of taking possession thereof by force and arms, amounting to more than ordinary trespass."

The presiding judge declined to give the foregoing instructions, otherwise than as the same appear in the charge as given.

To this refusal of the presiding judge to give the said instructions as requested; to that part of the charge, as given to the jury, relating to the intent to kill and the intent to kill and murder, and that part authorizing the jury to find the defendant guilty of an intent to kill Flood, if he discharged the gun with intent to kill Noyes and the charge took effect upon Flood; and to that part of said charge relating to the legal justification which defendant had for the act which he committed, and the right to use fire-arms for the purpose of expelling Flood and those with him from the close in question, under the circumstances disclosed by the evidence in this case, the defendant excepted.

The presiding judge, among other things, instructed the jury as follows:

"It is maintained by counsel that, if he had an intent to kill Mr. Noyes, and discharged the gun, and the charge took effect upon Mr. Flood, that the intent to kill Mr. Noyes is not sufficient to constitute the crime charged against the prisoner of intent to kill Mr. Flood. Upon this point in the case I instruct you that, if the prisoner in discharging the gun intended to kill Mr. Noyes or any other person, any one of the persons assembled there on that occasion, and the charge which he fired from the gun took effect upon Mr. Flood, that is sufficent to constitute the offense with which he is charged. The intent to kill characterizes the act,

goes with it; and, if the blow reaches any person, it carries with it the criminal intent to kill and murder; and, if it takes effect upon a person other than the one intended, the crime is made out precisely the same as though the intention had been to kill and murder the person hit, precisely as if death had ensued from the wound inflicted. Though the intention of the party was not to kill the person hit, still, if his intention was to kill any person by a murderous assault, and the blow takes effect upon a person other than the one intended, it is sufficient to constitute the crime of murder if death ensues, and it is sufficient to constitute the crime charged in the indictment if death does not ensue."

E. F. Webb, county attorney, for the state.

E. F. Pillsbury, *R. Foster & W. P. Whitehouse*, for the defendant, contended, *inter alia*, that the rule given by the court seems to be, that the intent with which one party commits a criminal act towards another characterizes the act, goes with it, and is transferred by presumption of law to another party accidentally injured by the act, and constitutes the same offense in degree as intended towards the party sought to be injured. This rule holds good only where the same degree of injury sought to be inflicted upon the one person is actually inflicted upon the other. When the injury to the second party differs in degree from that intended towards the first, the presumption of law as to intent is governed by the extent of injury so received rather than by the actual intention towards the other.

Suppose Flood had been killed, and Gilman indicted for murder, and the evidence had shown conclusively that he had fired at Noyes with no other intention than to wound him in the foot, would that intent have gone with the act then and saved him from the crime of murder? Nothing is better settled than that the law would presume in such a case that the party intended what he actually accomplished, notwithstanding there was in fact no intention to kill anybody.

Is not the reverse true that, if A assault B with intent to kill him, but accidentally wounds C, he is to be held responsible, as to C, for what he actually did to him, rather than what he actually

intended towards B? Is the grade of offense in such cases to be determined by the result of the incidental injury, or by the original intent, according as the one or the other may secure conviction of the higher grade?

Take the case given by Bishop, 256, as an illustration: "If one shoots into another's poultry, with intent to steal it, and undesignedly sets the house on fire, he is guilty of arson."

Reverse it, and suppose he discharges his gun into the house with the intent to set it on fire, but, instead of producing the result intended, the shot passes through the house and kills the poultry; would the killing of the poultry be punishable as an attempt to commit arson?

The general rule appears to be that the wrong intended but not done, and the wrong done but not intended, coalesce, and together constitute the same offense, not always in the same degree, as if he had intended the thing unintentionally done. 1 Bish. Crim. Law, c. 9, § 254.

In a note in the same section, a quotation from Eden Penal Laws, the following rule is given:

"The case should be considered in law as if the intent had been to do the thing which in fact was done." *Rex.* v. *Holt*, 7 Car. & Payne, 518. 32 E. C. L. 609.

If Gilman aimed at Noyes with intent to kill him, but accidentally and without intent, in fact, hit Flood in the leg, and is held liable by the law on the presumption that he intended the necessary, natural and probable consequences of the act, a conviction of intent to murder involves the idea that wounding Flood in the leg was not a natural and probable consequence, but that hitting him in a vital part would have been. If that were so in fact, if the wound received was not a natural or probable consequence of the act, he could not be held at all, for the law does not raise the presumption as to unnatural and improbable consequences. There were no other consequences than the wound in the leg, and if that was an unnatural and improbable result from the act, he should be acquitted. If it was the natural and probable consequence, how can he be held for any other?

Suppose Noyes had been wounded in the leg instead of Flood,

and Gilman indicted for an assault with intent to murder him. The wound in the leg would raise no legal presumption of intent to hit him in a vital part, but the intent would have to be specifically proved. *State* v. *Neal*, 37 Maine, 468, and authorities there cited.

The case should be considered in law as if the intent had been to do the thing which in fact was done. *Rex.* v. *Holt*, 7 Car. & Payne, 518. 32 E. C. L. 609. 1 Bish. Crim. Law, c. 9, § 254.

If this verdict stands, it will be no bar to an indictment charging an assault upon Noyes, with intent to murder, based on the same act. He may yet be thus indicted and convicted, and two offenses of the same grade be thus carved out of the same act.

As to defense of property, etc. 1 Bish. §§ 860, 861, 862.

APPLETON, C. J. This is an indictment charging the defendant, in the first count, with an assault upon one John Flood, with a dangerous weapon, with intent to kill and murder; in the second count with an assault to kill, and in the third count with an aggravated assault.

The assault in question was made by deliberately discharging a loaded gun into a crowd, by which Flood was wounded.

I. The counsel for the defendant requested the following instruction to be given: "That it is incumbent upon the government, in order to sustain the charge under the first and second counts in the indictment, to prove beyond a reasonable doubt that the specific intent there charged actually and in fact existed in the mind of the defendant at the time he committed the act; that it is incumbent upon the government, if it would establish an intent to kill, to prove beyond a reasonable doubt that, at the time he committed the act, the defendant in fact intended and designed to take life."

The court instructed the jury that it was incumbent upon the state, before it could ask a conviction, to prove the guilt of the accused beyond a reasonable doubt.

The court further, on this branch of the case, instructed the jury as follows: "Had he the intent to kill and murder in making the assault? This is the great element in the first and second counts. Because, as to both of these counts, if there was no

intent to kill, then the crime charged on the prisoner in those counts is not made out. It is incumbent upon the state to prove that the prisoner in fact intended to kill John Flood, under the rule that I shall give you."

This instruction includes the "specific intent" as in fact existing in the mind of the defendant, and embraces all the elements of the request.

II. The defendant's counsel requested the presiding justice to instruct the jury that, if the defendant in fact intended to kill Noyes, no presumption arises from that fact that he intended to kill John Flood.

Instead of such instruction, the following, which constitutes the basis of the defendant's complaint, was given:

"It is maintained by counsel that, if he (the defendant) had an intent to kill Mr. Noyes, and discharged the gun, and the gun took effect upon Mr. Flood, that the intent to kill Mr. Noyes is not sufficient to constitute the crime charged against the prisoner, of intent to kill Mr. Flood. Upon this point in the case I instruct you that, if the prisoner in discharging the gun intended to kill Mr. Noyes, or any other person, any one of those assembled there on that occasion, and the charge which he fired from the gun took effect upon Mr. Flood, that is sufficient to constitute the offense with which he is charged. The intent to kill characterizes the act, goes with it, and, if the blow reaches any person, it carries with it the criminal intent to kill and murder; and if it takes effect upon a person other than the one intended, the crime is made out precisely the same as though the intention had been to kill and murder the person hit, precisely as if death had ensued from the wound inflicted. Though the intention of the party was not to kill the person hit, still, if his intention was to kill any person by a murderous assault, and the blow takes effect upon a person other than the one intended, it is sufficient to constitute the crime of murder, if death ensues, and it is sufficient to constitute the crime charged in the indictment if death does not ensue."

"The intent charged in this indictment is an intent to murder, and to establish that essential element in the case, it is necessary

that the state proves to your full satisfaction that the prisoner, in making the assault charged upon him, intended to kill John Flood—intended to murder him; and that embraces the element of malice aforethought."

Here is the case of a man firing a loaded gun deliberately into a crowd. The ruling is that, if intending to "kill Mr. Noyes or any other person, any of the persons assembled there," and the shot took effect upon Flood, the offense as charged would be established. "Where a blow aimed at one person lighteth upon another, and killeth him, it is murder. Thus, A having malice against B, strikes at and misses him, but kills C; this is murder in A; and if it had been without malice, and under such circumstances that if B had died it would have been but manslaughter, the killing of C also would have been but manslaughter." Whar. Am. Crim. Law (4 ed.), § 965. "If a man, designing to kill another, kill by mistake a third, the killing of such third person is murder." *Id.* § 997. If intending to murder A, and supposing B to be A, a person shoots at and wounds B, he may be convicted of wounding B with intent to murder him. A question arose as to the propriety of the conviction under such circumstances. "This conviction is good," remarks Jervis, C. J. "There is no doubt," says Parks, B., "but the prisoner intended to hit Taylor, but he mistook the particular person." *Regina* v. *Smith*, 33 E. L. & Eq. 567. In *State* v. *Butman*, 42 N. H. 490, Bell, C. J., in delivering the opinion of the court, says: "If the evidence shows an intent to kill, under such circumstances as to constitute a murder if death had followed, the party may be convicted of an assault with intent to murder." In *Walker* v. *State*, 8 Ind. 290, the judge charged the jury that, "if the defendant fired into the crowd in question, of which A, the prosecuting witness, was one, with the deliberate intention, either formed at the time or previously, of killing and murdering some one of the crowd, and that A received a portion of the shot and contents of the gun, and was wounded thereby, it will be sufficient to establish the assault and battery with the intent charged." This instruction was held to be sound law.

Had death ensued in this case, there can be no question that

the prisoner would have been guilty of murder, whether he killed Noyes, whom he intended to kill, or Flood, whom he did not intend to kill, but whom he did kill.

III. The court were requested to give the following instruction: "The principle of law that every person is presumed to contemplate the ordinary and natural consequences of his own acts, is applicable to cases where death actually ensues; if death does not ensue, then there is no presumption of law, arising from the act alone, that death was intended; and if no consequences at all follow the act, there is no presumption of law that any consequences at all were intended."

Upon the question of intent, the instruction was that "a sane man must be presumed to contemplate and intend the necessary, natural and probable consequences of his own acts, and if one voluntarily or wilfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is that he intended to destroy such person's life. Upon this branch of the law, I do not say to you that there is a presumption of law when one discharges a loaded gun at another that he intended to kill. But the rule is that he who discharges a gun must be presumed to intend the natural and ordinary consequences of the act. You can only get at his motives by his act."

The intent precedes and modifies the act. The intent, if criminal, none the less exists, though the act intended fails, by mischance, of its accomplishment. It is the intent which determines the criminality of the act. If A intends to murder B, but the shot slightly wounds, the criminal intent none the less exists, and the assault with the intent to murder is established. So, if the shot intended to murder B hits C, the same result follows. If, when death does not ensue, the presumption is declared to be that death was not intended because death did not ensue, no one could be convicted of an assault with intent to kill. Because the shot does not take effect, though fired with ever so deadly an intent, it does not follow that the natural and ordinary consequences of the act were not intended. The presumption arises from the act and the intention of the act, not from what was accomplished or what failed of accomplishment.

IV. The assault in question was made for the purpose of expelling Noyes and others from the land claimed by the defendant's mother, Noyes claiming title thereto.

The court instructed the jury that it was for them to determine whether the weapon used was a deadly weapon, and, if it was, that the prisoner had no right to use it for the purpose of expelling Flood from his mother's land, if he was on her land.

The law was correctly stated. It was left to the jury to say whether the weapon was a deadly one. The law is well settled that "an assault with intent to kill cannot be justified on the ground that it was necessary for the defense of property. The law, in this respect, must be the same as in homicide. If there is an aggression—a going out of the house for the purpose of attack—self defense ceases." Whar. Am. Crim. Law, § 1284. An assault with intent to kill cannot be justified on the ground that it was necessary for the protection of property. Russell on Crimes, 663.

V. The third, fourth and fifth requests do not seem to have been much relied upon. They are sufficiently answered by the remarks of the judge that he did not say there was a presumption of law that where one man discharges a loaded gun at another, that he intended to kill. The inference from the act is for the jury. The instruction is, "that the man who discharges the gun must be presumed to intend the natural and ordinary consequences of his act." What those may be, and what may be the intent as shown from the act, was what the jury were to determine, and what was properly submitted for their determination.

Exceptions overruled.
Judgment on the verdict.

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

VIRGIN, J., did not concur.

DWIGHT G. PARKER *vs.* PORTLAND PUBLISHING COMPANY.

Cumberland. Opinion February 7, 1879.

Negligence. Evidence. License. Care.

In an action on the case for negligence, the evidence must be confined to the time and place and circumstances of the injury, and the negligence then and there; but what occurred to others, at other times, more or less remote, is collateral and inadmissible.

Thus, where one is charged with negligence in not sufficiently lighting the hall and passage-way to his place of business, and in leaving open the doors to his elevator-way; *Held*, that evidence, embracing a period of two years, tending to show at different times the condition of the hall and entrance-way as to light,—whether more or less, or none—the position of the elevator gates and doors, of what had happened to others at different times, and their fortunate escape from peril, was not admissible.

Ordinary care and diligence must be used to keep business places, and the usual passage-way to them, safe for the access of all persons coming to them at all reasonable hours, by their invitation express or implied, or for any purpose beneficial to them.

No duty is owed to a mere licensee, and he has no cause of action for negligence in the place he is permitted to enter.

One entering the premises of another, whether by invitation, or as a mere licensee, is himself bound to exercise ordinary care and diligence, and failing in this and suffering injury, he cannot recover.

ON EXCEPTIONS AND MOTION.

ACTION on the case for negligence.

Plea, general issue. Verdict for plaintiff for $4,000.

The facts, and so much of the bill of exceptions as are necessary to the understanding of the points decided, appear in the opinion.

S. C. Andrews, A. A. Strout & G. F. Holmes, for the plaintiff.

T. B. Reed, for the defendant.

APPLETON, C. J. This is an action on the case for negligence.

The defendants had their counting room on Exchange street, on the lower floor. The editorial and composing rooms were on the second floor. At the head of the stairs is a hall, on the right hand is the door leading to defendants' rooms, and on the left is an elevator-way with folding doors.

The plaintiff, as he alleges, on the 17th of September, 1875, between eleven and twelve o'clock at night, was proceeding to the defendants' rooms on the second floor, the counting room being closed, for the purpose of procuring the insertion of a notice in the newspaper published by them, when, there being no sufficient light in the hall, and the doors to the elevator-way being left open, he fell down the elevator-way and was seriously injured.

The question for determination was whether there was negligence on the part of the defendants, at the time when and the place where the plaintiff sustained the injury for which he seeks compensation; not whether there was negligence at other times and under different conditions. If the defendants are liable, they are not liable for past neglects, when an injury might have occurred but did not. Nor do previous omissions of duty prove, or tend to prove, the particular neglect of which the plaintiff complains.

I. Evidence, embracing a period of two years, tending to show at different times the condition of the hall-way and entrance to the Press editorial and composing rooms, as to light—whether more or less, or none—of the position of the elevator gate and doors, of what had happened to other men at other times, and of their fortunate escape from peril, was received, notwithstanding the seasonable and strenuous objections of the defendants.

These facts were all collateral to the main issue, and should have been excluded, "and the reason is, that such evidence tends to draw away the minds of the jury from the point in issue, and to excite prejudice and mislead them; and, moreover, the adverse party, having no notice of such a course of evidence, is not prepared to rebut it." 1 Greenl. Ev., § 52. "It may be added, that the evidence not being to a material point, the witness could not be indicted for perjury if it were false." 1 Greenl. Ev., § 448.

It was immaterial to the issue whether, on some particular day or night previous to the plaintiff's injury, the gates to the elevator had been closed or not; whether there had been sufficient light in the hall or not, or whether some individual had or had not been exposed to injury and had escaped. If evidence of this character is receivable, contradictory proofs would be admissible, and there would be as many collateral issues as there were collateral facts and witnesses testifying to them.

The entire weight of judicial authority is against the reception of the evidence received subject to objection. The attention of the jury would be diverted from the questions really in dispute, and directed to what is entirely collateral. *Hubbard* v. *A. & K. Railroad Co.*, 39 Maine 506. *Aldrich* v. *Pelham*, 1 Gray, 510. *Kidder* v. *Dunstable*, 11 Gray, 342. *Collins* v. *Dorchester*, 6 Cush. 396. *Gahagan* v. *B. & L. R. Co.*, 1 Allen, 187. *In re Baltimore & Susquehanna R. R. Co.* v. *Woodruff*, 4 Md. 242. *Schoonmaker* v. *Wilbraham*, 110 Mass. 134. "The evidence of what had happened at the same place the year before," observes Gray, C. J., in *Blair* v. *Pelham*, 118 Mass. 420, "was rightly rejected; because it tended to raise a collateral issue; because, it being admitted that the highway had been in the same condition for twenty-four hours before the injury now sued for, the previous length of time for which it had existed was immaterial."

The case of *Edwards* v. *Ottawa Riv. Nav. Co.*, 39 Up. Can. Q. B. 264, was an action against the defendant for negligence in the construction and management of their steamboat, by which sparks escaped from the funnel at the wharf, and the plaintiff's lumber and mills were burnt. The alleged negligence consisted in leaving the screens of the steamer open; and, on the part of the plaintiff, evidence was received, though objected to, that, on other occasions and at different times and places, the screens were open and cinders escaped. The presiding judge ruled that this evidence was admissible. *Held*, that such evidence was inadmissible to support the plaintiff's case, when it was tendered and received.

All the English and American cases bearing on the question were examined and discussed by Harrison, C. J., who, after stating the facts, says: "The declaration charges negligence by the defendants on a particular occasion and at a particular place, whereby, etc., and this the defendants deny. The only issue, therefore, for the determination of the jury was whether there was the negligence charged, on the occasion and at the place alleged, resulting in damage to some amount to the plaintiff. If, on the day and at the place in question, the screens were open and sparks escaped, one or more of which sparks set fire to the

pile of lumber, there was such negligence and such damage as alleged, and the jury should find for the plaintiff. It could not assist the jury in coming to a determination on that issue to show that, on other days and at other places, the screens were open and sparks escaped. Such evidence would, in my opinion, be more likely to mislead than to assist the jury in arriving at a proper determination." So in this case, what was done or omitted to be done, at other times, is immaterial.

As the case is one of grave importance, it may not be inexpedient to consider the various legal questions, which may arise in its different aspects in the trial of the case hereafter.

II. The defendants are only responsible for neglect of duty. They are bound to use ordinary and common care and diligence to keep the premises and the usual passage-way to them safe for the access of all persons coming to them at seasonable hours by their invitation, express or implied, or for any purpose beneficial to them, they exercising ordinary care in so coming. If the premises are in any respect dangerous, they are bound to give such visitors notice, to enable them with ordinary care to avoid the danger. *Knight* v. *P. & S. & P. Railroad Co.*, 56 Maine, 235. *Campbell* v. *Portland Sugar Co.*, 62 Maine, 552. *Elliot* v. *Pray*, 10 Allen, 378. *Sweeny* v. *Old Colony & Newport Railroad Co.*, 10 Allen, 369. *Chapman* v. *Rothwell*, 96 E. C. L. 168. *John* v. *Bacon*, 5 C. P. Law Rep. 437. Such are the general principles of law applicable to the case.

The counting room of the defendants was on the lower floor. This was the defendants' place of business. The editorial and composition rooms were in the second story. If there was an implied invitation, or permission merely, as a matter of accommodation, as the defendants' witnesses testified, the question would arise, if an invitation, whether such invitation could be implied after business hours and through the night, when the inhospitable absence of light would seem to negative such invitation.

III. But it is well settled, if the plaintiff was at the place where the injury was received by license merely, that the defendants would owe him no duty, and that he cannot recover. In *Holmes* v. *N. E. R. W. Co.*, 4 Ex. L. R. 257, Bramwell, B.,

said: "If the plaintiff had gone where he did by mere license of the defendants, he would have gone there subject to all the risks attending his going." In the same case, Channel, B., remarked: "I quite concur in the rule laid down by the cases, that where a person is a mere licensee, he has no cause of action on account of dangers existing in the place he is permitted to enter." In *Blackman* v. *Toronto Street Railway Co.*, 38 Up. Can. Q. B. 173, the deceased, a boy selling newspapers, got on a street railway car at the rear end and passed through the car to the front platform where the driver was standing; he stepped to one side behind the driver and fell off, there being no step on that side, and was killed by the car running over him. The boy had paid no fare. It appeared that newsboys were allowed to enter the cars to sell newspapers without being charged. It was held that no right of action existed against the defendant; that there was no breach of duty to him, and that he must take the cars as he found them. "Assuming," says Burton, J., "for the purposes of this case, that the defendant would be bound by any license or permission given to the deceased by the driver, he was, at best, in the position of a licensee, and, although whilst there the defendants would not be justified in injuring him by careless driving, any more than they would be by reckless driving over him if on the street, it is clear there was no duty on the part of the defendants, as regards the deceased, to have the steps of the cars in any other condition from that in which he found them when he availed himself of the permission to enter. He acquired no right, and whatever may have been the obligation of the defendants as regards their passengers, they owed no duty to the deceased to keep the car in repair." In the same case, Moss, J., remarks: "The passengers may have the right to insist that the car shall be free from patent defects, as the court of Queen's bench holds, but the licensee must take the vehicle as it is. He cannot claim that it should have been safer or stronger." "If," remarks Hagarty, C. J., "in the hall or office of a large hotel, newsboys or others were seen coming in and going out, offering newspapers, etc., for sale, I do not think there would be any implication in the event of an accident that such persons were guests in the hotel, or were there under

any contract, express or implied, with the host or owner that the premises should be in any particular order or condition."

The distinction between what is due to one on the premises by invitation, and a mere licensee, were fully considered and discussed in an elaborate opinion of Lord Chief Baron Lefroy, in the case of *Sullivan, ex'r*, v. *Waters*, 14 Irish Com. L. 466. The case came before the court on demurrer to a summons and plaint brought by the widow and administratrix of Patrick Sullivan, claiming damages from the defendants under Lord Campbell's act, on the ground that the death of Patrick Sullivan was occasioned by the negligence of the defendant. The negligence relied on is stated to consist in the permitting an aperture in the loft of the defendant to remain unguarded and neglected, by reason of which the deceased, passing along the floor of the loft, fell through the aperture and received injuries of which he died. The statements in the declaration, observes the Chief Baron, are, in substance, "that the defendant, at the time of the grievances in question, was in the possession of a distillery, and loft connected with it; that Patrick Sullivan was employed by him as a laborer to do certain work about the distillery at night; that Patrick Sullivan, as such laborer, had whilst so employed access by the license of the defendant to one of said lofts at night, and by such license used one of said lofts for the purpose of sleeping, during the intervals of the night when he was not actually engaged in said employment. The summons and plaint then proceeds (in the form of an assignment of a breach) to assert: Yet the defendant, well knowing the premises, wrongfully and negligently permitted a certain aperture, then being in the floor of said loft, to remain open, without being properly guarded and lighted, by reason whereof the said Patrick Sullivan, whilst passing along the floor of said loft in pursuance of said license, fell through the said aperture, and was thereby wounded and injured; and, by reason of the wounds and injuries thereby occasioned to him as aforesaid, the said Patrick Sullivan, afterwards and within twelve months before this suit, died. The pleading states that the defendant had access to the loft, for the purpose of sleeping, by the license of the defendant; which negatives that he used the

loft for that purpose under the contract of his employment. It is therefore quite plain that, if any obligation towards the deceased existed in the defendant to guard or light the aperture, such obligation must have arisen from the license to use the loft at night, and from the fact that the deceased used the loft in pursuance to such license." After an elaborate and exhaustive review of all the authorities, the Chief Baron concludes thus: "The deceased took the permission to sleep at the loft, instead of remaining up at night or sleeping elsewhere, during the intervals when he was not engaged in the business of the defendant. He must, I think, be considered as having taken the permission (to apply the language of Williams, J., in *Hansel* v. *Smith*, 7 C. B., N. S. 731, 'with its concomitant conditions, and, it may be, perils.' Under such circumstances he became his own insurer."

IV. Whatever may be the position of the plaintiff, whether there by express or implied invitation, or as a mere licensee, (his presence being simply permissible) he was bound to exercise common care and caution. He wished to find the Press office. He had never been there and did not know where it was. He was ignorant after he got to the head of the stairs as to the location of the door leading from the passage-way into the editorial rooms of the defendants. It was dark and he was a stranger to the premises. The alternative in such a case, as presented by Bramwell, B., in ordering a nonsuit was that, "if it was so dark that the plaintiff could not see, he ought not to have proceeded without a light; if it was sufficiently light for him to see, he might have avoided the staircase, which is a different thing from a hole or trap-door through which a person may fall." *Wilkinson* v. *Fairie*, 1 H. & C. 633. "In general," remarks Pollock, C. B., in that case, "it is the duty of every person to take care of his own safety, and not to walk along a dark passage without a light to disclose to him any danger." In *Forsyth* v. *Boston & Albany R. R. Co.*, 103 Mass. 513, it appeared that the plaintiff was a passenger in the defendants' cars at night, at a station of the defendants', on one of two platforms extending along each side of the track to a highway, (which, as the plaintiff knew, crossed the railroad) and having a step at the end next the highway; that,

instead of walking along the platform, he voluntarily stepped from it, with the intention of going obliquely across the track to the highway, and when he stepped off fell into a cattle guard dug across the track and was injured; that the night was so dark that he felt with his foot to find the edge of the platform; and that he did nothing to ascertain what would be found on stepping from the platform. *Held*, that he was not in the exercise of due care, and could not recover, because he did not take any precaution to ascertain if he could make a step with safety. In *Pierce* v. *Whitcomb*, 48 Vt. 127, the facts were these: The plaintiff and the defendant were farmers. The plaintiff went to the defendant's late in the evening to buy some oats. The defendant kept his granary locked. He obtained the key and went with the plaintiff to the upper floor of the granary where the oats were, and, while the defendant went for a measure, the plaintiff walked about the floor in the dark, fell through an aperture therein, and was injured. *Held*, that the defendant was not liable for the injury. If the plaintiff's want of common care and prudence was the cause of his injury, he has only himself to blame, and cannot recover.

Exceptions sustained.

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

VIRGIN, J., concurred in the result.

STATE *vs.* JOHN H. GODDARD.

Cumberland. Opinion February 12, 1879.

Indictment. Felony. Assault and battery.

Since the Stat. of 1872, c. 82, went into effect, assault and battery, as defined in R. S., c. 118, § 28, has been a felony.

An assault and battery being a substantive felony under the statute, there is no need in an indictment of charging an intent to commit any other felonious offense.

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

The defendant was charged with assault and battery by an indictment of the following tenor, omitting the simply formal parts:

"The jurors for said state, upon their oath, present that John H. Goddard, of . . in the county of . . on the twenty-fourth day of January, in the year of our Lord one thousand eight hundred and seventy-eight, at Portland, in said county of Cumberland, with force and arms in and upon one Charles Lambert, with a certain dangerous weapon, to wit, with a revolver then and there loaded with powder and leaden bullets, with which the said John H. Goddard was then and there armed, wilfully and feloniously did make an assault, and the said revolver, so loaded as aforesaid, did then and there wilfully and feloniously discharge and shoot off at, towards, upon and against him, the said Charles Lambert, thereby then and there feloniously giving to the said Charles Lambert, by means of the loaded revolver aforesaid so shot off and discharged as aforesaid, in and upon the body of the said Charles Lambert a painful and grievous wound, and other wrongs to him, the said Charles Lambert, then and there did, against the peace of said State, and contrary to the form of the statute in such case made and provided."

The defendant demurred to the indictment, and assigned the following reasons:

"That the said indictment charges that said Goddard wilfully and feloniously did make an assault, without anywhere alleging or

charging any felony attempted or intended by the assault to be committed.

"That said indictment charges a felonious battery without defining or charging by proper averments any felony attempted or intended."

The demurrer was joined.

The judge of the superior court overruled the demurrer, and adjudged the indictment sufficient; whereupon the defendant alleged exceptions.

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

W. W. Thomas, Jr., & G. E. Bird, for the defendant.

VIRGIN, J. It is contended that the offense set out is not a felony, and therefore that the allegation, that the acts therein described were feloniously done, is improper.

We do not think the objection tenable. Moreover, if it were, it would not be sufficient cause for quashing the indictment, inasmuch as such irregularity would not tend to the defendant's prejudice. If the simple allegation tended to prejudice the party accused, the provision in R. S., c. 131, § 12, would be a nullity.

But an assault and battery, as defined in R. S., c. 118, § 28, is, as the statute now stands, a felony. The term "felony," when used in R. S., cc. 117 to 139, inclusive, includes every offense "punishable by imprisonment" "for the term of one year or more." R. S., c. 131, § 9; c. 135, § 2. The offense of assault and battery is defined in c. 118, § 28. Though prior to 1872 the maximum imprisonment therefor was less than one year, the legislature then increased the maximum to a "term not exceeding five years," and thereby made the offense a statute felony. St. 1872, c. 82. To be sure, this statute does not *in totidem verbis* provide that R. S., c. 118, § 28, shall be amended by changing the term of punishment as therein provided; but it is none the less an amendment; and from the date of the amendment R. S., c. 118, § 28, is to be construed as if it originally contained the new provisions. *Byron* v. *Co. Comm'rs*, 57 Maine, 340. *Blake* v. *Bracket*, 47 Maine, 28.

Assault and battery being a substantive felony under the stat-

ute, there was no need of charging an intent to commit any other felonious offense.

Exceptions overruled.

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

DANIEL HUNTER *vs.* ELBRIDGE RANDALL.

Sagadahoc. Opinion February 18, 1879.

Exceptions. Malicious prosecution. New trial.

When instructions are requested which present a partial view of the case, and exclude from the consideration of the jury matters properly before them, the refusal is no ground of exception.

Where evidence is put in without objection, and is before the jury, the refusal of a request that the presiding judge rule, as matter of law, that such evidence can have no weight upon the issues in the case, affords no ground of exception.

In an action for malicious prosecution for the crime of perjury, the refusal of the presiding justice to instruct the jury, as matter of law, that, if the plaintiff's testimony was false, the defendant had probable cause, affords no ground of exception. The testimony may have been false, and still the defendant may have had good reason to believe it was not wilfully and corruptly false.

The fact that a witness testified before the grand jury, together with his testimony delivered there, may, when otherwise competent, be proved in the trial of an action, when such evidence is required for the purposes of public justice, or the establishment of private rights.

Objection to the admissibility of evidence must be specific in order to be available to the objecting party.

The declarations of a witness, which conflict with his testimony, are admissible to affect his credibility.

A letter written by an attorney (not of record) to, and received by the plaintiff, which subsequently came into the possession of the defendant, is at best the declaration of a third person and not admissible in behalf of the defendant, in the absence of any evidence, *dehors* the letter, that it was written in response to any communication from the plaintiff.

Where an issue is raised as to the genuineness of a letter purporting to have been written by the defendant, a request to instruct the jury that "they are to read and consider the contents of it, and see whether it is or is not consistent with known circumstances," affords no ground for exceptions on the part of the defendant, for the reason of the vagueness of the request.

A new trial will not be granted, on the ground of newly discovered evidence, when the moving party might, by proper diligence, have discovered such evidence in season for the trial.

On exceptions and motion.

Action on the case for malicious prosecution.

Many of the facts in the case are detailed in *Hunter* v. *Randall*, 62 Maine, 423. The plaintiff, in the writ in this action, charges that, in August, 1876, the defendant entered a complaint before a trial justice of the county against him, alleging that, in the trial of an action at the August term in this county in 1872, and at a subsequent term of the same court in the trial of the same action, the plaintiff, then and there, was a witness, and that he testified falsely and corruptly, and was guilty of the crime of perjury; that, in consequence of that complaint, he was arrested and brought before the magistrate, and bound over to answer before the supreme judicial court of the county, and was subjected to great inconvenience, peril and ignominy, etc.

The verdict was for the plaintiff for $1,500. The opinion presents the whole question.

The presiding judge, at plaintiff's request, instructed the jury that "if Randall and Oliver conspired to obtain the money from Hunter for their common benefit by deception or false representation, the acts of each in the accomplishment of that common purpose would be the act of the other. Each would be liable for the money thus wrongfully obtained. It is immaterial to you what proportion they were to share or be benefitted by the wrong, or on whose credit the money was obtained from Hunter."

The defendant, among other requests which were given in full, requested the presiding judge to give the following instructions to the jury:

"I. That the testimony of Hunter that he let Randall have $3,110 in 1868, if meant and understood as testimony delivered in support of his declaration for money had and received, is justifiable only in case Hunter had let him have money as a loan, accommodation, or otherwise, upon the credit of Randall."

This instruction was given, excepting the word only, which was omitted in reading.

"II. If it were true that Hunter let Randall have money for Oliver, as a loan to Oliver, that fact would not justify the testimony of Hunter that he let Randall have money as a loan, accommodation, or otherwise, to the credit of Randall."

This was given with the word "alone" inserted after the words "that fact."

"III. If Hunter parted with his money, and took Oliver's security for it, it was a loan to Oliver and not to Randall; and upon the trial of the case for money had and received, it is immaterial whether the money went through Randall's hands or not."

This was given with the word "alone" inserted after the word "security," and the words "without relying upon Randall," inserted after the words "for it."

"IV. That the transaction between Hunter and Randall, in which Hunter sold and endorsed notes to Randall for cash, and that in which Randall cashed the note or notes of Hunter, have no effect to charge Randall as indebted to Hunter; nor do such transactions have any effect to justify Hunter's testimony that he did let Randall have $3,110 in 1868."

"V. That if Hunter's loan was made to Oliver, and upon security given by Oliver, the testimony of Hunter to the effect that he let Randall have the money is false, and Randall had probable cause."

"VI. It is immaterial whether the security given by Oliver was or was not good or sufficient."

"VII. In the consideration of the question whether the letter of June 23d was or was not written by Randall, the jury are to read and consider the contents of the writing, and see whether it is or is not consistent with known circumstances."

J. S. Baker & N. M. Whitmore, for the plaintiff.

W. Gilbert & C. W. Larrabee, for the defendant.

LIBBEY, J. This is case against the defendant for malicious prosecution of the plaintiff for perjury.

The only exception to the charge, relied upon by the defendant's counsel, is to giving the instruction requested by the plaintiff. It is not maintained that that part of the charge is not good

law; but it is claimed that it is not applicable to the case; that there is no evidence in the case which would authorize the jury to find a conspiracy between the defendant and Oliver to obtain the plaintiff's money on the security of Oliver, and therefore the instruction should not have been given. Upon a careful consideration of the evidence, we cannot say that there is not enough in the case to authorize the instruction.

Certain requests for instructions were presented to the court by the defendant, which were given with some qualification, or not given at all except as appears in the charge, which is made a part of the case, and exceptions are taken thereto.

We shall consider the several requests in the order in which they are stated in the exceptions.

I. "That the testimony of Hunter that he let Randall have $3,110 in 1868, if meant and understood as testimony delivered in support of his declaration for money had and received, is justifiable only in case Hunter had let him have money as a loan, accomodation, or otherwise, upon the credit of Randall." This was given excepting the word "only," which was omitted.

This request is based upon the hypothesis that the plaintiff had no justification for giving the testimony recited, for which he was prosecuted, unless he had let the defendant have the money on his credit. The proposition shuts out all other theories.

The precise testimony given by the plaintiff, for which he was prosecuted by the defendant, does not appear in the report of the evidence. A full report of it was identified and verified by Mr. Pulsifer, the reporter, and was put in evidence, but it does not appear in the case. The evidence tends to prove that it was, in substance, that he let the defendant have $3,110 in 1868, and that it had not been paid to him; and that he was proceeding to state the facts and circumstances in the transactions between the parties, when objection thereto was made by the defendant's counsel, and he was not permitted to testify to them.

The real issue upon which the jury was to pass, was not merely whether the defendant had probable cause to believe the plaintiff's testimony false, but whether he had probable cause to believe the testimony wilfully and corruptly false. If the jury was satisfied

by the evidence that the plaintiff desired and was proceeding to state all the facts, in explanation of what he meant by his general declaration that he let the defendant have the money, and was prevented from so doing by the defendant's objection, they might deem it very important upon the question whether the testimony was wilfully and corruptly false; and whether the defendant had probable cause to believe it was so given. The request, if given, would shut out this view of the case from the consideration of the jury.

Again, the request excludes the plaintiff's theory that the defendant and Oliver conspired together to fraudulently obtain the plaintiff's money on the worthless securities of Oliver, and thereby induced him to deliver his money to the defendant, to be shared between them. If this theory was well founded, the plaintiff could recover under his count for money had and received, though he parted with his money on the credit of Oliver. And if the plaintiff testified as claimed, in support of the count, intending and attempting to follow his general statement with a detailed statement of the facts and circumstances tending to support that theory, and was prevented from doing so by the defendant's objection, it would seem to negative the theory that his testimony was wilfully and corruptly false.

The request presented a partial view only of the case, and was properly refused without the modification made.

II. "If it were true that Hunter let Randall have money for Oliver, as a loan to Oliver, that fact would not justify the testimony of Hunter that he let Randall have money as a loan, accommodation, or otherwise, to the credit of Randall." This request was given with the word "alone" inserted after "fact."

This was sufficiently favorable to the defendant. The presiding judge ought not to have given the request without qualification, for the reasons we have stated above; and for the further reason that it assumes, as fact, that the plaintiff testified that he let the defendant have the money as a loan, accommodation, or otherwise, to his credit.

III. "If Hunter parted with his money, and took Oliver's security for it, it was a loan to Oliver and not to Randall; and

upon the trial of the case for money had and received, it is immaterial whether the money went through Randall's hands or not." This request was qualified by inserting "alone" after security, and "without relying upon Randall" after "for it."

The request, as a legal proposition, is not correct. The plaintiff might have parted with his money on the credit of Randall, and still have taken Oliver's security. He might have relied upon the credit of both. As given, it was correct and sufficiently favorable to the defendant.

IV. "That the transaction between Hunter and Randall, in which Hunter sold and endorsed notes to Randall for cash, and that in which Randall cashed the note or notes of Hunter, have no effect to charge Randall as indebted to Hunter; nor do such transactions have any effect to justify Hunter's testimony that he did let Randall have $3,110 in 1868."

This request selects certain portions of the evidence tending to show the whole of the transactions between the parties, and asks the court to instruct the jury, as matter of law, that they have no effect upon the issues involved in the case. The evidence was introduced without objection. We cannot say that it was entirely irrelevant. It tended to show the interest the defendant took in procuring the money. It was proper for the consideration of the jury in connection with the other evidence in the case. The request was properly refused.

V. "That, if Hunter's loan was made to Oliver, and upon security given by Oliver, the testimony of Hunter to the effect that he let Randall have the money, is false; and Randall had probable cause."

The request was properly refused. The court could not declare, as matter of law, that, if plaintiff's testimony was false, the defendant had probable cause. The testimony may have been false, and still the defendant may have had good reason to believe that it was not wilfully and corruptly false.

VI. "It is immaterial whether the security given by Oliver was or was not good and sufficient."

This request was properly refused. If the security given was worthless we think it a material fact in the case.

VII. "In the consideration of the question whether the letter of June 23 was or was not written by Randall, the jury are to read and consider the contents of the writing, and see whether it is or is not consistent with known circumstances."

What the "known circumstances" were, with which the jury were to compare the contents of the letter, does not appear. The parties were at issue in regard to the most of the facts and circumstances of the case. The jury could not compare the contents of the letter with known circumstances outside of the case. The request was too vague and uncertain, and calculated to mislead the jury. Upon this point the court gave the jury proper instructions. The request was properly refused.

Exceptions are also taken to the admission and exclusion of evidence.

The plaintiff offered the list of witnesses before the grand jury at the August term, 1876, duly certified and returned into court with the indictments. It was admitted under the defendant's objection. Wm. T. Hall, county attorney, was called by the plaintiff, and was permitted by the court, under the defendant's objection, to testify what witnesses testified before the grand jury on the complaint against the plaintiff. It is claimed by the counsel for the defendant that this evidence was inadmissible, on the ground that it revealed the secrets of the grand jury.

By the settled law of this state, this evidence was clearly admissible. The fact that a witness testified before the grand jury, and the testimony given by him, when otherwise competent, may be proved "when the evidence is required for the purposes of public justice, or the establishment of private rights." *State* v. *Benner*, 64 Maine, 267.

J. D. Pulsifer, a witness called by the plaintiff, was asked, "Are you acquainted with Elbridge Randall's hand-writing as admitted by him at the last term?" The question was objected to generally by the defendant's counsel, but the witness was permitted to answer, and said, "I am."

It is contended that this question was not admissible, because it assumed an admission of the defendant supposed to have been made at a previous term of court. There are two answers to this

objection. 1. The objection was general. The ground of the objection should have been stated. If it had been, the question might have been changed so as to obviate the objection. 2. It was admitted by the defendant that the papers referred to by the witness were in defendant's hand-writing.

After Ezekiel Oliver had been called and testified in behalf of the defendant, Martha E. Luce and B. S. Luce were permitted to testify, against the defendant's objection, to certain declarations of Oliver. It is claimed that this evidence was incompetent, as it does not contradict Oliver. We think it had some tendency to impeach his credibility, and was admissible for that purpose.

Nathan Coombs, called by the plaintiff, was permitted to testify, against the defendant's objection, that Oliver told him that "all the money he received came through Randall's hands." It is claimed that this evidence was inadmissible, as it does not contradict Oliver. He had previously testified that he received a large part of the money directly from the plaintiff. The evidence had some tendency to impeach him, and was admissible for that purpose.

The defendant offered in evidence a letter, dated Portland, June 12, 1871, purporting to be signed by A. A. Strout, and addressed to the plaintiff. There was evidence tending to show that the signature was genuine, and that the letter had been in the possession of the plaintiff; but that it was found by Mrs. Mustard in her husband's orchard, and came into the possession of the defendant. It purports to be an opinion upon the law of the original action, *Hunter* v. *Randall*. It was objected to by the plaintiff and excluded. It is claimed that it was admissible, "as tending to negative the hypothesis of the testimony for which Hunter was prosecuted." At best, the letter is the mere declaration of a third party. There is no evidence that it was written in response to any communication by the plaintiff, other than what appears in the letter itself. We think it clearly inadmissible.

It is contended in behalf of the defendant that he acted upon advice of counsel, and acted in good faith upon the advice he received; and that that was sufficient to show probable cause. This point was submitted to the jury by the court under instruc-

tions to which no exception is taken. It presents no question of law for the consideration of this court.

There is a motion to set aside the verdict, because it is against the evidence, and because the damages are excessive; and also a motion for a new trial, on the ground of newly discovered evidence.

The evidence presented to the jury was conflicting. The issues of fact were submitted to them under appropriate instructions. The facts were exclusively for their consideration. They saw the witnesses, and could judge of their intelligence and disposition to testify to the whole truth. Their credibility and the weight to be given to their evidence were for the determination of the jury. We cannot say that there is such a preponderance of evidence against the verdict as will justify us in setting it aside as against evidence.

As to the motion for a new trial, on the ground of newly discovered evidence, the alleged newly discovered evidence comes from experts, and relates to the question whether the letters called the Oliver and Cox letters, marked B and C, are the handwriting of the defendant. The case had been once before tried to the jury when this issue was raised and presented to them. Several months intervened between that time and the second trial when this verdict was rendered. With full knowledge of the issue involved, and of the plaintiff's evidence upon it, the defendant had ample time in which to obtain the evidence of experts. Their evidence relates to matters of science and art, which, on inquiry, might have been discovered before the trial as well as after it. This court has held that, under such a state of facts, such evidence cannot be regarded as newly discovered evidence. *Blake* v. *Madigan*, 65 Maine, 522. But a careful consideration of the new evidence, in connection with the evidence in the case, does not satisfy us that the Oliver letter of June 23 is not genuine. The verdict ought not to be disturbed on account of the alleged newly discovered evidence.

The damages found by the jury are large. We think, under all the facts and circumstances of the case, that they are exces-

sive, and that the plaintiff ought to remit all over five hundred dollars.

Exceptions overruled. Motion sustained, unless the plaintiff will remit all over five hundred dollars. If he so remits, motions overruled.

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

GEORGE W. WELCH, in equity, *vs.* SAMUEL STEARNS & others.

Androscoggin. Opinion February 19, 1879.

Bill in equity. Joinder of parties.

All the owners of the equity of redemption must be made parties to the bill in equity to redeem the mortgage, otherwise the bill will be dismissed.

BILL IN EQUITY, on agreed statement of facts.

The bill is dated April 1, 1878, and is brought by plaintiff to redeem a mortgage; and it was agreed that the mortgaged premises, on the second day of June, 1848, were the property of Thomas S. Welch and Angerona Welch, his wife, in undivided halves; that on said second day of June, Thomas S. Welch and Angerona Welch mortgaged said premises to defendant, Samuel Stearns, to secure the payment of their promissory note of that date, for the sum of five hundred dollars, payable in five years from date, with interest; that said note and interest were not paid when they became due; that said Angerona Welch died August 3, 1851; that the plaintiff and Persis A. Welch, Seth C. Welch, Patience B. Welch, Benjamin A. Welch, Thomas S. Welch, Jr., and Angerona C. Welch, were the children of said Thomas S. Welch and Angerona Welch, and the heirs at law of said Angerona Welch; that the plaintiff was born February 22, 1849; that on the 20th day of April, 1854, the defendant Stearns foreclosed said mortgage by publication in accordance with the provisions of revised statutes; that a portion of said premises was afterwards

conveyed by said Stearns by mesne conveyances to defendant Quimby; that the remainder of said premises was afterwards conveyed by said Stearns by mesne conveyances to said Washburn, and that on the 4th day of September, 1873, said Washburn conveyed to the plaintiff an undivided half of the premises conveyed to him from said Stearns; that the plaintiff, on the 19th day of December, A. D. 1877, demanded of the defendants an account of the sum due on the mortgage, and of the rents and profits, &c., in accordance with the provisions of R. S., c. 90, § 13, and that defendants have not accounted.

The plaintiff prays among other things that he may be declared entitled to redeem said mortgaged premises, and that defendants account. If, from the foregoing statement of facts, the law court shall be of opinion that the plaintiff is entitled to redeem said premises or any part thereof, and to hold the defendants to an accounting, decree to be made accordingly; otherwise, bill to be dismissed, with costs.

J. W. Mitchell, for the plaintiff.

L. H. Hutchinson, *A. R. Savage* & *F. D. Hale*, for the defendants.

LIBBEY, J. This is a bill in equity to redeem a mortgage. Thomas S. Welch and Angerona Welch, his wife, were tenants in common, in equal shares, of the premises embraced in the mortgage, and on the second day of June, 1848, they made the mortgage in issue to Samuel Stearns, to secure the payment of a note for $500, payable in five years. Angerona Welch died August 3, 1851, leaving the complainant and six other children her heirs at law. By the agreed statement it appears that Thomas S. Welch owns one undivided half of the equity of redemption, and the seven children of Angerona, including the complainant, the other half. They are all interested in all the questions embraced in the bill.

It is well settled that all the parties legally interested in the right to redeem a mortgage must be made parties to a bill to redeem. If any of them refuse to become parties complainant,

they must be made respondents. *Chamberlain* v. *Lancey*, 60 Maine, 230. *Southard* v. *Sutton*, 68 Maine, 575.

As all the parties in interest are not in court, and have no opportunity to be heard, we do not deem it proper to consider, and attempt to determine, the other questions raised and discussed at the argument.

The bill must be dismissed for want of proper parties.

Bill dismissed with costs for respondents.

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

BENJAMIN M. BRADBURY *vs.* INHABITANTS OF BENTON.

Kennebec. Opinion February 20, 1879.

Defective way. Notice. Location. Liability. Rule of damages.

A notice of injuries received, and specified as injuries to the "periosteum of the tibia," is good—such words having become Anglicized.

Where a notice had been given, and a more specific one was afterwards substituted, the latter in no way impairs the effect of the first, there being no pretense of a withdrawal of the claim. Revocation of the first notice affords no evidence, of itself, of a revocation of the claim.

The notice need not specify the injuries as they are alleged in the writ. The plaintiff is not confined or limited to the precise statement of his injuries contained in his notice. It is sufficient if the town has such notice as will enable its officers to investigate the case and acquire a full knowledge of the facts.

Where the records of one county show a legal location of the way upon which the injury was received, it is not competent to introduce the records of another county to impeach the same.

Where the bridge on which the plaintiff was injured had been used as a toll bridge before a public way was located over it, and it had been properly constructed for public travel, and was a connecting link between two highways, and there was no timber, wood or erection on the way which the owner had the right to remove, and no time was prescribed in which the way should be opened; *Held*, the way should be opened in a reasonable time; and, if permitted to be used by the public after its location, and for nearly a year prior to the injury, the town became liable to keep it safe and convenient, and consequently liable in damages.

In this class of cases, the jury are authorized to assess prospective damages, although not specifically claimed in the writ.

ON EXCEPTIONS, AND MOTION.

ACTION on the case to recover for personal injuries alleged to have been received December 13, 1875, on account of a defect in a highway which the defendant town was bound to keep in repair. Ad damnum, $5,000. Date of writ January 21, 1876.

Plea, general issue and brief statement that the way described in plaintiff's writ was never legally established, and defendants were not bound to repair or maintain the same.

The verdict was for the plaintiff, the damages being assessed in the sum of $840.00. Thereupon the defendants moved to set aside the verdict and that a new trial be granted, because against law, evidence, and the weight of evidence, and likewise alleged exceptions to certain rulings of the presiding justice which are recited in the opinion. The notice to defendant town, put into the case, was in writing and as follows:

"Fairfield, December 28, 1875. To the selectmen of the town of Benton, Maine:

"Gentlemen: A demand against the town of Benton has been left at this office for collection. Your immediate attention to the matter will save cost. The demand is for damages sustained by Benjamin M. Bradbury of Fairfield, Maine, in consequence of injuries received from defect in that portion of the covered bridge across the Kennebec river, which is situated in said town of Benton, and which said town is by law bound to keep in repair, on the evening of the 13th of December, A. D. 1875. The nature of the injury, according to the statement of Dr. E. G. Fogg the attending physician, is inflammation of the periosteum (periostitis) of the tibia, at about the junction of the middle and the lower thirds of the right leg. Yours very truly, F. E. McFadden, att'y for Bradbury."

In the writ and declaration the plaintiff's injuries are described as "a dangerous contusion of the muscles of said leg, and the bones of said leg were then and there, by reason of said defect or hole in said bridge and highway, badly injured and displaced; his back strained and a general shock to his nervous system was then and there received by reason of the defect aforesaid, and many other grievous injuries were then and there sustained by said plaintiff by reason of the defect aforesaid, by reason whereof

he has hitherto been confined to his room, his health has been greatly impaired, his life endangered, and he has suffered great pain and has been put to great expense for medical aid and nursing."

Other necessary facts appear in the opinion.

O. D. Baker, for the plaintiff.

S. S. Brown, for the defendants, contended:

I. The notice was insufficient, because:

(1). It was not expressed in the English language.

(2). It was revoked.

(3). It did not specify the injuries which are alleged in the declaration.

II. The location of the way was not sufficient to charge the defendants, because:

(1). The commissioners had no jurisdiction of the way, it not being asked for in the petition, and it may be impeached collaterally. *Small* v. *Pennell*, 31 Maine, 267.

(2) The accident occurred before the liability of the town had become fixed, it being inside of one year after location. R. S., c. 18, § 14.

(3.) The court erroneously instructed the jury in regard to prospective damages, because the declaration did not allege them. 1 Chit. Plead., §§ 339, 399. *Patten* v. *Libbey*, 32 Maine, 378. 2 Greenl. Ev., § 254, *et seq.* *Hunter* v. *Stewart*, 47 Maine, 419.

LIBBEY, J. Exceptions are taken to the rulings of the presiding judge on three points.

I. As to the sufficiency of the notice by the plaintiff to the town after the injury. The notice was in writing, and the judge instructed the jury that it was sufficient. It is claimed that this instruction was erroneous:

(1). Because the notice was not expressed in the English language. The injury specified is to the "periosteum of the tibia." The words "periosteum" and "tibia" have become Anglicized, and are now used as English words. They are found in the English dictionaries now in use.

(2). Because it was revoked. The ground of this objection is that the plaintiff's attorney, after the action was commenced, thinking the notice not so specific as might be required, went to one of the selectmen of the defendant town and said "the first notice was not good; he waived it and would rely upon a new one," which he read. There is no pretense of a withdrawal of the claim against the town. This proceeding by the attorney in no way impaired the effect of the notice which had been given.

(3). Because it does not specify the injuries as they are alleged in the declaration. It was not necessary that it should do so. The plaintiff is not confined and limited to the precise statement of his injuries contained in his notice. The true nature and extent of the injuries may not be developed so as to be known to the plaintiff till after the time in which the notice is required to be given. It is sufficient if the town has such notice as will enable its officers to investigate the case and acquire a full knowledge of the facts. *Blackington* v. *Rockland*, 66 Maine, 332.

II. The second point excepted to is the instruction of the judge to the jury upon the questions of the legality of the location of the way and the liability of the defendant town to keep the bridge in repair. The instruction was as follows: "If that bridge continued to be traveled by the public as a part of the public highway after the location, then the location which has been introduced is sufficient in law to cast upon the defendant town the burden to keep it in repair."

The report of the evidence in the case is made a part of the exceptions. By the record of the location it appears that a part of the way located over the bridge, which had been used as a toll bridge, was in Somerset county and a part in Kennebec county. The petition was presented to the county commissioners of Somerset county, and notices duly given by them; a meeting of the commissioners of both counties was had; a joint adjudication, that common convenience and necessity required the location of the way, was made, and the proceedings were recorded in Kennebec county; and thereupon the commissioners of that county proceeded to locate the way in their county. They fixed no time in which the way should be opened for public travel. The evidence

is sufficient to authorize the jury to find that the bridge ceased to be used as a toll bridge from the location of the way, and was used by the public as a public highway from that time to the time of the plaintiff's injury. It is not claimed that there was any timber, wood or erection on the way which the owner had a right to remove.

It is claimed that the instruction of the judge is erroneous on two grounds:

(1). That the way was not legally located. The record of the county commissioners of Kennebec was introduced by the plaintiff. It is not claimed that there are any errors in the proceedings of the commissioners disclosed by that record. It shows a legal location. But the defendants claim the right to introduce the record of the county commissioners of Somerset county to show that the record in Kennebec is erroneous.

We are of opinion that the record in Kennebec cannot thus be impeached collaterally, but must be held to be sufficient to show a legal location in that county.

The same result must follow if the record in Somerset county is to control. That record shows everything necessary to give the commissioners of the two counties jurisdiction, and that their joint adjudication was sufficient to give the commissioners of each county jurisdiction to complete the location of that part of the way in their respective counties. The excess of authority, if any, under the petition can be shown only by parol evidence. The commissioners having jurisdiction, their action cannot thus be impeached collaterally. *Gay* v. *Bradstreet*, 49 Maine, 580.

(2). That the injury to the plaintiff occurred before the town became liable, under the location, to maintain the way and keep it in repair. In *Blaisdell* v. *Portland*, 39 Maine, 113, it is said that, "if no time is prescribed by the county commissioners, then, according to the general principles of law, the way must be opened within a reasonable time." Here the way located was a connecting link between two public highways, and was used as such as a toll bridge at the time of the location. It was properly constructed for public travel. There was no timber, wood or erection to be removed. It was reasonable that the town should

be required to assume it and keep it in repair at once. It took no measures to prevent the public from travelling over it, but permitted it to remain open and to be used by the public as a public highway. It thereby became liable to keep it in repair. *Blaisdell* v. *Portland*, *supra*, and cases there cited.

The instruction required the jury to find that the bridge had been traveled by the public after the location as a part of the public highway. We think this was correct.

III. Exception is taken to the charge of the judge authorizing the jury to assess prospective damages, on the ground that such damages are not claimed in the writ. It is not claimed that, in this class of actions, the plaintiff is not entitled to recover for such damages as will naturally and ordinarily result from his injuries in the future as well as for the past; but it is claimed they must be specifically declared for in the declaration. In legal contemplation all damages which will be sustained as the effect of the injury, are sustained immediately. The future effect of the injuries is not special damages which must be alleged, but general damages which necessarily flow from the injuries received. *Hunter* v. *Stewart*, 47 Maine, 419. The declaration specifically describes the injuries received. It is sufficient to authorize a recovery of all damages which had been or would be sustained by the plaintiff as the natural and ordinary effect of the injuries.

Exceptions overruled.

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

SUSAN D. H. BOYD *vs.* SAMUEL L. CARLTON.

Cumberland. Opinion February 22, 1879.

Dower,—assignment of.

In an action of dower, where the husband had conveyed a tract of land, which his grantor subsequently divided and conveyed to several persons, in severalty, the plaintiff is entitled to have her dower set out to her in the parcel described in her writ, according to the present value thereof, excluding the increase in value by reason of improvements made on the same by the defendant or his grantors since the husband aliened the tract of which said parcel is a part; but not excluding the increased value by reason of improvements made by the owners of the other parcels carved out of the same tract, or by their grantors.

She is entitled to have her dower assigned in the parcel held in severalty by the defendant, precisely as though that parcel had been aliened by the husband as a distinct estate, and by a separate conveyance.

ON REPORT.

ACTION OF DOWER. Writ dated May 22, 1876.

It appeared in evidence that on November 11, 1841, the President, Directors & Co., of the Exchange bank held a judgment and execution against Wm. Boyd, the then husband of demandant, and on that day levied said execution upon a large tract (about four acres) of land in Portland, of which the premises described in the writ constitute a part. Said tract at the time of said levy, and for several years after, was unimproved, and substantially unproductive. About the year 1848 a street was opened through said tract; the remainder of the tract was divided into lots of convenient size, which have become the property of sundry persons deriving their titles from said bank by sundry mesne conveyances, and valuable houses have been erected, and are now standing on all said lots.

The premises described in demandant's writ have been improved by the erection thereon of a valuable house covering a portion of said lot; and the whole of said lot has been improved by filling, draining and fencing.

The demandant claimed that she is entitled to her dower in the tenements described in her writ according to the present value

of said tenements, excluding the increased value by reason of improvements on that parcel of land by the successive tenants since the time when her husband aliened the premises; and that in determining her dower, this tenant shall not be permitted to take into account, and have the benefit of any increased value of his tenements by reason of improvements made, since her husband aliened, on other parcels of the entire tract by him aliened as aforesaid, but that as to all such increased value she is entitled to the benefit of the same.

The tenant contended that the demandant is entitled to have set out to her for her dower, such part of the premises described in her writ as will produce an income equal to one-third of the income which said premises would now produce if no improvements had been made since the levy upon any portion of the tract levied upon.

N. Webb & T. H. Haskell, for the plaintiff.

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

The general principle we assume to be well settled, that the dower must be adjudged according to the value of the land at the time of the assignment, excluding all increased value from improvements made upon the premises by the alienee, leaving the dowress the benefit of any increase of value arising from circumstances unconnected with these improvements. 1 Wash. R. Prop. (3 ed.) 273, and cases there cited. Or, as this court say in *Carter* v. *Parker*, 28 Maine, 509, such part of the land is to be set out as will produce an income equal to one-third of the income which the estate would have produced if no improvements had been made since alienation.

Of land taken on execution from husband, the wife is dowable as it existed at time of levy, and not in improvements made after. *Ayer* v. *Spring*, 9 Mass. 8.

The facts in this case are somewhat peculiar, but do not vary in principle. This land (four acres) was aliened in one piece, and was so held by the alienee for many years. Had it, to death of the husband, remained in one piece, owned by one person, or by many as tenants in common, and been literally covered with valu-

able improvements, the law is settled that the dower must be set out, excluding all increased value from improvements. But after the alienation by plaintiff's husband, the tract (the four acres) was divided into some twenty lots, which, during the life of the husband, became the property in severalty of some twenty different owners, and these different owners have each and all made valuable improvements upon their several lots; and now this plaintiff, suing each and all of these several owners, claims against each of them and against his lot, to have the benefit, in the assignment of her dower, of the increased value thereof from all the improvements made upon their several lots by all of the others. Does this subdivision of the lot, originally alienated by the husband, change the principle of law regulating her dower, and give her, in this indirect way, the benefit of the improvements made upon the alienated premises? The subdivision of the lot changes the mode of proceeding to obtain dower, and of setting it out, but not the principle of law governing the assignment.

The words, "improvements made upon the premises," as used in the decisions, do not mean improvements made upon the premises demanded in the writ, but improvements made upon the alienated premises.

BARROWS, J. The lot in which the plaintiff here demands her dower is part of a parcel of about four acres of land in Portland, which was owned by the plaintiff's husband during the coverture, until it passed from him in 1841 by the levy of an execution on the entire parcel in favor of the president, directors and company of the Exchange bank. At the time of the levy there were no buildings on said four acre parcel; but, a few years later, a street was opened through it, and the remainder was divided into lots of convenient size, one of which is the defendant's, and all of which have passed into the hands of sundry persons, holding under sundry mesne conveyances from said bank; and valuable houses have been built upon all of them. The defendant's lot has been improved by filling, draining and fencing, and the erection of a valuable house thereon.

The defendant, not denying the plaintiff's right to dower in

this lot, contends that she is entitled to have set out to her only such part thereof as will produce an income equal to one-third of the income which said lot would now produce if no improvements had been made since the levy upon any portion of the tract levied upon.

The plaintiff claims that she is entitled to her dower in the premises described in her writ according to the present value thereof, excluding the increased value by reason of improvements on the same by the successive tenants since the time when her husband aliened the premises, but that she, and not the tenant, is entitled to the benefit of any increased value of the lot by reason of improvements made since the levy on other parcels of the entire four acre tract.

Both parties accept as correct the general principle as stated in many American cases where dower is awarded against the alienees of the husband or their grantees, and in the text books, substantially thus: The dower is to be assigned according to the value of the lands at the time of the assignment, excluding the increase in value by reason of improvements made on the premises by the alienees, and giving the dowress the benefit of any increase from other circumstances; or, as expressed by this court, by Shepley, J., in *Carter* v. *Parker*, 28 Maine, 509, "The widow is entitled to have such part of the land set out to her as dower as will produce an income equal to one-third part of the income which the whole estate would now produce if no improvements had been made upon it since it was conveyed by the husband."

"She is not entitled to be endowed of improvements made by the grantee of the husband, or by the assignee of such grantee. The widow is to be excluded from the improved value arising from the labor and money expended upon the land since the alienation, but not from that which has arisen from other causes." *Mosher* v. *Mosher*, 15 Maine, 371.

"The plaintiff is entitled to her dower, excluding in the assignment of it any improvements made by the grantee or his assignee since the alienation." *Harvey* v. *Hobbs*, 16 Maine, 80.

The contention that arises between the parties is whether

expressions like those above quoted from our own decisions apply only to the lot in which dower is demanded in the suit, and is to be set out; or whether, where, as here, the lot is part of a larger parcel aliened by the husband by one conveyance, they exclude all increased value by reason of improvements by other grantees of the alienee on other parts of the parcel.

Such a contention could not arise under the English rule as laid down by Lord Denman in *Riddell* v. *Gwinnell*, 1 Adol. & El. 682, (41 E. C. L. R., 728,) where he discusses at large the ancient authorities, Fitz Herbert, and Plowden, and Coke, and concludes that, considering the nature of dower and the remedy provided for it by the law of England, the right unquestionably attaches on all of the lands of which the husband was seized during the coverture, "at the period of his death according to its then actual value without regard to the hands which brought it into the condition in which it is found; the law apparently presuming that it will continue substantially the same up to the assignment." He adds, "Mr. Park (on Dower, 257) informs us that 'the understanding of the profession is that the wife shall be endowed of the land as she finds it at the time of her title to dower consummated.' We have permission from Sir Edward Sugden to state that he always considered the rule to be that the widow is entitled to have assigned to her as her dower so much in value as is equal to a third in value according to the condition of the estate at the time of her husband's death." In fine, under Lord Denman's rule, he who builds on land in which there is an outstanding inchoate right of dower finds himself, after the death of the husband when the dowress comes, in the position of any other man who builds on land to which another has a paramount title.

But in this country, where land is more widely distributed in small parcels, and changes owners more frequently, the possession of it being less valued and the title less scrutinized than in England, it was long ago felt that such a rule would often produce inequitable and, in some cases, disastrous results; and the common law as held by the courts changed to accommodate itself to the new circumstances. The modification seems to have been

adopted for the reasons referred to by Parsons, C. J., in *Gore* v. *Brazier*, 3 Mass. 544, prominent among which is the idea that public policy requires it, so that purchasers may not be discouraged from improving their lands.

Widows, whose husbands had aliened with warranty during the coverture, and whose interest in the personals that might be required to respond for a breach of the warranty was large, would be likely also to adjust their claims, if they made any, upon easy terms, so that neither their children's nor their own share of the personals would be burdened thereby.

However it has come about, the difference between the American rule and that of Lord Denman is well established. The husband, while he has theoretically no control over his wife's right to dower, has it in his power to affect its value by his conveyances; i. e., he may compel her to claim and receive it in many small parcels, the owner of each of which may set out her dower therein, excluding the value of all improvements made thereon by himself or his grantors since the alienation by the husband.

The natural tendency of such alienations under the American rule is to diminish the value of the dower, because there is less probability that the dowress will be able to put many small parcels to the profitable use which she might make of one large one. The question presented in this case, then, is one which is almost sure to arise whenever the husband has aliened without warranty a considerable tract that has been subsequently divided and improved, and it needs careful consideration.

The counsel for the defendant ingeniously argues that the subdivision since the alienation should not affect the general principle, because the dowress will in that way in her various suits indirectly get the benefit of all the improvements made on the four acres, which clearly she could not do if it had remained the property of the original purchaser, and had been improved by him, or by many purchasers as tenants in common; and he claims that, while the subdivision affects the mode of proceeding to obtain the dower and of setting it out, these are only matters of form, not of substance, and the dowress should be excluded from the benefit of all improvements made on the premises aliened by the hus-

band, as well as those made by the defendant or his grantors, on the premises in which dower is demanded in this writ.

If we were satisfied that the subdivision affected the setting out of the dower in the form only and not in substance, it would go far to show that the governing principle ought not to be changed because of the subdivision after the alienation. But we think this proposition of the defendant cannot be maintained.

As before suggested, dower in a single parcel of four acres, set out, as it ought to be, in one piece, is obviously capable of being used in various ways more profitably than detached pieces of insignificant dimensions, such as the dowress might be obliged to accept when the subdivision has taken place. These last might depend for their value mainly upon the inconvenience to which the occupant of the small lot is subjected by the possession of the dowress, and his ability and willingness to free himself from that inconvenience by payment of a reasonable sum to procure the extinguishment or release of her right. We think there is a substantial difference between the dower in a single four acre piece and dower in the same when it has been divided into a score of small lots. Moreover, the case finds that, after the parcel went into the hands of the husband's alienee, a street was opened through the tract, preparatory to the subdivision of the remainder. Whether this was by dedication and acceptance does not appear; nor is it material, for, however it was brought about, the effect was to defeat the claim for dower in so much of the four acres as was thus appropriated. 1 Wash. R. P. (1 ed.) Book 1, c. 7, § 37, p. 220, and cases there cited.

Now, if the husband had aliened in small lots, as the tract is now divided, to the several owners, of whom the defendant is one, it would not be contended that the owner of either lot could claim that any improvements, except those made by himself upon his own lot should be excluded from the estimate. We think, for the reasons assigned at large in *Fosdick* v. *Gooding*, 1 Maine, 30, that, since the consequences to the widow in respect of dower must be the same where he alienes to one and the grantee afterwards conveys in several parcels to several, the rule for the assignment should be the same in such case as it would be if the husband had made the division directly.

The acts of the husband which are powerless to defeat, ought not to be suffered to impair the value of the wife's dower beyond their necessary results under the American rule. Creditors who take the husband's lands by levy take them subject to the contingency of the wife's claim of dower. Those who derive their title from the levying creditors take it with the same burden as though they derived it directly from the husband by a levy on the parcel which they own. The division by the levying creditors of the tract levied on as the husband's property, and the sale of it to various parties in small lots, and the improvements made by the owners of the other lots must be regarded, if they have tended to enhance the value of the defendant's lot, and consequently of the dower to be assigned therein, as among the "other causes" and "other circumstances" to the benefit of which the dowress is entitled.

The language quoted from the decisions applies only to the lot in which dower is demanded in the suit, and not to other land of the husband, though alienated at the same time and by the same act.

The plaintiff is entitled to have her dower assigned in the lot held in severalty by this defendant precisely as though that lot had been aliened by the husband as a distinct estate and by a separate conveyance.

Judgment for demandant for her dower accordingly.

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

JACOB WHITNEY *vs.* MAINE CENTRAL RAILROAD COMPANY.

Androscoggin. Opinion February 22, 1879.

Railroad crossing. Due care. Trains and noises. New trial.

A traveler upon a highway, and a railroad corporation with their trains, in approaching a crossing, are each bound to use their privilege with such reasonable precaution, prudence and actual diligence as may enable the one to cross in safety to the other.

A railroad corporation, having a chartered right to run its trains, has neces sarily the right to make all reasonable and usual noises incident thereto, whether occasioned by the escape of steam, rattling of the cars, or other causes.

A verdict should not be rendered in favor of a plaintiff when the evidence shows that the injuries were the result of his own fault and because he was not in the exercise of ordinary care.

Where the verdict is manifestly against the weight of evidence, on the point of want of care on the part of the plaintiff, it will be set aside.

ON MOTION.

CASE for injuries alleged to have been received by the plaintiff on the 6th day of June, 1877. "And the plaintiff avers that, on the sixth day of June, aforesaid, there was a certain public highway leading from south-west bend ferry, so called, to Lisbon factory village, in said county of Androscoggin, which said public highway was crossed by said railroad, occupied and controlled by said defendant corporation, at a place near the south-easterly end of the Lisbon depot, so called, at said Lisbon; and the plaintiff further avers that, on said sixth day of June, he was riding over and upon said highway in a wagon drawn by one horse, said horse, harness and wagon being then and there sufficient, and he, the said plaintiff, being then and there in the exercise of due care and without fault, and that, when he attempted to drive over that part of said highway where the same is crossed by said railroad, the said defendant corporation, by its servants, suddenly, negligently, and without due and sufficient warning, backed a train of cars propelled by an engine, then and there standing upon the railroad track on the northerly side of said highway, across said highway and immediately in front of the horse driven by said plaintiff, causing said horse to become

frightened and unmanageable. And the plaintiff further avers that said defendant corporation did not then and there employ in and about said train a suitable number of careful and competent engineers, firemen, conductors, and brakemen, for the management of said train and engine, and the same were not then and there properly stationed and in the exercise of due care, skill and vigilance in the management of said engine and train; but that said servants of said defendant corporation then and there in charge and control of said engine and train were careless and negligent in the management of said train, and gave no warning to the plaintiff by bell, whistle, or other signal or act, of the crossing of said road by their said cars as aforesaid and had no person at the rear end of said train or at said crossing to give warning to the plaintiff and others who should desire to cross said railroad where the same crossed said highway, by reason whereof and the negligence, carelessness, and this conduct of the servants of said defendant corporation then and there in charge of said train, and the want of suitable engineers, conductors, brakemen and firemen, and a sufficient number thereof, properly stationed, the plaintiff's horse became frightened, the plaintiff's carriage in which he was then and there riding was overturned, and the plaintiff was thrown violently upon the ground and then and there received grievous bodily injury," etc.

Plea, general issue. The essential parts of the evidence are recited in the opinion.

The verdict was for the plaintiff for the sum of $500; whereupon the defendants moved that the verdict be set aside and a new trial granted, upon the ground that the verdict was against law, the evidence, and manifestly against the weight of evidence.

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

A. A. Strout & F. W. Dana, for the plaintiff, who contended:

That a verdict will not be set aside as being against evidence unless it so preponderates in favor of the losing party as to authorize the court to infer that the jury acted under improper motives. *Williams* v. *Buker*, 49 Maine, 427.

Although the conclusion to which the jury arrives may be dif-

ferent from that of the court had the issue been submitted to them, the verdict will not be set aside unless it was most manifestly against the weight of evidence. *Googins* v. *Gilmore*, 47 Maine, 9. *Peabody.* v. *Hewett*, 52 Maine, 33. *Farnum* v. *Virgin*, 52 Maine, 576. *Darby* v. *Hayford*, 56 Maine, 246.

When the evidence is conflicting upon points vital to the result, the conclusion of the jury will not be reversed, unless the preponderance against the verdict is such as to amount to a moral certainty that the jury erred. *Inhabitants of Enfield* v. *Buswell*, 62 Maine, 128. *Woodis* v. *Jordan*, 62 Maine, 490.

The law imposes the duty of determining the facts upon a jury who see and hear the witnesses, and not upon the court who has not those means of ascertaining the truth. *Elliott* v. *Grant*, 59 Maine, 418.

A verdict founded upon conflicting testimony will not be set aside as being against the weight of evidence unless it be flagrantly erroneous. *Staples* v. *Wellington*, 58 Maine, 454.

VIRGIN, J. The plaintiff has the right in common with all other travelers to use the highway at all times for the purposes for which such ways are constructed. The defendant corporation also by force of their charter, had a right to lay their track and run their trains over and across the highway at the place where it is constructed. But they cannot both use the crossing at the same time. On the contrary, each, on approaching it, is bound to use his privilege with such reasonable precaution, prudence and actual diligence as may enable him to use it with safety to the other, approaching in like exercise of care. *Webb* v. *Port. & K. R. R. Co.*, 57 Maine, 117. On account of the nature of the motive power used by railroads, and the difficulties attending its management, and the noises incident thereto, the statute has prescribed means particularly adapted to give notice of the approach of a train, the object being to warn all persons of such approach in season to enable them to stop at a safe distance, and thus avoid the risk not only of collision but also of alarm to horses. *Hill* v. *Port. & Roch. R. R. Co.*, 55 Maine, 438, 441. *Norton* v. *Eastern R. R. Co.*, 113 Mass. 362. *Prescott* v. *Eastern R. R. Co.*, 113 Mass. 370. *Pollock* v. *Eastern R. R. Co.*, 124 Mass. 158.

But, having a chartered right to run their trains, the defendant corporation "has necessarily the right to make all the reasonable and usual noises incident thereto, whether occasioned by the escape of steam, the rattling of cars, or in any other manner." *Norton* v. *Eastern R. R. Co.*, *supra.*

Applying these principles to the case at bar, and it is evident that the verdict is so manifestly against the weight of evidence, on the point of want of care on the part of the plaintiff, that it ought to be set aside.

Taking the plaintiff's own testimony, several times repeated, and it appears that he had a store standing upon the other side of the track, and within twelve feet of it, where he had frequently stopped with this horse when trains were passing; that he knew the custom of freight trains at that station; that he "had heard all kinds of noises before" caused by such trains; that, seeing the train at the crossing, still he drove to the "planking between the rails;" that he saw the car moving down; backed his horse "some twelve feet," where "he stopped a minute or more;" when, by the "rattling of the cars," the horse became frightened, turned the wagon, and tipped him out.

The witnesses for the plaintiff testify to nothing materially different. They evidently did not see what the plaintiff so frequently details as first taking place.

The horse was frightened at the ordinary noises of the train. If the plaintiff had exercised ordinary care, and stopped at a reasonably safe distance from the train which he had seen when within a quarter of a mile of the crossing, the injury would not have occurred. *Grows* v. *M. C. R. R. Co.*, 67 Maine, 100. *Cordell* v. *N. Y. C. & H. R. R. Co.*, 19 A. L. F. 134.

The cases cited from the Massachusetts decisions are different from the case at bar. The crossings there were flag crossings, and the approach of trains not visible at a distance.

Motion sustained.
Verdict set aside.

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

JOHN KELLOGG *vs.* IVORY W. CURTIS.

Cumberland. Opinion February 22, 1879.

Note. Indorsee. Fraud. Burden of proof.

In an action by an indorsee against the maker of a note, if fraud in the inception of the note be proved by the maker, that casts the burden upon the indorsee to prove that he took the note before maturity for value and without notice of the fraud. It is immaterial that he might have known of the fraud by the use of diligence, if he did not in fact know of it, and purchased the note in good faith.

This burden is, *prima facie*, sustained by the indorsee by showing that the note was indorsed to him for value before maturity. Nothing else appearing, a presumption arises that he purchased the note in good faith, without notice of the fraud.

But where there is evidence on both sides affecting the several points or propositions necessary to be proved, then the general burden of proof is upon the indorsee to make them out, he having the natural presumptions in his favor.

The purchase by an indorsee must be "in the usual course of business," which means according to the customs and usages of commercial transactions; and if he purchases a note before maturity for value, that constitutes such a transaction.

ON EXCEPTIONS from the superior court.

ASSUMPSIT on a promissory note. The questions raised, and the material facts relating thereto, are sufficiently stated in the opinion.

G. W. Verrill, for the plaintiff.

J. H. Drummond & J. O. Winship, for the defendant, cited *Kellogg* v. *Curtis*, 65 Maine, 59. *Roberts* v. *Lane*, 64 Maine, 108. *Smith* v. *Harlow*, 64 Maine, 510.

PETERS, J. The defendant is the maker and the plaintiff an indorsee of a promissory note. The maker defends the suit on the note upon the ground that it was obtained of him by the payee through fraud.

The judge ruled at the trial that the burden of proof was upon the plaintiff to show that he had the rights of a *bona fide* holder, the alleged fraud being first admitted by the plaintiff or proved by the defendant. This was correct. Had the defense been merely a

want or failure of consideration in the note, the burden to prove a *bona fide* purchase would not have been cast upon the plaintiff. He would have been presumed to be a *bona fide* purchaser until proof was introduced to overcome such presumption. *Smith* v. *Prescott*, 17 Maine, 277. *Nixon* v. *De Wolfe*, 10 Gray, 343, and cases. *Tucker* v. *Morrill*, 1 Allen, 528. 2 Greenl. Ev., § 172. But where fraud or illegality in the inception of the note is shown by the maker, that puts the burden on the indorsee to show himself to be an innocent holder. The reason for this distinction, as generally given, is that a presumption exists that a fraudulent payee would be likely to shield himself by placing the note in the hands of another person to sue upon it.

From the character and importance of such a defense, this would seem to be a reasonable requirement, and it is approved by quite all the modern authorities. *Baxter* v. *Ellis*, 57 Maine, 178. *Perrin* v. *Noyes*, 39 Maine, 384. *Sistermans* v. *Field*, 9 Gray, 331. *Smith* v. *Livingston*, 111 Mass. 342. *Bailey* v. *Bidwell*, 13 M. & W. 73. *Smith* v. *Bruin*, 16 Q. B. 244. 1 Parsons on Notes and Bills, 184, *et seq.*, and notes.

The learned judge further ruled: "That, in order to entitle the plaintiff to recover, he must show that he himself, or some prior holder whose rights he has, came by the note fairly for value received before maturity without knowledge of the fraud in the due course of business, unattended with any circumstances justly calculated to awaken suspicion." This was not correct, although it may have been the rule commonly accepted in this state up to the time when the ruling in the case at bar was given. Since that time, after a careful reconsideration of the question, it has been determined by this court in the case of *Farrell* v. *Lovett*, 68 Maine, 326, that such a rule is unjust, impracticable, and upon principle and authority unsound. It is there decided that the indorsee in such a case can recover, if it appears that he took the note before maturity for value and without notice of any fraud or illegality. Suspicious circumstances attending the transaction of indorsement, especially if aided by auxiliary evidence, may have a ten dency to show to the minds of a jury that the indorser knew of the fraud, or that he acted in bad faith. But such circum-

stances do not, as a matter of law, show such a thing. If an indorsee had reasonable cause to know that fraud had been perpetrated upon the maker by the payee of the note, a jury would generally be justified in finding that he did know it. But it would not necessarily follow. Reasonable cause to know a fact is one thing, and actual knowledge of it is another. What convinces one man may not convince another. The point to be found is not whether the indorsee might have ascertained and could have known that the note he purchases was fraudulently obtained, but whether he in fact knew it, or acted in bad faith. It is a question not of negligence or diligence, but one of honesty and good faith. *Carroll* v. *Hayward*, 124 Mass. 120.

The inquiry naturally occurs, what must the indorsee show in order to sustain the burden cast upon him where the note originated in fraud? He makes out a *prima facie* case by proving that the note was indorsed to him for value before maturity. Nothing else appearing, a presumption arises that he purchased the note in good faith without notice of the fraud. This presumption exists, because it is not likely that he would give full value for a note which he knew or believed to be fraudulent, taking the hazard attending it upon himself; and because it would be difficult to prove his good faith in any better way than that he gave value for it.

To show, except by inference and presumption, that he did not have notice of the fraud, would be to establish a fact negative in its character. This presumption stands instead of direct proof till overcome by rebutting evidence. Where there is evidence on both sides affecting the several points or propositions necessary to be shown, then the general burden of proof is upon the plaintiff to make them out. In such case, too, the plaintiff has the aid of all the natural presumptions in his favor. *Hapgood* v. *Needham*, 54 Maine, 442. *Swett* v. *Hooper*, 62 Maine, 54. *Small* v. *Clewley*, *id.* 155. *Nixon* v. *De Wolfe*, 10 Gray, 348. *Smith* v. *Livingston*, 111 Mass. 342. *Hart* v. *Potter*, 4 Duer, 458.

The purchase by an indorsee must be "in the usual course of business." These words are usually defined to mean, "according to the usages and customs of commercial transactions." If the

plaintiff purchased the note before maturity for value, that would be such a transaction.

Exceptions sustained.

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

STATE *vs.* NOAH S. PAUL.

Kennebec. Opinion February 17, 1879.

Indictment. False pretense. Allegation.

An indictment cannot be sustained, the substance of the allegations being that the respondent got money in placing a mortgage upon land by falsely representing that the land was well wooded and well timbered, and had upon it a valuable growth of hard and soft wood and hemlock bark, and contained about one hundred acres ; when in fact the land was not well wooded and well timbered, and did not have upon it a valuable growth of wood, bark or timber, and did not contain one hundred acres.

Had the indictment alleged that there was at the time of the representations no wooded growth upon the land, the representations might have been criminal. But the fact should be laid directly, and positively, and not inferentially, or by way of recital merely.

The want of a direct and positive allegation, in the description of the substance, nature, or manner of the offense, cannot be supplied by any intendment, argument, or implication whatever.

ON EXCEPTIONS.

INDICTMENT, charging that the defendant at, etc., on the 20th of April, 1874, unlawfully, knowingly and designedly did falsely pretend to one William W. Edwards of said Waterville, that he, the said Noah S. Paul, then and there owned a valuable piece of timber land situated in Albion in said county, and that the same piece of land contained about one hundred acres in quantity, and that the same was well wooded and well timbered and that there was upon said land a growth of hard and soft wood and hemlock bark, all of which was very valuable, and that the whole tract of said land was worth one thousand dollars. Said premises being described as follows, etc., with intent thereby to induce the said Edwards to loan and advance to him, the said Paul, the sum of

three hundred and fifty dollars in money and of the value of $350, the property of said Edwards, and to take therefor the promissory note of said Paul for the said sum of three hundred and fifty dollars, dated on said 20th day of April, A. D. 1874, and payable to the order of Edwards in two years from the date thereof, with interest at the rate of nine per cent until paid, and interest payable annually, said note being secured by a mortgage of said tract of land given by said Paul to said Edwards and executed on said 20th day of April, 1874, which said mortgage is of the tenor following, etc., and with intent thereby to cheat and defraud the same Edwards of his said money; and by means of said false pretense did then and there induce said Edwards to loan and deliver to said Paul the said three hundred and fifty dollars in lawful money, and to take therefor said Paul's note for the sum of three hundred and fifty dollars as above described, and said Paul's mortgage of said land as security for the payment of said note as above described; and by means of said false pretense did then and there designedly obtain from said Edwards the said three hundred and fifty dollars in money, and of the value of three hundred and fifty dollars, the property of said Edwards, with intent then and there to cheat and defraud the said Edwards of the same, and did then and there cheat and defraud the said Edwards of said money.

Whereas, in truth and in fact, the tract of land above described was not a valuable piece of timber land, and did not contain one hundred acres in quantity, and was not well wooded and well timbered, and there was not on said land a valuable growth of hard and soft wood and hemlock bark, and the whole tract of land was not worth one thousand dollars, the timber, bark and lumber thereon having been, previously to said April 20, 1874, cut and hauled off, and said tract of land being then and there of no value whatever; all of which the said Paul then and there well knew, against the peace, etc.

The defendant demurred to the indictment, and it was joined. The presiding justice overruled the demurrer and adjudged the indictment good; and the defendant alleged exceptions.

E. F. Webb, county attorney, for the state.

S. S. Brown, for the defendant.

PETERS, J. The defendant is accused of obtaining money by false pretenses. He demurred to the indictment. It alleges that he represented that a parcel of land contained "about" one hundred acres, when in fact it did not contain one hundred acres. But, in criminal pleading, one hundred acres and about one hundred acres are not to be regarded as the same thing. The indictment also alleges that the respondent represented the land to be well wooded and well timbered and to have upon it a valuable growth of hard and soft wood and hemlock bark, and that the land was worth one thousand dollars, and that such representations were untrue. But all this is too much of the nature of an expression of opinion merely, to be actionable in a civil suit, and *a fortiori* not sufficient to support a criminal prosecution. What would be a valuable growth upon land, or a well wooded or timbered tract, is a very uncertain thing. The terms are indefinite. What one man would regard as valuable another might not. Where the representations embrace no details or particulars they should not be relied on.

The case of *Bishop* v. *Small*, 63 Maine, 12, and the cases cited in that case, and the arguments and citations contained in them, cover this whole field of inquiry. See, also, *Martin* v. *Jordan*, 60 Maine, 531, and *Mooney* v. *Miller*, 102 Mass. 217. The case of *State* v. *Stanley*, relied on by the government, differs from this case. See 64 Maine, 157. There a horse was represented to be sound. Whether he was or was not was a matter within the knowledge of the seller, and not ascertainable by the purchaser upon ordinary observation. Such a statement is regarded as a representation of fact, although very near the line that separates the one kind of representation from the other. Had the indictment in this case alleged that there was no growth of wood or timber upon the land, then the representations, if false, might appear to have been criminal. It does contain the words, "the timber, bark and lumber having been, previously to said April 20, 1874, cut and hauled off." But this is not a direct and positive assertion, but is given merely as an argument or reason why the land was not worth one thousand dollars, and (perhaps) why not well wooded and well timbered. All the

authorities upon criminal pleading agree that the want of a direct and positive allegation, in the description of the substance, nature or manner of the offense, cannot be supplied by any intendment, argument or implication whatever. *Com.* v. *Shaw*, 7 Met. c. 57. The charge must be laid positively, and not informally or by way of recital merely. 1 Archb. Crim. Pr. & Pl. 87. 2 Hawk. c, 25, § 60. See *Morse* v. *Shaw*, 124 Mass. 59.

Demurrer sustained.

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

STATE *vs.* FRANCIS JOAQUIN.

Somerset. Opinion February 20, 1879.

Indictment. Perjury. R. S., c. 112, § 2.

An indictment under R. S., c, 112, § 2, making it a crime to endeavor to incite another to commit perjury, is not good when it alleges that the act of perjury was to be committed in a suit designed to be brought, but which was not then, and never has been, pending.

The rule would be different if the attempt was to get another to commit perjury by going before a magistrate or grand jury to inaugurate a proceeding by false swearing.

ON EXCEPTIONS.

INDICTMENT under R. S., c. 112, § 2, wherein the defendant is charged at a certain time and place, as follows: "Meaning and intending to bring a suit or proceedings against one Aaron B. Fox, before a court of competent jurisdiction, for the killing of certain sheep and lambs belonging to him, the said Francis Joaquin, which he, the said Francis Joaquin, claimed were killed by said Aaron B. Fox, and by a dog belonging to him, the said Aaron B. Fox, did then and there wilfully and corruptly endeavor to incite and procure one George H. Ward to commit the crime of perjury, by testifying before said court, of competent jurisdiction, whenever the said suit or proceedings should be heard before said tribunal, that he, said George H. Ward, had seen the said Aaron B. Fox

dogging his, said Francis A. Joaquin's, sheep, which said testimony, whenever the said suit or proceeding was heard before said tribunal, would be material to the issue which would then and there be pending, and heard, and decided, in said suit or proceeding; whereas, in truth and in fact, the said Francis Joaquin, at the time of said endeavor to incite and procure the said George H. Ward to commit the said crime of perjury, then and there well knew that the said George H. Ward had never seen the said Aaron B. Fox dogging his, said Francis Joaquin's, sheep. And so the jurors for the state aforesaid, upon their oaths aforesaid, do present that the said Francis Joaquin did then and there in manner and form aforesaid, wilfully and corruptly endeavor to incite and procure the said George H. Ward to commit the crime of perjury, against the peace of the state, and contrary to the form of the statute in such case made and provided."

There were other counts in the indictment, but substantially setting out alike the offense charged.

To this indictment the defendant demurred, and the demurrer was joined. The presiding justice overruled the demurrer and adjudged the indictment good; whereupon the defendant alleged exceptions.

L. S. Walton, county attorney, for the state.

D. D. Stewart, for the defendant.

PETERS, J. This indictment alleges that the respondent endeavored to procure another to commit perjury. The substance of the matter alleged is, that the respondent intended to commence a suit, or institute a proceeding, in which the perjury was to be committed.

We think the case is not reached by the statute on which the indictment is founded. The true rendering of the statute is, that a person shall be liable who endeavors to procure a person to swear falsely "in a proceeding before any court, tribunal or officer created by law, or in relation to which an oath or affirmation is by law authorized." The objection is that the suit or proceeding was not pending. It might never be commenced. Therefore it was an instigation to commit an offense upon a condition or

contingency that might never happen. This was rather an ideal than a real offense, morally reprehensible no doubt, but not such as the law sees fit to notice.

The county attorney ingeniously argues that, if the proceeding is pending, it may never come on for trial, and that there is no more condition in the way of a suit being brought than there is of its being tried after it is pending in court. But there is a presumption that a case in court is to be tried or disposed of, a presumption of continuance, order or regularity in the course of judicial proceedings, while there is not a presumption that a person will consummate a crime that he may have had in contemplation.

No doubt a person could be guilty under the statute of endeavoring to incite another to commit perjury where no proceeding is pending, but where the act done would itself constitute a proceeding. A man might be induced to go before a grand jury and falsely swear to a complaint. A pregnant woman might be instigated by another to go before a magistrate and falsely swear to proceedings against a man as the father of her bastard child expected to be born. In such cases the acts of the foresworn parties would have the effect, *per se*, to institute proceedings. Mr. Chitty in his Pleadings has furnished precedents for such indictments. But here the instigation was not to commence a proceeding by false swearing, but to swear falsely in some proceeding, provided at some time before some court in some form one should be commenced.

Demurrer sustained.

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

GEORGE VANNAH & another *vs.* FRANKLIN L. CARNEY.

Lincoln. Opinion February 20, 1879.

Award,—consolidation of. Publication.

The plaintiffs had two suits in their joint names against the defendant A. Each of them had an individual suit against him. The cases were taken from court and referred to an arbitrator, the defendant A and his surety giving a bond to "pay to the plaintiffs such sums of money as should be awarded to be paid them by defendant A." *Held*, in a suit on the bond, that the award is not invalid because a consolidated one, finding a single sum due to the plaintiffs jointly.

Nor is the award invalid because the referee, behind the backs of the parties, and after he had shown to them his figures and calculations, ascertained for himself from any source that a suit was settled, in which the principal defendant had been summoned as trustee of one of the plaintiffs, in order to avoid mentioning the suit in the decision to be made by him.

ON EXCEPTIONS.

DEBT on a common law submission bond.

Plea, general issue, with brief statements. The plaintiff offered a paper, purporting to be an award of the arbitrator, which was objected to by the defendant but admitted by the presiding justice; and the defendant alleged exceptions.

The case is stated in the opinion.

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

J. Baker & H. Ingalls, for the defendant, contended:

I. The award did not follow the submission which was contained in the bond, nor does it decide the whole matters submitted to the arbitrator, or make any final disposition of them, and is consequently void. *Colcord* v. *Fletcher*, 50 Maine, 398–401. *Lincoln* v. *Whittenton Mills*, 12 Met. 31. *Houston* v. *Pollard*, 9 Met. 164. *Adams* v. *Adams*, 8 N. H. 82. *Harvey* v. *Brewster*, 14 N. H. 49. *Ackley* v. *Ackley*, 16 Vt. 450. *Porter* v. *Scott*, 7 Cali, 312.

II. There is another fatal informality in the award, and that is in the sum allowed for costs. The submission authorized the arbitrator "to determine the question of costs in said suits," but

not the costs of the arbitration. By the submission the suits were withdrawn from court and dismissed from the docket, and if they had not been, the law would have discontinued them the instant a common law arbitration and submission was effected. *Mooers* v. *Allen*, 35 Maine, 276. *Crooker* v. *Buck*, 41 Maine, 355.

The record, docket and a taxation of the costs show that the arbitrator taxed and allowed not only the costs in the suits, but the costs of the arbitration, which occurred after the actions were out of court. An arbitrator at common law has no power to award the costs of arbitration. *Vose* v. *How*, 13 Met. 243. *Shirley* v. *Shottuck*, 4 Cush. 470. *Gordon* v. *Tucker*, 6 Maine, 247. *Walker* v. *Merrill*, 13 Maine, 173. *Porter* v. *B. B. R. R.*, 32 Maine, 539. *Hanson* v. *Webber*, 40 Maine, 194. *Day* v. *Hooper*, 51 Maine, 178. *Maynard* v. *Frederick*, 7 Cush. 247–252.

III. Another reason why the award is void is because the arbitrator received evidence long after the hearing was closed, and in the absence of Andrews, Carney and Hilton, when the arbitrator read from sheets of paper in the presence of Hilton and Cunningham; this was a publication of his award, and all he could do after that was to complete writing out the award, if not already done, and sign it, and then his duties and powers were ended. *Knowlton* v. *Homer*, 30 Maine, 552. *Thompson* v. *Mitchell*, 35 Maine, 281.

After publication of the award, the arbitrator imposed additional burdens upon Carney, the surety in the bond, without hearing or notice, and without power so to do. *Woodbury* v. *Northy*, 3 Maine, 85. *Thompson* v. *Mitchell*, 35 Maine, 281.

IV. The award is void for want of mutuality. *Furbish* v. *Hale*, 8 Maine, 315.

PETERS, J. The plaintiffs, Vannah and Cunningham, had two suits in court, in their joint names, against the defendant Andrews. Each of them also had a suit in his individual name against Andrews. And they were defendants in an action of replevin brought against them by Erskine and Carney, Andrews appearing to have something to do with the replevin action. The

five cases were taken out of court and referred under an arbitration bond and agreement. The bond now in suit provides that Andrews shall pay to the plaintiffs "all such sums of money which the said arbitrator shall award to be paid them by the said Andrews." The award in favor of the plaintiffs was a consolidated one, finding a single sum due to them jointly.

The award is objected to by the defendants, because it does not contain separate findings and make a distinct decision upon each claim. No suggestion is made of fraud or mistake. The result hides nothing. It is only claimed that it is an irregular thing, and that the form of the award does not follow the submission. We can conceive that the plaintiffs might object to have their claims intermingled in such a way, but do not see why the defendants should complain of it. The plaintiffs by bringing this action, waive any right of complaint they might have, and all parties are thereby bound by the award. In fact, the form of the award is in accord with the form of the bond, and, as there can be but one suit upon the bond and that in the name of the plaintiffs, difficulties in the remedy might have arisen had the form of the award been otherwise. As a rule, awards are to be liberally construed.

It is objected that the costs of arbitration were allowed, when the costs of the suits while in court only were provided for in the submission. To show this to be so, the defendants produce with their brief a calculation of the costs of the parties in the cases while in court, and find them to fall considerably short of the sum allowed as costs in an aggregate sum by the referee. An answer to this objection is, that we do not know what the evidence as to the costs was before the referee, nor whether witness fees had not accrued and been included in the taxation or not.

It is contended that evidence was received after a publication of the award and *ex parte*. It seems that the referee submitted to the parties his figures and calculations, in order to guard against errors, before his written award was made out. Certainly this was not a publication, nor intended as such. At most, it was only an indication of what the award would or might be. Nor did it injure the defendant to ascertain (if he did) behind their

backs that a suit had been settled where Andrews was summoned as a trustee of one of the plaintiffs. The result of the award was to be the same whether the suit was settled or not. Its form only would have been varied if the trustee suit was pending. Had the trustee suit been provided for in the award, the plaintiffs could have settled it after as well as before the publication. The action of the referee (if proved as alleged) was immaterial. We find no cases that disapprove it. On the contrary, there are cases that commend such a precaution on the part of a referee. *Small* v. *Trickey*, 41 Maine, 507. *Chaplin* v. *Kirwan*, 1 Dallas, 187. *Innas* v. *Millar*, 2 Dallas, 188.

Exceptions overruled.

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

INHABITANTS OF BUCKSPORT *vs.* INHABITANTS OF CUSHING.

HANCOCK. Opinion February 22, 1879.

Pauper supplies,—application for. Stat. 1873, *c.* 119.

Where one was arrested for crime, and, while in the lock-up, attempted suicide—being found in his cell lying upon the floor with his throat cut, and so weak from loss of blood that he could not speak more than a few words with sufficient distinctness to be understood—and medical attendance and such other necessaries as his condition required were furnished by the plaintiff town, before he was taken before a magistrate and committed to the county jail, the expense thus incurred cannot be regarded as pauper supplies.

Under act of 1873, c. 119, the supplies must be applied for and received, in case of adults of sound mind, with a "full knowledge" that they are pauper supplies ; and all care, whether medical or otherwise, is subject to this rule.

ON REPORT.

ACTION to recover for supplies and medical attendance and nursing furnished one James Stone, who, plaintiffs allege, was a pauper having his legal settlement in the town of Cushing.

The facts and questions at issue are fully recited in the opinion.

After the testimony on both sides was in, by consent of the parties, the case was reported, with the agreement that, "upon so

much of the evidence as is legally admissible, the full court, exercising jury powers, are to render such judgment as the law and evidence require."

H. D. Hadlock & O. P. Cunningham, for the plaintiffs, contended that Stat. 1873, c. 119, should have a reasonable construction. It was enacted to check the tendency to interrupt the acquisition of new pauper settlements by furnishing, on some slight pretext, supplies to a family about to gain a settlement in a new town. The reason of the law should not be lost sight of, for when this ceases the law itself ceases.

Stone's condition, when found by the overseer, bleeding from a gaping wound in the throat, his life fading with every beat of the heart, was a direct personal application to the overseers of Bucksport for relief, for necessary supplies and medical treatment.

The statute is silent as to how the application is to be made. The dumb may make the application by signs; the unconscious by the helpless condition in which found

Stone's utterly destitute, helpless and dying condition declared his wants to the overseers of the poor with more potency than could the utterances of a human tongue; on this application he must have relief or die from want of it. And, as in this case, in which all of the indications were that Stone was insane, they were justified in furnishing supplies on the presumption that he was of unsound mind, as the fact of an attempt at suicide is presumptive evidence of insanity. 1 Whar. & Stil. Med. Jur., §§ 637, 678.

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

WALTON, J. This action is to recover expenses incurred for the support of one James Stone, and the only question is whether Stone, at the time the support was furnished, can be regarded as a pauper.

The facts are these: Stone was charged with a criminal assault upon a woman, and was taken into custody by a police officer and put into the lock-up. He was found, shortly after, lying upon the floor of his cell with his throat cut. He had attempted to commit suicide; and was so weak from loss of blood that he could

not walk, nor stand, nor speak more than a few words with sufficient distinctness to be understood. Medical attendance, and such other necessaries as his condition required, were furnished at the expense of the plaintiff town, from June 21, 1876, to July 12, 1876, (twenty-one days) when he was taken before a magistrate, and committed to the county jail.

The question is whether the expense thus incurred can be regarded as expense incurred for the relief of a pauper. We think not. Adult persons of sound mind cannot be made paupers against their will. To constitute pauper supplies, under the laws of this state, the supplies must be applied for, or received with a "full knowledge" that they are pauper supplies; and all care, whether medical or otherwise, is subject to the same rule. Act 1873, c. 119.

The evidence satisfies us that Stone was an adult of sound mind, and that he did not apply for the aid furnished him. It is conceded that he did not. Were the supplies (in the language of the statute) received with a "full knowledge" that they were pauper supplies? A careful examination of the evidence compels us to answer this question in the negative. He undoubtedly knew that his wants were being supplied at the expense of the public; but the evidence fails to show that he knew, or suspected, that he was being supported as a pauper. He had reason to believe, and we cannot doubt that he did in fact believe, that he was being supdorted as a criminal, and not as a pauper. He had been taken into custody as a criminal; and, as soon as he was able, he was taken before a magistrate, and by him committed to the county jail. There is no evidence that he was ever told that he was discharged from his arrest, or that he was in fact discharged. On the contrary, the evidence satisfies us that those having him in charge did not intend to release him; and that he was, by intent and in fact, a prisoner during all the time that the supplies sued for were being furnished him. He had reason to believe, and we cannot doubt that he did in fact believe, that he was being supported and cared for as a criminal, and not as a pauper. In other words, he did not know that the supplies he received were pauper supplies.

We do not mean to decide that supplies furnished one who is under arrest for crime can be regarded as pauper supplies, even if the prisoner does know that they are so intended. We think it may well be doubted whether persons can be made paupers, and subjected to the disabilities of pauperism, by being arrested for crime, and compelled to receive the supplies furnished them, or die for the want of them. There is but little opportunity for volition in such a case. But it will be time enough to determine that question when a case comes before us in which it necessarily arises. It does not arise in this case, because we are satisfied, as matter of fact, that the prisoner did not know that the supplies furnished him were intended as pauper supplies. As already stated, we think he had reason to believe, and that he did in fact believe, that the supplies were furnished him as supplies are ordinarily furnished persons who are under arrest for crime, at the public expense, but not as a pauper.

Judgment for defendants.

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

ROBERT O. FULLER & others *vs.* ISAAC H. NICKERSON & others, & new ship.

Washington. Opinion February 26, 1879.

Lien. Vessel. Specification.

Under R. S., c. 91, § 7, a person can have a lien for materials furnished in building a vessel only when they are so furnished with an existing intention that they should be used in such vessel, and were so used.

A specification, to be annexed to the writ, as required by § 9 of the same chapter, must have all the requisites therein specified to make it sufficient to lay the foundation for an attachment of the vessel, and such as will authorize a judgment against the property to enforce a lien claim.

A charge of "sundry articles of iron and metals" delivered by the plaintiffs to the builders from time to time from "27th Jan'y to 28th Oct., 1876, inclusive," is not such a particular statement of the demand claimed as the law requires.

The specifications, and the facts required to be stated therein, are conditions precedent to the attachment, and, if insufficient to authorize it, no judgment can be rendered against the property to enforce the lien.

Objections to the sufficiency of the specifications may be made at the trial when the judgment is asked for.

An inadvertent omission of a credit which should have been given, and from which no harm arises,—or an honest claim of an item for which there is no lien— is not a legal defect in the specification, but becomes so when knowingly and wilfully made; and whether so made is a question for the jury.

ON EXCEPTIONS AND MOTION.

ACTION upon a lien claim, under R. S., c. 91, § 7, for iron furnished by plaintiffs to one Nickerson & Rideout, in building a ship for W. H. Smith and others.

The writ bears date December 16, 1876, and (leaving out the immaterial parts) reads as follows: "We command you to attach ship or vessel now on the stocks at Calais, building by one Nickerson & Rideout of Orrington for the owners, and summon all persons interested, in the manner directed by law, to appear before our justices, etc., then and there to answer, etc., to Robert O. Fuller of ——, Eustace C. Fitz of ——, and Charles S. Dana, etc., copartners under name of Fuller, Dana & Fitz, who claim a lien on said ship or vessel for materials furnished and used in the construction of said ship or vessel, to the amount of twenty-eight

hundred and thirteen dollars and eighty-six cents, according to the specification hereto annexed, together with thirty-seven dollars and thirty-seven cents for interest on same, which amount Isaac H. Nickerson and Henry A. Rideout, copartners in business under the firm of Nickerson & Rideout, of Calais aforesaid, who owe the same, neglect and refuse to pay, to the damage of said Fuller, Dana & Fitz, as they say," etc.

Specification of demand of plaintiffs:

"Sundry articles of iron and metals delivered by plaintiffs to Nickerson & Rideout from time to time from the 27th day of January, A. D. 1876, to October 28, 1876, inclusive, amounting to five thousand two hundred and seventy dollars and eighty-six cents, and there was paid on account of same July 27, 1876, $782; September 15, 1876, $575; September 20, 1876, $600; November 9, 1876, $500; in all, $2,457; leaving balance justly due of $2,813.86, on which is claimed interest to the amount of $37.37. Nickerson & Rideout are the persons personally liable to the plaintiffs. The owners of the ship or vessel, so far as known, are H. F. Smith & Co. of New York, W. H. Smith of Bangor, and Llewellyn Morse of Bangor, Captain J. F. Bartlett of Orrington, Maine, and Jabez Snow of Bucksport, Maine. And I, the subscriber, in behalf of the said plaintiffs, lien claimants, upon oath, say that I believe that the said plaintiffs, Fuller, Dana & Fitz, by the laws of the State of Maine have a lien on the said ship or vessel, for the whole or a part of said claim. Joseph Granger. Washington, ss. December 19, 1876. Sworn to before me, George A. Curran, justice of the peace."

Officer's return:

"Washington, ss. December 19, 1876. By virtue of the within writ, I have this day attached the ship or vessel, now on the stocks in the ship-yard formerly used by J. & C. Short, near the lower steamboat wharf in Calais, Washington county, Maine, superintended by J. F. Bartlett of Orrington, for the owners; and on the same day I posted, in a conspicuous place on said ship or vessel, a notice signed by me, directed to the owners thereof, stating that I had attached the said ship or vessel, the amount of the lien

claimed, by whom it was claimed, the parties from whom said amount was due, and the court to which the writ was made returnable. And on the same day I gave to the master workman on said ship or vessel, and to the city clerk of said Calais, a copy of so much of my return as relates to the said attachment of said ship or vessel, with the name of the plaintiffs, the names of the persons liable for the debt, the description of the vessel as given in the writ, the date of the writ, the amount claimed, and the court to which the writ is returnable, and on the same day I left a copy of said certificate with J. F. Bartlett, one of the owners named in said writ, and on the same day I summoned the within named defendants, Nickerson & Rideout, part owners of the said ship, to appear and answer at court, by giving each of them a summons in hand as within directed. John S. Smith, deputy sheriff."

Pleadings: "And now come William H. Smith, Charles V. Lord, Annie H. Smith, Morse & Co., Frank H. Holyoke, A. Leighton, Jabez Snow and Fred H. Smith, owners of said ship when, &c., where, &c., and defend said action so far as relates to the validity and amount of the lien claim alleged in the plaintiffs' writ, declaration and specification, and for defense and brief statement say:

I. "That the specification, annexed to the writ does not contain a just, true and particular account of the demand claimed to be due the plaintiffs, with all just credits."

II. "The specification does not contain the names of the persons personally liable to the plaintiffs."

III. "The specification does not contain the names of the owners of said ship or vessel; nor does it state that the names of the same are unknown to plaintiffs or their agent and attorney.

IV. "That the said specification is not verified by the oath of the plaintiffs, or by any person in their behalf; that the amount claimed in said specification is justly due from the person named in his said writ and specification as owing it."

V. "That no valid attachment was made of said ship under or by virtue of said writ."

VI. "That the plaintiffs never furnished any materials or labor for the building of said ship; and no materials furnished the

defendants by plaintiffs entered into the construction of said ship."

VII. "That the defendants, from January 27, 1876, to January 1, 1877, built and completed three ships or vessels, and did a large amount of labor, and furnished a large amount of materials, to wit: iron, timber, &c., for old ships and vessels, as and for repairs, and were merchants and traders as well as ship-builders and carpenters; and that all the goods charged by the plaintiffs to said defendants during the time aforesaid, were charged to them personally, and upon their own personal responsibility, upon an open, mutual and running account, to be by them used in the construction of vessels or otherwise, and not in particular for said ship, and no lien on said ship was intended by the plaintiffs at the time of the sale and delivery of said materials and none ever existed.

VIII. "That nothing is due from said defendants to said plaintiffs.

"And pray that the questions specified in section 16, chapter 91, R. S., may be put to the jury impaneled to try the cause aforesaid. By Barker, Vose & Barker, their attorneys.

"And the said plaintiffs, reserving all right of exception to the sufficiency and legality of each and every one of the aforesaid specifications of the said William H. Smith *et als.*, claiming to be owners of the said ship, say that, so far as the plaintiffs are in law bound to answer and reply to the same, the writ and all requirements of the law, in such case made and provided, are sufficient, and deny each and every one of the allegations of said defendants, so far as the same are required to be answered unto, and request that the jury ascertain and find what amount is due from the defendants to the plaintiffs, and for how much amount the plaintiffs have a lien on the said vessel, viz: the ship Annie H. Smith. By their attorneys, J. & G. F. Granger."

After the plaintiffs had opened their case to the jury, read their writ, specification, etc., and the pleadings, William H. Smith *et als.*, owners of said ship, by Barker, Vose & Barker, their attorneys, moved the court to rule that the plaintiffs could not maintain their action for the enforcement of a lien on said ship, for the following reasons, viz:

I. "That the specification annexed to the writ did not contain a just, true and particular account of the demand claimed to be due the plaintiffs, with all just credits.

II. "That the specification aforesaid did not contain the names of the owners of said ship, and did not contain a statement that the names of such owners were unknown to said plaintiffs.

III. "That said specification was not verified by the oath of one plaintiff, or of some person in his behalf, that the amount claimed in said specification was justly due from the person named in the writ and specification as owing it.

IV. "That the return of the officer upon said writ was insufficient and did not show that a valid attachment of said ship had been made upon said writ, and that no attachment had been made."

The court denied the motion and request of said owners of said ship, but did rule, for the purposes of the trial, that the writ, specification, verification and officer's return were sufficient in form and in law to enable the plaintiffs to maintain their said action and enforce a lien on said ship, if they are in all other respects entitled to their lien.

The court allowed plaintiffs to amend by filing particulars of plaintiffs' account of iron, and it was so done before the trial proceeded. The attorney for the ship-owners, being called upon to specify his objections to the officer's return, declined to state his objections.

The defendants, Isaac H. Nickerson and Henry A. Rideout, did not appear to defend, it appearing upon the docket that they were in bankruptcy.

The owners of the ship appeared to defend against the alleged lien, and the court was requested by the counsel for the said owners to instruct the jury "that the specification annexed to the writ did not contain a just, true and particular account of the demand claimed to be due the plaintiffs, with all just credits, and was not verified by the oath of one plaintiff, or of some person in his behalf; that the amount claimed in said specification is justly due from the persons named in the writ and specification as owing it; and for these reasons the plaintiffs cannot maintain their action

for the enforcement of any lien upon the ship described in their writ;" which instruction the court refused to give, but instructed the jury, for the purposes of this trial, that the specification annexed to said writ, and the verification in said specification, were sufficient in law for the plaintiffs to maintain said lien if they were, in all other respects, entitled to a lien."

Also for the following instructions: "If plaintiffs sold and delivered iron to Nickerson & Rideout on a general account, and no particular iron was sold for the special purpose, and at the sale set apart to go into the ship Annie H. Smith, it would become the property of Nickerson & Rideout; and if after that, Nickerson & Rideout used any part of the iron in the construction of the ship, they, and not the plaintiffs, must be regarded the party who furnished that iron for building the ship; and in that case the plaintiffs would have no lien on the ship; and, if it was so sold and delivered, it would make no difference whether the whole or a part of any particular item of the account went into the ship.

"If Nickerson & Rideout bought and received of the plaintiffs, iron of different qualities and dimensions, on a general account, and used part for the ship attached and part for other purposes of their own choice, or as they had occasion, and there was no agreement between the parties which was violated by such use, it was the property of Nickerson & Rideout, and they were the party who furnished it for the ship, and plaintiffs would have no lien."

Which instructions the presiding justice declined to give, but did instruct the jury as follows: "That, in order to have a lien, the party must have furnished the iron for the vessel, and it must have gone into the vessel; it must have been furnished, and been used in the construction of that vessel in good faith; because here are parties outside who had nothing whatever to do with that part of the contract, who have purchased the vessel, and they are only liable if there is a legal lien. There is some testimony at least tending to show that these defendants, Nickerson & Rideout, were building at that time, or part of the time, three vessels, and it is claimed that this iron was bought upon general account and went into the three vessels. Whether any of it went

into this vessel or not, I believe it is not conceded on the part of those representing the vessel that it did; but it is claimed that it was bought on a general account, and if used for those three vessels, that it went irrespectively into the vessels. I will say to you, for the purposes of this trial, that, if it was furnished in good faith for the three vessels, and if different parts of it went into the three vessels, the plaintiffs would have a lien for that part that went into this vessel now in question, so far as it went in there in good faith."

The action was tried by the jury, who returned a verdict for the plaintiffs; and, in answer to the question: "For how much of such amount have the plaintiffs a lien on the vessel attached?" answered, $2,995.31.

Plaintiffs alleged exceptions, and likewise filed a motion to have the verdict set aside as against law, the evidence and the weight of evidence.

J. & G. F. Granger, for the plaintiffs, in a very elaborate and able argument, contended:

That the ship-owners and defendants, by their counsel, appeared generally at the first term, when everything in both declaration and specification of claim was apparent upon the record, and made no objection, nor hinted at any, up to the time of trial. This should be considered a waiver. It is a rule of the civil law, and consonant with reason, that anyone may renounce or waive that, even, which has been established in his favor. 2 Bouv. L. Dict. 483. *Rowley* v. *Stoddard*, 7 Johns. 207. *Jones* v. *Dawing*, 2 Johns. Cases, 74. *Smith* v. *Eddie*, 3 Johns. 107. *Johnson* v. *Richards*, 11 Maine, 49. *Wilson* v. *Nichols*, 29 Maine, 566.

It is a very familiar law that a general appearance is a waiver of any and all defects in the form of the writ or process, and in its service. Story's Plead. Oliver Ed., c. 8, p. 28. 4 Mass. 438. 1 B. & Pul. 250. 1 Moore, 299. 3 Cranch, 496. 4 Cranch, 180–421. *Simonds* v. *Parker*, 1 Met. 508–511. *Fox* v. *Hazelton*, 10 Pick. 275. *Clark* v. *Montague*, 1 Gray, 446. *Carlisle* v. *Weston*, 21 Pick. 535. *Smith* v. *Robinson*, 13 Met. 165. *Ripley* v. *Warren*, 2 Pick. 592. *Joyner* v. *School*, 3 Cush. 567.

Brewer v. *Sibley*, 13 Met. 175. *Shaw v. Usher*, 41 Maine, 102.

And as to amendment. *McCabe* v. *McRae*, 58 Maine, 96. R. S., c. 82, § 9. *Bell* v. *Austin*, 13 Pick. 90. *State* v. *Folsom*, 26 Maine, 212. *Lawrence* v. *Chase*, 54 Maine, 196. *Dyer* v. *Brackett*, 61 Maine, 587. *Page* v. *Hubbard*, 1 Sprague, 335. *Jones* v. *Keen*, 115 Mass. 170.

As to instructions. Those requested are so mixed with improper requests that, the court not being bound to give the whole, was justified in refusing the whole. The requested instructions were objectionable as calling upon the court to take facts from the jury. *Hubbard* v. *Brown*, 8 Allen, 590. *Story* v. *Buffum*, 8 Allen, 35, 37. *Young* v. *Orpheus*, 119 Mass. 184.

L. Barker, *T. W. Vose & L. A. Barker*, for the defendants.

DANFORTH, J. By R. S., c. 91, § 7, it is provided that "any person who furnishes labor or materials for building a vessel shall have a lien on it therefor, which may be enforced by attachment thereof, within four days after it is launched." Upon this provision, and this alone, the plaintiffs rely for the validity of the lien sought to be enforced in this case.

At the trial there was testimony tending to show that the defendants, Nickerson & Rideout, to whom the materials in question were sold and delivered, were ship-builders doing a general business in building and repairing vessels; that, from January 27, 1876, to October 28, 1876, inclusive, they had an open running account with the plaintiffs, in which were charged, from time to time, such materials, consisting of different kinds of iron, as they had occasion to use in their business, whether of building or repairing, without any discrimination as to which they were to be used for; that payments made from time to time were credited upon the general account, and that the ship on which the lien is claimed was built, in part at least, for other parties.

In this state of the case, the presiding justice was requested to instruct the jury that, "If Nickerson & Rideout bought and received of the plaintiffs iron of different quantities and dimensions on a general account, and used part for the ship attached and part for other purposes, of their own choice, or as they had

occasion, and there was no agreement between the parties which was violated by such use, it was the property of Nickerson & Rideout, and they were the party who furnished it for the ship, and the plaintiffs would have no lien."

This request was refused; which refusal was clearly erroneous. It is in accordance with a reasonable construction of the statute, and called for by the testimony in the case. The terms of the statute are plain and free from ambiguity. Any person furnishing materials for building a vessel shall have a lien on "it." The materials must be furnished for the vessel on which the lien is claimed, not for another, not for a different purpose, or without any purpose whatever as to their use. They cannot, in any proper sense, be furnished for a vessel unless there was at the time an existing intention that they should be used in that vessel. If it is sufficient that the materials were used in the vessel, a vendor might have a lien on a vessel built years after the sale, and the building of which was not thought of at the time of the sale. If such were the case, they might be traced through several hands, and the original vendor, not having received his pay, would be entitled to the lien if he could show that his materials had been used in the construction of any vessel. The law cannot be susceptible of so broad a construction, involving as it does the rights of other parties besides the contractors. It would open too wide a field for fraud.

Besides, this lien is a matter of, or at least an incident to, a contract. True, it is established by law, but it is affixed to, and cannot exist without, a contract. It is therefore an element of the contract of sale, just the same as though specially agreed to by the parties. But if the goods are sold generally without any reference to the use to be made of them, no such element can be attached. The law makes it a part of a sale for a specified purpose only. The authorities bearing upon this point are collected and discussed in *Rogers* v. *Currier*, 13 Gray, 129. See, also, *Tyler* v. *Currier*, *id.* 134.

The instruction given was perhaps correct as far as it went, but it was not a compliance with the request, and not so full an explanation of the law as the facts required.

We do not mean to say that the instruction allowing the jury to find a lien for so much of the material as went into the construction of the ship, if furnished for the three vessels, was incorrect. If it was furnished for three specific vessels, that portion which went into each was furnished as much for that one as if there had been no other; precisely as if more than sufficient was furnished for one vessel, the lien would attach for that which was actually used.

An objection was also raised to some of the proceedings adopted for enforcing the lien.

Whether there is any other remedy for securing the lien than that provided by the statute, it is not necessary to inquire. The plaintiffs, having elected to pursue the statute remedy, must comply with its provisions or fail.

Section 8 of the statute referred to prescribes the form of the writ, and among other things requires the plaintiff to state the amount of his lien claim "according to the specification hereunto annexed." The next section provides that, "the specification annexed to the writ shall contain a just, true and particular account of the demand claimed to be due the plaintiff, with all just credits; the names of the persons personally liable to him, and the names of the owners of the ship or vessel, if known to him, and shall be verified by the oath of one plaintiff, or of some person in his behalf, that the amount claimed in said specification is justly due from the person named in the writ and specification as owing it, and that he believes that by the laws of this state he has a lien on such ship or vessel for the whole or a part thereof."

After the case was opened to the jury, a motion in behalf of the owners, who had appeared, was made to the court, asking a ruling that the action could not be maintained for the enforcement of the lien, on account of certain specified deficiencies in the writ and specification named. This motion was overruled.

Thereupon the case proceeded to trial, and the court was requested to instruct the jury, "That the specification annexed to the writ did not contain a just, true and particular account of the demand claimed to be due the plaintiffs, with all just credits, and was not verified by the oath of one plaintiff, or of some person in

his behalf; that the amount claimed in said specification is justly due from the persons named in the writ and specification as owing it; and for these reasons the plaintiffs cannot maintain their action for the enforcement of any lien upon the ship described in their writ." This request was refused, and the jury were instructed that the specification and verification were sufficient.

This instruction and ruling was evidently erroneous. The specification was not verified by oath. None whatever appeared in the case. No authentication that the amount claimed, or any part of it, was due. This authentication is by statute made an indispensable prerequisite to an attachment. It is a part of the writ, as necessary as any other part. Without it the writ was incomplete, one upon which no attachment under this law could be made, and without an attachment no judgment can be rendered enforcing the lien claim.

The specification was defective. It was not particular. "Sundry articles of iron and metals delivered to Nickerson & Rideout from time to time from the 27th day of January, A. D. 1876, to October 28, 1876, inclusive, amounting to $5,270.86," with certain credits named, however just it may be, or correct in amount, cannot be a "true and particular account of the demand claimed," and was therefore a fatal defect at the time the motion was made.

The exceptions state that before the trial proceeded, by leave of court the specification was amended by filing a bill of particulars of plaintiffs' account of iron. This amendment does not appear in the case, but assuming it to be sufficiently particular, the instruction to the jury was still erroneous. Doubtless the court may rule as a matter of law upon the effect of whatever appears upon the face of the papers, but defects which do not so appear present questions of fact for the jury. The very question now under consideration presents a good illustration.

By the testimony as reported, it appears that during the time or a part of it, when this account on which the plaintiffs claim a lien on this single vessel accrued, the defendants, Nickerson & Rideout, were building two others and doing sundry repairs upon old ones. It is certain some of this iron went into the other vessels and probable that some went into the repairs, and that the

last four items in the account having been sold on four months credit were not payable at the date of the writ. With regard to the credits, there are two notes which it is claimed should have been credited, and there is some testimony tending to show that fact. Hence there are items claimed as a lien which are not, for the plaintiffs cannot have a lien upon this vessel for iron which went into others, and at least a question of fact in relation to the credits. If the notes should have been credited, then the specification does not contain all just credits. It is not then a just, true and particular account of the plaintiffs' claim with all just credits. Still, whether fatally defective is a question of fact rather than of law. Formerly it was holden in Massachusetts that an item, not a lien claim put in or a credit omitted, was fatal and dissolved the lien. *Lynch* v. *Cronan*, 6 Gray, 531. *Truesdell* v. *Gay*, 13 Gray, 311. These and other like decisions were made under a statute requiring "a certificate, containing a just and true account of the demand justly due him, after all just credits are given." Under a different statute, one requiring a statement, giving "a just and true account of the demand claimed to be due him, with all just credits," a different rule seems to have been adopted. If an item for which there is no lien is honestly claimed, or a credit inadvertently omitted from which no harm arises, the error may be corrected at the trial. But if the misstatement or omission is wilfully and knowingly made the specification is still fatally defective. *Story* v. *Buffum*, 8 Allen, 35. *Young* v. *Orpheus*, 119 Mass. 179–185.

Our statute in this respect corresponds more nearly with that of Massachusetts, under which the latter decisions were made, and has received a similar construction. *Dyer* v. *Brackett*, 61 Maine, 587. This certainly is a reasonable construction, and by it, although the plaintiffs have clearly put some items into their claim for which they cannot maintain a lien, and possibly omitted some items of credit which should have been allowed, if honestly and inadvertently done, believing the demand to be just and true, it would not be a defective or insufficient specification. But if the non-lien items were knowingly inserted, or the omissions of credit purposely made, the demand cannot, in the sense required by the law, be said to be just and true.

This construction of the statute is confirmed by other parts of it. Section 9, which provides for the specification and the verification by oath, makes it sufficient for the plaintiff to swear that he believes that he has a lien on such ship or vessel for the whole or a part of his demand. Section 14 provides that "the owners of the vessel may admit in writing filed with the clerk, that a certain sum is due the plaintiff as a lien on the vessel; and if the plaintiff does not recover a greater sum as lien," he shall not recover, but pay costs.

Section 16 provides that at the request of either party the jury shall find the amount due from the defendant, and for what portion of such amount the plaintiff has a lien upon the vessel attached.

By § 17 separate judgments shall be rendered for the amounts found to be lien and non-lien claims, and separate executions are to issue.

These different provisions of the statute clearly contemplate that a plaintiff may recover a less amount than that put into his specification as a "just, true and particular account of his demand." In the absence of such a right, they would be entirely useless and of no effect.

With this construction of the statute, whether the plaintiffs' amended specification is a compliance with the law requiring a just, true and particular account of the demand claimed, is a question of fact for the jury. The original was clearly insufficient upon its face.

It is contended that these several objections to the specification came too late, that they should have been made within the time allowed for pleas in abatement, and a considerable number of cases have been cited as bearing upon that point.

These decisions are all good law but not applicable to this case. A general appearance will undoubtedly cure a defect in the service. A party litigant may ordinarily waive a want of compliance with the law in any process against him when that want relates to matters established for his benefit, and that waiver may be shown by acts, or a neglect to act, as well as by words. As a general rule that which is incidental or tends to show that the

present action cannot be maintained through any defect in the process, but has no effect upon the merits of the controversy between the parties, must be taken advantage of in abatement, or a waiver will be conclusively inferred.

But the specification and the matters therein required to be stated, do not come within any of these rules or any found in the cases cited. Though this case has its origin in a contract between the plaintiffs and the principal defendants, and without that contract, as we have seen, cannot be maintained, yet that contract is but one element among others necessary to be shown in order to maintain that branch of it now under consideration. The plaintiffs are not now seeking to enforce their claim against those who promised to pay it, but against the vessel *in rem*, and the question is not whether they shall have a judgment, but whether that judgment shall be against the property, so that they may secure their lien upon it. The owners of this property are not parties to the contract, though they may have put themselves in a condition to be the losers by its nonperformance. But before they can be put in that condition the statute requires certain things of the plaintiffs. There must be a valid attachment within four days after the vessel is launched; and that attachment cannot be made except upon such a writ as is prescribed by law. The writ, and specification which is a part of it, are as much elements of the judgment as the contract, and the facts therein stated must be proved just the same or the judgment fails. These facts are in issue as much as the contract, and the whole issue must be determined at the same time.

This statute was not, as contended in the argument, made for the benefit of the owners of the vessel, but rather for that of the plaintiffs. Certain methods of procedure are adopted to protect the rights of the owners, but the statute is antagonistic to their interests, and before their property can be taken all the elements necessary to authorize a judgment must be complied with. It is sufficient for the owners to make their objection whenever the judgment is asked for. Such has heretofore been the practice both in this state and Massachusetts, and that without objection. *McCabe* v. *McRea*, 58 Maine, 95. *Dyer* v. *Brackett*, 61 *id.* 587.

And the same is apparent from the cases already cited from Massachusetts.

True, the Massachusetts statute differs somewhat from ours, but not so as to affect this question. That requires a sworn statement of the demand to be filed in the office of the town clerk if personal property, or in the registry of deeds if real, within a specified time; this makes it a part of the writ upon which the attachment must be made within the same time. There the lien is dissolved if not filed within the time allowed; here it is a condition precedent to the attachment, without which the lien cannot be enforced. It matters little to the parties whether by neglect the lien is dissolved, or the right to enforce it is lost, the result in either case is the same.

It follows as a necessary consequence that the amendment to the specification allowed, even if the whole deficiency had been supplied, cannot affect the result of this action. It must abide the condition of things as they existed at the time the attachment was made. As that is the foundation of the judgment against the property, if it was not valid when made, no subsequent act of the party can refer back so as to make it valid, and hence no such judgment can be rendered. An invalid attachment is no attachment. Nor can one be made to take effect in the past. Whether the lien still exists is immaterial to this case; the only question to be considered is whether the judgment now asked for has in law a sufficient basis upon which to rest. But the whole deficiency is not supplied by the amendment. The oath is still wanting.

It is equally certain that no amendment can be allowed, and for the same reason that, if the attachment was invalid when made for want of process, no subsequent procuring of process can relate back so as to supply the deficiency; and, in this respect, there is no difference between an entire want of one and one deficient in any matter made requisite by law. In this conclusion we do not mean to intimate that the case of *Dyer* v. *Brackett*, *supra*, was not correctly decided. On the other hand we still approve and affirm it. In principle it comes clearly within the construction we have given the statute. Under this construction the specification in that case, upon the facts there found, was suf-

ficient to authorize the attachment. The difficulty was in the amount to be recovered; an inadvertent omission of one item of credit, from which no harm arose, was supplied. The result would have been the same if the omission had been supplied by proof of payment of that amount by the respondent. So, if an item of debt had been honestly claimed for which no lien existed, and others shown by a failure of proof on the part of the plaintiff, such an error would have no effect upon the sufficiency of the specification, whether voluntarily corrected by the plaintiff under leave of court, or by a verdict of the jury. Such a correction is not technically an amendment of the process, no more so than is required in a declaration when there is a failure in the proof to sustain the amount claimed, or the defendant proves a payment omitted in the credits. It is simply a correction of an error in the amount claimed, which has no effect upon the specification, as it was originally made, as a valid foundation for an attachment and judgment.

Exceptions sustained.

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

UNION SLATE COMPANY *vs.* JOSIAH TILTON.

Somerset. Opinion March 1, 1879.

Trustee. Cestui que trust. Possession. Nonsuit.

The mere possession of personal property is *prima facie* evidence of title, and sufficient to enable the possessor to maintain an action against a wrong doer.

A nonsuit is not to be ordered when there is evidence to be submitted to the jury.

A trustee purchasing trust property risks the setting aside of his purchase, if the *cestui que trust* is dissatisfied.

The contract in such case is voidable, and not void. It is valid to pass the title as against strangers until rescinded.

ACTION OF REPLEVIN for a quantity of marbleized slate mantles.

At the trial of the cause, and after the introduction of the plaintiffs' evidence, the presiding justice, on motion of the defendant, ordered a nonsuit and return of the property, on the ground that the plaintiffs had not proved any title to the property replevied.

Plea, general issue, and brief statement of justification.

The case is fully stated in the opinion.

Wright & Record, for the plaintiffs.

Walton & Walton, for the defendant.

APPLETON, C. J. This is an action of replevin. The writ is dated February 15, 1876. The defendant is sheriff of Somerset county and justifies under certain writs in favor of Peter Cunningham and others against the Mayfield Slate Company, dated January 21, 1876, in which they severally claim a lien for their labor upon the slate attached.

Upon the introduction of the plaintiffs' testimony the presiding justice ordered a nonsuit and return of the property attached, to which rulings the plaintiffs excepted.

The plea of the general issue admits the plaintiffs' corporate existence. The question, therefore, is whether a *prima facie* case as against a mere wrong doer is made out.

It is in evidence that the Mayfield Slate Company was embar-

rassed, and that its real and personal property was subject to a mortgage of $64,750.

At a directors' meeting held by adjournment on December 8, 1875, "it was voted to sell the real and personal property of the Mayfield Slate Company at public auction at Lewiston, Maine, (at the office of James T. Small) on Friday, the 31st day of December, instant, 1875, at two o'clock P. M., pursuant to authority given by a vote of the stockholders at their annual meeting held at Skowhegan, Maine, on the 12th day of October last."

In the meantime, the plaintiff corporation having obtained a charter, organized under the same on December 31, 1875, in the forenoon, and after making choice of their officers, Joseph G. Tibbetts being chosen general agent, "voted to authorize the general agent to purchase for the company all the right, title and interest which the Mayfield Slate Company has in and to any and all real estate and personal property for such sum as he may deem for the interest of the Union Slate Company."

In the afternoon of December 31, the real and personal property of the Mayfield Slate Company was sold at auction, as advertised, and to Joseph G. Tibbetts, acting for the plaintiffs, for a sum exceeding the amount of the mortgages upon the Mayfield Slate Company's property.

There was nothing paid by Tibbetts at the auction sale, but he and others of the old company settled fifty-four thousand dollars of its indebtedness, and a mortgage was made by the plaintiff corporation to secure the balance. The Mayfield Slate Company ceased to have an active existence, and its property, after the sale, was in the possession and under the control of the plaintiffs until the attachment of the same by the defendant.

The plaintiff corporation was in possession by its agent and superintendent, C. H. Doughty. Possession of personal property is *prima facie* evidence of title and sufficient to enable the possessor to maintain an action against a wrong doer. *Linscott* v. *Trask*, 35 Maine, 150. *Pinkam* v. *Gear*, 3 N. H. 484.

Here was evidence both of title and possession in the plaintiffs. A motion for a nonsuit will not be granted when there is any

evidence in the case competent to be submitted to the jury, tending to show the liability of the defendant. *Page* v. *Parker*, 43 N. H. 363. *Fickett* v. *Swift*, 41 Maine, 65. In the present aspect of the case, the defendant is in no better condition than would any other stranger be, who should undertake to interfere with the plaintiffs' possession without right or title.

It is urged that Tibbetts was the agent of the Mayfield Slate Company in the sale, and purchased its assets as the agent of the plaintiff corporation, and that the whole sale was void. So far as Tibbetts was the servant or agent of the plaintiff corporation, they have ratified his action by taking possession of the property purchased. The Mayfield Slate Company have in no way disaffirmed it, but on the contrary, their directors have affirmed it, and the proceeds of the sale have gone to cancel their liabilities.

It is said in *European & N. A. R. R. Co.* v. *Poor*, 59 Maine, 277, that "the agent to purchase cannot at the same time occupy the position of a seller. It is not that in particular instances the sale, or the purchase, may not be reasonable, but to avoid the temptation, the agent to sell is disqualified from purchasing, and the agent to purchase from selling. In all such contracts, the sales or purchases may be set aside by him for whom such agent is acting. The *cestui que trust* may confirm all such sales or purchases if he deems it for his interest. The affirmance or disaffirmance rests with him, and the trustee, when buying trust property and selling it to himself, must assume the the risk of having his contracts set aside, if the *cestui que trust* is dissatisfied with his action."

It is for one or the other of the corporations interested to set aside the purchase, if there be good cause for so doing, but it is not a matter where strangers to the proceedings have a right to intervene, unless, being or representing creditors, they can impeach the transaction as fraudulent as to them. In that event, the question of fraud would be for the determination of the jury.

The general rule is as stated in *Reese Silver Mining Co.* v. *Smith*, 4 L. R. Eng. & Irish Appeal Cases, 64, that, where a contract is voidable but not void, it remains valid till it is rescinded. So, in *Oakes* v. *Turquenel*, 2 L. R. Eng. & Irish Appeal Cases,

325, it was held that a contract, induced by fraud, was not void, but voidable only at the option of the party defrauded.

The plaintiffs had no title whatever to a portion of the property replevied when their writ was sued out. It seems that, on August 3, 1875, Tibbetts bought property of the Mayfield Slate Company to the value of $1,000, which, on March 6, 1876, he sold the plaintiffs. To this property the plaintiffs had no title. This is subject to an attachment made before their title accrued. As to the residue of the articles replevied, they have, at any rate, a *prima facie* title. Whether their doings and those of the plaintiffs were fraudulent or not are matters for the jury. But, whether fraudulent or not as to creditors, these sales and purchases cannot affect or impair the rights of laborers having valid liens for labor on the articles replevied.

Exceptions sustained.

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

MARIA J. WENTWORTH *vs.* ARTHUR F. WENTWORTH

and

ARTHUR F. WENTWORTH, appellant, *vs.* MARIA J. WENTWORTH.

York. Opinion March 4, 1879.

Dower,—bar of. Allowance. Consideration.

Under the provisions of R. S., c. 61, § 6, a woman, contemplating marriage, may, by a proper writing, executed before marriage in the presence of two witnesses, bar her right of dower in the lands of her intended husband.

Thus, when parties about to enter upon the marriage relation, but before marriage, mutually agreed in writing under seal, that neither they nor their heirs, executors or administrators, would, "in any event, take, claim, control, hold or intermeddle with, any of the real estate, personal property, or any property whatever, which either has or may thereafter derive by inheritance, devise, donation, purchase or otherwise, nor with the rent, profit or interest thereof, intending thereby to bar each other of all right, title and interest which they might otherwise have in each other's estate by reason of marriage:" *Held*, that the right of dower was barred.

Also *held*, that such an agreement was no bar to an allowance by the judge of probate.

Marriage is sufficient consideration for the agreement. So is the reciprocal character of the stipulations.

ON REPORT.

The first case is an action of dower; the second an appeal from an allowance made by the judge of probate to the appellee, as the widow of Asa Wentworth.

The two cases were tried together. During the progress of the trials, Arthur F. Wentworth offered in evidence paper "A," and contended that it would bar the claims for dower and allowance. The presiding justice ruled, *pro forma*, that said instrument would not bar Mrs. Wentworth of her claim for dower or allowance. Whereupon, by agreement, the cases were withdrawn from the jury, for the law court to determine, before settling any other questions in the cases, whether the paper, if executed freely and understandingly, would bar the claim of Mrs. Wentworth for dower and allowance, or either. Upon reception of the opinion the cases to stand for trial upon such questions as either party may raise.

[Paper "A."] "Know all men by these presents, That I, Asa Wentworth of Saco, in the county of York and state of Maine, and Maria J. Brown of Portland, in the county of Cumberland and state of Maine, single woman, whereas a marriage is soon intended to be had and solemnized between the said Asa Wentworth and the said Maria J. Brown, that if a marriage shall be had and solemnized, it is agreed between the said Asa Wentworth and the said Maria J. Brown, that the said Wentworth, his heirs, executors, administrators and assigns, shall not, and will not in any event, take, claim, control or intermeddle with any of the property which now is of the said Maria J. Brown, or which may hereafter be derived in her right by inheritance, devise, donation, purchase or otherwise, nor with the profit, interest or income thereof. And that the said Maria J. Brown, her heirs, executors, administrators or assigns, shall not, and will not in any event, take, control, claim, hold or intermeddle with any of the real estate, personal property, or any property whatever, which now is of the said Asa Wentworth, or which may hereafter be derived in his right by inheritance, devise, donation, purchase or otherwise, nor with the profit, rent or interest thereof, or income, and we hereby intend to bar each other of all rights, title and interest which we might otherwise have in each other's estate by reason of the aforesaid marriage.

"In witness whereof, I, the said Asa Wentworth, and Maria J. Brown, have hereunto set our hands and seals this fourth day of February, A. D. 1867. (Signed) Asa Wentworth. (seal). Maria J. Brown. (seal).

"Signed, sealed and delivered, and executed in presence of, and the word "control" and "purchase" interlined before signing and sealing, Jane Chase, F. W. Guptill."

W. J. Copeland, H. H. Burbank & J. S. Derby, for the defendant.

I. It has long been settled that antenuptial contracts are an equitable bar to dower, and will be enforced in chancery agreeably to their intent. 2 Kent Com. 172. 2 Scrib. on Dow. 390. *Stilley* v. *Folger*, 14 Ohio, 610. *Murphy* v. *Murphy*, 12 Ohio St. 407. *Andrews* v. *Andrews*, 8 Conn. 79. *Selleck* v. *Selleck*, 8 Conn. 85. *Cauley* v. *Lawson*, 5 Jones Eq. 132. *Geltzer* v. *Geltzer*, 1 Bailey's Eq. 387. *Logan* v. *Phillips*, 18 Mo. 22. *Johnson* v. *Johnson*, 30 Mo. 72. *Miller* v. *Goodwin*, 8 Gray, 544.

II. R. S., c. 61, § 6, extends the common law so far as to make such contracts a bar at law.

The statutes of Massachusetts, (Gen'l Stats., c. 108, § 27) similar to, though not so comprehensive in its terms as our own, has been held to bar dower. *Sullings* v. *Richmond*, 5 Allen, 187. See notes on Gen. Stat. 268.

III. Marriage and the mutuality of the release disclose a sufficient consideration without requiring us to resort to extrinsic evidence. 2 Kent Com. 173. Schouler's Dom. Rel. 263. *Andrews* v. *Andrews*, 8 Conn. 84. *Vance* v. *Vance*, 21 Maine, 370. *Reade* v. *Livingston*, 3 Johns. Ch. 481. *Jacobs* v. *Jacobs*, 42 Iowa, 600. *Maguiac* v. *Thompson*, 7 Peters, 348. *Neves* v. *Scott*, 9 Howard, 196.

IV. R. S., c. 61, § 6, like the Stat. of Mass., is additional to, and independent of, the settlement by jointure and the pecuniary provision assented to in lieu of dower, and empowers the parties to contract that the property of "either shall be held by them according to its stipulations." *Jenkins* v. *Holt*, 109 Mass. 262.

If a pecuniary consideration in addition to the consummation of the marriage is required, the contract falls within R. S., c. 103, § 8, and the present statute is a nullity.

V. Equity will enforce such a contract as this in bar of allowance. *Tarbell* v. *Tarbell*, 10 Allen, 278. *Buttman* v. *Porter*, 100 Mass. 337. *Jenkins* v. *Holt*, 109 Mass. 261.

VI. A fair construction of our statutes, making it at law "a bar to all rights," will include allowance as well as dower.

R. P. Tapley, for the plaintiff.

I. The instrument does not operate as a relinquishment of dower. *Vance* v. *Vance*, 21 Maine, 364.

II. The covenants cannot operate as estoppel. *Gibson* v. *Gibson*, 15 Mass. 106. *Hastings* v. *Dickinson*, 7 Mass. 153. 5 Allen, 187.

Not lawfully barred. R. S., c. 103, §§ 1, 6–10.

The provision under which this instrument releases dower is found in chapter on Married Women, first enacted, 1857.

It is not a "marriage settlement," which has a legal, technical signification. It is not executory. Some title passes. 2 Bouv. L. Dict. 2 Whart. Lex. title Marriage Settlement. Burritt's L. Dict., same title.

The agreement in terms does not extend beyond married life.

Heirs of both excluded.

The last claim adds nothing in effect.

There is no consideration. 3 Redf. Wills, (2 ed.) 381. 4. Kent Com. 56. *McCosta* v. *Tiller*, 2 Paige, 511. *Power* v. *Sheel*, 1 Moll. 296.

The allowance is discretionary, and is no right, title or interest, which alone are within the terms of the agreement.

E. Eastman, on same side, cited *French* v. *Peters*, 33 Maine, 396. *Lakin* v. *Lakin*, 2 Allen, 45. Stat. 27 Hen. VIII, c. 10. 2 Steph. Com. 307. 2 Kent Com. 172–178. Atherly Mar. Set. 92. *Bubier* v. *Roberts*, 19 Maine, 460. *O'Brion* v. *Ellis*, 15 Maine, 125. *Stevens* v. *Owen*, 25 Maine, 94. Stearns Real Act. 239. *Lufkin* v. *Curtis*, 13 Mass. 223. *Leavitt* v. *Lamprey*, 13 Pick. 382. *Hall* v. *Savage*, 4 Mass. 293.

No bar by estoppel. *Vance* v. *Vance*, 21 Maine, 364, 371. *McGrachen* v. *Wright*, 14 Johns. 193. *Gibson* v. *Gibson*, 15 Mass. 106. Klines' Est., 64 Pa. St. 124. *Garrison* v. *Grogan*, 48 Mo. 302. *Curry* v. *Curry*, 17 N. Y. S. C. 366. 4 Kent Com. 56. *Gould* v. *Vomack*, 2 Ala. 83. *Stilley* v. *Folger*, 14 Ohio, 610. 1 R. S. of N. Y. 741, §§ 8, 9, 11.

On allowance. 32 Maine, 576. Reaffirmed in *Kersey* v. *Bailey*, 52 Maine, 198.

VIRGIN, J. The first question to be determined is: Does the instrument of February 4, 1867, if executed freely and understandingly, bar the plaintiff's claim of dower in the lands of her late husband?

The decision of this question depends upon the construction to be given to R. S., c. 61, § 6, and upon that of the instrument itself.

This provision of the statute first appeared in the revision of 1857, in accordance with the recommendation of the distinguished revision commissioner, Shepley, late C. J. Com. Rep. 7. The material part of the section provides that, parties about entering upon the relation of husband and wife, "may, by a marriage settlement, executed in the presence of two witnesses before marriage, determine what rights each shall have in the other's estate during marriage, and after its dissolution by death; and may bar each other of all rights in their respective estates not so secured to them."

Whatever may have been the great leading object of marriage settlements, when, under the common law, a married woman's entity was so merged, and her property so essentially lost by marriage, now, since the statute has placed her more nearly on an equal footing with her husband, one of the principal objects of such antenuptial proceedings has become obsolete, and the provisions formerly so common have disappeared. For now, in this state, a married woman is no longer under the necessity of having property settled upon her, since she may "acquire," "own," "manage," "convey" and "devise" any kind of property, and make any lawful contract, and is not deprived of any part of it by mar-

riage, nor does the husband thereby acquire any right to any of his wife's property. R. S., c. 61, §§ 1, 2, 4. Still there are some rights which each has in the property of the other when deceased, (R. S., c. 103, § 15) which need not be enumerated here, together with the right of dower as provided in R. S., c. 103, § 1.

The rules governing the status of marriage are fixed and cannot be changed by parties to suit themselves. The terms of the conjugal relation are too essential to the public weal to be tampered with. But, before marriage, parties have always had the authority, within certain well defined limits, by special stipulations fairly and understandingly entered into *inter sese*, to vary the property interests which each, by virtue of the marriage, acquires in the other's estate. 1 Bish. Mar. W., §§ 418, 425, 427, and cases cited in notes. Schoul. Dom. R. 262. Almost any *bona fide* antenuptial contract made to secure the wife, either in the enjoyment of her own property or a portion of that of her husband, either during coverture or after his death, will be enforced in equity. Schoul. Dom. R. 263. 1 Bish. Mar. W. § 423, notes. *Jacobs* v. *Jacobs*, 42 Iowa, 600. *Andrews* v. *Andrews*, 8 Conn. 79, 85. *Naill* v. *Maurer*, 25 Md. 532, and cases. The principle underlying the cases is that the parties have substituted their own agreement for the rule which prevails in the absence of any agreement. 1 Bish. Mar. W. § 627. Same as one may substitute a devise for the rule of descent in the absence of a will.

R. S., c. 61, § 6, already quoted, has substantially adopted the rules which have been so long established in equity, and now parties contemplating marriage may determine their property rights and bar their respective interests at will. The right to "determine what rights each shall have in the other's estate," authorizes a determination that neither shall have any rights in the other's estate. This result was frequent in marriage settlements. It comes within the definition of Burrill: As an instrument in "writing, usually made before marriage, and in consideration of it, by which the estate of either or both of the parties is settled or limited to be enjoyed in a certain way." Burrill's Dict. Tit. Mar. Set. To the same effect are numerous cases in the

Southern courts, where settlements have frequently been the subject of litigation. Thus in *Bullard* v. *Taylor*, 4 Desau (S. C.) 550, it was held that a marriage settlement may provide that the property of each shall remain as if no marriage had taken place. See, also, *Naill* v. *Maurer*, *supra*. *Jacobs* v. *Jacobs*, *supra*.

The sweeping language in the last clause of the statute must include the right of dower. "All rights" are not less than the whole. This is not inconsistent with R. S., c. 103, section one of which provides that every married woman shall be entitled to dower in the lands mentioned "unless lawfully barred,"—not unless barred as hereinafter provided. There is no language limiting her power of barring her dower to the modes specified in c. 103. She may bar her dower in any lawful manner, since by the statutes she can make any lawful contract.

Upon examination of the instrument executed by the parties February 4, 1867, we find it was signed and sealed in the presence of two witnesses, and acknowledged and recorded, having the leading characteristics of a deed of conveyance except in language. It was made in consideration of marriage, although it is not so declared in terms. *Naill* v. *Maurer*, *supra*. Marriage is the highest consideration known to the law. *Ford* v. *Stewart*, 15 Beav. 499. *Maguiac* v. *Thompson*, 7 Pet. 348. *Vance* v. *Vance*, 21 Maine, 370. Even if it were otherwise, the reciprocal character of the stipulation might well constitute a sufficient consideration. *Naill* v. *Maurer*, *supra*. After specifically stipulating in almost every conceivable manner that neither will "in any event," take, control, claim, hold or intermeddle with any property of the other, or interest in the same, they then mutually declare their meaning and intention to be "to bar each other of all rights, title and interest which we might otherwise have in each other's estate by reason of the aforesaid marriage." What "right, title and interest" was it possible for her to have in his estate "by reason of the aforesaid marriage" except that of dower and the right provided in c. 103, § 15? And she bars all her rights which she might otherwise have. To be sure, she does not specify dower any more than she does any other right, but

aggregates them all in her bar. Parties need not in express terms stipulate that the "right of dower" is barred. It is sufficient if such intent can be legally inferred from the entire instrument. *Hoyle* v. *Smith*, 1 Head (Tenn.) 90. *Mason* v. *Deese*, 30 Ga. 308. Thus in *Jevis* v. *McCreary*, 3 Met. (Ky.) 151, the court say that whether the provision for the wife "shall be regarded as having been made in satisfaction of dower is a question of intention. It is not necessary that such provision should be expressly stated to be in lieu of dower; it will be sufficient if it can be clearly collected from the instrument that it was so intended. 1 Bright on Hus. & Wife, 450. *Worsley* v. *Worsley*, 16 B. Mon. 469. So in *Jacobs* v. *Jacobs*, *supra*, where parties contemplating marriage stipulated that "each is to have the untrammeled and sole control of his or her own property, real or personal, as though no such marriage had taken place," it was held that the wife could not claim dower after the husband's death.

Mr. Bishop says, in relation to upholding such contracts in law: "The contract which was executed before marriage is, though not enforceable at law during coverture, just as good in the courts of law after coverture is dissolved as if there had been no intermediate practical suspension of its legal effect. Therefore if a widow prays, in a court of law, to have dower assigned to her,—her claim being not a vested one in the land but a right merely in the nature of a chose in action—it ought in this court to be deemed a sufficient answer that she had, for a good consideration, agreed not to present any such claim." 1 Bish. Mar. W. § 425. This result is substantially brought about by our statutes.

The general statutes relating to married women in New York are very different from ours, and the case of *Curry* v. *Curry*, cited by the plaintiff, is not in accordance with the modern current of authority; and neither does the reasoning satisfy us. Whether the plaintiff or the defendant made the better trade we have no means of knowing, for none of the circumstances are reported.

II. We are of the opinion that the instrument of February 4, is no defense in the supreme court of probate to a petition for an allow-

ance, which is wholly within the court's discretion. Such have been the decisions in Massachusetts. *Blackington* v. *Blackington*, 110 Mass. 461, and cases therein cited.

Cases to stand for trial.

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

ROCKLAND WATER COMPANY *vs.* DAVIS TILLSON.

Knox. Opinion March 1, 1879.

Easement. License. Condition. Waiver. Quarry. Waste. Damages.

Where a water company was authorized by their charter "to take and hold, by purchase or otherwise, any land or real estate for laying and maintaining aqueducts;" and were required, "within six months from the time of taking" "to file in the registry of deeds" "a description thereof and a statement of the purposes for which taken;" "to pay all damages sustained by persons by the taking of any land, or excavating through any land for the purpose of laying down pipes;" and if the parties "could not mutually agree upon the sum to be paid, the mode of recovering the same was provided in the charter:" *Held*, that a writing given by a land owner—through whose land the company made an excavation for their pipes—to the company, therein acknowledging the receipt of a specified sum "in full for damages done land or otherwise in completing the works of the company," conveys no land or interest therein; but is simply an acknowledgment of the payment of damages for an easement taken.

Also *held*, that the company does not hold the easement by virtue of the receipt, or by a license, but by authority of its charter.

Also *held*, that the return to the registry of deeds provided in the charter, if required when an easement only is taken, is not a part of the taking, but a condition precedent to such taking; and it being for the benefit of the land owner, it may be, and is waived as to him, by a mutual agreement upon the amount of damages and a receipt thereof.

Where the land, through which a chartered water company has made an excavation, under their charter, for their pipes, contained lime rock, and the person, who owned the land at the time of the taking, conveyed an undivided interest in the quarry only, in consideration of the opening of the same, the grantee has the same rights only as the grantor.

Where, in trespass on the case, the injury complained of is the taking away the support of a chartered company's aqueduct pipe, by undermining it and the destruction of a portion of it, the action is in the nature of waste; and all the damages which are the proximate result of the injury, whether present or prospective, must be recovered in this one action.

The rule of damages in such action is the diminution in value of the property injured, not exceeding its real worth.

ON EXCEPTIONS by both parties.

ACTION ON THE CASE for injuries to the plaintiffs' aqueduct. Writ dated September 23, 1875.

Plea, general issue and brief statement which alleged, *inter alia*, that the aqueduct was constructed on land of Orris B. Ulmer, without right and against his will; that at the time of the supposed injury, the defendant and one Cornelius Hanrahan owned in common with Ulmer, the limestone in and upon said land, with the lawful right to dig and remove said limestone and the soil thereupon; and that if any injury was caused to the aqueduct by the defendant, it was done in the prosecution of the rightful use and occupation of said land, and in the digging and removal of the soil and limestone in behalf of himself, Ulmer, and Hanrahan.

The plaintiffs put in their charter, approved August 20, 1850, together with its amendments, which are sufficiently recited in the opinion.

Plaintiffs' exceptions:

L. L. Buckland, surveyor appointed by the court, presented a plan and testified in substance, among other things, that he surveyed the location of the plaintiffs' aqueduct from the lake, which is a mile from the Ulmer field, where he found the pipe supported over the quarry by a truss bridge—a temporary structure. The rock had been excavated from beneath the bridge, which is about fifty feet long. It was thirty-one feet from the pipe to the bottom of the quarry. East of the bridge the quarry had been excavated and the dirt fell off shelving, exposing the pipe where no protection had then been provided.

That from the east end of the bridge across the excavation to the eastern line of the eastern excavation it is about seventy feet; that across this seventy feet, the crest line is about over the pipe, from which point it slopes down to the edge of the quarry; and that some kind of protection to this part of the pipe is necessary.

That he surveyed a certain line (shown on the plan) commencing some two hundred feet northerly of the north end of the bridge, where he dug down to the pipe; thence southerly, to avoid the quarry, around to where it strikes the line of the pipe again; that this is the proposed line, for the change of the location of the

pipe, so as to avoid the Ulmer quarry; that it would clear all present quarrying operations, and would be less expensive, to thus carry the pipe around, than the building of a permanent bridge would be, to sustain it over the quarry; that he estimated the expense of this change, without land damages, at $1,264; that he had also made an estimate that it would cost $2,000 to build a permanent bridge, sufficient to sustain the pipe across the whole quarry, including that portion of the quarry now partially opened; that the bridge now built is about fifty feet long, and that it would require about seventy feet more.

It appeared that the plaintiffs laid their water pipe through the Ulmer field, in 1851, with the knowledge and without the objection of Orris B. Ulmer, who then owned it, before any quarry in that field had been opened; and that they have ever since maintained it there.

The plaintiffs also put in a receipt signed by Orris B. Ulmer, dated November 9, 1852, of the following tenor:

"Received of the Rockland Water Company, thirty-five dollars in full for damages done land or otherwise in completing the works of said company."

It further appeared that the defendant opened the quarry and made the excavations under the pipe, commencing in the summer of 1869; that the first injuries to the pipe, by reason of the undermining and blasting out of the lime rock, occurred in November, 1869; that the defendant built the temporary structure for the support of the pipe; that the plaintiffs, during the fall of 1869 and the summer of 1870, expended the sum of $173.36 for new pipe and repairs of pipe, made necessary by injuries inflicted upon it by the defendant.

The plaintiffs proposed to prove by further testimony that the pipe would be in constant peril where it now is, by reason of the excavations and undermining done by defendant prior to the date of the writ; that it would be necessary to remove it, or to build some more expensive structure to support and protect it; but the court rejected all further evidence on this subject, and ruled that the plaintiffs in this action could recover only the amount of money actually expended prior to the date of the writ

for repairs done by them, which were made necessary by the acts of the defendant, and that, if more permanent supports and security for the pipe were necessary, plaintiffs could not recover the prospective cost of them, but must wait until the expense was actually incurred before they would be entitled to recover it. Plaintiffs claimed to recover not only what they had actually expended, but the future cost of sustaining and protecting the pipe over the quarry; and if it would be cheaper to remove it to a new location, they would be entitled to recover the cost of such removal.

These propositions were overruled.

The plaintiffs made eight requests for instructions, which, on account of the view taken by the court, need not be reported here.

The remaining material facts relating to the plaintiffs' exceptions appear in the opinion.

Defendant's exceptions:

The defendant put into the case a deed of warranty, from Orris B. Ulmer to Cornelius Hanrahan, dated June 15, 1869, duly acknowledged and recorded, of "one undivided quarter of all the lime rock or other minerals within" certain parcel of land including the locus of injury. Also a similar deed from said Ulmer to the defendant.

The deeds were introduced for the express purpose of showing that if the plaintiffs had a license to lay the aqueduct over the *locus in quo*, it was revoked by these conveyances; and further to show revocation, David Tillson, the defendant, testified as follows:

"Before commencing to go under the pipe at all I called the attention of the president of the water company to the fact, and told him I should do so; that, while we would avoid in any possible way injuring the pipe, it would be safer to take it up and move it to the south as indicated in that plan, though there was no need of taking it so far south. I notified Mr. Farnsworth, the president of the company, and asked him to take it away. He went there with Mr. I. K. Kimball, and I think Mr. Berry. I think the other gentlemen advised the change. Mr. Farnsworth afterwards refused to make it. I gave that notice to remove the

pipe before we commenced digging under the pipe. We were digging in that vicinity. I think we had not uncovered the pipe."

Defendant also put in deed of Davis Tillson to Cobb lime company, dated April 24, 1871.

The presiding judge, in his charge to the jury, gave them the following instructions among others, viz:

"They (the plaintiffs) have placed a pipe over the land of Mr. Ulmer. The first question is whether it is legally there or not. They were there under the charter. Their charter provides that they may take land by filing within six months, in the office of the register of deeds, a description of the land and a statement of the purpose for which it is taken. They have not done so, as I understand. It is not alleged that they have done so. They have therefore omitted to do what they were bound to do. But the question is whether this defendant or Ulmer, under whom he claims, have any right to question their acts on that account.

"It seems that Ulmer owned the land; that while the works were being built and the pipe laid he saw daily what was being done, saw where it was laid, knew all about it, and after it was done received what he was willing to receive at any rate for all the doings of the corporation. Now, for the purposes of this case, if you find the facts to be so, and I don't know as they are denied as told by Ulmer, I instruct you that Ulmer cannot interfere with these works. It would be inequitable. All the expenses had been incurred, and he had received what he had received (whether too much or too little is of no consequence) as compensation for what was done. I say, therefore, if you find the facts to be so, he is estopped from setting up any adverse claim, or for interfering with their works.

"Now he conveyed the land to Tillson as it was, with these easements upon it, if you term them so, and the easements he implied might remain. He gave the General (Tillson) no rights which he did not have himself. The General undertook to work a lime quarry. Now each of these are valuable rights; the plaintiff corporation owning the right to convey water into the city,

and Tillson and Ulmer owning a valuable lime quarry. Both have rights, and the rights of both should be respected. While on the one hand the plaintiffs should not be interfered with in the enjoyment of their rights, the defendant should not be debarred from the exercise of his rights. But, if in the exercise of his rights he injured the pipe of the plaintiffs, or delayed the transmission of water to the city, he would be liable for such interference. That he did some acts is not denied; that he more or less interfered with the works of the plaintiffs I do not understand to be denied. While he had a right to use his own property, to dig, to blow, or whatever he did, he must be careful not to injure the rights of the plaintiffs, because the rights of both are to be protected. One has a right to his works, the other to his land. . . The defendant must make the plaintiffs good for all injuries directly flowing from the act done by him during the time when he held the title."

The jury returned a verdict for the sum of $173.36 and interest.

A. P. Gould & J. E. Moore, for the plaintiffs, on the question of damages, cited: *Cumb. & Oxf. Canal Co.* v. *Hitchings*, 65 Maine, 140. *Bonomi* v. *Blackhouse*, 96 E. C. L. 622. *Troy* v. *Cheshire R. R. Co.*, 23 N. H. 83, 104. *Fowler* v. *New Haven & Northampton Co.*, 107 Mass. 352. *Same* v. *Same*, 112 Mass. 334. *Warren* v. *Bacon*, 8 Gray, 397, 402, 405. *Tetter* v. *Beale*, 1 Salk. 11. S. C. Ld. Raymond, 339. Shear. & Redf. on Neg. § 597. Sedg. Dam. (6 ed.) 123, 109*. Wash. Ease. (2 ed.) 477, 560. *Warner* v. *Bacon*, 8 Met. 405. *Howell* v. *Young*, 5 Barn. & Cr. 259, 267. *Hodsoll* v. *Stallebrass*, 39 E. C. L. 178, 180. *Whitney* v. *Clarendon*, 18 Vt. 258.

On defendant's exceptions:

Plaintiffs had an easement not a license. Wash. Ease. (2 ed.) 601, 513*.

The requirement to record location is directory merely, but if imperative, it was waived. *Moore* v. *Boston*, 8 Cush. 274, 276, 277. *Wamesit Pow. Co.* v. *Allen*, 120 Mass. 252, different from case at bar. So is *Willson* v. *Lyman*, 119 Mass. 174. *Hazen* v. *Boston & M. R. R. Co.*, 2 Gray, 574, 579, admits principle contended for by plaintiffs. No conflict in Massachusetts cases.

That conditions may be waived, see 1 Wash. R. P. (2 ed.) 477, 354*. 1 Redf. Rail. (4 ed.) 392. *Hitchbock* v. *Dam. & Nor. R. R. Co.*, 25 Conn. 516. High Injunc. 397, notes and cases cited. *McClinten* v. *Pittsburg, &c., R. R. Co.*, 66 Pa. St. 404.

Conditions precedent may be waived. *Baltimore, &c., R. R. Co.*, v. *Highland*, 48 Ind. 381. But the statute was directory. *Veazie* v. *Mayo*, 45 Maine, 560, 564.

An easement runs with the land wherever acquired, and would be valid against Ulmer's grantees. Wash. Ease. (2 ed.) 29, 22*.

On estoppel. Big. Est. (2 ed.) 559. *Brooks* v. *Curtis*, 4 Law. (N. Y.) 283. *Marble* v. *Whitney*, 28 N. Y. 297. Big. Est. 527. *Ricker* v. *Kelly*, 1 Maine, 117. 2 Am. Lead. Cas. 682–706. Wash. Ease. (2 ed.) 63, 90, and cases in note 3. *Liggins* v. *Inge*, 20 E. C. L. 304, 309.

On rights of licensee. *Leferre* v. *Leferre*, 4 Serg. & R. 241. *Berrick* v. *Kern*, 14 Serg. & R. 267. *Ricker* v. *Kelly*, *supra*. *Clement* v. *Durgin*, 5 Maine, 9. Ang. Wat. (4 ed.) §§ 318–324. 3 Kent Com. (7 ed.) 557, 452*. Hill. Vend. (2 ed.) 131. *Wilmington, &c., R. R. Co.* v. *Butler*, 66 N. C. 540.

On dedication. *Morgan* v. *Chicago & A. R. R. Co.*, 10 Chic. Leg. N. 238. *Learned* v. *Learned*, 11 Met. 421, 423.

A. S. Rice & A. G. Hall, for the defendant, elaborately argued the following propositions:

I. The plaintiffs acquired no easement in or over defendant's land. Wash. Ease. 23. *Moore* v. *Copeland*, 2 Gray, 302. *Cork* v. *Stearns*, 11 Mass. 533. *Lund* v. *New Bedford*, 121 Mass. 286. They omitted to comply with the charter. *Wamesit Pow. Co.* v. *Allen*, 120 Mass. 352. *Wilson* v. *Lynn*, 119 Mass. 174. *Moore* v. *Boston*, 8 Cush. 274. 1 Redf. Rail. § 65. They only had parol license. *Gardiner* v. *Hazelton*, 121 Mass. 494. The receipt was protection from trespass. *Whitney* v. *Holmes*, 15 Mass. 152.

II. The license was revokable. Wash. Ease. 19. *Prince* v. *Case*, 10 Conn. 372. 2 Am. Lead. Cas. 682. *Benedict* v. *Benedict*, 5 Day, 464. *Morse* v. *Copeland*, 2 Gray, 302.

III. The instruction that it would be inequitable for licenser to interpose, implied that the license was irrevocable. Wash. Ease. 19. *Morse* v. *Copeland*, *supra*. Wash. Ease. 307. 1 Wash. R. P. 400. *Owen* v. *Field*, 12 Allen, 457. *Houston* v. *Laffer*, 46 N. H. 507. *Marston* v. *Gale*, 24 N. H. 176. Wash. Ease. 3, 64. *Hall* v. *Chaffre*, 13 Vt. 157. *Gardiner* v. *Hazelton*, 121 Mass. 494.

On estoppel. *Fisher* v. *Browning*, 4 R. I. 52. *Hamlin* v. *Hamlin*, 19 Maine, 141. *Gerrish* v. *Union Wharf Co.*, 26 Maine, 384. Estoppel could not affect defendant, who was not a party to it and who purchased the land without reservation, and, so far as appears, without knowledge of the license. *Stinchfield* v. *Emerson*, 52 Maine, 465. *Seidensparger* v. *Spear*, 17 Maine, 123. *Snow* v. *Moses*, 53 Maine, 546. *Cobb* v. *Fisher*, 121 Mass. 169. *Ricker* v. *Kelly*, 1 Maine, 117, not in conflict. See *Cook* v. *Stearns*, 11 Mass. 533.

Plaintiffs must comply with charter. Redf. Rail. § 65. *Wilson* v. *Lynn*, *supra*. *Wamesit Pow. Co.* v. *Allen*, *supra*. *Central Railway* v. *Hitfield*, 8 Dutch, 206.

IV. License was revoked by the conveyances by Ulmer. *Seidensparger* v. *Spear*, *supra*. *Fateria* v. *Smith*, 4 East. 107. *Cook* v. *Stearns*, *supra*. Wash. Ease. 6.

DANFORTH, J. This is an action for alleged injuries to the plaintiffs' aqueduct, constructed under an act of the legislature approved August 20, 1850, entitled, "An act to supply the people of Rockland with pure water." That such an act is so far for a public purpose as to authorize the taking of private property upon the "payment of a just compensation," is too apparent, and has been too long recognized to admit of doubt.

It is under this charter that the plaintiffs claim and its organization is admitted.

By § 3 the corporation "may take and hold by purchase or otherwise, any land or real estate necessary for laying and maintaining aqueducts, for conducting and discharging, disposing of, and distributing water, and for forming reservoirs."

By § 4 it is provided that, "said corporation, within six

months from the time they shall take any lands for the purposes of this act, shall file in the office of the register of deeds for the county or registry district wherein said lands lie, a description thereof and a statement of the purposes for which taken."

Section seven provides for the payment of "all damages that shall be sustained by any persons in their property, by taking of any land, or excavating through any land for the purpose of laying down pipes." It also provides the manner of recovering such damages when the parties do not agree upon the amount to be paid.

At the place of the alleged trespass the plaintiffs had taken an easement in the land by excavating through it and laying down their pipes.

To show that the damages for such an easement had been agreed upon and actually paid, a receipt from O. B. Ulmer, who was the owner of the land, was put in by the plaintiff. A question has been raised as to the force and effect of this receipt, but its proper construction can hardly admit of doubt. It is not under seal and does not of itself convey, or purport to convey, the land or any interest therein. It simply acknowledges the receipt of "thirty-five dollars in full for damages done land or otherwise in completing the works of said company."

As it covered all damages for completing the works of the company, and as, by completing such works, it must have taken the easement it now claims, the receipt is proof of payment of satisfactory damages for the easement taken. This will more fully appear from the fact that the damages received were the same in kind, if not in amount, as would have been assessed if the compulsory process provided by the act had been resorted to. Nor does the explanation offered in the testimony of the signer tend in any degree to change its effect.

It is, however, claimed that the plaintiffs acquired no right under their charter to this easement for which they had paid, as against the land owner, other than a license to enjoy the same, which might be revoked at will; because they made to the registry of deeds no such return as the act requires.

It may be somewhat problematical whether in such case the act

requires any return whatever. The act evidently authorizes the taking of land, when necessary, or an easement only, when that is sufficient. The damages in section seven are to be paid "for land taken, or for excavating through any land for the purpose of laying down pipes." Though by our statutes the word land includes all interests therein, this act seems to treat land and an easement therein as two distinct things and requires a return to the registry of deeds only of the land taken and the purposes for which taken. The reason of this distinction is sufficiently obvious; for the easement taken is definite and certain in extent and purpose, while the land taken can only be made so by such return as the act requires.

But if otherwise, the return was such as could be and was waived by the land owner. It was not a condition precedent, for it was not required, nor could it be made until after the taking was accomplished; nevertheless it was a condition of the taking, and if not complied with, the owner might at his election reclaim his property. *Wilson* v. *Lynn*, 119 Mass. 175. *Wamesit Pow. Co.* v. *Allen*, 120 Mass. 352. *Lund* v. *New Bedford*, 121 Mass. 286.

These cases, however, differ materially from the one at bar. In neither had the damages been paid or assessed. Nor could they be, except by agreement with the land owner. Without such a return there was nothing definite to show what land or what interest had been taken, and hence no basis upon which to make an assessment. But it is obvious that this is a matter which concerns the land owner only, and therefore one which he can waive. It is only for the purpose of securing the "just compensation" required by the constitution, and if that is otherwise secured to the satisfaction of the land owner, it would seem to be sufficient. From the control which every owner has over his own property it follows that, when taken for a public or private purpose, it is at his own option to insist upon or waive his right to compensation, and if so, a condition prescribed by law, not as a part of the taking, but to secure the compensation, not only may be, but is waived when a satisfactory compensation is received. This is in accordance with the principle laid down in *Moore* v.

Boston, 8 Cush. 274, in which it is held that the land owner may at his election, confirm the taking and avail himself of the compulsory process provided for the recovery of his damages, though no return, as required, has been made. That case is recognized as good authority in *Wamesit Pow. Co.* v. *Allen*, *supra*.

If the owner had proceeded under the law for the assessment and recovery of his damages, obtained a judgment for and a satisfaction of them, it would hardly be pretended that such a proceeding would not have been an affirmation of and rendered valid the taking. An agreement upon the amount and a payment under that agreement can certainly be no less effective.

We have no occasion to deny the authority of the several cases cited and relied upon in defense to show that a parol license to use an easement upon the land of the licenser may, at any time, be revoked, even though the licensee may have been at expense in making necessary erections to render his easement available. They refer to private easements and rest upon the well established principle that such can be acquired, under statute, only by deed or prescription.

There is another class of cases, perhaps equally as numerous and authoritative, in which it has been held that one in the enjoyment of an easement upon the land of another may, by parol, release it, and be estopped to deny the legal validity of that release after erections and expenditures had been made in good faith, relying upon it. The distinction upon which these two classes of apparently, if not really, conflicting cases rests, is that the former refer to and depend upon the conveyance of an easement upon one's own land, while the latter are releases simply of an easement upon the land of the releasee. It is unnecessary to cite these cases, as they may be found collected and commented upon in 2 Am. Lead. Cas. 682–706. The former class are not applicable to the case at bar, for the reason that here the plaintiff claims the easement under its charter and not by any voluntary conveyance or license. The latter class has a bearing upon this, because they rest upon an estoppel amounting to a waiver. In these cases it is clearly held that by inducing one to make expenditures, it would be fraudulent to deny the truth of

the statements made, or to set up rights which have been released, as such inducements.

In this case no conveyance is claimed to have been made. The land owner had a right to the return, for the purpose of his remedy in the assessment of damages. He agrees upon and receives his damages without that. The most that can be said is, that here is a release of that right, and it can hardly be denied that it would be in him a fraud to set up a claim to that for which he has been paid to his own satisfaction. In holding him to that release or waiver there is no violation of any principle of law in reference to conveyance or otherwise.

In *Cushman* v. *Smith*, 34 Maine, 247, it is held by necessary implication that where land is taken for a railroad an action of trespass will not lie if damages are paid. If such an action will not lie, the land owner could hardly be justified in tearing up the track.

In *Hazen* v. *B. & M. Railroad*, 2 Gray, 579, Thomas, J., says, "In cases where the land owner has received his damages for the road as actually constructed, he may be estopped to deny the right of the corporation to use the land in fact taken and used."

In *Clement* v. *Durgin*, 5 Maine, 9, it was held that the right to flow lands is given by the statute and that the damages for flowing may be relinquished by parol. If, then, the damages resulting from an easement may be released by parol without detriment to that easement, it would seem that an agreement for, and receiving the pay, should be held as a waiver of one of the conditions of the taking.

In this case it is not necessary to decide what effect the acts of Ulmer may have upon a subsequent purchaser without notice. The defendant, at the trial, does not appear to have put his defense upon that ground. The deed was given in evidence, simply, as the case finds, to show a revocation of a license.

Besides, he was the purchaser of an undivided interest in the quarry only, and became so far a tenant in common with the owner, and the consideration of his deed was the opening of the quarry.

Thus his position is that of Ulmer and his rights the same, and his exceptions must be overruled.

The plaintiff has also filed exceptions raising a question as to the correctness of certain rulings in excluding testimony and refusing instructions requested and instructions given upon the question of damages.

The action is for an injury to the plaintiffs' easement across the land described in their writ, for the purpose of carrying water in an aqueduct, including the materials necessary for its use. The injury complained of is the taking away the support of the pipe by undermining it, and the destruction of a portion of it.

It appears from the exceptions that, "the sum of $173.36 had been expended for new pipe, and repairs of pipe, made necessary by the injuries inflcted upon it by the defendant;" and that it was "proposed to prove by further testimony that the pipe would be in constant peril where it now is, by reason of the excavations and undermining done by the defendant, prior to the date of the writ; and that it would be necessary to remove it, or to build a more expensive structure to support and protect it;" but the court rejected all further evidence on this subject, and ruled that the plaintiffs in this action could recover only the amount of money actually expended, prior to the date of the writ, for repairs done by them, which were made necessary by the acts of the defendant," and "that, if more permanent repairs were necessary, plaintiff could not recover the prospective cost of them, but must wait until the expense was actually incurred before they would be entitled to recover it."

It also appears that eight different requests for instructions were refused.

The report of the evidence filed by the defendant in this case is made a part of the case, so far as it may modify this bill of exceptions. That report shows that some particular evidence was offered by the plaintiffs and excluded. This ruling, taken in connection with other testimony appearing in the report, does not appear to be objectionable. It does not appear from the report whether this testimony offered, as shown by the bill of exceptions, was in fact offered or not offered. Hence the exceptions in this

respect cannot be considered as modified, but must stand as we find them. It further appears that, in the course of the trial, the court "ruled that the plaintiffs can only recover in this action for expenses incurred to repair damages actually sustained in consequence of the acts of the defendant." If we are to understand by the phrase "expenses incurred" such as had been paid, this ruling would be consistent with that excluding the offered testimony.

Thus the exceptions, modified as they are by the report of the testimony, present the single question whether the plaintiffs can recover all the damages caused by the defendant's wrongful act in this action, whether such injuries have been repaired in full, or otherwise.

The general rule undoubtedly is, that no damages can be recovered which have accrued, or may accrue, subsequent to the date of the writ. This, like most general rules, may be subject to exceptions. In the case of a personal injury prospective damages may be recovered when shown by sufficient testimony, if they could not be avoided by reasonable care and skill.

Another equally general rule is that a second action cannot be maintained for damages resulting from a single act. This rule may have its apparent exception, as when one erects a nuisance upon the land of another. In such case the injured party would recover damages only up to the date of the writ, and could maintain a separate action for each day the wrong should be permitted to continue. *Russell* v. *Brown*, 63 Maine, 203. *C. & O. Canal Co.* v. *Hitchings*, 65 Maine, 140.

These exceptions, however, are apparent rather than real. Both classes of cases rest upon the same principle, and are governed by the same rule in the assessment of damages. In all of them the plaintiff recovers for such damages as legally follow the wrongful acts set out in the writ. In the case of a personal injury the act complained of is complete and ended before the date of the writ. It is the damage only which continues, and is recoverable because it is traced back to the act; while in the case of a nuisance it is the act which continues, or rather is renewed day by day. The duty which rests upon the wrong doer to remove

a nuisance, causes a new trespass for each day's neglect. The difference results from the different nature of the acts. The one is destruction or waste of property, the other a creation or addition to it. While to the latter the duty of removal is attached, from the former, for obvious reasons, no duty results but that of compensation. This difference is illustrated in *Canal* v. *Hitchings*, above cited. See, also, *Lamb* v. *Walker*, reported in 18 Albany L. Jour. 131.

The injury complained of in the case at bar is in the nature of waste. The acts complained of were complete and ended before the date of the writ. Hence whatever damages the plaintiffs are entitled to recover must be recovered in this action. As the act is not a continuing one, no new action can be maintained. If the damages are continuing, testimony showing that fact, if offered, should be admitted.

In such a case as this, the test to be applied is that recognized in *Canal* v. *Hitchings*. "Whatever diminution there is in the value of the property by reason of the trespass, is an element of damage." In that case, at the close of the opinion, it is said, "For an injury in the nature of waste, it would have been appropriate. For an injury resulting from a continuing nuisance, it was inappropriate." If the property was wholly destroyed, its value would be the test of damages; if partially destroyed, its diminution in value.

It will be readily seen from this view, that the cost of repairs is not to control, and may not even throw any light upon the question of damages. The plaintiff may repair in his own way, and thus make the property very much more or less valuable than it was before; or, if no repairs were made or "expenses incurred" in consequence of the injury, the damages recoverable would still be the same.

It will also appear that, while the testimony showing the cost of bridging, and the increased expense of supporting the pipe, if confined to the excavation made by the defendant, as well as that of removing it to another place, was admissible, the requests for instructions in relation to those matters were properly refused. They involve questions of fact, rather than of law. It may be

that the aqueduct was not worth repairing in any of the methods suggested, and if the jury should conclude that it was, it would be for them to say what would be the most judicious course to adopt, for the purpose of fixing the damages. While the plaintiffs would have the right of election as to the method or kind of repairs, the aqueduct could not be increased in value at the expense of the defendant, and the testimony in this respect could only be used for the purpose of showing the actual injury to the property and whether entire or only partial destruction. It does not appear that the plaintiffs were under any legal obligation to the public, or otherwise, to continue the aqueduct. If they were, the case of *Troy* v. *Cheshire R. R. Co.*, 23 N. H. 83, in which the plaintiff was under obligation to support and continue the road at whatever expense, would be applicable. In that event, the plaintiffs would not only recover the cost of restoration, but the increased cost of support, if such increase was made necessary by the trespass. Still, the whole damage must be recovered in one action, as it would be the result of a complete and not a continuing trespass.

If, however, the value of the aqueduct would render the necessary repairs judicious, and the best method of repair would leave it in a more exposed condition or with a less permanent support, then the increased expense of future support as shown by the testimony would be an element of damage.

Taking all these matters into consideration, the jury are to judge as reasonable men, whether any, and if so, what repairs should be made, and from this the actual injury to the property, and assess the damages accordingly. The result is, that, by the instructions given and withheld, they were evidently confined within too narrow limits, and the plaintiffs' exceptions must be sustained.

Plaintiffs' exceptions sustained.
Defendant's exceptions overruled.

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

ALLEN R. McDONALD *vs.* JOHN D. GILLETT & another, and CHARLES D. LATHAM, trustee.

Cumberland. Opinion March 15, 1879.

Trustee. Servant. Service.

A delivered to L, (his alleged trustee,) a steer, with directions to have it killed and disposed of to the best advantage; L thereupon killed it, and delivered the carcass to a butcher to dress and sell, who did so and credited the proceeds to L, before service of the trustee process, but paying over no money till after: *Held*, that the butcher was the servant of L, and the receipt by him of the proceeds of the steer, and crediting the same to L, prior to the service of the process upon him, rendered L chargeable as the trustee of A.

ON EXCEPTIONS.

ACTION OF ASSUMPSIT by Allen R. McDonald against John D. Gillett and Frank Allday, principal defendants, and Charles D. Latham, their alleged trustee. Writ is dated January 24, 1878, and was served January 29, 1878, upon the supposed trustee, and subsequently in February upon the defendants, and was returnable before the justice of the superior court for Cumberland county. Allday filed allegations claiming the funds in the hands of the alleged trustee by virtue of an assignment from Gillett to him after service of the writ upon the trustee. The steer, and the funds arising therefrom, were the property of Gillett until the same were assigned to Allday, as aforesaid.

The deposition of Isaac A. Sweetsir was put in as follows:

"I, Isaac A. Sweetsir, on oath depose and say that I dressed and sold the steer which was shot, and is spoken of in this suit. I received the carcass from C. D. Latham, December 24, 1877. I did not know who owned it. I delivered Latham a round of beef out of this steer in December, 1877, worth about eight dollars. I commenced to sell the steer December 26, 1877, and credited the beef to Latham as I sold it. I sold it all on the 26th and 27th of December, 1877. The steer was sold for $110.95. I charged $10 for my services, delivered the round of beef to Latham worth $8 as aforesaid, and February 16, 1878, settled with Latham for the steer; on that day paid him check annexed $63,

money $7, and my bill against him was about $30. My bill against Latham was for beef sold him between December 26, 1877, and that time. My bill included that round of beef. Mr. Latham came to me and wanted me to pay him the money for Allday to make his defense with. Mr. Latham wanted me to dress the steer and do the best I could with it, and take out my pay for dressing and selling, and to account to them for the proceeds. Isaac A. Sweetsir."

The following disclosure was made by the trustee:

"I know Frank Allday of London, England, one of the principal defendants in this cause; first got acquainted with him some time in December, 1877. He came to see me about yarding some cattle. One steer of the steers was killed. Had conversation with Allday about the dead steer. Allday says to me, 'you take this steer, have him killed, and dispose of him the best that you can.' I hired a man to haul the steer down to Mr. Sweetsir's shop. Sweetsir was a butcher. I told him to take the steer, sell him, and pay me the proceeds. Sweetsir paid me between eighty and ninety dollars; paid for carting, out of that sum. After the expenses were paid, there was about $50 due Allday. Paid Sweetsir about $11 and $3.50 for carting, all of which came out of the gross amount received by me, to wit: $80 or $90.

"Don't recollect that Allday stated that he was acting for himself or not. Allday said after the steer was killed, that Crogan had nothing to do with the cattle at all, Crogan was simply a hired man. Before Allday sailed for England, don't recollect that he told me who the cattle belonged to, but since his return he has told me they belonged to Gillet. Have no claim against Gillet or Allday, except for services in this matter of killing that steer. I got none of the money from Sweetsir until after the service of the writ upon me. Has paid it at different times since, some in money and some in beef.

"Mr. Sweetsir can give day and date of the proceeds of the steer paid for me. Charles D. Latham."

Thereupon the justice of the said superior court ruled as follows:

"I am of the opinion (not intending, however, any finding of

fact in that respect), that Sweetsir should be regarded as the servant of Latham, the alleged trustee, and that the receipt of the proceeds of the steer by Sweetsir prior to the service of the trustee writ, and crediting the same by Sweetsir to Latham on account prior to that date, renders Latham chargeable as trustee in the action; and I rule that the alleged trustee is to be charged in the sum of $97.45."

The defendant, Allday, alleged exceptions.

W. W. Thomas, Jr., & G. E. Bird, for the plaintiff.

N. Webb & T. H. Haskell, for the defendant, Allday.

WALTON, J. The court is of the opinion that, upon the facts stated in the disclosure of the trustee (Latham), and proved by the deposition of Sweetsir, the latter must be regarded as the servant of the former, and that the money in Sweetsir's possession must be regarded as constructively in Latham's possession, and that Latham was properly charged as trustee, and for the correct amount. *Ward* v. *Lamson*, 6 Pick. 358.

Exceptions overruled.
Trustee charged for $97.45.

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

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JOSHUA HOPKINS *vs.* PATRICK McGILLICUDDY.

Androscoggin. Opinion March 19, 1879.

Malicious prosecution. Evidence. Advice of counsel. Damages.

In an action for malicious prosecution, where there is evidence tending to prove that the defendant, before making the complaint and warrant against the plaintiff, sought the advice of his attorney and did not find him, but before the arrest of the plaintiff and before the trial, consulted him in regard to the prosecution and got his opinion and followed his advice in the prosecution: *Held*, this evidence is competent and material upon the question of malice and also upon the question of damages, and should have been submitted to the jury.

ON EXCEPTIONS AND MOTION.

ACTION on the case for an alleged arrest and prosecution of the plaintiff by the defendant, before the municipal court of Lewiston upon a complaint and warrant for an alleged larceny.

Plea, general issue.

The case is fully stated in the opinion. Verdict for the plaintiff for $937.50.

L. H. Hutchinson, *A. R. Savage & F. D. Hale*, for the plaintiff, contended:

I. (Exceptions.) Should these exceptions be sustained, the effect will be that a new trial must be granted. Now when we see in the case itself that substantial justice has been done by the verdict, and that it could not have been legally rendered otherwise than it was, it seems to be preposterous that a new trial should be granted. *French* v. *Stanley*, 21 Maine, 517, and case there cited.

There are numerous cases in which it is held that even if instructions are erroneous, unless it appears also that they might have been prejudicial to the excepting party, a new trial will not be granted. *Russell* v. *Turner*, 59 Maine, 258, and cases there cited. *Bryant* v. *Knox & Lincoln R. R. Co.*, 61 Maine, 300.

It is not sufficient to show that upon a forced and unnatural construction of the statements in the exceptions, and in an improbable contingency, the excepting party may have been aggrieved. It is incumbent on him to show that he actually was so aggrieved. *Lord* v. *Kennebunkport*, 61 Maine, 464. *Soule* v. *Winslow*, 66 Maine, 447. Exceptions will not be sustained on account of abstract errors in instructions, when no injury could have resulted therefrom. *State* v. *Watson*, 63 Maine, 129.

As to employment of counsel or previous consultation. *Fasset* v. *Stevens*, 27 Maine, 283.

Even had he consulted counsel he would not thereby free himself absolutely from liability. In *Hewlett* v. *Churchley*, 3 Taunt. 277, the court held substantially that it would be a most pernicious practice to introduce the principle that a man by obtaining an opinion of counsel might shelter his malice in all cases by bringing an unfounded prosecution. This doctrine is sanctioned in *Blunt* v. *Little*, 3 Mason, 102.

The damages are not excessive. It is proper in the assessment of damages that the jury should take into account the wealth of the defendant, which in this case was between $30,000 and $40,000. *Humphries* v. *Parker*, 52 Maine, 507.

W. P. Frye, J. D. Cotton & W. H. White, for the defendant.

LIBBEY, J. This is case for a malicious prosecution of the plaintiff by the defendant before the municipal court of Lewiston, for the larceny of fifty dollars belonging to the defendant. The declaration alleges that the complaint was made and prosecuted before the court by the defendant, maliciously and without probable cause. The evidence proves that the complaint was made, a warrant issued and the plaintiff was arrested and carried before the court, and gave bail for his appearance on a subsequent day, to which the case was adjourned. The plaintiff then appeared, and the defendant appeared and prosecuted the case against him.

There was evidence tending to prove that the defendant, before the complaint was made, went several times to the office of his attorney, Mr. Ludden, for advice in regard to the matter, but did not find him; that after the arrest and before the trial, he consulted Mr. Ludden in regard to the case, and took his advice and followed it in prosecuting the complaint further before the court.

Mr. Ludden was called as a witness by the defendant and testified in substance that the defendant consulted with him in regard to the prosecution on the day of the trial, immediately in connection with the trial; that he advised with him in relation to it; that he told the defendant, from the statements made to him that he thought an offense had been committed; he did not know as that was the precise language, but that was the substance of it; that he was present at the trial in the municipal court, and acted as attorney for the city and prosecuting attorney for the defendant; that in the consultation there were two points that he asked the defendant particularly in reference to, and two points in reference to which he asked the plaintiff, on cross-examination at the trial, and the defendant and plaintiff entirely concurred in

their statements, and upon those statements he based his opinion; that he told the defendant and the clerk of the court that there was a mistake, if he remembered right, in the complaint; the complaint being for larceny, whereas it should have been for embezzlement; that the offense was embezzlement and the complaint should have been made for embezzlement; and that he did not remember what the defendant said to him about the plaintiff's stealing the money, or that he was going away on the train and he had him arrested to prevent him from going.

In his charge to the jury the presiding judge withdrew this evidence from their consideration entirely; either on the question of probable cause, or of malice, or of damages. We think this was error.

To maintain his action the burden was on the plaintiff to prove a want of probable cause and malice on the part of the defendant in prosecuting him.

It is claimed by the plaintiff that the evidence was not competent for the consideration of the jury upon the question of probable cause, because the defendant did not prove that he, in good faith, communicated to the attorney all the facts within his knowledge, or which he might have learned in the exercise of due diligence, bearing upon the question of the guilt of the plaintiff. This was a question of fact for the determination of the jury. *Anderson* v. *Friend*, 71 Ill. 475. If, however, the evidence was not sufficient, giving it all its probative force, to authorize the jury to find in favor of the defendant upon this issue, it was properly withdrawn from their consideration by the judge. We do not deem it necessary to decide this point, as we think it clear that the evidence was proper for the consideration of the jury upon the question of malice.

"The existence of malice is always a question exclusively for the jury. It must be found by them or the action cannot be sustained. Hence it must always be submitted to them to find whether it existed. The court has no right to find it, nor to instruct the jury that they may return a verdict without it. Even the inference of malice from the want of probable cause is one which the jury alone can draw." *Stewart* v. *Sonneborne*, U. S.

S. C. Oct. T. 1878, (Alb. L. Jour., Feb. 1, 1879,) and cases there cited. *Humphries* v. *Parker*, 52 Maine, 502.

The plaintiff was not required to prove that the defendant was actuated by express malice in the popular sense of the term; but it was sufficient if he proved malice, in fact, in its true legal import. "In a legal sense, any act done wilfully and purposely to the prejudice and injury of another, which is unlawful, is, as against that person, malicious." *Commonwealth* v. *Snelling*, 15 Pick. 337. *Pullen* v. *Glidden*, 66 Maine, 202.

The jury may infer malice from the want of probable cause, but the want of probable cause is only one fact tending to prove malice. It may be proved by the defendant's acts, conduct and declarations in regard to the prosecution, or by other circumstantial evidence, like any other fact. *Humphries* v. *Parker*, *supra*. 2 Greenl. Ev., § 453. *Pullen* v. *Glidden*, 68 Maine, 559.

So on the part of the defendant, any evidence which fairly tends to show that in what he did he acted from proper motives, honestly and without malice, was proper for the consideration of the jury upon this issue. Acting upon this rule, this court, in *Pullen* v. *Glidden*, *supra*, held that the defendant may prove that it was the common report in the community where the plaintiff lived that he had committed the crime for which the defendant caused him to be prosecuted. The evidence withdrawn from the consideration of the jury tended to prove the defendant's acts and conduct immediately connected with the prosecution, before making the complaint, while it was pending and before the trial in court. We think it had some tendency, in connection with the other evidence in the case, to prove that the defendant was acting from proper motives and honestly, and not for the unlawful purpose of inflicting an injury upon the plaintiff.

We think the evidence competent for the consideration of the jury on the question of damages also. The jury was authorized to give punitive damages, and from the large damages awarded, we presume a large portion of the verdict is for damages of that class. What sum the jury, in the exercise of a sound discretion, should award against the defendant by way of punishment would

depend largely upon the degree of malice by which he was actuated. If they were satisfied that there was express malice, in the popular sense of the term, they might award a larger sum than if it existed in its true legal import merely. The evidence might properly have some weight in determining that question.

Exceptions sustained.
New trial granted.

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

CHARLES H. PEARSON & wife *vs.* CITY OF PORTLAND.

Cumberland. Opinion March 21, 1879.

Defective highway. Stat. 1872, *c.* 34, *unconstitutional.*

Stat. of 1872, c. 34, is in conflict with the 14th amendment of the United States Constitution, which declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

ON REPORT.

ACTION to recover damage to female plaintiff for injuries from a defective way.

The plaintiffs, at the time of the injury and time of trial, were resident in Cardenas, Cuba, and had been residing there for several years. No residence in this state.

Defendants claim that the action could not be maintained under c. 34, of laws of 1872, unless a similar remedy existed by the laws of Cuba.

The parties agreed to report to the full court the questions upon which party lies the burden of proof as to the laws of Cuba, and also whether said statute is constitutional, and if so, whether it operates to bar the plaintiffs if it should appear that no similar remedy exists in Cuba,—the plaintiffs claiming that they are both natives of Maine, and both citizens of the United States, never having been naturalized in Cuba nor assumed any of the duties or liabilities of citizens of Cuba, but only residing there for temporary business purposes.

The parties thereupon agreed to try the cause to the jury, without any ruling upon the foregoing questions, but saving them for the full court. The trial resulted in a verdict for plaintiffs for one thousand dollars. If the court shall determine said act of 1872 to be unconstitutional, then judgment is to be rendered for the plaintiffs upon the verdict. If otherwise, then the court is to decide upon whom is the burden of proof as to the laws of Cuba, and whether said statute can operate to bar the suit, if the plaintiffs are citizens of the United States, although residents of Cuba. And testimony as to the laws of Cuba, and as to the citizenship of plaintiffs, is to be taken by a judge at *nisi prius*, and the judgment to be entered for plaintiffs on the verdict, or plaintiffs nonsuit, as the facts shall appear upon these two questions, according to the law of the case that shall be announced by the court.

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

H. B. Cleaves, city solicitor, for the defendants, in an elaborate argument, among other things, contended:

That this law was not in conflict with the constitution of the United States.

The legislature can exercise all power not prohibited. *People* v. *Flagg*, 46 N. Y. 401.

Charters granted cities may directly or by implication exclude the general laws of the state, and peculiar and exceptional regulations may be made applicable to particular portions only and still be valid. *Nathaniel Goddard, petitioner*, 16 Pick. 504. *Commonwealth* v. *Patch*, 97 Mass. 222; 44 Mo. 547.

The constitution of the state in conferring the legislative power has established such prohibitions as the people see fit to impose. In ascertaining the powers of the legislature under the constitution, we look not to what the instrument authorizes to be done, but to what is prohibited. *McMillan* v. *Lee*, 6 Clark, (Iowa) 391.

It is only necessary that the law should be uniform, and its effect the same upon all persons standing in the same category. *Waterville* v. *Commissioners*, 59 Maine, 80. *Smith* v. *Judge*, 17 Cal. 547.

Whether an enactment is reasonable or for the benefit of the

people, it is for the legislature alone to decide. *Moore* v. *Veazie*, 32 Maine, 343. This state law does not come within the class of those privileges and immunities guaranteed by amendment, Art. 14, U. S. Con. *Corfield* v. *Corgell*, 4 Wash. C. C. 380. *Albott* v. *Bailey*, 6 Pick. 92. *Connor* v. *Elliot*, 18 How. 591. *Ward* v. *Maryland*, 12 Wall. 418. *Lemmon* v. *People*, 26 Barb. 270. 20 N. Y. 562. *Crandall* v. *State*, 10 Conn. 340. *Butler* v. *Farnsworth*, 4 Wash. C. C. 101. *State* v. *Medbury*, 3 R. I. 138. *People* v. *Imly*, 20 Barb. 68. *Ducat* v. *Chicago*, 48 Ill. 172. *Cincinnati Health Association* v. *Rosenthal*, 55 Ill. 85. *Haney* v. *Marshall*, 9 Md. 134.

WALTON, J. In 1872 the legislature of this state enacted the following statute:

"No person shall recover of any city or town in this state, damage for injury to person or property, which damage is claimed to have been done in consequence of any defect, or want of repair, or sufficient railing, in any highway, townway, causeway or bridge, provided the said damage be done to or claimed by any person, who was at the time said damage was done a resident of any country where damage done under similar circumstances is not recoverable by the laws of said country." Act 1872, c. 34.

The only question we find it necessary to consider is whether this act is constitutional. We think it is not. It is in conflict with the 14th amendment of the United States Constitution, which declares, among other things, that no state shall "deny to any person within its jurisdiction the equal protection of the laws." By the general statutes in force in this state at the time of the passage of this act (and still in force), every person sustaining an injury, in person or property, through any defect, or want of repair, in any highway, townway, causeway or bridge, could recover for the same, in an action on the case, of the town, city or county whose duty it was to keep the way in repair. R. S., c. 18, § 65. This is a protective law. It guards the traveler against injuries, by making towns and cities more careful to keep their ways in repair, and shields him from loss in case he is injured through their negligence in not keeping them in repair.

And it is universal in its application. It protects every one alike. The act of 1872 undertakes to destroy this equality of protection. It declares in effect that one class of persons shall not be thus protected; that if they happen to be residents of a country where no similar protection exists, they must travel in this state at their peril, and without that protection which the law affords to all others. They may be citizens of the United States and of this state, and within its jurisdiction at the time of injury; still, they are denied redress, denied "the equal protection of the laws," on account of the condition of the law of a foreign country, for which they may be no more responsible than they are for the color of their eyes or the color of their skins. The denial might as well be based on race or color as upon the law of a foreign country; for the parties to be affected by it may be as powerless to change the one as the other. The general statute may undoubtedly be repealed; but the court is of opinion that while it remains in force for the protection of one class of persons within the jurisdiction of the state, it must remain in force for the protection of all others similarly situated.

The plaintiff was within the jurisdiction of the state at the time of her injury. She has established her right to recover for it, unless the act of 1872 is a bar. For the reasons above stated, the court is of opinion that it is not a bar.

Judgment on the verdict.

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

GEORGE C. WING, judge of probate, for Mrs. Roseman Wheeler, *vs.* ZECHARIAH G. ROWE.

Androscoggin. Opinion March 21, 1879.

Guardian bond. Liability. Costs.

A guardian, upon appointment and acceptance of his trust, becomes subject to the jurisdiction of the probate court upon all matters concerning the proper discharge of his duties; and a settlement with his ward after her marriage and during her minority, and taking her discharge of all matters in his hands as guardian will not release him from liability on his bond after refusal to appear in probate court and account when cited so to do.

An action of debt, under R. S., c. 67, § 19, commenced in such a case by authority of the judge of probate for the breach of the bond, is maintainable; and if discontinued, the defendant is entitled to no costs.

ON REPORT.

DEBT ON GUARDIAN BOND. Plea, *non est factum*, with a brief statement of a settlement, etc.

It appeared that the female ward was married August 30, 1874, and that on December 25, 1874, she being sixteen years of age, made a settlement with her guardian, and gave him a receipt as follows, to wit:

"Poland, December 25th, 1874.

"Received of Zechariah G. Rowe, my guardian, the whole amount of my property, that is to say, the sum of $1,559.19 by note, and fifty dollars in cash, and it is a full settlement; and I am now a married woman; and I further declare that the said Zechariah G. Rowe has conducted the guardianship to my entire satisfaction, and that he and his sureties are forever discharged.

"Witness my hand and seal. In presence of David Dunn. (Signed) Roseman Wheeler. [L. S.]"

It appeared also that the said Roseman Wheeler, in November, 1875, cited the said Rowe to appear at the probate court, December term, 1875, to render his final account, which the said Rowe neglected to do.

Thereupon, at the March term, 1876, leave was granted by the judge of probate to bring this suit.

Rowe, the defendant, relied upon his said settlement and the discharge, as a waiver of any breach, and as a bar to any pretended breach of the bond after December 25, 1874.

But the court ruled that the neglect to render his final account in December, 1875, when cited by this party, was in law a breach of the bond by Rowe, and that the receipt aforesaid was not a waiver thereof, nor a settlement thereof by law. Hereupon the case was reported to the full court, and if the full court shall reverse the ruling then the action is to stand for trial, but if the said ruling is sustained by the full court judgment to be entered for the plaintiff, and a hearing in damages had before the court at *nisi prius.*

At said trial, January term, 1878, the plaintiff discontinued the suit against two of the defendants. Thereupon, the same two defendants moved for judgment for costs against Mrs. Roseman Wheeler, the party that brought the suit, but the court ruled that no costs could be allowed, and this question of costs is also reported to the full court for their decision.

N. Morrill, for the plaintiff.

D. Dunn, for the defendant.

LIBBEY, J. The defendant was guardian of Roseman Wheeler and gave the bond in suit as required by R. S., c. 67, § 10. One of the conditions of the bond is, "to render a just and true account of his guardianship when by law required." Section 19 of the same chapter provides that every guardian shall settle his account with the judge of probate at least once in three years, and as much oftener as the judge cites him for that purpose; and on neglect or refusal to do so he shall be deemed to have broken the condition of his bond.

His ward married during minority, and he soon afterwards settled with her, and took her discharge of all matters in his hands as guardian. Afterwards he was cited to appear before the probate court and settle his account as guardian, which he neglected to do, and the judge of probate granted leave to bring this suit upon his bond.

By his appointment as guardian and acceptance of the trust, the defendant became subject to the jurisdiction of the probate court upon all matters concerning the proper discharge of his duties. His settlement with his ward did not deprive the probate court of its jurisdiction. He should have appeared and accounted, and if the judge of probate had been satisfied that his settlement with his ward was a fair and just one, he would have confirmed it, as in *Pierce* v. *Irish*, 31 Maine, 254.

But the ward had a right to be heard in regard to the matter, and to show that the settlement was not fair and just, and that her discharge was improperly procured, as in *Wade* v. *Lobdell*, 4 Cush. 510.

The defendant's neglect to appear in probate court and account, on being cited so to do, was a breach of the condition of his bond, for which this action can be maintained.

The plaintiff discontinued against two of the defendants, and they claim costs against the ward for whose benefit the action is brought. The presiding judge ruled that no costs could be allowed.

By R. S., c. 72, § 5, all suits on probate bonds must be brought in the name of the judge of probate, "but no costs shall be awarded against the judge therein." By § 9 any person interested in any probate bond, whose interest has been specifically ascertained by a decree of the judge of probate, or by judgment of law, as provided in said chapter, may bring a suit on such bond without applying to the judge of probate for his authority therefor, and in such case, by § 10, if the suit is not sustained judgment shall be awarded and execution shall be issued for costs against the party originating it.

By § 15 of the same chapter, the judge of probate may expressly authorize any person interested to commence a suit on a probate bond, aud when the suit is commenced by such authority there is no statute provision authorizing a judgment for costs against the person who originates the suit; and in the absence of such authority, the person originating the suit not being a party of record, the court has no power to render judgment against him for costs.

We think the rulings of the presiding judge correct on both points reported.

Judgment for the plaintiff. Damages to be assessed by the court at nisi prius. No costs for the defendant.

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

NATHANIEL P. RICHARDSON, executor, in equity, *vs.* LUCY E. KNIGHT & others.

Cumberland. Opinion March 21, 1879.

Executor. Trustee. Specific bequest. Sale. Reinvestment.

Where by a will several parties are to take the income or dividends of certain stocks named therein till the happening of certain events in succession, but the legal title thereto is not to pass to them, and the will contemplates that the stocks shall be held by the executor till the contingency happens, when they are to pass to the legatee absolutely: *Held*, this creates an interest in the nature of a trust, and confers a power and imposes a duty in regard to the subject matter of the bequest, and if there is no special designation of the executor or any other person as trustee, nor any provision in the will for the appointment of a trustee, it devolves upon the executor to administer the estate according to the provisions of the will.

The bequest being a specific one, the executor has no power to sell the stocks and reinvest, but he has the right to invoke that authority from this court which is conferred upon it by R. S., c. 77, § 5, clause 7, and if the case presented is a proper one for the exercise of such power it will be given.

BILL IN EQUITY, for authority to sell and reinvest certain stocks specified in the last will and testament of the plaintiff's testator, who made the following bequest:

"Sixteenth. I give and bequeath to Lucy Elizabeth Knight, wife of Lucius W. Knight, now residing at number one hundred and thirty-seven Harrison Avenue, in Boston, in the state of Massachusetts, during her natural life, the income or dividends from my one hundred shares of the capital stock of the Boston & Maine Railroad Company, and from my ninety-three shares of the capital stock of the Eastern Railroad Company in Massachu-

setts, and from my fourteen shares of the capital stock of the Eastern Railroad Company in New Hampshire, and from my forty shares of the capital stock of the Boston & Worcester Railroad Company, and from my forty-five shares of the capital stock of the Fitchburg Railroad Company; and from and after her decease I give and bequeath said income or dividends, during his natural life, to said Lucius W. Knight; and from and after the decease of said Lucy Elizabeth and of said Lucius W., I give and bequeath said income or dividends to the children of said Lucy Elizabeth and Lucius W., to be paid to them until all said children shall arrive at the age of twenty-one years, and when all said children shall have arrived at the age of twenty-one years, then I give and bequeath the said shares to said children and to the representatives of any deceased child or children in equal parts *per stirpes*, to have and to hold the same to them and their heirs. But if said Lucy Elizabeth and Lucius W. should leave no child living at their decease, then all the shares aforesaid shall merge in and become a part of the residuum of my estate."

Other facts sufficiently appear in the opinion.

W. L. Putnam, for the plaintiff.

C. B. Merrill for the defendants.

LIBBEY, J. Israel Richardson, late of Portland, by the sixteenth clause of his will, made the following bequest: "I give and bequeath to Lucy Elizabeth Knight, wife of Lucius W. Knight, now residing at number one hundred and thirty-seven Harrison Avenue, in Boston, in the state of Massachusetts, during her natural life, the income or dividends from my one hundred shares of the capital stock of the Boston & Maine Railroad Company, and from my ninety-three shares of the capital stock of the Eastern Railroad Company in Massachusetts, and from my fourteen shares of the capital stock of the Eastern Railroad Company in New Hampshire, and from my forty shares of the capital stock of the Boston & Worcester Railroad Company, and from my forty-five shares of the capital stock of the Fitchburg Railroad Company; and from and after her decease I give and bequeath said income or dividends, during his natural life, to said Lucius W.

Knight, and from and after the decease of said Lucy Elizabeth and of said Lucius W., I give and bequeath said income or dividends to the children of said Lucy Elizabeth and Lucius W., to be paid to them till all of said children shall arrive at the age of twenty-one years, and when all of said children shall arrive at the age of twenty-one years, then I give and bequeath the said shares to said children, and the representatives of any deceased child or children, in equal parts *per stirpes*, to have and to hold the same to them and their heirs. But if said Lucy Elizabeth and Lucius W. shall leave no child living at their decease, then all the shares aforesaid shall merge in and become a part of the residuum of my estate."

There is no provision in the will for the appointment of a trustee to hold said shares and pay over the income or dividends to the parties entitled thereto.

The complainant, as executor of said will, brings this bill in equity, in which he alleges that, after the payments of all debts and charges against the estate of the said Israel, all said shares and stocks remained and vested in him as such executor, and that the same have been increased and added to by dividends of stock and rights to subscribe thereto, which stocks and shares and such increase are now held by him in his said capacity. "That said shares and stocks have, since the decease of his said testator, greatly diminished in value, and that as all said shares or stocks are especially subject to great taxation the net income thereof is very small; that the special purpose of said bequest was to furnish an income to and aid in the comfortable support of said Lucy Elizabeth Knight, which purpose is defeated by keeping the said shares and stocks in their present form; that there is great danger that some of them will further greatly depreciate in value; that therefore they or the greater part of them should at once be converted into bonds or mortgages, or some other securities less liable to fluctuation in value and more certain to yield a steady income than the said stocks and shares; that said Lucy and her said husband, Lucius, have requested and are desirous that the same should be so converted, but that he fears he has no power to convert the same except by the direction of the court.

He prays that he in his said capacity, or his successor in the trust, may be allowed and directed by the court to sell and reinvest in other more reliable securities such portion of said stocks and shares and additions thereto as to him or his successor in office may from time to time seem proper.

Lucy Elizabeth Knight and Lucius W. Knight, and all the other parties in being, who in any contingency can have an interest in said stocks and shares, appear and answer, not denying any of the allegations in the bill, and submit to the judgment of the court.

By the will several persons are to take the income or dividends of the stocks till the happening of certain events in succession. It directs that such income or dividends shall be paid to them. The legal title to the stocks and shares is not to pass to them, but the will contemplates that they shall be held by the executor till the contingency happens, when they are to pass to the legatees absolutely. This creates an interest in the nature of a trust, and confers a power and imposes a duty in regard to the subject of the bequest; and whenever any interest in the nature of a trust, or any power or duty implying a trust, is created by a will, and there is no special designation of the executor or any other person as trustee, nor any provision in the will for the appointment of a trustee, it devolves upon the executor as such to administer the estate according to the provisions of the will. *Pettengill* v. *Pettengill*, 60 Maine, 412. *Nutter* v. *Vickery*, 64 Maine, 490. *Nason* v. *First Church*, 66 Maine, 100.

This being the settled rule of law in this state the executor is the proper party to bring the bill.

Has the court the power to make the decree prayed for? The bequest is a specific one. The parties named are to receive the income, in succession, of the stocks and shares specified till the happening of the contingency, and then said shares are to vest absolutely as specified in the will. By the provisions of the will the executor has no power to sell and reinvest. When specific property is held in trust with no power in the trustee to sell and reinvest, it is competent for the legislature to authorize a sale and

reinvestment. *Stanley* v. *Holt*, 5 Wall. 119. *Sohier* v. *Trinity Church*, 109 Mass. 1. *Old South Society* v. *Crocker*, 119 Mass. 1.

The legislature having this power may confer it upon the court. By R. S., c. 77, § 5, clause 7, this court has jurisdiction in equity, "to determine the construction of wills, and whether an executor, not expressly appointed a trustee, becomes such from the provisions of a will, and in cases of doubt, the mode of executing a trust, and the expediency of making changes and investments of property held in trust."

We think this statute confers upon the court power to pass the decree prayed for. *Old South Society* v. *Crocker*, *supra*. Having the power, we have no doubt that the case presented is a proper one for its exercise. The great object of the testator seems to have been to provide an income for the support of Mrs. Knight, her husband and their children till the happening of the contingency named in the will.

Although the stocks were the dividend paying stocks, yet from their character and the many hazards and vicissitudes attending the business of the corporations to which they belonged, it is fair to presume that the testator contemplated that some of them at least might depreciate in value and become non-dividend paying stocks, as has already occurred; or that some of the corporations might wind up their affairs and divide their capital; and in either case, in order to obtain the income desired, it would become necessary to convert and reinvest, and as no party interested in the subject matter of the suit makes any objection thereto, a decree may be entered, authorizing the executor, or his successor in said trust, to sell and convert into money, from time to time, such of the shares and stocks held by him as in his opinion the interests of all parties interested therein require, and reinvest the proceeds thereof in bonds of the government of the United States, or of any of the New England states, or in first mortgages on income paying real estate, of a value at least double the amount loaned thereon; and when payment of such investments may be made, to reinvest in like manner, and hold the same subject to the provisions of the

will. The costs of the suit, to be taxed and allowed at *nisi prius*, may be paid out of the income of said stocks.

Decree accordingly.

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

FRANK W. BERRY, executor, *vs.* ANDREW J. STEVENS & others.

Waldo. Opinion March 22, 1879.

Evidence. Surviving party.

If the surviving party introduces as evidence, in an action by or against an executor or administrator, a memorandum of the deceased, he must be content with its legal import and effect, unless he can explain or control it by the testimony of disinterested witnesses.

The husband or wife of such surviving party is not a competent witness in such cases when such surviving party is not.

ON EXCEPTIONS.

The facts and questions raised are fully stated in the opinion.

J. Williamson, for the plaintiff.

W. H. McLellan, for the defendants.

BARROWS, J. In actions prosecuted or defended by an executor, or administrator, or other legal representative of a deceased person, the adverse party is not at liberty to testify respecting matters occurring before the death of such persons, except in the cases particularly specified in the statutes. R. S., c. 82, § 87. Stat. 1873, c. 145. Stat. 1876, cc. 83, 128.

That this is only a prudent safeguard will be admitted by all who have noticed the apparently increasing disregard of the sanction and obligations of an oath since the laws were so changed as to permit parties and interested witnesses to testify. Without it the widow and the orphan would be almost defenseless against the machinations of the greedy and unscrupulous. It is doubtless better that a careless business man should occasionally suffer during his lifetime for his neglect to have suitable evidence of his

transactions, than to offer a premium for skilful perjury in the plunder of his estate when his mouth is closed in death.

The statutes regulating the admission of the testimony of parties are to be examined carefully and construed strictly. *Dwelly* v. *Dwelly*, 46 Maine, 377. *Kelton v. Hill*, 59 Maine, 259.

To take the note in suit out of the statute of limitations plaintiff relied upon a payment of $400 upon it, made in 1873. The defendants had in their possession a receipt signed by the testatrix for the amount thus paid. Plaintiff gave the defendants notice to produce it, which they declined to do, and it was not produced until the plaintiff had offered testimony tending to show that one of the defendants had exhibited such a receipt, claiming that it was a genuine receipt of the testatrix, and that he had paid the amount to her, supposing that it would be endorsed on the note. Here the plaintiff stopped, and the exceptions state that he did not use the receipt in evidence. It is not perceived that he could have used it, except in connection with testimony as to the defendants' acts and declarations respecting it. The receipt itself, without such testimony, would be no more competent to establish a payment than an endorsement made by the testatrix upon the note.

But hereupon one of the defendants took the stand, produced the receipt, read it to the jury, and, under the guise of explaining it, against the objection of the plaintiff, proceeded to testify to an independent agreement, which he said the testatrix made with him, to give up the note on which more than $600 was then due, in consideration of the payment of the $400 paid when he took the receipt. The body of the receipt was written by the defendant who gave this testimony, and it runs thus: "Received of A. J. Stevens & Co. $400, to be endorsed on a note signed by us and John Stevens as surety. Belfast, April 12, 1873. P. C. Berry."

The defendant further testified that when he paid the money to Mrs. Berry, "she says, 'I have not got the note here to give you, but I will have it and give it to you.' Said I, 'you told me you would give me my note, and I feel as though I ought to have it.' She says, 'I will give you a receipt for it; you are not afraid to

trust me, are you?' Says I, 'no Mrs. Berry, I am not.'" Thereupon he wrote and she signed the receipt he produced.

Why he wrote the receipt as for $400 "to be endorsed on the note," instead of "in full payment and satisfaction" of it, he did not attempt to explain. Apparently the jury thought no explanation necessary as there was no one to contradict him, for they found for the defendants.

It is possible that his story was true, but it is hard to believe that a business man, after such a conversation, would write a receipt which comports so ill with his present version of the transaction it was intended to represent. The question, however, is not now whether his testimony was true, but whether he was a competent witness to prove it, under the fourth exception in R. S., c. 82, § 87, which runs thus: "In an action by or against an executor, administrator, or other legal representative of a deceased person, in which his account books or other memoranda are used as evidence on either side, the other party may testify in relation thereto." We think he was not. The exception originated with c. 230, Stat. of 1864, which provided that "in any action by an executor, etc., when the account books or other memoranda of such deceased party are used as evidence to prove any account or claim, . . . the defendant shall be a competent witness," etc. In process of time it was seen that the same rule ought to apply to suits against an executor, etc., when he offered the account books or other memoranda of the deceased, and so the exception assumed its present form in Stat. 1870, c. 132. But it cannot be so construed as to permit the surviving party to put in a memorandum signed by the deceased, and then engraft upon it his own testimony to an independent substantive contract with the deceased, which not only does not appear in the memorandum, but is inconsistent with it.

It is "the other party" who may testify in relation to the account books or other memoranda of a deceased person, when offered in evidence by his representative, either as plaintiff or defendant. But "the other party" cannot be permitted to make himself a witness as to matters occurring before the death by offering a memorandum of the deceased. If he offers it, he must

be content with its legal import and effect, unless he can explain it by the testimony of disinterested witnesses. See, as analogous, *Folsom* v. *Chapman*, 59 Maine, 194. Neither was the defendant's wife a competent witness. *Hunter* v. *Lowell*, 64 Maine, 572.

Exceptions sustained.

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

JENNIE A. ROWELL, in equity, *vs.* HENRY S. JEWETT.

Somerset. Opinion March 28, 1879.

Married woman. Condition subsequent,—breach of. Waiver. Re-entry for breach of condition. Forfeiture,—relief against. Parties. Equity.

D M and wife bought a farm, paid for it in part and had it conveyed to the wife and son F M, who gave their joint promissory notes secured by their joint mortgage of the farm, for the balance of the purchase money. Thereupon the wife conveyed her half to the son, by deed conditioned that he would support his father and mother comfortably through life; pay $100 to each of his two sisters when married; and pay off the mortgage and save harmless D M and wife (father and mother) therefrom. In equity, *Held:* (1.) That the wife's half of the farm was bound by the mortgage, though she might not be personally liable on her note. (2.) That the son (F M) was bound to relieve the property from the mortgage within a reasonable time; and suffering the last note to remain unpaid for four years after maturity is a breach of the third condition. (3.) That to save the second condition, he should have paid or tendered to the daughters the sums specified within a reasonable time after notice of their marriage. (4.) That the daughters could not waive a tender of performance; and a demand was not necessary. (5.) That F M's unfilial and undutiful treatment of both of his parents was a breach of the first condition. And (6.) That the first condition did not require the beneficiaries to receive their support on the farm, but gave them the right to select their place of residence within reasonable limits as to distance and cost.

A grantor's formal re-entry, in the presence of two witnesses, upon land conveyed on condition of the comfortable support of the grantor, for non-performance, accompanied by a statement to the grantee that he had wholly neglected to support the grantor, is sufficient to revest the estate in her; and such an entry upon one parcel of land embraced in the deed may be sufficient to embrace the whole.

This court sitting in equity can relieve against a forfeiture of land for con-

dition broken, when the proper sum to be paid is susceptible of definite calculation, and the breach was not gross and wilful.

In a bill in equity to redeem a mortgage, one apparently having an equitable interest in the premises liable to be affected by the decree for redemption should be made a party.

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

On August 21, 1865, David Mitchell and his wife Eliza Mitchell, purchased a farm together with forty-four acres of other land of Scamman Burrill for $4,000, and paid down $2,130. The premises were conveyed to Eliza Mitchell and Fifield Mitchell, the youngest son of David and Eliza. At the same time Eliza and Fifield gave to Burrill their four joint promissory notes for $1,970, balance of purchase money, and secured the payment thereof by their joint mortgage of the premises. At the same time, Eliza Mitchell (her husband David joining in the deed) by deed of warranty conveyed her half of the premises to Fifield, for the nominal consideration of $1,000, upon the conditions following:

"That if the said Fifield Mitchell shall support the said David Mitchell and Eliza Mitchell during their and each of their natural lives in a comfortable manner, in sickness and in health, and furnish them good and decent clothing, in summer and in winter, good and sufficient house room and fire-wood, and also furnish them with a horse and wagon and harness, to visit their friends and to attend church, and to furnish everything necessary for their support and comfort suited to persons of their age and condition in life, (with this proviso, that whatever labor said David Mitchell shall perform shall be turned in for the support of himself and wife) and pay one hundred dollars each to Zilpha and Amanda Jane when they are married, and save said David Mitchell and Eliza Mitchell harmless from four notes by them signed with me this day, payable to Scamman Burrill, for nineteen hundred and seventy dollars, then this deed to remain in full force and virtue, otherwise to be void and of no effect."

There was evidence tending to show that Fifield grossly maltreated both his father and mother, especially the latter; that said David Mitchell died May 24, 1873; that Eliza Mitchell, on

account of the maltreatment from Fifield, went to live with her son Frank, at Skowhegan, thirteen miles from the farm, on September 4, 1873, 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.

On November 19, 1873, Eliza Mitchell went to the house on the farm, in the presence of two witnesses, and then and there informed Fifield that she had come to make an entry upon the property for breach of the conditions of her deed to him; that he had refused to support both her husband and herself while living on the farm and at Skowhegan; that he had not paid the Burrill notes; and had not paid Zilpha who was married in May, 1873.

It also appeared that Fifield was notified of the marriage of Zilpha; that he did not offer to pay her during a five weeks visit at his house; that after she left he wrote to her saying he would pay her if she would send him a receipt; that she replied she could not send the receipt until she received the money which would be very acceptable.

It also appeared that, on July 19, 1873, just before Eliza Mitchell left the farm to live with her son Frank, at Skowhegan, she made a written demand on Fifield for certain groceries and cloth and received from him the articles, amounting to the sum of $25.

It also appeared that on March 15, 1870, the defendant took an assignment of the Burrill mortgage and last note of $470 and interest; that on April 2, 1872, the defendant advanced to Fifield $485 for which he took his note secured by a second mortgage on the farm, and that on August 31, 1871, Fifield gave to the defendant a quitclaim deed of his interest in the farm taking back an unsealed written agreement, of the same date, to reconvey the premises on payment, within six months, of certain sums therein specified. In connection with this agreement, Jewett (defendant) testified that as the time expired, he told Fifield "to go to work and keep the farm up and he would wait upon him and give him a chance," etc.

It also appeared that Eliza Mitchell devised her interest to the

plaintiff; that she died August 10, 1874; that her will was duly probated and the plaintiff appointed and qualified as executrix thereof in February, 1875.

No question was made in relation to demand and tender.

The remaining facts appear in the opinion.

D. D. Stewart, for the plaintiff, submitted an exhaustive brief.

J. Baker, for the defendant, elaborately argued the following propositions:

I. The father died and paid nothing, and so no breach as to him.

II. The mother being a married woman, and her note being made before Stat. 1866, c. 52, took effect, she was never liable thereon. *Bryant* v. *Merrill*, 55 Maine, 515. *Mayo* v. *Hutchinson*, 57 Maine, 546. *Lee* v. *Lanahan*, 59 Maine, 478. But if liable she died without having paid anything, hence father and mother were held harmless.

III. Zilpha declined to send a receipt and never demanded the money.

IV. The mother lived on the farm eight years; never claimed any forfeiture or ceased to receive support from Fifield under the contract, thus recognizing it as subsisting; and every time she received supplies she waived any past deficiencies. Demanding and receiving supplies in July, 1873, was a distinct recognition of the contract to support and a waiver of all prior breaches. *Hooper* v. *Cummings*, 45 Maine, 369. *Andrews* v. *Senter*, 32 Maine, 394. *Sharon Iron Co.* v. *Erie*, 41 Penn. St. 341.

V. The facts show that the support was to be furnished on the farm; relationship of the parties and the language of the deed, "good and sufficient house room," "horse, wagon and harness," all tend the same way.

VI. Full performance was tendered "anywhere" before expenses were incurred for her support at Skowhegan.

VII. Re-entry not sufficient.

VIII. If sufficient, the case should be sent to a master to determine what sum will compensate for the breach and save the for-

feiture of the whole estate; or that an issue be made up, *quantum damnificatus*, to be tried by a jury.

IX. Equity and justice should be done both parties. The court has full equity powers (Stat. 1874, c. 175,) and may send the case to a master or jury to ascertain the damages. *Frost* v. *Butler*, 7 Maine, 225–31. Smith's Laws of Maine, c. 50, § 2 and note. *Jenks* v. *Walton*, 64 Maine, 97. *Atkins* v. *Chilson*, 11 Met. 112. *Stone* v. *Ellis*, 9 Cush. 95. *Steel* v. *Steel*, 4 Allen, 417. *Gibson* v. *Taylor*, 6 Gray, 310. Story's Eq., §§ 1315, 1319, 1320, 1326 *a* and notes. *Henry* v. *Tupper*, 29 Vt. 358. *Austin* v. *Austin*, 9 Vt. 420. *Hill* v. *Barclay*, 18 Vesey, 56. *Dunkler* v. *Adams*, 20 Vt. 421.

X. A pecuniary consideration can be made for any supposed breach of the conditions. Neither father nor mother has paid anything on the mortgage. One hundred dollars and interest to Zilpha. On the condition for support; the father died without complaint or expense—the mother had her support for eight years on the farm and then left, and the court may possibly find that there was some expense which Fifield ought to pay. The amount of that expense is easily ascertainable. The breach was not "gross, wilful and inequitable." *Jenks* v. *Walton*, *supra*.

BARROWS, J. The transactions out of which this suit has arisen are mostly stated in the report of the case of *Rowell* v. *Mitchell* 68 Maine, 21.

That was a suit at law, originally brought by Eliza Mitchell, the mother of the plaintiff, and after her death prosecuted by the plaintiff as her devisee, for the possession of an undivided half of a certain farm, against this defendant and Fifield Mitchell, who was originally a tenant in common with Eliza, of the said farm, which the plaintiff here seeks to redeem from their joint mortgage given to Scamman Burrill, and now held by the defendant.

The plaintiff was non-suited in that action, upon the ground that even assuming that she, as Eliza's devisee, had established as against Fifield Mitchell her right to recover an undivided half of the farm, by reason of the forfeiture of his estate under Eliza's conditional deed of that half to him, and though he might be precluded by the pleadings from setting up his tenancy under Jewett as a

defense, still she could not maintain her action at law for the possession against this defendant Jewett, who had, as against her, the rights of a mortgagee against a mortgagor, nor against his tenant.

The effect of this view of the case was to leave it undetermined as between the plaintiff and Fifield Mitchell, whether she had the right to redeem which originally belonged to Eliza Mitchell as owner of an undivided half of the farm mortgaged, or whether it still belonged to said Fifield under the conditional deed to him from Eliza.

Subject to the mortgage here sought to be redeemed, Fifield Mitchell, April 2, 1870, mortgaged an undivided half the farm to the defendant, to secure a promissory note of that date, for $485, payable in two years, with interest at 6 per cent for the first year, and 9 per cent for the second and thereafterwards until paid; and afterwards, August 31, 1871, while in possession of the whole farm, quitclaimed his interest in the same to said defendant, taking back an agreement of the same date signed by the defendant, but not (so far as appears) under seal, and never recorded, to give said Fifield a quitclaim deed of the interest thus conveyed to him by said Fifield, if he should pay to the defendant within six months the sum of two hundred and fifteen dollars, with interest at 8 per cent until paid, and also pay the aforesaid note secured by mortgage at maturity. It does not appear that he has done either.

In this condition of things this bill in equity for redemption from the mortgage given by Eliza and Fifield Mitchell, is brought against Jewett, and the case is presented on bill, answer and proof consisting mainly of the evidence given at the trial of the before mentioned suit at law, used here by agreement of parties.

Whether the plaintiff has a right of redemption from this mortgage depends on the proof of a breach of one or more of the conditions in the conditional deed from her mother to Fifield Mitchell, and a re-entry to claim a forfeiture by reason of such breach.

We think the evidence clearly shows a breach of more than one of the conditions, if not of all.

Touching the condition to save David and Eliza Mitchell harmless from the Burrill notes, the respondent argues that it was per-

formed because David in his lifetime was not called upon to pay anything on them, and Eliza being a married woman was not liable, because they were given before the statute of 1866, c. 52.

But Eliza's half of the farm was bound by her mortgage for the payment of the notes, though she might not be personally liable thereon. *Brookings* v. *White*, 49 Maine, 479.

We cannot regard it as a fulfillment of that condition to suffer one of the notes to remain unpaid so many years after it became due, accumulating interest which must be paid out of her property in case a breach of the other conditions of her deed to Fifield made it necessary for her to re-enter to procure the means of support, or to pay the marriage portion of the daughters. The condition substantially required Fifield Mitchell to relieve the property from the incumbrance of the mortgage within a reasonable time. *Ross* v. *Tremaine*, 2 Met. 495. *Fiske* v. *Chandler*, 30 Maine, 82. *Hayden* v. *Stoughton*, 5 Pick. 534.

And that condition was not and never has been performed.

The condition for the payment of the marriage portions to the daughters made it the duty of Fifield Mitchell (if he would save it) to pay or tender the sums specified within a reasonable time after being notified of their marriage.

There is no satisfactory proof that Zilpha ever intended to waive the payment to her. But if there had been, nothing short of a tender and refusal of the $100 could be regarded as a performance on the part of Fifield Mitchell.

Though Zilpha was pecuniarily interested in the condition, she had no such legal interest in it as would enable her to waive a tender of performance. *Gray* v. *Blanchard*, 8 Pick. 290–292.

The condition was one which it was competent for David and Eliza Mitchell to make in their conveyance, and they were the only parties who could absolutely and entirely dispense with it. It cannot be said upon the testimony here that Zilpha in any way refused the money, for it was never tendered, or that she hindered or obstructed the performance of the condition. It was not necessary for her or any one else to demand it. *Whitten* v. *Whitten*, 38 N. H. 127. Nor can silence be construed into a waiver. *Gray* v. *Blanchard*, *ubi supra*. This condition also was broken.

While upon some points the testimony touching the performance of the condition for the support of David and Eliza Mitchell is conflicting, an examination of it satisfies us that Fifield Mitchell broke this condition also, in more ways than one: firstly, by the unfilial and undutiful treatment of both his parents, and a cold neglect that was the reverse of the comfortable support stipulated for, and which would have amounted to a breach, even if the condition could be construed as one requiring them to receive their support on the farm. It cannot be so construed, and gave the beneficiaries the right to select their place of residence, within reasonable limits as to cost and distance. *Wilder* v. *Whittemore*, 15 Mass. 262. *Thayer* v. *Richards*, 19 Pick. 398. *Pettee* v. *Case*, 2 Allen, 546.

It is urged that Eliza Mitchell waived all past breaches by calling for and receiving some small supplies in July, 1873, a few weeks before she finally left and went to live with another son a few miles distant, with whom she remained until her death. We do not think that a course of neglect and unkindness, persisted in until the heart of a mother is alienated from her son to the point of leaving him and taking refuge elsewhere, should be regarded as in any part condoned by the fact that, while the process of alienation was going on, the mother received some of the supplies which it was the duty of the son not merely to furnish, but to accompany with the kindness which civilization is apt to teach even coarse and brutal men to manifest to their parents. The testimony of Lowell Wheeler and others indicates a course of vulgar and profane abuse, of such a description that it is no wonder the mother should declare that she had rather call upon the town than on such a son to supply her wants.

It is not every case of reception of portions of what is due under the contract that will amount to a waiver. *Frost* v. *Butler*, 7 Maine, 225. And if the position of the defendant on this point could be sustained, there would still remain a breach by reason of the refusal and neglect to provide for the support of the mother, with her other son, in addition to the other breaches previously noticed.

We are satisfied that Eliza Mitchell had good grounds for

re-entering, and claiming a forfeiture under the conditional deed as she did. What she did and said to Fifield Mitchell at that time was sufficient for that purpose. The entry seems to have been for the whole, though made on only one of the parcels embraced in the conditional deed. Stearns Real Act., 42, 43, §§ 17, 18. *Hawkes* v. *Brigham*, 16 Gray, 565, and cases cited. *Jenks* v. *Walton*, 64 Maine, 97.

The defendants' counsel urges that in lieu of the forfeiture which the mother claimed, there should be a decree for pecuniary compensation to be made for the loss and expense growing out of the breach of the conditions by Fifield Mitchell. With the full equity powers that the court now has under Stat. 1874, c. 175, doubtless it can relieve against such forfeitures where the proper sum to be paid is susceptible of definite calculation, and the breach was not gross nor wilful.

The pecuniary equivalent for some of the breaches might be readily calculated, but this cannot be said in respect to the profane abuse and heartless neglect which embittered the declining years of David and Eliza Mitchell, and at last induced the mother to claim a forfeiture against her son. There is nothing in the evidence before us which should lead us to intervene to protect Fifield Mitchell or his grantee against the legal consequences of his unfilial conduct.

We think the plaintiff has established her title to an undivided half of the mortgaged premises, and, this settled, her right to redeem from the mortgage is not controverted.

Out of the peculiar relation in which this respondent stands as respects the title, two questions of practical importance arise, which remain to be determined.

The mortgage on which the respondent in the outset advanced his money, and which the complainant seeks to redeem, covers the undivided half of the farm originally belonging to Fifield Mitchell, as well as that which belongs to the complainant. Relying upon a subsequent quitclaim deed from Fifield Mitchell, the respondent has advanced other sums besides those due on the mortgage.

The respondent's security upon Fifield's half ought not to be disturbed. When the complainant has a decree for redemption, what shall be its terms?

The complainant asks that the respondent may be ordered, upon payment of what may be found due him, to assign and deliver the mortgage and note to her, or to release to her all his right, title and interest, under and by virtue thereof, which amounts to the same thing.

But there seems to be no good reason why he should be compelled, at the plaintiff's instance, to part with whatever title he may have to the half of the farm upon which she has no claim, unless she is compelled to pay the whole of the mortgage debt to relieve her half from the incumbrance. If her request is complied with, it would seem that the respondent, holding a quitclaim deed from Fifield Mitchell, would stand in the same position as to the right of redemption which she now holds, and have a right to redeem from her, and so on in endless succession. Such a result would be futile.

All that equity can require of the respondent seems to be that he should release her undivided half from the mortgage, on her paying half the amount of the mortgage debt remaining due.

It remains to be determined whether a decree to that effect can properly and safely be made between the parties now before the court.

Fifield Mitchell, after having made one mortgage of an undivided half of the farm to the respondent, subject to the one here to be redeemed, to obtain further advances from him, gave him a quitclaim deed of all his interest in the premises, taking back an agreement (not under seal) to re-convey upon payment of certain sums, at specified times, which have not been paid. This last transaction did not amount to a mortgage. *Jewett* v. *Bailey*, 5 Maine, 87. *French* v. *Sturdivant*, 8 Maine, 246. *Purrington* v. *Pierce*, 38 Maine, 447.

By Fifield's deed his legal title, interest and estate passed to and rested in the respondent. Has he, nevertheless, such an equitable interest therein, or is he so situated in relation to the property and this controversy, that he ought to be made a party to these proceedings before a final decree is passed?

The general rule touching such questions is thus stated in 2 Story's Eq. Jur. 745, § 1526: "The direct and imme-

diate parties having a legal interest are those only who can be required to be made parties in a suit at law. But courts of equity frequently require all persons who have remote and future interests, or equitable interests only, or who are directly affected by the decree, to be made parties, and they will not, if they are within the jurisdiction and capable of being made parties, proceed to decide the cause without them.

"It is the great object of courts of equity to put an end to litigation; and to settle, if possible, in a single suit, the rights of all parties interested or affected by the subject matter in controversy."

Prior to the Statute of 1874, c. 175, giving this court full equity jurisdiction, Fifield Mitchell could not have been regarded as having an equitable interest in this matter according to the doctrine laid down in *Richardson* v. *Woodbury*, 43 Maine, 206, 210, 211.

But the reason assigned in the last named case, and in the cases therein cited and commented upon, why the court could not regard a deed absolute and unconditional in its terms, but made in fact to secure the payment of a loan, as a mortgage, was "the limited equity power of the court."

The remark of Whitman, C. J., in *Thomaston Bank* v. *Stimpson*, 21 Maine, 195, that "no doubt can be entertained that a court, having general equity jurisdiction, would regard such a conveyance as a mortgage," is quoted with apparent approval.

Cessante ratione, cessat etiam lex. Under the present statute the court has power to recognize the true character of Fifield Mitchell's quitclaim deed to the respondent. The whole course of dealing between said Mitchell and Jewett shows that it was never designed by them that Jewett should hold this farm (said to be worth $4,000), except as security for the moneys that he let Mitchell have to the amount, as he stated it, of $1,225.

The testimony of the respondent that, "as the time expired, I told him to go to work and keep the farm up, and I would wait on him. If he wanted to redeem, I would wait on him and give him a chance. He has been in possession of the place ever since under me," shows how the respondent regarded it, and that he did not consider time as of the essence of his contract to re-convey upon payment of sums found due.

Fifield Mitchell apparently has an equitable interest in the premises liable to be affected by the decree for redemption in favor of the plaintiff, and ought to be made a party to the proceeding for that reason.

Moreover, he should be made a party in order to accomplish what is said to be "the great object of courts of equity," the settlement in one suit of the conflicting claims of all parties concerned in the subject matter, thus putting an end to litigation respecting it. Fifield Mitchell appears to be still in possession of the farm, doubtless not only claiming a right to redeem from the mortgage and conveyance, held by Jewett, but denying any breach of the conditions of the deed from Eliza Mitchell to him.

Unless he is made a party to this suit another action at law between the plaintiff and him, for the possession, is inevitable. So long as he is not a party here, should he redeem from Jewett, the question as to the breach of the conditional deed must still be regarded as open to him.

In *Grant* v. *Duane*, 9 Johns. 611, Thompson, J., says, speaking of those who were claiming a right to redeem, "it cannot be allowed to them to speculate upon the claims of others, and redeem at their peril, and then litigate with those who may have the right." Whether this right of redemption which the plaintiff claims really belongs to her or Fifield Mitchell must be definitely settled here and now between them, in a manner that will preclude further litigation between said Fifield and either of the present parties.

It is true that apparently all which Fifield Mitchell could present bearing upon the questions here discussed is before us. These parties agreed to make the testimony in the suit at law brought against said Mitchell and Jewett, in which the testimony of the defendants was received and a large mass of evidence pro and con touching the question of a breach of the conditions of the deed of David and Eliza to Fifield Mitchell was presented and canvassed by the counsel of said Mitchell, a part of this case.

But until he has been regularly made a party to this suit it can not be judicially known that he has nothing more to urge to defeat the plaintiff's claim and no decree touching his right and

interest can or ought to pass. The control of that interest acquired by Jewett, though absolute according to the terms of the conveyance, is not final and complete, but subject to be defeated by a bill in equity and redemption.

Unless Fifield Mitchell is able to exhibit some substantial ground of objection the bill will be sustained and a master appointed to ascertain the amount remaining due upon the mortgage debt; and the ultimate decree will be, that upon the payment by the plaintiff to the defendant Jewett of one-half the sum remaining due on said mortgage, the said Jewett and the said Fifield Mitchell shall release and convey to the plaintiff by deed duly executed all their right, interest, title and claim in and to one undivided half of the farm described in the bill with covenants of warranty against all persons claiming or to claim by, through or under them or either of them.

Remanded to nisi prius for further proceedings in conformity herewith.

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

JANE D. BLAISDELL *vs.* BRYCE M. HIGHT.

Somerset. Opinion March 31, 1879.

Will. Possessions. Devise. Intention.

A testator, after bequeathing a support to his wife and sums of money to several children, declared thus: "I give and devise to my son, Albert G. Barnard, his heirs and assigns, all my real estate situate in Sidney aforesaid; also, all the residue of my personal estate and possessions of whatever kind or name." Many years afterwards a parcel of land, not situate in Sidney, unexpectedly descended to him from a brother: *Held*, that the latter real estate was not devised by the will, but upon the death of the testator descended to his heirs.

The word "possessions" may include real estate, if the context shows such to be the testator's intention.

ON REPORT.

WRIT OF ENTRY, in which the plaintiff seeks to recover one undivided sixteenth of the real estate described in the writ, as heir of her father, Alexander Barnard, who died January 14, 1877, leaving four heirs, of whom the plaintiff is one. Alexander Barnard, on the first day of July, 1856, made and executed a will of the following tenor:

"I. I give and bequeath to my wife, Betsy Barnard, a comfortable support during her life; and it is my will that she shall be furnished with meat, drink, lodging, clothing, medical attendance and nursing, and all other things necessary for her comfort and support, in sickness and in health.

"II. I give and bequeath to my daughters, Eliza P. Cleaveland and D. Jane Blaisdell, one dollar each, to be paid at my decease.

"III. I give and bequeath to my sons, George A. Barnard and Andrew C. Barnard, two hundred and fifty dollars each, to be paid them when they shall have attained the age of twenty-one years.

"IV. I give and devise to my son, Albert G. Barnard, his heirs and assigns, all my real estate situate in Sidney aforesaid; also, all the residue of my personal estate and possessions of whatever kind or name."

The will was duly probated before the commencement of this action.

Cromwell Barnard, a brother of Alexander, died about March, 1874, intestate, leaving four heirs, of whom Alexander was one. The real estate in dispute was a certain messuage situated in Skowhegan, in Somerset county, and owned by said Cromwell at time of his decease. The defendant has a valid deed from Albert G. Barnard purporting to convey the whole property described in the writ to the defendant, which deed has been given since the probate of said will, and by force of said deed the defendant claims to hold the whole of said property.

It was admitted by the defendant that the plaintiff is entitled to recover one-sixteenth of the property as demanded in the writ, unless the defendant has a valid title to the whole of said property by virtue of the provisions of said will and the aforesaid deed of Albert G. Barnard to the defendant.

Should the law court find that the demandant is the owner of one undivided sixteenth of the property described in the writ, judgment is to be entered for her; but if the court should hold that the defendant is entitled to the whole property by virtue of said will and the aforesaid deed, the plaintiff is to become nonsuit.

S. S. Brown, for the plaintiff.

E. F. Pillsbury, for the defendant, contended:

That the will indicated that the testator intended to make a full disposition of his property, and ought to receive that construction. R. S., c. 74, § 5. 2 Redf. Wills, 116. *Brimmer* v. *Sohier*, 1 Cush. 118. *Winchester* v. *Foster*, 3 Cush. 366. *Fisk* v. *Keene*, 35 Maine, 349. *Deering* v. *Adams*, 37 Maine, 264. *Cotton* v. *Smithwick*, 66 Maine, 360. The words, "situate in Sidney," are merely words of description, and not limitation. The concluding words, "and possessions of whatever name or kind," show an intention to dispose of everything not previously devised, and this general form of expression is sufficient to convey the estate. *Hopewell* v. *Ackland*, 1 Salk. 239. *Wilce* v. *Wilce*, 7 Bing. 664, and cases there, and before cited.

PETERS, J. The testator, after bequeathing a support to his wife, and sums of money to several children, added in his will

these words: "I give and devise to my son, Albert G. Barnard, his heirs and assigns, all my real estate situate in Sidney aforesaid; also, all the residue of my personal estate and possessions of whatever kind or name." Many years after the will was made, an undivided fourth of a parcel of land, not situate in Sydney, descended to him from a brother. It is reasonable to suppose, as argued on both sides, that at the date of the will he had no expectation of such an inheritance. Nor does it appear that at that time he had any real estate outside of Sidney. The question is, does the will operate to devise this real estate not situate in Sidney. The claim that it does rests upon the idea that the words "situate in Sidney," undertake to describe, rather than to limit, the real estate to be devised, the testator meaning to devise all the real estate he had, or might have, wherever situated, and that the word "possessions" was used to embrace real, as well as personal, estate. The argument is aided by the suggestions, usually of force, that the presumption is that the testator intended to leave no possible property undisposed of, and that the policy of the law favors the rule of preferring a construction which will prevent intestacy.

Although the question is a nice one, we are constrained to think that, all things considered, this interpretation is not the correct one. We are to ascertain the real intent of the testator. It will be noticed that the will was drawn by some one tolerably familiar with the use of legal terms. The word "possessions" may, no doubt, include real estate, if so intended, though such would not be its technical signification. Bouvier so declares in his law dictionary. The words "all I may die possessed of," may include real estate (*Wilce* v. *Wilce*, 7 Bing. 664), or may not (*Monk* v. *Mawdsley*, 1 Sim. 286), just according to the context with which the words are associated.

The writer of the will had used the term "real estate," describing the property in Sidney, and knew the force and meaning of it. The presumption is that, if he had intended to include other real estate in an after-description, he would have used the same term again. If he intended to leave all his real estate to his son, why should he have devised it in two parcels instead of including

it in a single description. If it was his intention to devise all lands then or ever to be possessed, he would have left off the qualifying words "situate in Sidney." And if by the word "possessions" he intended to include realty, there was no necessity of the other clause in addition to it. It has been held that, where the word "land" has been used in a preceding portion of a will and omitted in a later portion of the instrument, the omission of so important a word could not have been accidental. Redfield in his work on wills cites cases to that effect.

Had the testator intended to include real estate in the word "possessions," it strikes us forcibly that he would not have used the prefix "personal" at all, and the language would have been "all the residue of my estate and possessions." The words "of whatever kind or name" are not naturally descriptive of real estate, but usually apply to personal property. Lands are not of various kinds and names often. The word "personal" was manifestly used to qualify and describe both estate and possessions. Accomplished draughtsmen often use words somewhat tautologically in the effort to embrace every description of personal estate.

The defendant's counsel insists that a general intention existed in the mind of the testator to dispose of all the property he ever expected to have. The trouble is, that he has not employed words sufficient to carry that intention into effect. There may have been an omission. But the court are to construe and not make the will. After all, it is but conjecture that the testator would have made the favored son the devisee of still other real estate had he known he was to possess other. It might have led him to make an entirely different partition of his property among his children. In Roper's Leg. 1464, it is laid down that where a testator, in the disposition of his property, overlooks a particular event, which had it occurred to him he would have provided against, the court will not rectify the omission by implying or inserting the necessary clause. Then, it is a general rule that, if it is uncertain and doubtful whether the testator intended to devise real estate, the title of the heir must prevail. At common law, after-acquired interests in real estate would not pass by will. By our statute (R. S., c. 74, § 5,) they do, provided such appears to have been the

intention. *Bullard* v. *Goffe*, 20 Pick. 252, 258. *Gibbons* v. *Langdon*, 6 Sim. 260. *Goodchild* v. *Fenton*, 3 Yo. & Jer. 481. *Cooper* v. *Pitcher*, 4 Hare. 485.

Judgment for demandant.

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

JOSHUA T. RANDALL *vs.* EBEN MARBLE.

Somerset. Opinion April 1, 1879.

Deed. Condition subsequent. Restraint of marriage.

A condition in restraint of marriage, subsequent and general in its character, annexed to a devise or conveyance from parent to child, is void unless there be a valid limitation over.

A father conveyed to his daughter, with a proviso that the gift should stand if she remained single, otherwise the land to be divided among his three children, the grantee to have fifty dollars the most: *Held*, that the condition was subsequent, general, and void; that a limitation over to one's heirs is of no effect, as a title by descent is the worthier title.

ON REPORT.

WRIT OF ENTRY, wherein the plaintiff seeks to recover one undivided third part of certain real estate described in the writ. It was admitted that the plaintiff is one of the three heirs at law of William B. Randall, under whom he claims his title. That he is entitled to his share of the land unless the full court shall find the title to the whole to be in the defendant from the following agreed facts:

William B. Randall, the father of this plaintiff, on the 18th day of January, 1858, owned and was in the possession of the demanded premises. On that day he delivered to Hannah F. Randall, his daughter, a deed of the premises duly executed, and in the usual form of a deed of warranty; and after the covenant to defend to her and her heirs and assigns, was the following condition: "provided she remain single, otherwise it is to be divided among my three children, Hannah to have fifty dollars more than Lucy or Joshua."

Hannah was married to Thomas Gifford in May, 1863; a few

days thereafter, she deeded this property to Alfred Chase. The defendant claims the demanded premises by sundry mesne conveyances, which were admitted to be in regular form, from said Hannah and her grantees, and they have occupied the premises ever since.

The only question presented is the construction and legal effect of said deed from William F. Randall to his daughter, Hannah. The law court to determine the legal rights of the parties, and judgment to be entered accordingly.

S. S. Brown & E. O. Howard, for the plaintiff, contended: That the condition in the deed was a conditional limitation, rather than a condition subsequent, and therefore not void. 1 Story's Eq. 284, § 291. I Wash. R. Prop. 458–489, § 28. 2 Black, 155–156. *Parsons* v. *Winslow*, 6 Mass. 178.

But if a condition subsequent, then the condition may be good. The deed in no event is to be entirely void because grantee takes, at any event, certain rights, though not the land. 2 Redf. Wills, 292, § 22. *Creagh* v. *Wilson*, 2 Vt. 572. *Sillet* v. *Wray*, 1 P. Wms. 284.

In regard to the exact rule as to conditions in restraint of marriage, the apparent tendency of the decided cases seems to be this: Where the condition is reasonable, or amounts to a limitation, and there is a grant over, it is valid; but where it is unreasonable, and there is no grant over, it is regarded as *in terrorem* merely, and void. 1 Story's Eq. 283, § 291 *b*–291 *d*. *Id.* § 291 *e*. 2 Redf. Wills, 298.

E. W. & F. E. McFadden, for the defendant.

PETERS, J. If a condition in restraint of marriage is annexed to a devise or conveyance of real estate, and the condition is subsequent and of a general character, it is held by the law to be void. (Whether this doctrine applies to the widow of a testator or not is held differently by different courts.) If the condition be partial, and not general, as where it relates to the time when or the place where or the person with whom a marriage may take place, then it may or may not be void according as the condition imposed may be considered reasonable or otherwise.

In this case the grantor conveyed a parcel of land to his daughter Hannah, with a proviso that the gift was to stand if she remained single, otherwise the land to be divided among his three children, Hannah to have fifty dollars more than either of the others. Here the fee must have vested in Hannah, because it might have been in her and her heirs forever; the condition was subsequent and general; and the condition was void.

The counsel for the plaintiff, admitting the general principle to be as stated, seeks to avoid its application to this deed upon several grounds.

It is argued that the condition here is special and limited and not general, because the forfeiture was not to be of the whole estate conveyed. Hannah was in the event of marriage to have a portion of it. This does not bring the case within any recognized exceptions to the rule. There was to be an absolute forfeiture of an interest, if she married. It would be impracticable for the law to make distinctions as to amounts or values. The condition is nugatory whether it requires one sum or another to be forfeited. It is the character of the condition that makes it void or valid, and not the amount depending upon it. The less the amount to be forfeited, the less the importance of the condition requiring forfeiture. There are many cases among the reported decisions where the condition has been of an alternative character, the legatee to have one sum marrying and another sum not marrying, in which the distinction now called for has not been noticed. Such an exception would easily abrogate the rule itself.

The counsel for the plaintiff further contends that this is a conditional deed with a limitation over, and that therefore the condition is valid. Most courts (not all) admit the doctrine that a condition in restraint of marriage will be upheld when there is a valid gift or limitation over. The court of Massachusetts, as long ago as in 1810, doubted whether this would be regarded as a reasonable doctrine if it had then been presented as an original question. *Parsons* v. *Winslow*, 6 Mass. 169, 181. And Chancellor Kent says the distinction has been supposed to be more refined and subtle than solid. 4 Kent Com. 127. Judge Story gives as a reason, why the condition is treated as ineffectual in case of not

giving the estate over, that the testator is deemed to use the condition *in terrorem* only or he would make some other disposition of the bequest provided the condition is not kept. Other reasons are also assigned by other writers. One reason is that courts cannot relieve against the forfeiture in such case without doing an injury to the person to whom the estate is limited over. Bac. Abr. Conditional Legacies. Where the gift is until marriage and no longer and then over, there is nothing to carry the gift beyond marriage. *Morley* v. *Rennoldson*, 2 Hare. 570.

But we are of opinion that the provision in the deed in this case for giving over the estate is null and void. A limitation over to one's heirs is of no effect, for the reason that the estate would descend to the heirs in case of forfeiture whether there was a limitation or not. A forfeiture to the grantor's heirs is therefore no forfeiture. To be valid it must be to a stranger. The presumption is that his heirs have been reasonably provided for by the testator or grantor without a forfeiture for their benefit. The title by descent is, in estimation of law, the worthier title. This is an old principle of the law, and clearly stated in the cases following. *Parsons* v. *Winslow*, 6 Mass. 169. *Whitney* v. *Whitney*, 14 Mass. 88, 90. See authorities cited in the above cases. *Otis* v. *Prince*, 10 Gray, 581. *Stearns* v. *Godfrey*, 16 Maine, 158. *Roper Leg.*, original page 763, *et seq.*, and cases cited.

The plaintiff further contends that this is not a limitation to the grantor's heirs, but in effect a gift over to strangers, because the provision is that the property is to go to the heirs in unequal shares, Hannah having the most, and not as the law would apportion it. There may be several answers to this suggestion. The greater proportion is to the grantee herself. The testamentary provision of allowing Hannah the extra $50 is not such as can be made effectual by deed. But even if a charge upon the estate in equity, the division among the heirs to be subject to it, the rule before stated applies just as strongly. Again, the remainder is not given to the children and their heirs, but creates a life estate in them only.

Taking into consideration all the objections that may be urged against it, we have no doubt that the crude and ill-defined limita-

tion attempted by the grantor in the deed is of no legal effect and utterly void.

Plaintiff nonsuit.

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

INHABITANTS OF BELMONT *vs.* INHABITANTS OF MORRILL.

Waldo. Opinion April 1, 1879.

New trial. Public acts. Judicial notice. Constitutional law. Exceptions.

A new trial will be granted, where the court ruled that the rights of the parties in a cause depended upon the interpretation of a statute which, as afterwards discovered, but at the time unknown to all concerned, had been repealed.

The repeal of a section of an act, incorporating a town, will be noticed by the court as a public act without proof thereof.

An act, dividing the territory of one town into two towns, fixed the liability of such towns for the support of paupers having a settlement upon the common territory. The rule was altered by a legislative act, not affecting any person then chargeable as a pauper: *Held*, such act is constitutional.

Exceptions, regularly allowed and duly certified, will be considered by the court, although they are not minuted by the clerk as filed at the term when taken.

ON EXCEPTIONS.

ASSUMPSIT for pauper supplies to Harriet Childs, wife of Robert Childs.

The question in litigation was whether the pauper's husband, Robert Childs, had his legal settlement at the time of his decease in the town of Belmont, or in the town of Morrill. The writ was dated February 12, 1877.

Plea, general issue.

It was admitted that the pauper fell into distress at the time stated in the writ, and that the supplies named therein were furnished by the plaintiffs. There was no testimony tending to show that the pauper, Harriet Childs, or her husband, Robert Childs, had ever become chargeable as paupers prior to the winter of 1875.

The testimony tended to show that Robert Childs had a derivative settlement from his father in that part of the original town

of Belmont which is embraced in the town of Morrill, under the act of March 3, 1855, dividing the town of Belmont, and incorporating the northerly part of it into a new town by the name of Morrill.

There was testimony tending to show that prior to the act of division, Robert Childs had acquired a legal settlement in his own right in that part of the original town which is now Belmont. But this point was controverted, and there was testimony tending to show the contrary.

There was no testimony tending to show that he had acquired a legal settlement in any place since the act of division.

Defendants offered testimony, and several witnesses testified to facts, tending to show that at the time of the passage of said act of division of the town of Belmont, said Robert Childs was absent from said town, and had separated from his family, having no home or dwelling place with them; and that his last dwelling place in the original town of Belmont was not in that part of it which was incorporated into the new town of Morrill, but was in that part of it which remained, and still is the town of Belmont.

On this subject the presiding Judge charged the jury as follows:

"It is claimed here that under the law as we have it, Robert Childs would acquire his settlement on the division of the town of Belmont, upon that territory where he last resided, he having been absent from Belmont at the time that act of incorporation of Morrill was passed. Were there no other law than our general pauper law applicable to this case, that would undoubtedly be true, but it is competent for the legislature to provide for the settlement of paupers when they make a division of a town, and provide as to which town incorporated out of a given piece of territory shall take the paupers, and divide them as they see fit. Sometimes there is no provision made in the act of division, and sometimes there is. It appears that in this case there was a provision made as to the support of paupers, not only of all those paupers who at the time were chargeable, but all who should afterwards become chargeable. There have been several cases of division of towns in this state where the act has provided for the support of paupers subsequently to become chargeable, and have used certain lan-

guage which has received a judicial construction. Upon examining the language in this case I find it varies somewhat from those, and yet perhaps not so much but what I may apply the same principles that were applied to those, to this one. Therefore I follow the decisions as I understand them; and for the purposes of this trial, I instruct you that the general pauper law in this respect does not apply, but that the provision of the law in the act of incorporation of the town of Morrill and division of Belmont does apply. Of course we have got to go back to the general law to get what is meant by a settlement. It is said in the dividing act that each town is to take all the paupers to become chargeable, who have acquired a settlement upon that part of the territory which may fall within the one or the other; that is to say, if the pauper had acquired a settlement upon that part of the territory which is now within the territory of Belmont, then he would be supported by Belmont; if on the other hand, he had acquired a settlement upon that part of the territory which falls within the town of Morrill, then he would be supported by Morrill. That word, settlement, has a technical meaning and precisely that meaning which I have given to you, that his connection or relation to that territory would be such that in case he fell into distress he would be entitled to be supported by that town. . . . . Hence you see the principles of law apply just the same as though there were two separate and distinct towns at the time, and I give you the law with that view."

The attention of the court was not called to the statute repealing the provision relating to the support of paupers in the act dividing Belmont and incorporating Morrill, and no question was raised at the trial in regard to it.

The verdict was for the plaintiffs for $148.21, and defendants alleged exceptions.

W. H. Fogler, for the plaintiffs.

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

PETERS, J. In this case the court ruled that the rights of the parties depended upon a section of a statute which (as afterwards discovered) had been repealed. We feel sure that the fact of

repeal was not known to any of the parties concerned. It is not strange that it was forgotten. The act was passed in 1855. The section referred to was repealed in 1861, and it probably had no practical application before 1875. The plaintiffs contend that the ruling must stand, because the court was not apprised of the statute by counsel when the cause was tried. The rule of practice, that a party who does not take a point in the trial should not be allowed to take it afterwards, was discussed at some length in *Eaton* v. *New England Tel. Co.*, 68 Maine, 63. It was there conceded that the rule might in possible cases admit of exception. Most rules are subject to exceptions. Whether the rule can apply to a case like the present we need not take the trouble to determine, because we think, if it can, this should be an exception to the rule. The error was an innocent one upon the part of the parties. The ruling misdirected the jury, and the case suffers injustice unless relief can be granted. The consequences might be much greater than would ordinarily attach to an erroneous verdict where the same sum of money was directly involved. As the judgment will bind both towns in fixing the settlement of the pauper, many unexpected claims may in the future be dependent upon it. It was said by the court in Massachusetts (*Wait* v. *Maxwell*, 5 Pick. 220): "We are satisfied, however, that the verdict has been returned upon a wrong principle, and that it is within the discretion of the court to grant a new trial, notwithstanding the point on which we decide was not distinctly raised at the trial." The court granted a new trial there. For the same reason, and in an extreme case, we grant a new trial here.

The plaintiffs contend that the act of repeal is not a public act, and that therefore the court without proof could not have taken notice of it. By paragraph 26 of § 4, c. 1, R. S., acts of incorporation are to be regarded as public acts. We think an act in addition to an act of incorporation, becoming, as this is, a part thereof, is a public act also. Such acts are generally regarded as public acts, irrespective of the statute regulating the construction of legislative acts. *New Portland* v. *New Vineyard*, 16 Maine, 69. Whar. Ev. § 293.

We do not agree with the counsel for plaintiffs that the act of

repeal is unconstitutional. It related to no person then chargeable. It changed a rule only. No one could foresee which town would be most affected by it in the future. It abolished a special, and supplied the general, rule. *Appleton* v. *Belfast*, 67 Maine, 579.

A point is made against the exceptions that they are not minuted as filed at the term when taken. But they are regularly allowed as of that term, and duly certified, and that presents them to us.

Exceptions sustained.

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

EDWIN CLEMENT & others *vs.* GEORGE F. FOSTER.

Cumberland. Opinion April 15, 1879.

Award. Error. Remittal.

An arbitrator made an award which was larger, by a given sum, than it should have been, owing to an error, merely, in computation, and which could be made certain by mathematical calculation: *Held*, that this error does not render the award void, but it may be obviated by a remittal.

ON EXCEPTIONS from the superior court.

The case is stated in the opinion.

W. L. Putnam, for the plaintiffs.

H. C. Peabody, for the defendant.

WALTON, J. The plaintiffs and one Blair submitted all claims existing between them to arbitration. The defendant guaranteed the payment of any award that should be made against Blair. This is an action upon the guarantee.

It appears that the arbitrator by mistake made an award against Blair larger by $360 than it should have been. The error occurred in computing the amount of certain surveys of lumber. The question is whether this error renders the award void, or whether it may be obviated by a remittal by the plaintiffs. We

think it may be thus obviated. It is settled law in this state that, an award may be good in part and bad in part, and that when the good and the bad can be separated, the bad may be rejected and the good affirmed. We think a mathematical error, which can be readily ascertained and the amount made certain, comes within the operation of this rule. No reason is perceived why an award, which may be the result of a long and patient investigation of complicated accounts and conflicting claims, should be held to be void *in toto*, on account of a mere clerical error in footing up a column of figures, when the error can be at once ascertained by a re-casting, and corrected with mathematical precision. An error that cannot be thus eliminated may have that effect. But one that can be, falls within the operation of the rule that when the good and bad are separable, the bad may be rejected and the good affirmed. *Day* v. *Hooper*, 51 Maine, 178. *Clement* v. *Durgin*, 1 Maine, 300. *Gordon* v. *Tucker*, 6 Maine, 247. *Banks* v. *Adams*, 23 Maine, 259. *Walker* v. *Merrill*, 13 Maine, 173. *Davis* v. *Cilley*, 44 N. H. 448.

No other question of law is presented by the bill of exceptions in this case. All the other questions will be found, on examination, to be questions of fact; and the findings of the judge of the superior court upon these, is conclusive, and not reviewable in this court.

Exceptions overruled.

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

JAMES LARRABEE *vs.* JAMES KNIGHT.

Cumberland. Opinion April 15, 1879.

Trustee. Assignment. Disclosure.

It is settled law in this State that, if one summoned as a trustee is notified before making his disclosure that the funds in his hands have been assigned, and he neglects to disclose the assignment, his being charged will not be a bar to a suit against him for the benefit of the assignee.

ON EXCEPTIONS from the superior court.

ACTION OF ASSUMPSIT, brought in the name of James Larrabee, for the benefit of A. S. and E. F. Larrabee, his assignees. Writ dated January 20, 1875.

The case was submitted to the presiding justice of the superior court to find the facts, with right of exception in matters of law. The real question presented being his ruling that the judgment in the prior suit of *Gustin* v. *Larrabee* and said Knight, his trustee, is no bar to the present suit,—said Knight having been notified of said assignment before making his disclosure, and therein making no mention thereof. In said suit of *Gustin* v. *Larrabee* and trustee, judgment was recovered and execution duly issued against the principal defendant and against the trustee for the amount in his hands, and, after due proceedings, on February 10, 1877, said Knight, as trustee, paid the sum with which he had been charged, to the officer holding the execution.

It was argued that $174.08 is the amount which the plaintiff should recover, if he is entitled to recover at all; there was no dispute about that sum being the amount of half of the proceeds received by the defendant and which belonged either to James Larrabee or to A. S. and E. F. Larrabee, at the date of service of the trustee writ. After the testimony was closed the presiding justice ruled as follows:

"Upon the foregoing evidence, I find, as matter of fact, that there was an assignment of the $174.08 in controversy from James Larrabee to Albert S. Larrabee and Edward F. Larrabee, of which assignment said James Knight had due notice before he was summoned, as trustee, in the suit of *Gustin* v. *Larrabee* and trustee;

and further find, in accordance with the statement of said James Knight, that he was not a party to said assignment, and did not consent to the substitution of Albert S. Larrabee and Edward F. Larrabee for James Larrabee in the contract relating to the corn, and did not promise, in consideration of release from his contract with James Larrabee, to pay to Albert S. and Edward F. Larrabee one-half the proceeds of the corn.

"I therefore rule that this action may be maintained in the name of James Larrabee, for the benefit of the assignees, Albert S. and Edward F. Larrabee, and that James Knight having had notice of this assignment prior to making his disclosure in *Gustin* v. *Larrabee*, the judgment in that suit is no bar to this.

"After hearing the evidence and arguments of each party, and considering the same, I decide that said defendant did promise in manner and form as said plaintiff has declared against him, and I award damages in the sum of $174.08, and interest from date of writ."

Whereupon the defendant alleged exceptions.

P. J. Larrabee, for the plaintiff.

G. B. Emery, for the defendant.

WALTON, J. It is settled law in this State that, if one summoned as a trustee is notified before making his disclosure that the funds in his hands have been assigned, and he neglects to disclose the assignment, his being charged will not be a bar to a suit against him for the benefit of the assignee. *Milliken* v. *Loring*, 37 Maine, 408. *Bunker* v. *Gilmore*, 40 Maine, 88.

But it is claimed that this rule of law is inapplicable to this case, because, notwithstanding the trustee in the former suit (defendant in this) had notice of the assignment, and notwithstanding he neglected to disclose it, still, it was made known to the court by the assignee himself, and its validity either was, or might have been, determined in that suit, and cannot, therefore, be again brought into litigation. In other words, the defense is substantially *res adjudicata*,—the matter has been once put in litigation and cannot be put in litigation again.

The court is of opinion that this defense fails for want of proof

of the facts on which it rests. There is no evidence that the assignee's claim was brought into litigation in the former suit. There is no evidence that its existence was ever known to the court at the time the judgment charging the trustee was rendered. True, the assignee filed with the clerk a statement of his claim; but this was after the disclosure of the trustee had been passed upon, and there is no evidence that any action whatever was had upon the claim, or that the court, or the adverse party, even knew of its being filed with the clerk. The attempt by the assignee to obtain an adjudication upon the validity of his claim was made too late,—the trustee had already been charged—and it is not improbable that it was for this reason that the assignee abandoned his attempt to protect his rights in that suit and resorted to this. Very clearly the proceedings in that suit are no bar to this. Such was the ruling of the justice of the superior court. We think the ruling was correct.

Exceptions overruled.

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

WILLIAM STEVENS *vs.* JOHN D. ORR.

Cumberland. Opinion April 16, 1879.

Right of way. Beneficial use. Deed.

A conveyance of a specified portion of real estate, described by metes and bounds, will not carry with it a right of way over the grantor's adjoining land (although such way may be highly convenient, and apparent upon the face of the earth, and in actual use at the time of the conveyance, and although the deed contains the words "with all the privileges and appurtenances"), unless such way is clearly necessary to the beneficial use and enjoyment of the estate conveyed.

ON EXCEPTIONS.

This was an action of trespass *quare clausum*; writ dated May 21, 1877, and tried by the justice of the superior court without the intervention of jury, subject to exceptions in matters of law.

Plea, the general issue, with brief statement that defendant had a right of way over plaintiff's close, and that the alleged trespass was only the rightful use of the way. Facts found, and ruling, were as follows:

Prior to March 17, 1824, John Orr, the defendant's grandfather, was owner of plaintiff's close, as well as of the adjoining lot now occupied by the defendant.

In the year 1812, Richard Orr, son of said John Orr, and father of defendant, built on his father's, John Orr's, land, the house now occupied by defendant, and used the way in controversy from said house to the cove over plaintiff's present close; the title to both lots then being in John Orr.

The way has been used from that time to the present by the defendant's father and himself, both being fishermen, as a foot path from their house to the cove where their boats lay.

So far as the case shows, they had no other right of way to the cove, and no other means of access to it without crossing the lands of other persons. If defendant's claim of a right of way rested solely upon prescription, it would be necessary for me to decide whether this use was permissive or adverse, which is one of the controverted questions in the case. But I find that Richard Orr, defendant's father, having built his house (on the site

now occupied by defendant) on his father's, John Orr's, land in 1812, continued to occupy it and to use the way in dispute in the manner before stated from 1812 to 1824, the premises described as plaintiff's close in the declaration, being then the same John Orr's land and the way leading across it, in the same place as now. On March 17, 1824, John Orr conveyed to his son, Richard Orr, the premises on which Richard had built his house in 1812, with all the privileges and appurtenances. It is clear that the way across the present plaintiff's pasture, which had been used by Richard Orr, under whom defendant claims, from 1812 to 1824, was at the time of this deed to Richard Orr in 1824, apparent upon the surface of the ground as a path leading across the grantor, John Orr's pasture to the cove, and accustomed to be used by Richard.

Under these circumstances, I rule that the right of way in question passed to Richard Orr by the deed of March 17, 1824, and thence to defendant as one of the privileges and appurtenances of the premises thereby conveyed.

After hearing the evidence and arguments of each party, and considering the same, I decide that said defendant is not guilty in manner and form as said plaintiff has declared against him.

Plaintiff alleged exceptions.

C. Hale, for the plaintiff.

T. T. Snow, for the defendant.

WALTON, J. The court is of the opinion that it must be regarded as the settled law of this state that the conveyance of a specified parcel of real estate, described by metes and bounds, will not carry with it a right of way over the grantor's adjoining land (although such way may be highly convenient, and apparent upon the face of the earth and in actual use at the time of the conveyance, and the deed contains the words "with all the privileges and appurtenances"), unless such way is clearly necessary to the beneficial use and enjoyment of the estate conveyed. So held in *Warren* v. *Blake*, 54 Maine, 276. And the same rule was applied to a drain in *Dolliff* v. *Boston & Maine R. R.*, 68 Maine, 173.

We are aware of the conflicting state of the authorities upon this question. We have had occasion to examine them very fully on several occasions within the last few years. The leading cases are cited and commented upon in the case first above cited (*Warren* v. *Blake*), and it cannot be profitable to go over them again. They are also quite fully cited in the briefs of the learned counsel in this case.

The justice of the superior court (by whom this case was tried without a jury) found as matter of fact that the grantee "had no other right of way to the cove, and no other means of access to it without crossing the lands of other persons." From this we infer that he was of the opinion that the way was highly convenient to the grantee. He also found that, at the time of the conveyance, the way in question "was apparent upon the face of the earth as a path leading to the cove, and accustomed to be used by the grantee." But he did not find (or if he did, the exceptions fail to so state) that the way was necessary to the beneficial use and enjoyment of the estate conveyed. His conclusion, therefore, that the way in question passed as one of the privileges and appurtenances of the estate, is apparently unwarranted and erroneous.

Exceptions sustained.

New trial granted.

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

GOING HATHORN *vs.* CROSBY HINDS, executor.

Somerset. Opinion April 16, 1879.

Deed. Warranty. Breach. Description. Construction.

A and other grantors conveyed to B a parcel of land described thus: "Beginning at the north-west corner of lot number six; thence easterly on the line to the north-east corner of said lot, thence southerly on the east line of said lot to the south-east corner of said lot; thence westerly on the south line of said lot to land formerly owned by John Dutton; thence north on the west line of said lot to the first mentioned bounds; being the same lot of land conveyed to us by Jeremiah Bragg and formerly in possession of Warren Spearin, to contain one hundred acres more or less." Lot five adjoins lot six and is immediately west of it; each containing one hundred acres. John Dutton once owned the west and not the east half of lot five, but the parties to the conveyance had reason to suppose he had owned the east half, as he had previously conveyed it to one of the grantors. Jeremiah Bragg had conveyed to one of the grantors the west half of lot six and the east half of lot five. Warren Spearin occupied upon six and not upon five: *Held*, that the description in the deed from A and others to B covered lot six and no more.

ON EXCEPTIONS.

Going Hathorn having claimed against the estate of David Hunter, the defendant's testate, one hundred and fifty dollars and interest for breach of warranty in a deed given by said Hunter, October 11, 1851, to him, by reason of a portion of the land so deeded having been by him sold to some other person, a statute reference was executed between the plaintiff and defendant. A hearing was duly had before the referee (Solyman Heath, Esq.) who, on request, made an alternative award, submitting the questions of law arising on the facts found by him to the determination of the court. His report is as follows:

"The defendant's testator sold and conveyed to said Hathorn by deed of warranty, on October 11, 1851, lots No. 4 and 5 of 100 acres each, in 5th Range in Pittsfield, and the only question arising is, whether at the time of said conveyance, the said testator was seized of the east half of said lot No. 5. The description in said deed was, 'Beginning at the north-west corner of lot No. 4 on the town line betwixt Pittsfield and Hartland, thence on said line easterly the width of the two lots No. 4 and 5 to land for-

merly owned by David and James Hunter and occupied by Warren Spearin, thence southerly on said Hunter's line to the south-east corner of lot No. 5, thence westerly across said lots No. 4 and 5 to land owned by the heirs of the late Levi Prince, thence northerly by said Prince's land to the first mentioned bound, being the same land formerly owned by the late John Dutton of Vassalboro', containing two hundred acres more or less.'

Said Dutton sold and conveyed the same lot by warranty deed to the testator, February 28, 1845, by the same description, but concluding thus: 'Being same I bought of Gardiner & Bowman, and to be the same where John Hunnewell now lives, containing two hundred acres more or less.' John Hunnewell lived on the eastern half of lot No. 5.

I also find by copies of deeds produced that Bowman conveyed to John Dutton, Jona. Dutton and Ezekiel Small in July, 1835, part of lot 4 in 5 Range, and part of lot 4 in 4 Range, and that Gardiner conveyed to said Dutton & Small in August, 1835, the west half of lot No. 5, and the remaining part of lot No. 4 in 5 Range, not conveyed to Bowman, and part of lots 4 and 5 in 4 Range, being contiguous lots.

I also find that the testator had a conveyance by warranty deed in 1834, from one Bragg, of the east half of lot No. 5 and west half of lot No. 6 in 5 Range.

I also find that the testator, with others, on January 24, 1849, conveyed by a deed of quitclaim to one Francis Spearin, the land described as follows:

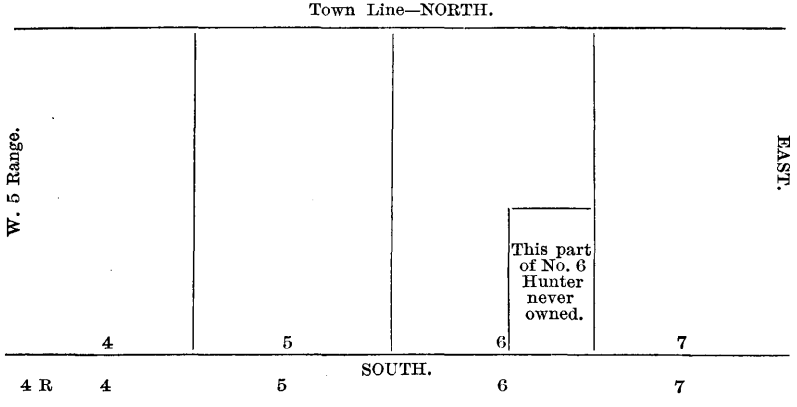
'A tract of land in Pittsfield in said county of Somerset, beginning at the north-west corner of lot No. 6 in Pittsfield, thence running easterly on said town line to the north-east corner of said lot; thence southerly on the east line of said lot to the south-east corner of said lot; thence westerly on the south line of said lot to land formerly owned by John Dutton; thence north on the west line of said lot to the first mentioned bounds, being the same lot of land conveyed to us by Jeremiah Bragg, and formerly in possession of Warren Spearin, to contain one hundred acres more or less.'

No question was made at the hearing that the testator at the

time of his conveyance to Hathorn of lots No. 4 and 5 was not the owner of said lots, unless the deed given by him to Spearin in 1849 conveyed the east half of lot No. 5; and I find that he was the owner unless the court holds that the legal construction of the deed aforesaid, and any other facts by me found in this case, should forbid it.

Now if the court shall determine upon the facts found by me, and the legal construction of the deed aforesaid, that the testator was not seized of the easterly half of lot No. 5 in 5 Range at the time of his conveyance to Hathorn, then I award that said Hathorn recover against the estate of said testator in the hands of Crosby Hinds, his executor, the sum of three hundred and sixty-six dollars damages, and costs of reference taxed at thirty-one dollars and fifty cents, and costs of court to be taxed by the court. But if the court should be of the opinion that the testator conveyed to Hathorn a good title of the easterly half of lot No. 5 in 5 Range, and was seized thereof at the time of said conveyance, then I award that Crosby Hinds, as such executor, recover against said Hathorn costs of reference taxed at thirty-one dollars and fifty cents and costs of court to be taxed by the court.

I annex a sketch of the several lots."



Judgment *pro forma* was entered by the Justice presiding, upon the report of the referee, and the plaintiff alleged exceptions.

D. D. Stewart, for the plaintiff, contended:

That Dutton never owned, and never had any pretense of title to east half of lot five; that Hunter acquired from Bragg title to east half of five and west half of six, and conveyed the tract thus acquired to Spearin, erroneously describing it as six, when in fact he never owned the east half of six. He only intended to convey what he owned, and there is enough in the deed to correct the mistake.

Any boundary, or any part of the description of the premises mentioned in a deed, may be rejected, "when it is clear from all the circumstances of the case that it was erroneously inserted." *Bosworth* v. *Sturtevant*, 2 Cush. 393. *Forbes* v. *Hall*, 51 Maine, 570. *Wing* v. *Burgiss*, 13 Maine, 111. *Jones* v. *Buck*, 54 Maine, 301. *Chesley* v. *Holmes*, 40 Maine, 536. *Abbott* v. *Pike*, 33 Maine, 204–6–7.

As Spearin holds east half of five by deed, January 24, 1849, the deed of the same half, two years later (October 11, 1851,) to plaintiff, conveyed no title against Spearin, and the covenant of warranty is broken, and plaintiff is entitled to recover.

C. Hinds, for the defendant.

PETERS, J. The intention of the parties has been called the polar star in the construction of writings. This rule controls all others. Of course it must be such an intention as is effectually expressed in the writing. Then there are certain rules or guides that are considered valuable to aid in getting at the intention. Among them are these: Erroneous or defective references to the sources of title are not to vary a prior description clearly and definitely given. *Crosby* v. *Bradbury*, 20 Maine, 61. A precedent particular description is not to be impaired by a subsequent general description or reference. *Melvin* v. *Proprietors, &c.*, 5 Metc. 15, 29. Parties are supposed to rely more on a first description, than on an attempted re-description, other things equal. A reference is more important where the description is imperfect without the reference, and where the description is aided rather than controlled by it. *Weller* v. *Barber*, 110 Mass. 44, 47. Definite boundaries subsequently used will limit the generality of a term previously used, nothing else controlling. *Haynes* v. *Young*, 36 Maine, 557. *Stewart* v. *Davis*, 63 Maine, 537, and cases there

cited. *Whiting* v. *Dewey*, 15 Pick. 428, 434. If the particular description by metes and bounds be uncertain and impossible, the general description governs. *Savage* v. *Kendall*, 10 Cush. 241. When there are several descriptions in a deed, such a construction will be given as will, if possible, satisfy each. *Law* v. *Hemstead*, 10 Conn. 23. *Madden* v. *Tucker*, 46 Maine, 367. References to the origin and sources of title are often inconsiderately inserted as additional description in deeds. Applying to this case the rules and tests before named, we think the result must be favorable to the award of the referee in favor of the defendant.

The deed in question describes the land conveyed as "a tract of land in Pittsfield in said county of Somerset, beginning at the north-west corner of lot number six in Pittsfield, thence running easterly on said town line to the north-east corner of said lot; thence southerly on the east line of said lot to the south-east corner of said lot; thence westerly on the south line of said lot to land formerly owned by John Dutton; thence north on the west line of said lot to the first mentioned bounds, being the same lot of land conveyed to us by Jeremiah Bragg, and formerly in possession of Warren Spearin, to contain one hundred acres more or less."

The plaintiff's position is, that this description includes the east half of lot number five, which lot adjoins lot number six and is immediately west of it. He contends that John Dutton did not own lot number five, but that he owned the westerly half of it only, and that the call in the deed "to land formerly owned by John Dutton" must extend, not to the south-east corner of lot five, but to the middle of the southerly line thereof. This deed was made in 1849. The case discloses the fact that one of the grantors received a deed of warranty from John Dutton in 1845 of lots four and five, and that he conveyed the same lots to the plaintiff in 1851. It may well have been supposed by the parties that John Dutton formerly owned the whole of lot five, whether he did in fact own it or not. But the case does not show that he did not own it, and at most throws perhaps some doubt upon that question. It seems that, when John Dutton conveyed the lots four and five in 1845, by a full and definite descrip-

tion, he added these words: "Being same I bought of Gardiner and Bowman." The referee reports that copies of deeds were produced before him showing that Bowman conveyed to John Dutton, Jonathan Dutton and Ezekiel Small a part of lot four, and that Gardiner conveyed to Dutton and Small the balance of lot four and the west half of lot number five. These conveyances would not carry the east half of number five into John Dutton or his partners. But they do not render it at all improbable that there were other conveyances to John Dutton. Certainly Gardiner and Bowman did not convey to John Dutton alone, but to him and others. But other words of reference were added by John Dutton in his deed in 1845: "To be the same where John Hunnewell now lives." And the fact is found that John Hunnewell lived on the eastern half of lot number five, so that the references are inconsistent with each other. To add to the confusion of the title, it also appears in the facts reported that the testator, the party defendant and grantee of John Dutton and grantor in the deed now under discussion, had a conveyance in 1834, before the deed from Dutton, from one Bragg of the east half of lot five and the west half of six; and this fact the plaintiff relies on. But notwithstanding the testator received such conveyance from Bragg in 1834, in 1851, when he conveyed lots four and five to the plaintiff, he again asserts at the close of his description that the same lots were formerly owned by John Dutton. It would seem that a more exhaustive examination of the earlier title of the lot in question and its adjuncts, might have presented the case to us more clearly. Still, we are inclined to think that, if the third line goes to the middle of lot number five, it would have to be rejected as false demonstration, because it would be inconsistent with the fourth boundary and the starting point in the description. There is too much other evidence that lot six only was to be conveyed, to be overcome by it.

The plaintiff, secondly, relies upon a further part of the description to prove that the parties to the deed of 1849 intended to include the easterly half of lot number five. The grantors say, "being the same lot of land conveyed to us by Jeremiah Bragg." Here the before named rules of construction have a more direct

application. The reference is general, while the description is particular. It gives no date of deed nor its record. There is no declaration that the conveyance from Bragg was to be resorted to for the purpose of fixing boundaries or to make the description more certain and particular. It is merely the recital of a supposed source of title. The reference is defective and erroneous in several respects. Bragg did not convey to the grantors, but only to one of them. Bragg's deed does not cover the east half of lot six, while the deed to be construed does. The two descriptions cannot be so reconciled as to stand together. The reference does not aid but alters the prior description. Still the main description needs no assistance to make it certain. There is no suggestion that the boundaries of lot six are not fixed and well known. The force of this reference is broken by the still further reference, "formerly in possession of Warren Spearin." It would seem a fair inference from the deed to the plaintiff that Warren Spearin lived on lot six. Another inference from all the deeds is, that each lot was supposed to contain one hundred acres. The deed in question purports to convey that number. Lot six gives that number. If the deed in question goes into lot five, the grantee got more. While the plan shows that the defendant's testator did not own the south-east quarter of six, it does show that he owned the north-east quarter. While the case may not be free of all difficulty, we are induced to believe that the facts presented require us to adhere to the result pronounced by the referee.

Exceptions overruled.

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

INHABITANTS OF HARPSWELL *vs.* FREDERICK G. ORR & others.

Cumberland. Opinion April 16, 1879.

Collector of taxes. Bond. Sureties. Real estate. Lien.

Where the evidence fails to show any money in the hands of the collector not accounted for, and it is admitted that in the valuation books of the assessors there is no description whatever of the real estate taxed, such omission on the part of the assessors will relieve the collector of the duty of completing his collection, and his neglect to do so is not a breach of his official bond, and will not support an action against his sureties.

ON REPORT, from superior court.

DEBT on bond of collector of taxes. Writ dated December 13, 1875.

Plaintiffs discontinued as to Orr, the principal in the bond, and the case proceeded against the sureties.

Plea, general issue, and brief statement denying any breach of the bond; that if there had been, nothing was due the plaintiffs from the sureties thereon, and that the carelessness and negligence of the plaintiffs, through their officers and agents, have released the sureties from all liability.

The facts sufficiently appear in the opinion.

W. Thompson, for the plaintiffs.

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

WALTON, J. Frederick G. Orr was chosen, and acted, as a collector of taxes for the eastern portion of the town of Harpswell for the years 1872 and 1873. He collected and paid over to the proper officers a little less than three-fourths of the amount committed to him for collection; and then, in 1875, without completing his collections, left the town and has not since returned. It is not improbable that he may have collected more than he accounted for; but there is no proof that he did. We must, therefore, assume that he did not; and it is upon this assumption, and the fact that there is no proof to repel it, that our decision is based. The question is whether, upon the facts agreed and the evidence reported, his neglect to complete the collection of the

taxes committed to him was a breach of his official bond and will support an action against his sureties. We think it was not. It is agreed that in the valuation books of the assessors there is no description whatever of the real estate taxed. We think this was such an omission on the part of the assessors as relieved the collector of the duty of completing the collection of the taxes; and that his neglect to do so, was not a breach of his official bond; and consequently will not support an action against his sureties. Not being described, no lien was created, and the real estate could not be sold for non-payment of the taxes assessed upon it. The omission deprived the collector of one mode of collecting the tax. There are many errors, mistakes, and omissions, which will not have that effect; and, in such cases, the collector will not be relieved of the duty of collecting the tax. But an error that does have that effect—that does deprive the collector of one of the modes which he would otherwise have of collecting the tax—will relieve him of the duty of collecting it; and his neglect to collect it will not be a breach of his official bond; and, consequently, will not support an action against his sureties. *Greene* v. *Lunt*, 58 Maine, 518. *Orneville* v. *Pearson*, 61 Maine, 552. *Boothbay* v. *Giles*, 64 Maine, 403.

Judgment for the defendants.

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

GEORGE H. STARR & another *vs.* ALEXANDER McEWAN & others.

Cumberland. Opinion April 16, 1879.

Will. Construction.

A testator, after providing for the payment of his debts, and funeral charges, gave all his estate, real, personal, and mixed, to his wife, "to her use during her natural life," and the remainder, after termination of his wife's life estate, to his brother, and appointed his executor: *Held*, that the widow is entitled to the possession, management and control of all that remains of the estate, personal as well as real, after payment of debts, funeral expenses, and costs of administration; and that it is the duty of the executor to deliver the same to her, after which he has no concern with it.

BILL IN EQUITY, brought under the provisions of R. S., c. 77, § 5, to obtain a construction of the will of Thomas McEwan, late of Portland, deceased, dated June 4, 1870.

The case is fully stated in the opinion.

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

A. F. Moulton, guardian *ad litem*, for the defendants.

WALTON, J. Thomas McEwan, by his last will and testament, after providing for the payment of his debts and funeral expenses, gave all his estate, real, personal, and mixed, wherever and however situated, to his wife, "to her use during her natural life," and the remainder, after the termination of his wife's life estate, to his brother; and appointed George H. Starr his executor.

The executor says he is in doubt whether he ought to pay over to the testator's widow the personal estate remaining after payment of the debts, funeral expenses, and costs of administration, or whether he should hold it as a trustee under the will, paying her the income only; and if the latter, whether he is authorized to pay the expense of managing the estate, including repairs, taxes and insurance, out of the principal, or whether it must come out of the income; and he asks the direction of the court. And the widow, being doubtful of her rights, has joined the executor in asking for a construction of the will.

It is the opinion of the court that the widow will be entitled to the possession, management, and control of all that shall remain of the estate, personal as well as real, after payment of the debts, funeral expenses, and costs of administration; and that it will be the duty of the executor to deliver the same to her, after which he will have no further concern with it. It will then be the duty of the widow to pay the taxes, and insurance money, if insurance is procured, and to keep the property in suitable repair; and if she shall fail to do so, it will be a matter between her and the remainder-man, and not between her and the executor. *Warren* v. *Webb*, 68 Maine, 133. *Martin* v. *Eaton*, 57 N. H. 154.

Decree accordingly, with costs to be paid out of the estate.

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

EMMA J. RUSSELL, libellant, *vs.* ASA B. RUSSELL, libellee.

Cumberland. Opinion April 18, 1879.

Divorce. Libel. Support. Order in vacation. Contempt. Appropriate remedy.

A libel for divorce, inserted in a writ, is to be regarded as pending after service on the libellee.

After such service and before the return day of the writ, a justice of this court can in vacation, after notice to the libellee, order him to pay money for the support of his wife and for the expenses of litigation pending the libel.

The husband neglecting or refusing to pay as ordered is in contempt for such neglect or refusal, but he may purge himself from contempt by proof of inability to comply with such order.

No exceptions lie to the judgment of the presiding justice determining such ability or inability.

In libels for divorce, commitment for contempt is an "appropriate process," to enforce the payment of money; or an execution in the usual form, may issue for the amount ordered to be paid and remaining unpaid.

ON EXCEPTIONS.

LIBEL for divorce inserted in a writ of attachment, dated October 28, A. D. 1878, and made returnable at the January term of this court, 1879.

The real estate of the respondent was attached, and service of the libel was made upon him on the day of the date of the writ. In vacation, after the October term, A. D. 1878, of this court, to wit, on the second day of November, 1878, the libellant filed her petition praying that the court would order that her said husband pay to the clerk a suitable sum of money for the prosecution of her suit, and make such reasonable provision for her separate support and the support of her child as the court should deem reasonable, and that the custody of said child, *pendente lite*, be decreed to her. The libel was filed in the clerk's office supreme judicial court November 11, 1878.

A copy of this petition, and order of court thereon, was duly served upon the respondent November 2, 1878, and on November 13 thereafter, Virgin, J., who had made the order, after a hearing of the parties thereon (the parties to said libel being present),

made the following order and decree: "that the within named Asa B. Russell pay to the clerk of the supreme judicial court on Saturday of each week, until the libel is heard, the sum of six dollars for the support of the libellant and child, and that, on or before the first Tuesday of January next, he deposit with said clerk the sum of $50, to enable the libellant to prosecute her libel."

The respondent paid the sum of $54 from November 16, 1878, to January 11, 1879, on account of the weekly sum ordered to be paid as above stated.

On the fourth day of the January term, being January 18, 1879, the libellant filed her motion and complaint, representing that the libellee had failed to comply with the order of court as to the payment of the $50, and praying that he show cause why he should not be adjudged to be in contempt, and that the court would make such order and decree, and issue such process as the case required.

The libellee appeared, and for answer thereto, said that he is not of sufficient ability to enable him to comply with the order directing him to pay said $50, and, further, that the honorable judge of this court, who made said order on the thirteenth day of November, had no jurisdiction over the parties to said libel, because said libel was not then pending in this court, the return day thereof being the second Tuesday of January, A. D. 1879.

After a hearing of the parties, upon the motion, the presiding judge, (Walton, J.,) adjudged the libellee to be of sufficient ability to comply with the order of court, and directed him to pay the said sum of $50, and ruled that the court had jurisdiction of the parties to the libel on the thirteenth day of November, A. D. 1878, for the purpose of making said order, and found, as matter of fact, that the libellee was guilty of contempt in failing and refusing to comply with said order, and directed that the libellee be committed to the county jail situated at Portland in the county of Cumberland, until he comply with said order and decree of court. Thereupon, the libellee alleged exceptions.

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

C. P. Mattocks, for the libellee.

APPLETON, C. J. By R. S., c. 60, § 4, a libel for divorce may be inserted in a writ of attachment and served by summons and copy.

By c. 81, § 91, "the time when a writ is actually made, with an intention of service, shall be deemed the commencement of the suit." A suit must be regarded as pending from its first institution, until its final termination. *Brown* v. *Foss*, 16 Maine, 257. The making of the writ is to be deemed the commencement of the action or process. *Bunker* v. *Shed*, 8 Met. 150.

By R. S., c. 107, § 3, any suit, libel or other process is to be regarded as pending when, and after, service has been made on the respondent so far as relates to the taking of depositions.

The libel having been served on the libellee, there was a suit pending for divorce from the bond of matrimony. The parties could no longer live with propriety or legally in matrimonial cohabitation. The wife must be supported. The duty to support her devolves on the husband. By the fact of marriage she is entitled to alimony *pendente lite*. By the terms of the order it usually commences from the return of the citation. Such, in England, is held the true rule, "for, till then, the wife may be considered as able to obtain subsistence on the credit of her husband." *Loveden* v. *Loveden*, 1 Phillim. 208. When, however, the husband does not use due diligence in causing the return of the citation to be made, the alimony may commence from the date of the citation. Nor does the fact that there is a plea to the jurisdiction affect the power of the court to allot alimony *pendente lite*. *Ronalds* v. *Ronalds*, 2 L. R., Prob. & Div. 259.

By R. S., c. 60, § 6, this court is authorized, pending a libel, to order the husband to pay the wife a suitable sum for her defense, or to enable her to prosecute her libel and for her separate support, etc., "and to enforce obedience by appropriate processes." By the Act of 1878, c. 25, the order provided by c. 60, § 6, may be issued in vacation.

Service having been made of the libel and the same being then pending, though before the return day of the writ, the libellant petitioned a justice of this court to issue an order requiring the libellee to pay a sum of money, such as the court should decree for

the purposes specified in c. 60, § 6, and amended by c. 25 of the Acts of 1878. Notice was duly given the libellee of this petition. He appeared and contested the granting of the prayer of the libellant, and after a full hearing was ordered to pay the sum of six dollars weekly till the further order of the court.

The decree was one authorized by statute to be made, the justice issuing the decree having jurisdiction.

The libellee made payments under this order for the space of nine weeks, and then refused to make further payment. At the January term of this court notice was issued to the libellee to show cause why he should not be adjudged to be in contempt for not complying with the previous order of the court. *Newcomb* v. *Newcomb*, 12 Gray, 28.

The libellee attempted to purge himself from contempt by showing a pecuniary inability to comply with the order of court, but on a full hearing the presiding justice adjudged him of sufficient ability. This adjudication is conclusive and binding upon the parties. *Call* v. *Call*, 65 Maine, 407. *Sparhawk* v. *Sparhawk*, 120 Mass. 390.

The libellee was then adjudged in contempt and ordered to be committed until he should comply with the order of court. This has been held to be the proper course in such case. *Dwelly* v. *Dwelly*, 46 Maine, 377. *Slade* v. *Slade*, 106 Mass. 499. It is an appropriate remedy to enforce a decree of the court.

Undoubtedly, execution may issue in the usual form against the husband for alimony decreed the wife. *Prescott* v. *Prescott*, 62 Maine, 429. *Slade* v. *Slade*, 106 Mass. 499. *Barrows* v. *Purple*, 107 Mass. 429. No reason is perceived why it may not issue upon failure by the libellee to make the payments ordered to be made *pendente lite*, the amount to be paid being matter of record. Attachments for contempt for non-payment of the amount ordered, and executions for such amount, when unpaid, are both appropriate remedies for the enforcement of the decrees of the court.

Exceptions overruled.

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

FRED QUIMBY *vs.* BOSTON & MAINE RAILROAD COMPANY.

Cumberland. Opinion April 18, 1879.

Railroad. Approaches thereto. Defect. Liability. Burden of proof.

A railroad corporation are bound to keep all approaches to their depot, constructed by them and under their control for the use of persons having lawful occasion to use them to go to or from their depot or cars, safe and convenient for such use, even though the same may be within the limits of the highway.

In an action for an alleged injury received in passing over a foot-walk leading to defendants' depot, by reason of the defective condition of the walk, the burden is upon the plaintiff to show that the walk where he received his injury was constructed by the defendant corporation, and was in their possession and control as one of the approaches to their station.

ON REPORT from superior court. The law court to render such judgment as the law and evidence require.

ACTION in the nature of tort against defendant corporation for negligence of duty in not maintaining in good repair and in a safe, passable condition, their bridges, with their necessary approaches, and the places of access to their depots for the use of passengers. Writ dated December 1, 1877.

Plea, general issue.

The material facts appear in the opinion.

H. H. Burbank & J. S. Derby, for the plaintiff.

I. This obligation is imposed by R. S. 1871, c. 51, § 16. *Watson* v. *Lisbon Bridge*, 14 Maine, 201. *Parker* v. *B. & M. R. R.*, 3 Cush. 107. *Commonwealth* v. *Deerfield*, 6 Allen, 449. *White* v. *Quincy*, 97 Mass. 430. Shear. & Redf. Neg., § 252–3.

II. Independent of the statute requirements and rights, plaintiff hath this his remedy at common law. *Murch* v. *Concord R. R.*, 29 N. H. 9. *Sweeny* v. *Old Colony R. R.*, 10 Allen, 372. *Elliott* v. *Pray*, *Id.* 378. *Carlton* v. *Franconia Iron Co.*, 99 Mass. 216. *Knight* v. *P. S. & P. R. R.*, 56 Maine, 244. *Barrett* v. *Black*, *Id.* 504. *Tobin* v. *P. S. & P. R. R.*, 59 Maine, 183. *Campbell* v. *Portland Sugar Co.*, 62 Maine, 552.

III. Slipperiness alone on a horizontal plane may not be

deemed a defect; but the defect here alleged was both structural and superficial. This very construction (an inclined plane) imposed an additional burden of safety and convenience upon the company. Their liability arises from their neglect to exercise suitable and reasonable precautions to prevent injury. *Elliott* v. *Pray*, 10 Allen, 378. Shear. & Redf. Neg., § 442. And cases *supra*. This point would seem to be sustained by recent authorities. *Morse* v. *Boston*, 109 Mass. 446. *McAuley* v. *Boston*, 113 Mass. 505.

W. L. Putnam, for the defendants.

LIBBEY, J. This is case against the defendants for an injury alleged to have been received December 30, 1876, in passing over a foot-walk leading from York street, in Portland, to the defendants' depot, by reason of the defective condition of the walk. The defects alleged are the steepness of the grade of the walk, and its slippery condition by reason of snow and ice thereon.

A railroad corporation are bound to keep their depot and the grounds around it, owned by the corporation, or in their possession and used in connection with it, safe and convenient for persons who have lawful occasion to use them. *Knight* v. *P. S. & P. R. R. Co.*, 56 Maine, 234.

They are bound to keep all approaches to their depot, constructed by them and under their control, for the use of persons having lawful occasion to use them to go to or from their depot or cars, safe and convenient for such use, even though the same may be within the limits of the highway. *Tobin* v. *P. S. & P. R. R. Co.*, 59 Maine, 183.

The burden is on the plaintiff to show that the walk where he received his injury was constructed by the defendants, and was in their possession and control as one of the approaches to their station.

We think the evidence proves the following facts: In 1872 the defendants located their road into the city of Portland. They were permitted by the city government to cross State street, between York and Commercial streets, and some other streets, by a deep cut, "upon condition said railroad shall construct and always maintain

overhead bridges," and change the grades of thes treets as may be necessary for such bridges, and pay all damages caused by such changes of grade. "Provided and upon conditions that the construction of said bridges, and said changes of grade shall be in all respects satisfactory to the committee on streets, sidewalks and bridges on the part of this board."

In 1872 and 1873 the defendants constructed their road. The north line of its location was about ninety-nine feet from the south line of York street. In the construction of their road across State street, they removed and damaged the sidewalk on the west side of that street, south of York street. In 1873, after the construction of their road, they built an overhead bridge across the street for travel with teams and carriages, and also one for foot travel in connection with the sidewalk, and restored the grade of the street; and, to restore the condition of the street, built a new sidewalk, south of York street, on the west side of the street, on the same grade as the old one.

In 1874 or 1875, the city raised the grade of the south side of York street about two feet above the grade of State street, and closed all of State street south of York street except the sidewalk; but the street was not discontinued. After the street and sidewalk were restored by the defendants in 1873, the city resumed control over them and kept the sidewalk in repair. It was a common thoroughfare for foot travel down State street and from York street over defendants' bridge to Commercial street and the Boston & Maine, Eastern, and Maine Central stations. The plaintiff received his injury on said sidewalk about forty feet north of the north line of defendants' location.

Upon this state of facts we think it clear that the defendants were under no obligation to keep the sidewalk in repair north of its location. It was no part of their bridge. It was a part of the public street under the control of the city. The defendants had no right to enter upon it to make any changes or repairs. Their liability ceased when they restored the condition of the street and sidewalk to the acceptance of the city. The sidewalk between the location of the railroad and York street was no more one of the approaches to the defendants' station which they were bound to

keep in repair, than the extension of said walk along State street north of York street used for the same purposes.

Plaintiff nonsuit.

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

ABRAHAM SANBORN *vs.* DANIEL STICKNEY.

Penobscot. Opinion April 19, 1879.

Writ. Service.

Where a defendant was described in the writ as of Lee, in Penobscot county, and the officer declared in his return that he left a summons for him at his last and usual place of abode in Kennebec county, the service was not good.

The summons must be left at his last and usual place of abode in the State.

If such action be entered and defaulted, without appearance upon the part of the defendant, an action upon the judgment cannot be sustained.

ON FACTS AGREED.

DEBT upon a judgment.

A. Sanborn, for the plaintiff.

L. Barker, T. W. Vose & L. A. Barker, for the defendant.

PETERS, J. The case presents these facts: The plaintiff on the seventh of December, 1858, sued out a writ against the defendant, describing him of Lee, in Penobscot county. On the eighteenth of the same month the sheriff of Kennebec county made a nominal attachment on the writ, and declared that he served the writ upon the defendant by leaving a summons for him "at his last and usual place of abode in Kennebec county." The action was entered at the January term of court, 1859, in Penobscot county, when it was defaulted without any appearance for the defendant. Nothing else appears touching the matter until the present action of debt upon the judgment in that case was instituted by writ dated April 5, 1877.

The question is, whether in the former action a jurisdiction was obtained of the person of the defendant such as would make the judgment valid. Does it sufficiently appear that a summons was

left at the defendant's "place of last and usual abode." The point taken in the defense is, that "his last and usual place of abode in Kennebec county" would not be his "place of last and usual abode" in the State. We concur in that interpretation of the officer's return. The presumption is that the defendant was at the time dwelling in Penobscot county. The plaintiff in his writ so declared. All the officer certified may be true and no service be made. The officer would not be liable for making a false return. But he made an indefinite, equivocal and insufficient return. It must be certain that a defendant has been legally notified, before judgment can properly go against him.

It may not be easy to define with exactness the words of the statute. In Massachusetts there have been decisions that a person might have in that state a place of last and usual abode for the service of process, although having once been an inhabitant in the state he had removed therefrom. *Wright* v. *Oakley*, 5 Met. 400. *Morrison* v. *Underwood*, 5 Cush. 52. And in *Tilden* v. *Johnson*, 6 Cush. 354, it was held that one who lived in that state until 1841, and then removed to another state where he continued to reside until 1843, still had a last and usual place of abode in the former state. Our statutes upon the subject of notice to defendants have never been broad enough to admit of such a construction. An absent defendant, who has his permanent home and residence out of this state, cannot be considered as having his domicile here. But the law of this state assumes that every man has a domicile somewhere, either in or out of the state, where process may be served upon him. Once having a domicile, it remains until another is obtained. It remains while the person to whom it pertains is temporarily absent or is moving about from place to place. The word domicile in this connection has a more enlarged meaning than the word residence under the pauper laws. *Holmes* v. *Fox*, 19 Maine, 107. *Littlefield* v. *Brooks*, 50 Maine, 475. In this case the defendant's last dwelling place was his "place of last and usual abode." The law proceeds upon the supposition that, until a new domicile is established, a man will have at the domicile he has left "some person enjoying his confidence, careful of his interests, and charged with his concerns, who will

give him actual notice " of any civil process that may be left for him at such place. *Ames* v. *Winsor*, 19 Pick. 248. With these views entertained by courts and familiar to officers, we think the sheriff of Kennebec county intended by his return only to declare that he left a summons for the defendant where he last and usually resided when he was in that county, taking no responsibility to ascertain or decide whether it was his place of last and usual abode in this state or not. The law requires more than that to constitute a legal service. The case of *Ames* v. *Winsor* (cited above) has important weight upon the point here presented. There the defendant was described in the writ as of Duxbury, but then commorant of Boston. The officer returned that he had left a summons for the defendant " at his last and usual place of abode known to me in this city (Boston)." The service was deemed to be insufficient, because, notwithstanding the declaration of the officer, the defendant was presumed to have a residence in Duxbury as alleged in the writ.

In an action on a judgment this defense is admissible to defeat the action. *Davis, ex parte*, 41 Maine, 38. *Weeks* v. *Penobscot R. R.*, 52 Maine, 456. *Eastman* v. *Wadleigh*, 65 Maine, 251. *Waterville Iron Man. Co.* v. *Goodwin*, 43 Maine, 431. *Langdon* v. *Doud*, 6 Allen, 423. *Fitzgerald* v. *Salentine*, 10 Met. 436. *Wilbur* v. *Ripley*, 124 Mass. 468.

Plaintiff nonsuit.

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

DANIEL C. HALL & others *vs.* INHABITANTS OF BENTON.

Somerset. Opinion April 19, 1879.

Boom. Tax. Benton & Fairfield.

The plaintiffs, residents of Fairfield, are owners of the Fairfield boom, on the Kennebec river, erected by the Fairfield Boom Co. by virtue of its charter granted in 1836, giving it power to take land for its charter purposes, paying damages therefor, and the right to use the shores on either side of the river for the management of its business, paying a reasonable rent therefor. The boom consists of a line of permanent piers across the river with logs attached thereto and to the shores. The right to maintain the boom is without limitation: *Held*, that by R. S., c. 6, § 3, and c. 1, § 4, Rule X, the boom is taxable as real estate, and that part situated in the town of Benton is properly taxed in that town.

ON FACTS AGREED.

The property of the plaintiffs upon which the defendants have assessed a tax about which the plaintiffs complain, is a portion of what is known as the Fairfield boom, and that portion of it situate in the defendant town. This boom consists of two lines of piers, one extending in a north-easterly direction from the west shore of the Kennebec river to a point about two-thirds across said river towards the Benton shore of said river, and the other extending in a south-easterly or southerly direction down said river to the east shore of the river. The point on the west shore of said river is in the town of Fairfield, the point on the east shore is in the town of Benton, the central point is also in the town of Benton. Between the aforesaid piers and the two shores are stretched logs fastened to the shores and the piers by iron chains. The piers are built of logs, and are loaded with rocks to keep them in position on the bottom of the river. The plaintiffs have no title to the land in the town of Benton on which these piers stand excepting such as is given by the act of the legislature, approved March 23, 1836; and pay rent for the shores as provided in said act annually to the owners of the same, but pay no rent for the land on which the piers stand. The plaintiffs own in fee a quantity of land connected with said boom in the town of Fairfield, where they now live and have lived for many years past, on which is

placed their boom house. The question submitted to the law court is whether the property situated in the town of Benton, as before described and constituting a part of what is known as the Fairfield boom, is taxable in the town of Benton. If held taxable the plaintiffs are to become nonsuit, otherwise the defendant town is to be defaulted for nominal damages.

S. S. Brown, for the plaintiffs.

S. D. Lindsey, for the defendants.

LIBBEY, J. This action is brought to recover back a tax paid to the defendants, assessed on that part of the Fairfield boom situated in the defendant town. The question presented by the report is whether the boom is taxable as real estate.

The plaintiffs are the owners of the boom. It was erected by the Fairfield Boom Company, a corporation chartered in 1836, with the right to take land and erect the boom and maintain it perpetually, paying any damages sustained thereby, with the further right to use the shores of the river so far as is necessary for the management of their business, paying the owners a reasonable rent therefor.

The boom consists of a line of permanent piers across the river, and logs fastened to the piers and shores by iron chains. One portion of it is in Benton and the other in Fairfield, the centre of the river being the dividing line between the two towns.

By R. S., c. 6, § 3, "real estate for the purposes of taxation . . . shall include all lands in this state and all buildings and other things erected on or affixed to the same."

By c. 1, § 4, Rule X, for the construction of statutes, the words "land or lands," and the words "real estate," include lands and all tenements and hereditaments connected therewith, and all rights thereto and interests therein."

Applying these rules to the boom property we are of opinion that it is taxable as real estate, and that that part situated in Benton was properly taxed by said town.

Plaintiffs nonsuit.

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

ANN McALLISTER *vs.* WILLIAM SHAW & others.

Washington. Opinion April 19, 1879.

Tax deed. Recitals. Presumption. Possession.

At common law no lapse of time will afford presumptive evidence of the regularity of a tax sale.

The recitals in a tax deed more than thirty years old are evidence of the facts recited, only when the grantee takes and holds possession of the premises under the deed.

Where there is no such possession, the burden is upon the grantee, in such deed, to show that, in the sale (made August 15, 1840,) under a tax assessed by the county commissioners on unincorporated land, the county treasurer complied with Stat. 1836, c. 242, § 2, as amended 1840, c. 87, § 2.

ON REPORT.

TROVER for six hundred cords of hemlock bark, taken by defendants June 1, 1876. Writ is dated June 7, 1876.

Plea, the general issue.

After the evidence was all out at *nisi prius*, the case was continued on report. The full court to have jury powers, and to settle the law and facts.

The facts appear in the opinion.

E. B. Harvey, for the plaintiff.

J. & G. F. Granger, for the defendants.

LIBBEY, J. This is trover for six hundred cords of hemlock bark. We are satisfied by the evidence that the bark was cut and peeled on lots numbered one and six in Orient.

The plaintiff claims title to those lots through mesne conveyances under Randall Whidden. The only title that Whidden had was by tax deed from Jonathan Green, treasurer of Aroostook county, dated August 15, 1840, of sale for non-payment of a tax assessed on said township, as unincorporated lands, by the county commissioners of said county, for the repair of the Houlton and Baring road.

The defendants claim under a permit from Carpenter and Powers, who derive title to said lots by mesne conveyance, from

Ira and Jesse Wadleigh, who purchased the same of the state of Maine, by deed dated September 7, 1831.

To show sufficient title to said lands to enable her to maintain this suit, the burden is on the plaintiff to prove that the county treasurer, in advertising and selling the same to Whidden, complied with the requirements of law in relation thereto.

By act of 1836, c. 242, § 2, as amended by act of 1840, c. 87, § 2, on or before the fifteenth day of May the county commissioners shall certify the tax to the county treasurer, who shall, as soon as may be, publish an attested copy thereof in some newspaper published in the county, if any, and in the newspaper published by the printer to the state, three months before the time of sale, together with a notice that so much of said lands will be sold at public sale to the highest bidder, at such time and place as he shall designate, as will satisfy the assessment and incidental charges, unless said assessment shall be paid before that time.

The only evidence tending to show a compliance with the requirements of law by the treasurer is found in the recitals in his deed to Whidden.

It is claimed by the counsel for the plaintiff that as that deed is more than thirty years old, its recitals are evidence of the facts recited. They are not made so by statute. It is well settled that, at common law, no lapse of time will afford presumptive evidence of the regularity of a tax sale. The recitals in a tax deed more than thirty years old are evidence of the facts recited, only when the grantee takes and holds possession of the premises under the deed. *Worthing* v. *Webster*, 45 Maine, 270. The evidence does not satisfy us that either Whidden, or any of the intermediate grantees, ever had any actual possession or occupation of any of the lands embraced in the deed. The recitals in the deed are not competent evidence of a compliance, by the county treasurer, with the requirements of law in advertising and making the sale.

But if the recitals in the deed are to be treated as competent evidence, they fail to show a compliance with the requirements of law by the county treasurer. By the deed it does not appear that the treasurer published a certified copy of the assessment in any newspaper. It does not appear that notice of the sale was pub-

lished in a newspaper published in the county, or that no newspaper was published in the county. It does not appear that the Eastern Argus, in which the notice was published, was a newspaper published by the printer to the state. Nor does it appear that the notice was published three months before the time of sale.

The evidence entirely fails to show that the plaintiff or those under whom she claims ever had any such possession of the lots in controversy as will give her any title or rights by adverse possession.

Plaintiff nonsuit.

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

CHARLES H. CHANDLER *vs.* JEREMIAH B. GREEN & another.

Piscataquis. Opinion April 19, 1879.

Deed. Description. Construction.

Where all the calls in a deed, except one, may be applied upon the face of the earth, making a true and intelligent description of the lot to which they are thus applied, the one not applicable will be rejected as false and the others will prevail.

ON REPORT.

WRIT OF ENTRY, dated July 1, 1875.

Plea, *nul disseizin.*

The full court to render such judgment as the law requires.

The facts sufficiently appear in the opinion.

C. A. Everett, for the plaintiff.

E. Flint, for the defendants.

DANFORTH, J. The plaintiff seeks to recover "all that part of lot numbered ten, range eight, Perham's survey of Dover, lying easterly of the old county road as traveled through Dover to Charleston and Bangor in 1853."

To prove his title he puts in a deed from Samuel Sias to Sam-

uel Sias, Jr., under which he claims to hold through several mesne conveyances. This deed, with certain exceptions not important to be noticed at this time, conveys to the grantee all the grantor's interest in his homestead farm on the easterly side of the road leading to Bangor, and it is admitted that it covers the premises described in the second count in the writ. The next deed in the plaintiff's chain of title is that from Samuel Sias, Jr., to James Thompson and Caleb O. Palmer, dated September 5, 1860. This deed conveys the same part of lot ten as the former, excepting "a certain part of the same previously conveyed to John Sias." By subsequent deeds, containing the same exception, the title to this lot comes to the plaintiff. It will be seen that the plaintiff gets no title to that part of lot ten which was previously conveyed to John Sias; nor can we ascertain from any description in the deed what part of that lot his deed covers until we know how much of it was previously conveyed.

The defendant, as the foundation of his title, puts in the deed of Samuel Sias, Jr., to John Sias, dated July 4, 1855. This deed purports to convey a part of lot numbered eleven, range eight, and therefore it is claimed that it does not apply to, and cannot limit the plaintiff's title to any part of lot ten.

Assuming this to be so, the plaintiff must fail in his action. There is no other proof by deed of any part of lot ten conveyed to John Sias. As already seen plaintiff's deed excepts that, without any description of what it is. There is then no proof of the extent of plaintiff's land, or of the precise premises which his deed covers. It does not appear that he owns any particular part of lot ten, and as he must recover, if at all, upon the strength of his own title, in this state of the facts the judgment must be against him. It is not sufficient for an execution to issue for an indefinite part of ten. It would give no authority whatever to the officer serving it.

But the plaintiff is not in quite so unfortunate a dilemma. It is true that the deed purports to convey a part of lot eleven, but it also describes that part by definite bounds. If we begin, as the deed does, at the north-east corner of eleven, we cannot apply these bounds to the face of the earth and the deed can have no

effect whatever. But in the description we find certain definite courses and distances which lead to the county road, and thirty-four rods on that road to a stake and stones. Starting from this point and following each way the courses and distances given in the deed, and we find them all upon the face of the earth, making a clear and intelligible description conforming to that in the deed, except that it leads to the north-east corner of lot ten as the starting point instead of lot eleven as stated in the deed. To accomplish this result we do not find it necessary to resort to parol evidence except for the purpose of finding the monuments upon the face of the earth. The result is, that, as applied to a part of lot eleven, the deed is so much of it false that it is void; as applied to lot ten, all of the description is true except the starting point, and that can be ascertained by that which is true.

Under these circumstances, by well established principles of law, the false is to be discarded, and the true adopted. *Jones* v. *Buck*, 54 Maine, 301; approved and explained in *Jones* v. *McNarrin*, 68 Maine, 334.

Furthermore, John Sias had possession of the land when the deed to him was given, and it has been in his possession and that of his grantees ever since, and was so when the plaintiff took his deed, excepting the conveyance of a part of lot ten to Sias.

It is certainly clear that the defendant can hold the part of lot ten as described in that deed as against this plaintiff, however it might be as against a subsequent purchaser without notice, and the plaintiff must hold under his deed, limited by the title of the defendant.

Thus the question between the parties is simply one of a disputed line, just what, as we may suppose from the testimony in the case, was the only one raised at the trial.

The survey shows the line as described in the deed to be substantially where the defendant claims. According to the testimony of the defendant, corroborated by other testimony and contradicted by none, John Sias was in possession, at the time he received his deed, holding up to a fence then standing upon the north line now claimed by the defendant, which fence has stood as the line fence ever since. This can leave no doubt that the

true line between these parties is that delineated on the plan and marked A, C, B.

At the trial the defendant had leave to file a disclaimer but did not do so. From the report of the case we see no chance for any misunderstanding as to the precise question to be tried; nor does it appear that the plaintiff has lost anything by the neglect of the defendant to file his disclaimer at an earlier period. He may therefore do so now, and upon filing a disclaimer to all that part of the premises claimed which lies north and west of the line A, C, B, judgment may be entered in his favor.

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

GEORGE CUNNINGHAM & others *vs.* HENRY M. HALL & another & trustee.

Hancock. Opinion April 19, 1879.

Bankruptcy. Composition. Lien.

A composition in bankruptcy does not discharge the lien created by an attachment of the bankrupt's property, unless the estate of the bankrupt has been conveyed to an assignee.

ON REPORT.

The principal defendants were declared bankrupts upon their own petition within four months after the writ in this case was commenced and service made on the trustee. The estate of the defendants was not conveyed to an assignee in bankruptcy, as no assignee was ever chosen or appointed, but the estate was settled under a resolution for composition which was approved and recorded by the court, the plaintiffs not taking the percentage offered upon their claim. The plaintiffs contend that because the estate was not transferred to an assignee, their lien of attachment upon the funds in the hands of the trustee is not lost. If that be so, the proper judgment is to be entered up, to give the plaintiffs

the benefit of any attachment upon the funds in the trustee's hands. If it be not so, then plaintiffs are to be nonsuited.

W. P. Joy, for the plaintiffs.

G. S. Peters, for the defendants.

PETERS, J. A composition in bankruptcy does not discharge the lien created by an attachment of the bankrupt's property, unless the estate has been conveyed to an assignee. The reason is this: An attachment is a lien which the law cannot release except by such means as may be provided for the purpose in the bankrupt law itself. *Peck* v. *Jenness*, 7 How. 612. The only mode provided is that contained in U. S. R. S., § 5044, which declares that an assignment in bankruptcy shall relate back and vest the title of the estate in the assignee, notwithstanding the same is held under an attachment not four months old. *Morgan* v *Campbell*, 22 Wall. 381. In such case there is no estate that the attachment can operate upon. The law in this way liberates property from attachment, and in no other way can such a result be attained. The authorities generally take this view. *Sage* v. *Heller*, 124 Mass. 213. *Blume* v. *Gilbert*, *Id.* 215. *Storer* v. *Haynes*, 67 Maine, 420. *In re Clapp*, 2 Lowell, 468. *In re Chidley*, L. R., 1 Ch. D. 177. *Ex parte Jones*, L. R., 10 Ch. (App. Cas.) 663. Bump on Composition, 18, and cases cited. Two cases have come under our observation which are opposed to this interpretation of the bankrupt law, but we are not satisfied that the conclusion adopted by them is the correct one. *Miller* v. *McKenzie*, 43 Md. 404 (13 B. R. 406). *Smith* v. *Engle*, decided by the Iowa supreme court, 14 B. R. 481.

Plaintiff to have a judgment such as will preserve to him his security held by the trustee process.

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

FREDERICK A. HATCH *vs.* SIMON G. JERRARD.

Penobscot. Opinion April 19, 1879.

Attachment. Release. Lien.

The plaintiff, having property seized upon execution, authorized the officer to apply it for the benefit of subsequent attachers, relying upon a promise of the debtor to pay to him the execution: *Held*, that the plaintiff, upon a failure of the debtor to keep his promise, could countermand the authority, so far as it had not been acted upon by the officer, and retain his lien upon the property attached.

ON REPORT.

ACTION of the case against defendant, as sheriff of the county, for the official neglect of his deputy, G. S. Bean. Writ dated March 13, 1878.

The plaintiff introduced writ, *Hatch v. Carter et al.*, dated October 1, 1876, for balance due for rent, on which the livery stock of the defendants was attached; and subsequently the property so attached was sold by the officer, on the writ, according to law, for $770.70.

The action was entered, and judgment recovered, at the October term, 1877, for $248.33 debt, and $13.98 cost. Execution was duly issued and seasonably placed in the deputy's hands, who made his return thereon.

A. W. Paine, plaintiff's attorney in said action, testified that his client agreed to take a note of Carter & Carter, who were intending to carry on the business of Carter & Emery, on receiving which his attachment was to be released; but that he did not communicate the agreement to the defendant, except as hereafter stated.

On the ninth of December, 1876, said Paine left with the defendant, at his office, a paper of that date, directed to G. S. Bean, deputy sheriff, of the following tenor: "*Hatch* v. *Carter* is settled so as to let the subsequent attachers take all the money except your costs and mine, Mr. Carter and his partner to give a note for the amount of back rent due. My costs agreed at $5. Give me credit for that amount."

The deputy received it and claiming to act under it paid over, of the proceeds, to the subsequent attaching creditors, $604.22 on December 18, 1876, without seeing Mr. Paine in the intervening time. The remaining $155 were paid over on May 8, 1877, after he had been informed of Mr. Paine's claim that a note should be given upon settlement, and his complaint that it was not so given. On the payment of the $155 last mentioned, to the subsequent attaching creditors, the defendant took a contract of indemnity for the payment of said last mentioned sum, and the sum of $604.22, against this claim of Mr. Hatch.

No note of Carter & Carter has been given, but the parties, who were to give it, declined to give the same.

A. W. Paine, for the plaintiff.

C. N. Hersey, for the defendant.

PETERS J. The plaintiff had an execution against certain persons. The deputy of the defendant held the execution, together with the proceeds of certain attached property to be applied thereon. The plaintiff arranged with the debtors to release his lien upon the proceeds of the property upon the production of a certain consideration therefor. The promised or expected consideration did not come. The plaintiff, supposing it would come, ventured to notify the deputy that the money might be diverted from his execution and be paid upon the executions of others who attached the property subsequently to his attachment. So far as the officer acted upon this permission the plaintiff must be bound by it. But the officer was but the agent of the plaintiff, and (within legal bounds) under his control and direction. The plaintiff could withdraw his order or modify it, so far as it had not been acted upon.

If the plaintiff misinformed the officer, he should not suffer beyond what the officer did based upon the mis-information. The plaintiff was under no obligation to any one to surrender the property. Nor was the officer bound to do so. After notice from the plaintiff countermanding the direction he had no excuse for doing so. He wisely took an indemnity before doing so. The contro-

versy is therefore between the plaintiff and the subsequent attachers.

Defendant defaulted for $155 *and interest from date of writ.*

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

INHABITANTS OF CUMBERLAND CO. *vs.* THOMAS PENNELL & others.

Androscoggin. Opinion April 21, 1879.

County treasurer,—responsibility of. Robbery as defense. County commissioners,—authority of. Evidence.

The responsibility of a county treasurer, in the absence of any statute enlarging it, is measured by the common law rule applicable to bailees for hire other than common carriers and innholders.

The statute official bond of a county treasurer does not increase his responsibility; but its office is to secure the performance of his legal obligations.

If, without fault or negligence on his part, a county treasurer is violently robbed of money belonging to the county, it is a valid defense, *pro tanto*, to an action upon his official bond.

The burden of proving such defense is upon the defendants.

Evidence that the treasurer used a safe placed in the treasurer's office for his use by the county commissioners, is immaterial.

The commissioners have no authority to release a treasurer from responsibility.

ON EXCEPTIONS.

DEBT upon the official bond of Thomas Pennell as treasurer of the county of Cumberland, for the year 1874, executed by Pennell as principal and the other defendants as sureties, containing the following condition: "The condition of this obligation is such that whereas the said Thomas Pennell has been duly elected to the office of county treasurer of said county and entered upon the duties thereof; now, if the said Thomas Pennell shall well and faithfully attend to the duties of said office and perform all things required by said office to be performed, from the first day of January, 1874, to the first day of January, 1875, the term to which he has been elected, then this obligation to be void; otherwise to remain in full force and virtue."

The defendants pleaded *non est factum*; with a brief statement setting out the conditions of the bond, and alleging in substance that Pennell performed the conditions therein contained according to the form and effect thereof; that he well and truly attended to the duties of, and performed all things required by, said office of county treasurer to be performed, from January 1, 1874, to January 1, 1875; that during that time, he applied all moneys received by him to the use of the county in defraying its expenses as directed by the county commissioners and the supreme judicial court by their written orders therefor; that he paid over to the treasurer of the law library association of the county, all moneys received of persons admitted as attorneys in the supreme judicial court; that during said term, annually, and as often as required by the commissioners, he exhibited an account of all moneys and effects belonging to the county, holden by him as treasurer, to the commissioners for adjustment, and the same was adjusted by them; that he has accounted with them for all receipts and payments during said time; and that he has performed all the duties prescribed in R. S., c. 8, and all other acts and statutes of the state applicable thereto.

That the plaintiffs provided a certain room in the city building in Portland, to be used as an office by the county treasurer, and placed therein a safe for the purpose of depositing and keeping therein the moneys and effects belonging to said county and received by the county treasurer; that Pennell placed the moneys and effects of said county in said safe, that being the only place provided by the county for the depositing and keeping of the same; that on the thirtieth day of December, 1874, the said Thomas Pennell being in said room occupied by the treasurer of said county, was suddenly set upon by robbers and instantly overpowered and rendered senseless and unconscious by reason of the violence and injury then and there inflicted upon him by said robbers, and that while the said Pennell was so senseless and unconscious the safe containing said moneys and effects was feloniously and burglariously broken open by said robbers, and said moneys and effects then and there belonging to said county were then and there feloniously and burglariously taken from said safe by said

robbers and carried away, against the will of said Pennell; and that said Pennell has never been able to recover possession of said moneys and effects from said robbers or from any other person, for said county, and from that time has never had possession or control of said moneys and effects or the means of acquiring possession and control thereof, and that said Pennell at the time of said robbery and at all times prior thereto was in the exercise of due care; that said robbery was without fault or negligence on the part of said Pennell, and that if said loss and robbery of said money and effects were occasioned by the fault of any party, it was through the fault and want of care and precaution on the part of the plaintiffs, in whose care and management said money and effects then were, and not on the part of said Pennell.

That the plaintiffs caused said loss and contributed thereto by reason of the room and safe provided by them being improper and unsafe and insufficient for the purposes aforesaid of said county.

That the said Pennell has accounted with the commissioners of said county of Cumberland for all moneys and effects so feloniously and burglariously robbed from said safe, and has paid over as required by law all moneys and effects received by him, so far as by the law under his said bond he is required to do, and that subsequently, to wit, on December 31, 1874, the said Pennell adjusted with the county commissioners of said county his account of all money and effects received by him for said county, during his term of office as treasurer of said county, from January 1, 1874, to January 1, 1875.

That if said Pennell has not actually paid over money or effects belonging to said county, received by him as treasurer, that said money or effects were feloniously and burglariously stolen and taken from said safe of said county in the manner and through the means as aforesaid.

The plaintiffs, by counter brief statement specifically denied every allegation in the defendants' brief statement, alleging, *inter alia*, that the said Thomas Pennell as the treasurer of said county of Cumberland, during the time named in said bond, had and received divers sums of money amounting in the whole to a large

sum of money, to wit, the sum of ten thousand eight hundred and twenty-three dollars and forty-one cents belonging to the plaintiffs and for the use of said county, and hath not accounted for and paid to the plaintiffs the same or any part thereof, although often requested so to do, but hath therein wholly failed and made default; and the said sums of money so had and received by the said Thoms Pennell as aforesaid in his capacity of treasurer of said county as aforesaid are still wholly unpaid and unsatisfied to said plaintiffs, contrary to the form and effect of the said condition of the said writing obligatory.

That if the said moneys and effects were feloniously and burglariously stolen from said Pennell in the manner set forth in his brief statement, which is denied, such a robbery would not be a valid defense to this action.

The plaintiffs introduced in evidence the bond declared on and the testimony of the county commissioners tending to show that in their settlement with the treasurer he said that he had been robbed of a certain sum of money belonging to the county, to wit, $9,973.95; that a room was provided by the county for the treasurer at the extreme end of the west corridor in the city building; that the county commissioners provided for the taking care of the room as they did of all the county offices and owned all the furniture, including a Tilton & McFarland safe, having a plate on its front containing the words, "Manufactured for Cumberland County Treasury;" that a demand was duly made. There was also put into the case the settlement with Pennell by the commissioners, at the end of which was the following certificate in the handwriting of Pennell but signed by the commissioners:

"Cumberland ss. January 21, 1875. This may certify that we have examined the accounts of Thomas Pennell from October 1, 1874, to December 31, 1874, and find them correctly cast and properly vouched for, and the balance due the county is thirty thousand seven hundred and eighty-one dollars and four cents, and we find that there is now in the treasury the sum of twenty thousand eight hundred and seven dollars and nine cents, which has been paid over to Roscoe G. Harding, county treasurer for

1875, and the balance, being nine thousand nine hundred seventy-three dollars and ninety-five cents, was robbed from the treasury on December 30, 1874."

The defendants put in plans showing the locality of the treasurer's office and its surroundings.

The defendants offered testimony tending to show that the safe was put into the treasurer's office in 1868 by the county commissioners for the purpose of depositing and keeping the moneys and effects of the county therein; that the moneys and effects of the county were usually deposited in the safe; that the new safe was substituted for an old one; all of which was excluded.

The defendants offered to prove that the money claimed by the plaintiffs in this suit to the amount of $10,823.41, was taken by robbery on the evening of the thirtieth day of December, 1874; that on said thirtieth day of December, 1874, the said Thomas Pennell being in said room occupied by said Thomas Pennell as the treasurer of said county, at about six o'clock in the evening was suddenly set upon by two robbers and instantly overpowered and rendered senseless and unconscious by reason of the violence then inflicted upon him by said robbers; that while the said Pennell was so senseless and unconscious, the safe in said office, in which said moneys and effects had been placed by said Pennell, was feloniously and burglariously opened by said robbers, the door of said safe being closed and the bolts turned, but not locked, and said money then and there in said safe was then and there taken by said robbers and carried away against the will of said Pennell; that said Pennell has never been able to recover any part thereof; and that said robbery was without the fault or negligence of said Pennell.

Thereupon, the presiding justice ruled "that, assuming the robbery proved as offered by the defendants without the fault of the plaintiffs, it would constitute no defense to this action."

The court further ruled as matter of law that the plaintiffs were entitled to recover interest on the amount of the deficiency from the first day of January, 1875. Thereupon a *pro forma* verdict was rendered for the plaintiffs in the sum of $10,823.41 (which comprised the amount alleged to have been stolen, together with

balance of errors in the settlement) with interest on same, amounting in all to $11,574.78.

The case was then marked law with the stipulation that, if the rulings of the presiding justice upon the questions of law shall not be sustained; or if the evidence of the robbery without fault on the part of the treasurer, together with the evidence reported and that offered and rejected which is legally admissible, would constitute a defense, or would authorize a jury to find in favor of the defendants, the verdict should be set aside and the action stand for trial.

Bion Bradbury & C. F. Libby, for the plaintiffs, contended:

I. That a depositary of public funds cannot avail himself of the ordinary circumstance which would discharge a bailee for hire, by reason of an imperative principle of public policy. This policy is founded in the danger of collusive defenses which the depositary could easily manage so as to make a strong case and which the government could have no means of rebutting, however false or simulated it might be. It has, therefore, been thought better to hold the party to the absolute payment or delivery of the money than to open the door to such frauds.

II. That by giving a bond in a penal sum for the performance of all the duties of his office without exception, the depositary makes himself by express contract an insurer of the public funds in his hands. *U. S.* v. *Prescott*, 3 How. 578. *U. S.* v. *Morgan*, 11 How. 154. *U. S.* v. *Dashiel*, 4 Wall. 185. *U. S.* v. *Keehler*, 9 Wall. 83. *U. S.* v. *Boyden*, 13 Wall. 17. *U. S.* v. *Bevans*, 13 Wall. 56. *U. S.* v. *Halliburton*, 13 Wall. 63. *Muzzy* v. *Shattuck*, 1 Denio, 233. *State* v. *Harper*, 6 Ohio St. 607. *Commonwealth.* v. *Comly*, 3 Barr. (Penn.) 372. *Union* v. *Smith*, 39 Iowa, 9. *Hancock* v. *Hazzard*, 12 Cush. 112. Whart. Neg. § 290.

The failure of Pennell to account for and pay over to the county the sum sued for, made him a defaulter, and his default dates from the expiration of his official term, and failure to account for all money "received by him for the use of the county." R. S., c. 8, §§ 7 and 16.

His duty to pay over the county's money at the expiration of his official term is independent of any statute provision. It results from the nature of his office, of which this is one of the plainest duties implied by the law.

His statement in the certificate signed by the county commissioners that "the balance being $9,973.95 was robbed from the treasury December 30, 1874" is not a legal accounting for the funds in his hands. The commissioners could not pass upon such a defense.

A sufficient demand for accounting appears, and interest follows the default to pay over the balance at the expiration of the term, December 31, 1875.

A. A. Strout, *G. F. Holmes*, (*Frye*, *Cotton & White*, with them) for the defendants.

VIRGIN, J. Debt on the official bond of Thomas Pennell as treasurer of the county of Cumberland, executed by him as principal with the other defendants as his sureties, and conditioned that he "shall well and faithfully attend to the duties of said office, and perform all things required by said office to be performed, from the first day of January, 1874, to the first day of January, 1875, the term to which he has been elected."

Under the brief statement pleaded, the defendants offered to prove, in substance, that on December 30, 1874, while Pennell was sitting in the treasurer's office, with the door of the safe therein closed and bolted but not locked, he was suddenly and violently beset, overpowered and rendered senseless by robbers, who, thereupon, against his will and without his fault, burglariously opened the safe and feloniously took and carried away therefrom, the sum of money belonging to the county not paid over by him at the close of his official term, and for the recovery of which this action was brought.

The presiding justice ruled that, assuming the robbery proved as offered, it would constitute no defense. The main question for decision involves the correctness of that ruling.

As the money was taken from the safe in the treasurer's office, no question relating to the ownership of bank deposits arises.

Counties are *quasi* corporations possessing but few powers and requiring a small number of officers. The general financial agents of a county are its county commissioners, whose powers and duties are prescribed by the statute. They have the care of its property and the management of its business; cause its taxes to be assessed; obtain loans for its use; order its money to be paid in defraying its expenses; and examine, allow and settle accounts of the receipts and expenditure of its moneys. R. S., c. 78, § 10. They act under oath but give no bond.

The moneys of the county are kept and handled only by the treasurer. He is required to be sworn and give a bond "for the faithful discharge of his duties in such sum as the commissioners order, and with such sureties as they approve." R. S., c. 8, § 4.

Moreover the statute also requires that every county treasurer, "holding any money or effects belonging to his county, shall annually and oftener if required, exhibit an account thereof to the county commissioners for adjustment." R. S., c. 8, § 16. In fact all the language of the statute relating to the subject matter, is predicated upon the idea that the moneys which come into the official custody of the county treasurer, are not his own private funds, but the county's; and that they remain so until legally paid out. R. S., c. 78, § 10. *Mechanics' Bank* v. *Hallowell*, 52 Maine, 545. If Pennell, instead of being robbed, had been sued and the money attached the attaching creditor would hardly expect to hold it; or if he had suddenly died, his successor in office would not have delivered over the money in the safe to Pennell's personal representative. *Thompson* v. *White*, 45 Maine, 445.

Experience had taught the people of this state that public treasurers with comparatively small salaries are sometimes tempted to try to increase the emoluments of their trust by using the money coming into their possession *virtute officii* for purposes of speculation not always financially successful; or by loaning it to friends who cannot always meet the notes given therefor. Consequently a statute, (Stat. 1860, c. 161, embodied in R. S., c. 120, § 7,) directed against such abuses, and entitled "an act to prevent the embezzlement of public money," was enacted, making such acts larceny and punishable accordingly. If, however, the

" money in the possession of the treasurer or under his control by virtue of his office " be his own and not the county's, then we have the anomaly of a person being liable to be indicted and punished for larceny for using or loaning his own money.

In some of the states, however, by force of their statutes, treasurers and collectors become responsible as debtors for the money which comes into their possession by virtue of their office. *Colerain* v. *Bell*, 9 Met. 499,—a case against a collector. *Hancock* v. *Hazzard*, 12 Cush. 112,—against a town treasurer. *Muzzey* v. *Shattuck*, 1 Denio, (N. Y.) 233,—against a collector. This last case was approved in *Looney* v. *Hughes*, 26 N. Y. 514, and in *Perley* v. *Muskegon*, 32 Mich. 132,—case against a county treasurer. We have no such statute as this relating to county treasurers; and as before remarked, the money which comes to their official custody, is public and not private property.

The office of county treasurer is a public office; and we have sought in vain to find something in the common law which distinguished a public treasurer or depositary from other custodians of property, public or private. In some jurisdictions his duties and his responsibilities even have been increased and multiplied by various provisions of statutes; but in the absence of such statutory provisions, his duties and obligations remain where the common law of bailment leaves them.

In this state, the official duties of the county treasurer are prescribed in part by the common law and in part by the statute; the provisions of the latter more particularly defining his special duties, leaving his general duties unmodified. When the treasurer elect accepts his office, he thereby takes upon himself all the duties thereof, general as well as special. His general duties, arising from the very nature of his office, are to receive the money of the county lawfully deposited with him, keep it safely and pay it out according to law. *State* v. *Harper*, 6 Ohio St. 607. From these general duties accepted springs a legal obligation that he will bring to their performance good faith and reasonable skill and diligence; to enforce which, the statute already referred to requires him to take upon himself the moral obligation of an oath that he will faithfully perform the duties which he has assumed,

and give a bond with sureties with a condition of like import. R. S., c. 8, § 4.

As already intimated, the responsibility of the county treasurer, in the absence of any statute enlarging it, is measured by the common law rule applicable to bailees for hire other than common carriers and innholders. He is bound, *virtute officii*, to exercise good faith and reasonable skill and diligence in the discharge of his trust; or, in other words, to bring to its discharge that prudence, caution and attention which careful men usually exercise in the management of their own affairs; and he is not responsible for any loss occurring without any fault on his part. That this substantially is the rule by which the common law measures the responsibility of those whose official duties require them to have the custody of property, public or private—such as officers of courts having the custody of the property of suitors therein; trustees, except when they mix the trust property with their own, whereby the identity of the former is lost; marshals, appointed by courts of admiralty to take care of vessels and cargoes; receivers, etc., etc.,—is amply illustrated by the numerous authorities cited by Bradley, J., in *U. S.* v. *Thomas*, 15 Wall. 337, 343, 344. See also 1 Perry on Trusts, § 441, and notes.

Sheriffs, however, will not be excused for the escape of a person under arrest, although an armed multitude break the jail and rescue him; for the sheriff has the power of the county at his beck, to aid him in the execution of precepts; and "the law supposes the *posse* to be a sufficient defense against a rescue, and that no force is able to resist successfully the sheriff and his *posse*." Fortescue, J., in *Crompton* v. *Ward*, 1 Strange, 430. Whether a sheriff is held to the same strict accountability in relation to property attached or money collected, is both declared and denied by high authorities. Story Bailment, § 130. *Browning* v. *Hanford*, 5 Hill (N. Y.), 588. S. C. in error, 5 Denio, 586, and cases cited in the chancellor's opinion. *Moore* v. *Westervelt*, 21 N. Y. 103. *Phillips* v. *Lamar*, 27 Ga. 228. Some authorities make a distinction between property attached on mesne process and that seized on execution. *Bridges* v. *Perry*, 14 Vt. 262. *Briggs* v. *Taylor*, 28 Vt. 180. In the latter case, Redfield, J., says: "The

degree of diligence required of sheriffs is that of a bailee for hire, which is that which the manner and nature of his employment make it reasonable to expect of him as a prudent and careful man." The authorities are the other way in Missouri. *State* v. *Gatzweller*, 49 Mo. 26.

Executors' and administrators' responsibility is measured by that of trustees. "They are liable only for want of due care and watchfulness, and reasonable skill and prudence." 3 Redf. Wills, 394.

The rigorous rule governing a common carrier—one whose general occupation is the carrying for hire—has for a long time been established, and it is said to have been founded in necessity. He is self-appointed. Being unknown to his employers and not employed in special confidence, he must answer for all the risks which the salutary rule requires; otherwise protection against combinations between such unknown persons and others with whom they might collude, would be impracticable. But a county treasurer is not of this description. He is selected by the people in special confidence, to receive their money and disburse it as the statute directs. For an honest and prudent discharge of these plain and well known duties his stipulation with the law binds him and his employers (constituents) pay him. His comparatively small salary shows that he is no insurer. And for any losses that happen outside of this obligation, without any fault of his, the inhabitants of the county must bear.

Of course, the legislature may at will, by general statute, change this rule of responsibility of public officers, as it can, within certain well known constitutional limits, any other rule of common law. The office being created by the statute, it may be subjected to any reasonable conditions by the statute. A change of the rule, however, will not result necessarily from an addition of new duties. We look in vain through the ten additional sections of R. S., c. 2, enacted in 1856, "for the better security of moneys in the state treasury," for any change in the degree of responsibility of the state treasurer. To effect this, some provision is necessary which clearly shows the intention of dealing with that subject matter as distinguished from mere duty. It may be

done in various ways. A positive provision to that effect will accomplish it. Thus R. S., c. 63, §15, after prescribing the conditions of the bond of a register of probate, provides: "And if he neglects to complete his records for more than six months at any one time, sickness or any extraordinary casualty excepted, such neglect shall be adjudged a forfeiture of his bond." So by Stat. 1877, c. 168, § 1, "any neglect by any county treasurer to make and forward the report provided in R. S., c. 136, § 13, shall be a breach of his official bond." So in Indiana, after prescribing the duties of county treasurers, the statute of that state provides that, "if any county treasurer shall neglect or refuse to pay over all moneys as provided herein, he and his sureties shall be liable for the full amount which he should have paid over, together with interest and ten per cent damages." 1 G. & H. 68, § 127. So the U. S. statutes are very rigorous in relation to collectors, receivers and depositaries of public money, which may be found cited in the notes on page 346 in 15 Wall. See also the statute of N. Y. which imposes a definite liability on town collectors and their sureties, recited in *Muzzey* v. *Shattuck*, 1 Denio, 233, 236–8. So the statute of Ohio, in force when *State* v. *Harper*, 6 Ohio St. 607, was decided, provided (§ 24): "If any county treasurer shall fail to pay over all money with which he shall stand charged . . . suit may be instituted against him and his sureties; and it is made lawful for the court, at the first term thereafter, to render judgment against them for the amount due from such treasurer, with legal interest and a penalty of ten per cent thereon, from which judgment there shall be no appeal, or stay of execution; and the property of such delinquent treasurer and his sureties may be sold without appraisement."

The legislature of this state has never expressed such intense solicitude in relation to their public money in the hands of their treasurers.

Such then being the extent of the treasurer's responsibility at common law, and there being no statute increasing it, unless it arises from the bond which the statute requires him to give, we pass to an inquiry into the effect which his bond has upon his obligations.

As already seen the statute requires a bond stipulating "for the faithful discharge of his duties." This being the only condition, recourse must be had to the common and statute law for a specification of his duties. *Bevans* v. *United States*, 13 Wall. 61. The tender of a bond containing that condition, "in such sum as the commissioners order and with such sureties as they approve in writing," entitles the treasurer elect, after taking the statute oath, to enter upon the discharge of his official duties. He might enter into a common law bond containing stipulations making him liable at all hazards. But one requiring of him more than a "faithful discharge of his duties" cannot be demanded of him as a condition precedent to his being allowed to hold the office. The same requirement is made of town treasurers (R. S., c. 6, § 151); of collectors (c. 6, § 100); of treasurers of savings institutions (c. 47, § 89); of receivers of banks (c. 47, § 61); and in fact of all official depositaries who receive and disburse the funds of their respective constituents.

In 1845, in *United States* v. *Prescott*, 3 How. 578, it was decided in substance that, while a receiver or other depositary of the public funds is a bailee, he is a special bailee; made such by his bond which constituted him an insurer; and that public policy required the party to be held absolutely. This case was followed, with more or less consistency, by numerous cases, in various jurisdictions, in which the question was directly or indirectly involved; among them the following: *U. S.* v. *Morgan*, 11 How. 162. *U. S.* v. *Dashiel*, 4 Wall. 182. *U. S.* v. *Keehler*, 9 Wall. 83. *Boyden* v. *U. S.* 13 Wall. 17. *Bevans* v. *U. S.* 13 Wall. 56. *U. S.* v. *Thomas*, 15 Wall. 337. *Commonwealth* v. *Comly*, 8 Penn. St. 372. *State* v. *Harper*, 6 Ohio St. 607. *New Providence* v. *McEachron*, 4 Vroom (N. J.), 339. *Taylor* v. *Morton*, 37 Iowa, 550. *Union* v. *Smith*, 39 Iowa, 9. *Halbert* v. *State*, 22 Ind. 125. *Morbec* v. *State*, 28 Ind. 86. *Roch* v. *Stinger*, 36 Ind. 346. *Steinbach* v. *State*, 38 Ind. 483. *Perley* v. *Muskegon*, 32 Mich. 132.

All this long array of cases follow and, so far as the point under examination is concerned, depend upon *U. S.* v. *Prescott*, *supra*; "prior to which," says Miller, J., "I do not believe

there was any principle of public policy recognized by the courts, or imposed by the law, which made a depositary of the public money liable for it, when it has been lost or destroyed without any fault, or negligence, or fraud on his part, and when he had faithfully discharged his duty in regard to its custody and safe keeping." *U. S.* v. *Thomas*, 15 Wall. 354. To a similar purport, see opinion of Cowen, J., in *Browning* v. *Hanford*, 5 Hill (N. Y.), 591. And still the doctrine is strenuously urged for holding depositaries (as it is said) "strictly to the contract;" "for," say the court in *Commonwealth* v. *Comly*, *supra*, "if they were to be let off on shallow pretenses, delinquencies, which are fearfully frequent already, would become incessant." Every one will concur in this statement literally construed as an abstract proposition; but when "shallow pretenses" are intended to include robbery without fault of the officer robbed, we are compelled to withhold our concurrence.

Notwithstanding the high character of the several courts whose decisions are above cited, we cannot yield our convictions as to the construction to be given to the bond in such case, or concur in relation to the new-born public policy, based upon supposed facility or temptation, which depositaries of the public money are said to possess, for collusive robberies. "For," as was said by Readfield, J., in *Bridges* v. *Perry*, 14 Vt. 262, "we cannot believe that they are founded upon any just warrant, either of sound judgment or constant experience." Even that old doctrine which the law by necessity imposed in early times upon common carriers has practically become obsolete, since they are allowed to mitigate that original rigorous accountability by any stipulations which stop short of an excuse for their own negligence.

On the contrary, this is the first case in this state in which the "shallow pretense" of robbery, without fault on his part, has been interposed by a treasurer in an action upon his official bond; ever since the decision of *Potter* v. *Titcomb*, 7 Maine, 302, the people of this state have entertained a different view from that promulgated for the first time in *U. S.* v. *Prescott*, as to the effect of an official bond stipulating for a "faithful discharge" of official duties. In the case last cited, Mellen, C. J., in discussing the

nature of official bonds and the accountability of sureties thereon, said: "The design of all official bonds is to secure from losses those who are or may be interested in the faithful discharge of the duties mentioned in them. Such bonds are given to protect against damage occasioned by unfaithfulness, negligence or dishonesty in such officers. . . Sureties on such bonds are, in some respects, like underwriters upon the pecuniary responsibility and official fidelity of their principals."

So, in speaking of the official bond of the state treasurer, Appleton, C. J., in *Mechanics' Bank* v. *Hallowell*, *supra*, said: "The bond required is not so much for the moneys as for the faithful discharge of his duties in reference thereto. For the one, it would be entirely inadequate; while for the other, it might be amply sufficient."

So Miller, J., in the opinion already quoted from, while speaking of *U. S.* v. *Prescott*, and *U. S.* v. *Morgan*, said: "When the case of *U. S.* v. *Dashiel*, *supra*, came before the court, I was not satisfied with the doctrine of the former cases. I do not believe now that, on sound principle, the bond should be construed to extend the obligation of the depositary beyond what the law imposes upon him, though it may contain words of express promise to pay over the money. I think the true construction of such a promise is to pay when the law would require it of the receiver, if no bond had been given; the object of taking the bond being to obtain sureties for the performance of that obligation." He then adds what we have heretofore quoted.

Such a construction has been put upon the bond of bank-tellers (*Union Bank* v. *Clossey*, 10 Johns. 27; S. C. 11 Johns. 182. *American Bank* v. *Adams*, 12 Pick. 303); and that of cashiers (*Minor* v. *Mechanics' Bank*, 1 Pet. 46, 69. *Commercial Bank* v. *Ten Eyck*, 48 N. Y. 305).

The doctrine that the official bond of a public depositary rendered him an insurer of the public funds in his possession is nowhere recognized by Judge Story. On the contrary, he was of the opinion that robbery is a good defense. Col. John L. Tuttle, a U. S. paymaster, was murdered and robbed of the public funds in his official custody, and an action was brought therefor against

Samuel Hoar, Jr., as administrator of Tuttle's estate. In the trial of the action at the May term, 1822, of the U. S. C. C. in Boston, the defense of robbery was set up, and the jury, under the instructions of Judge Story presiding, returned a verdict for the defendant—showing that the court must have ruled that robbery was a good defense. It seems the question was not carried any further and hence the case was not reported. In *U. S.* v. *Hoar*, tried the year before, and reported in 2 Mass. 311, other questions were raised.

In New York, in an action on a county treasurer's bond, conditioned that he would "faithfully execute the duties of said office, pay according to law all moneys which shall come into his hands as treasurer, and render a just and true account thereof," etc., the supreme court, comprising Nelson, C. J., and Bronson and Cowen, JJ., held the treasurer's liability limited by the common law rule; and that he was not responsible for money stolen from the treasurer's office without any fault on his part. *Albany* v. *Dorr*, 25 Wend. 438. This case was affirmed by the court of errors, though by an equally divided court, Chancellor Walworth voting for affirmance. 7 Hill, 584. Note *a*.

Subsequently, in an action on a town collector's bond, the same court, consisting of Bronson, C. J., and Beardsley and Jewett, JJ., held the collector liable under the same circumstances. After an elaborate analysis of the statutes pertaining to collectors,—one provision of which is that the bond shall be a lien on the real estate of the collector, and of his sureties, till the condition be fully satisfied—the court said: "The statute imposes a definite liability on the collector and his sureties for the omission to collect and pay; and whether that omission is the result of misfeasance or neglect, unavoidable accident or felony committed by another, we do not think it furnishes any defense to the action." *Muzzey* v. *Shattuck*, 1 Denio, 233. The decision of this case is thus placed expressly upon the provisions of the statute relating to collectors. It was cited with approbation, so far as the reasoning is concerned, in *Looney* v. *Hughes*, 26 N. Y. 514, which was also an action on a collector's bond. Selden, J., speaking for the court, said: "The bond itself is a creature of the statute. Its

form is prescribed by the statute. Independently of any statutory provisions on the subject, the obligors in such bond would only be liable to pay the damages which might accrue in consequence of any default upon the part of the collector. The conclusion is the necessary result of the provisions of the statute," citing *Muzzey* v. *Shattuck*.

Albany v. *Dorr* and *Muzzey* v. *Shattuck* are thus decided upon distinct and independent grounds, and are not inconsistent. The former is alluded to in the latter, but in nowise overruled, and has been cited with approbation as already stated *ubi supra*.

So in England, in an action by the trustees of a Benefit Building Society, established and organized under the statutes 6 and 7, W. 4, c. 32, and 10 G. 4, c. 56, against the sureties of the treasurer, the court of Q. B. in 1852, held the same doctrine contended for. The treasurer covenanted, *inter alia*, that he would "faithfully discharge all the duties of treasurer;" obey the directions and instructions of the trustees in all particulars relating to his duties; and, in particular, would faithfully and punctually account to them for all moneys, etc., which he in his office should receive. He was also required by the rules of the society to pay over in a given time the same moneys received. The defendants pleaded, *inter alia*, that, after the treasurer's receipt of the money sought to be recovered, and before the time when he ought to pay it over, he, without any fault on his part, was violently robbed of all said money; and that thereby he was unavoidably, without his fault, prevented from paying over the same. On the trial of an issue joined on these facts as alleged, the jury returned a verdict for the defendants.

On motion for judgment for the plaintiffs, *non obstante veredicto*, it was urged that a loss by robbery is not an "accounting" within the covenant; that money once received by the treasurer constituted a debt not dischargeable by the debtor's loss however unavoidable; that he is treated as a debtor by St. 10 G. 4, c. 56, §§ 20, 22; that, if bailee, the treasurer's liability is not less than that of a carrier or innkeeper; and that the intention of the statutes is, at all events, to protect the funds of poor people intrusting them to these societies. But Lord Campbell, C. J., and Wight-

man, Erle and Crompton, JJ., who sat, overruled the motion, unanimously declaring that they entertained no doubts upon the points. *Walker* v. *British Guar. Ass.*, 18 Ad. & E. (N. S.) (83 E. C. L.), 276.

We consider the English case cited as directly in point and correctly decided. Were the law otherwise in this state, and known to be such, faithfulness and honesty, even if they continued to be considered commendable personal qualities, would be held, if not mere abstractions, matters of secondary importance at best in candidates. Such qualifications, accompanied by the highest capability, would, in the absence of sufficient property in the principal to secure his sureties, fail to obtain them. For many a responsible person would gladly sign a bond as surety, guarantying the faithfulness, honesty and capacity of his neighbor which were so potent in effecting his election to the responsible public station of county treasurer, who would long hesitate to insure the public against possible loss happening in spite of such qualities; for to insure against such a loss is not only vouching for the integrity of the officer, but practically for that of the rest of mankind—that they will not rob him.

After the promulgation of the contrary doctrine, it was deemed so unjust, harsh and oppressive that congress enacted a statute (14 U. S. St. 44) authorizing the court of claims to hear and determine the claims of a disbursing officer for relief; and, in case the loss be found to be without fault or negligence on the part of such officer, to make a decree setting forth the amount thereof, which shall be allowed as a credit by the accounting officers of the treasury in the settlement of his accounts,—thus practically overruling the decisions not allowing losses thus occurring to be set up in defense. We have no such court in this state. Our only courts of claims are the supreme and the superior courts. And we do not perceive why such a loss cannot be set up in defense, if it be a proper subject for a claim to be allowed. Of course the burden is upon the defendant. If he can satisfy the jury that he was violently robbed, without any fault or negligence on his part, it is quite as well as to try the same issue in the form of a claim before some other tribunal.

The fact that the treasurer used the safe placed in the treasurer's office by the county commissioners, for the depositing of the money and other effects of the county therein, was no defense and rightly excluded. As already seen, the commissioners, like selectmen of a town, have limited powers. They have no control of the money of the county, though they "examine, allow and settle accounts of the receipts and disbursements of" it, and "have the care of its property and the management of its business." R. S., c. 78, § 10. But the treasurer keeps and handles the money; and, in doing this, he acts on his own responsibility and independently of the commissioners. They are creatures of the statute, but find therein no authority to direct how, where or in what manner the funds shall be kept. If they could require him to keep the funds in a safe placed by them in the treasurer's office, they could also compel him to place them elsewhere; and thus absolve him from the necessity of exercising his own discretion, prudence and diligence, and relieve him from all responsibility in that behalf. On the contrary, it is optional with him to keep the funds wherever he deems it expedient; and by keeping them in the safe placed there for his convenience simply, he assumed the risk of so doing. The commissioners could not thus bind the county any more than the selectmen can their town. *Farmington* v. *Stanley*, 60 Maine, 472. Nor could they release their treasurer from any liability arising from the use of the safe, if he thereby through negligence incurred any. See *Halbert* v. *State*, *supra*, precisely in point.

Our conclusion therefore is, that the treasurer's degree of responsibility was simply that which the common law imposed upon him as bailee for hire; that the statute of this state did not extend or enlarge it; that his official bond does not increase his responsibility, but simply affords security for the performance of his legal obligations; that if, without fault or negligence on his part, the county treasurer is violently robbed of money belonging to the county, it is a valid defense, *pro tanto*, to an action upon his official bond; that the burden of proving such a defense is upon the defendants; that evidence that the treasurer used a safe placed in the treasurer's office for his use by the county commis-

sioners, is immaterial; and that the commissioners have no authority to release a treasurer from responsibility.

If the people, who elect their own depositaries and place money in their hands, are willing to continue it there subject only to such obligation, and do not conclude to change it by legislative enactment, we do not conceive it to be our duty to make an imaginary public policy, never until recently recognized by any court, the cause for creating a new obligation by judicial legislation.

Exceptions sustained.
Action to stand for trial.

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

APPLETON, C. J., DANFORTH and LIBBEY, JJ., did not concur.

CHARLES SEYMOUR *vs.* JOSEPH D. PRESCOTT.

Franklin. Opinion February 22, 1879.

Duress. Consideration.

In an action upon a promissory note by the payee against the maker, the defense alleged threats to have been made by the plaintiff to induce the defendant, as he was about to take the train from Knoxville, Tenn.,—in infirm health—for his home in Maine, to sign the note for the amount of the plaintiff's claim against the defendant's son; such threats being to the effect that defendant would not be allowed to leave Knoxville till he signed the note, but there being no menace of violence, and no pretense that process authorizing an arrest had been procured, nor that an officer was in attendance to make such arrest; *Held*, that this does not fall within the legal definition of duress, and affords no legal defense to the note.

The note not having been procured by duress, the discharge of the plaintiff's claim against the defendant's son was a sufficient consideration.

ON REPORT.

ASSUMPSIT on a promissory note of the following tenor:

"Knoxville, Tennessee, June 11, 1870. One year after date I promise to pay to the order of Charles Seymour, with interest at the rate of ten per cent, one hundred and ninety-six and 15–100 dollars at said Seymour's office in Knoxville, Tenn., value received. (Signed) J. D. Prescott."

Answer, duress and want of consideration. The material facts appear in the opinion.

S. Belcher, for the plaintiff.

J. B. Severy, for the defendant, in a written brief of thirty-seven pages, cited, among others, the following authorities:

I. Duress. 1 Par. Con. (5 ed.) 392, 393. Met. Con. 23, and ref. 2 Greenl. Ev. 302. *Robinson* v. *Gould*, 11 Cush. 57. *Foshay* v. *Ferguson*, 5 Hill, 154. *Bush* v. *Brown*, 19 Am. R. 695–8, and ref. 49 Ind. 573. *Alexander* v. *Pierce*, 10 N. H. 494. *Worcester* v. *Eaton*, 13 Mass. 371. *Taylor* v. *Jaques*, 106 Mass. 291. *Whitefield* v. *Longfellow*, 13 Maine, 146.

II. Want of consideration. Met. Con. 171, 172. *Packard* v. *Richardson*, 17 Mass. 129. *Bixler* v. *Ream*, 3 Penn. 282. *Bingham* v. *Kimball*, 17 Ind. 396.

SYMONDS, J. This case was tried at *nisi prius*, by consent of parties, before the presiding justice, who, after hearing the evidence, ruled, as matter of law, that it did not sustain the claim of the defendant in respect either of want of consideration for the note in suit, or of its procurement by duress; and, as these were the only grounds of defense, ordered judgment for the plaintiff for the amount of the note. The evidence is now before the court upon exceptions taken by the defendant to this ruling thereon.

There is an essential inconsistency between the testimony for the plaintiff and that for the defendant in regard to the transactions which led to the giving of the note and the circumstances attending it. The contradictions cannot be reconciled. The statements cannot both be true.

In reference to the testimony for the plaintiff, it is sufficient to say that, if it is to be believed, there can be no pretense either that a legal and adequate consideration for the note was wanting, or that the defendant's signature was obtained while he was under the influence of any fear or restraint. It was, on the contrary, if this evidence is credible, a note given for money loaned to defendant, at his request and for his accommodation; made at the time and for the amount of the loan.

The only question, then, to be determined is whether the testimony offered by the defendant sustains either of the grounds on which the defense proceeds.

The defendant is a resident of Maine, who at the date of the note was in Knoxville, Tennessee, where he had gone as agent for his son for the purpose of effecting the sale of certain real estate, which had previously been in charge of the plaintiff, a real estate agent in Knoxville. On June 4, the defendant says, he finished his business, paid the plaintiff $100 for his commissions and services in completing the sale and writing the deeds, and then regarded his dealings with the plaintiff as at an end. The defendant was at that time seventy-one years of age, and, according to this account, in a state of health so poor that he did not dare to return to Maine alone, and therefore remained in Knoxville about a week for the purpose of making the journey in the company of some friends, Mr. Holt and his family, who were going as far as New York. Just as the defendant was about to take the train with these friends he says the note was signed, and under circumstances which may be stated in his own language. "I knew about what time the cars started, . . and as the time was expiring and I thought I ought to be there, Mr. Seymour came into the house with an inkstand and a pen and some papers in his hands and requested me to execute the note on my son's account. I said to Mr. Seymour, 'The cars are about to leave, Mr. Holt has already gone up. I can't stop a minute to see to this matter.' Said he, 'You can't leave the place until you sign this note,' holding it up to me. Well, I felt for a moment as if my life depended on going home at that time with Mr. Holt. So great was my terror that I seized the pen and signed the note, and immediately made my way to the depot. He held the note and this paper in his hand."

The paper which the plaintiff is said to have held in his hand at that time with the note was a bill against the defendant's son, containing items of commissions and cash expended, on which the balance due was the same as the face of the note in suit. This bill, receipted by the plaintiff, was taken by the defendant after signing the note, and on his return home was delivered to his son, by whom it has since been retained.

This is substantially the defendant's account of the manner in which the note was given, the details of which are stated more fully in the report of the case.

Giving, then, to all the testimony introduced by the defendant upon this point the weight of truth, does it prove the duress alleged?

The plaintiff claimed that a balance of account equal in amount to the face of the note was due to him from the defendant's son for services and disbursements. It was not, so far as the case shows, a fraudulent or fictitious claim. There is nothing to impeach the good faith of the plaintiff in asserting that amount to be due him from the defendant's son, nor to indicate that he was knowingly preferring a claim when he had none, or intentionally demanding more than was due. From the subsequent conduct and correspondence of the parties a strong inference may be drawn that the plaintiff's claim against the son was not without foundation; but, in considering the ruling of the court, it is enough to say that, admitting all that the testimony for the defendant tends to show, still nothing appears to indicate that the plaintiff's statement of the account between himself and the defendant's son was not an honest one, correct from the plaintiff's point of view, and showing the balance which he in good faith believed to be due.

Under these circumstances, the plaintiff, it is said, called upon the defendant as he was about to take the train, presented the bill, and stated that the defendant could not leave town until the note was signed.

Giving full effect to all that the evidence shows in regard to the age and infirmity of the defendant, and his anxiety to reach home, we see nothing in the threats used, or in the situation, to excite in his mind a reasonable belief that he was under the necessity to give his own note for his son's debt, or a reasonable apprehension of serious consequences to himself if he did not sign; nor did he attempt to avail himself of the resources at his command to avoid compliance.

What had the defendant to fear? It was not physical force or resistance, for none was offered; and, if offered, no reason appears

why an outcry would not have summoned aid and prevented violence. But there is no evidence whatever that the defendant was resisted in any attempt to leave without signing the note. He made no such attempt.

Was it the use of legal process, and defendant's arrest and detention thereby?

It is difficult to believe this when we remember that the bill itself was on its face a bill against the defendant's son, not against himself. Nor did the defendant wait till even an apparent necessity to sign the note arose. He made no effort to proceed on his way. He did not attempt to detain his friends to accompany him on a later train if he was obliged to stay. Besides these friends in Knoxville, according to his own statement he had with him an amount of money, part of the proceeds of the real estate sold, amply sufficient to procure even strangers for bail. Under these circumstances, the act of the defendant in signing the note, according to his own account of it, was rather a yielding to the importunity, than submission under the threats and violence, of the plaintiff. The case presented, upon the defendant's testimony, is not that of one who executes a contract because at the time he believes he is compelled to do it, but rather that of one who, knowing that he is under no compulsion, for the sake of accomplishing some purpose he has in mind, voluntarily yields to the demand which is made on him without right, and thereby assumes the liability.

The recent opinion of the court in *Harmon* v. *Harmon*, 61 Maine, 227, renders the citation of authorities upon this point unnecessary. It may safely be stated, as the result of them, that words like those alleged to have been used by the plaintiff, unaccompanied even by a menace of violence, and without a pretense that process authorizing an arrest had been procured, or that an officer was in attendance to make such arrest, do not fall within the legal definition of duress. To act upon them is not to yield to a reasonable fear of immediate danger, but is, on the contrary, to give the consent which completes the contract.

To avoid the danger of losing a particular train, a danger which certainly might be regarded as remote rather than immediate,

until an attempt was made to escape it in some other way, the defendant, as he says, gave his own note in payment of a debt claimed to be due from his son. The note not having been obtained by duress, it follows that the discharge of the plaintiff's claim against the son was a sufficient consideration.

An examination of all the evidence shows that the law, which does not allow the defendant to avoid his note given under these circumstances, works no injustice in this instance.

Exceptions overruled.

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

WALDO T. PEIRCE *vs.* JOHN P. BENT,
and
JOHN P. BENT *vs.* WALDO T. PEIRCE & others.

Penobscot. Opinion April 21, 1879.

Judgment. Set-off. Common law and statute right.

Judgments in cross actions may be set off, the one against the other, when the parties in interest are the same, on motion addressed to the court in which one or both of the actions are pending; and this right exists at common law, independent of statute law.

A judgment in favor of the principal alone may be applied in satisfaction of a judgment against him and his sureties.

Such a set-off will not be allowed to defeat an attorney's lien for the taxable costs.

An assignment will not defeat the right of set-off, if both causes of action existed at the time the assignment was made.

If the right of set-off had attached at the time of the assignment, the assignee must take the demand *cum onere*,—with the right of set-off still clinging to it.

FACTS AGREED.

ON MOTION, filed by said Peirce to have an off-set of judgments, the one against the other, so far as the smaller goes, except the costs due the attorneys. The facts are as follows:

On the 19th day of May, 1873, said John P. Bent brought his action of trover against said Waldo T. Peirce, for the wrongful and unlawful conversion of two promissory notes of hand for

$600 and interest, each dated January 6, 1873. Said notes were signed by one Fuller & Stanford, and payable to said Bent or order, and not by him negotiated. Said action was made returnable to the supreme judicial court, October term, 1873, and there entered and continued to April term, 1874, at which time the action was tried by a jury, and a verdict rendered for the plaintiff for $1,308.50 damages. At the same term defendant filed motion to set aside said verdict as being against law, evidence and the weight of evidence, and also on the ground of newly discovered evidence; and also filed exceptions; and said case was taken to the law court, and there considered.

The full court affirmed the verdict, and at the April term of said court, 1875, (to wit, on the 8th day of May, 1875,) judgment was rendered on said verdict, and execution issued thereon, June 10, 1875, for $1,389.19 damages, and $35.04 costs of suit.

On the 14th of June, 1875, said Waldo T. Peirce filed his petition to review the above named judgment, and prayed for a writ of *supersedeas*, to stay the enforcement of said execution and judgment against him; which *supersedeas* was ordered by the court, upon said Peirce filing the statute bond required in such case; and said Peirce thereupon filed said bond, duly approved, signed and sealed by himself, O. M. Shaw, David Fuller and Samuel Stearns, (the other defendants in action *Bent* v. *Peirce & others*) in the penal sum of $2,848.46, dated June 14, 1875.

Said petition for review was presented to the full court, and upon hearing before said court, the order of court thereon was "writ denied," (see *Peirce* v. *Bent*, 67 Maine, 404,) and judgment for costs taxed at $30.00, rendered in favor of said Bent, and against said Peirce, July 3, 1877, and execution issued thereon July 9, 1877, which is still unsatisfied.

On the 30th of July, 1877, said John P. Bent, having paid nothing to Messrs. Brown & Simpson, and F. A. Wilson, his counsel in the above entitled suits referred to, for services and disbursements by them done, performed and made, executed and delivered to said Brown & Simpson, and F. A. Wilson, an assignment of said judgment and execution, and also of said bond, for the purposes therein stated.

On the 6th day of August, 1877, said assignees of said bond brought a suit thereon, in the name of said Bent, (and for their benefit) against said Peirce, Shaw, Fuller, and Stearns, returnable to this court, October term, 1877, which was continued to January term, 1878, and at said January term, 1878, was defaulted, and now stands defaulted.

On the 24th day of June, 1874, said Waldo T. Peirce brought an action of assumpsit on account annexed, against said John P. Bent, and entered said action at the October term of the supreme judicial court, 1874, Penobscot county, and at the April term of said court, 1877, recovered judgment against said John P. Bent for $5,688.85 debt, and $290.27 costs of suit. Judgment rendered July 3, 1877. Execution issued thereon August 29, 1877.

On the 30th day of August, 1877, said Waldo T. Peirce brought an action of debt on said last named judgment, against said John P. Bent, and entered said action at the October term, supreme judicial court, Penobscot county, 1877, and at said term, on the 37th day of said term, said action was defaulted, but judgment has not been entered up in either said suits brought on said bond, nor on said last named suit, brought on said judgment.

The law court to determine, upon the evidence reported, whether the set-off claimed shall or shall not be made, according to the legal rights of the parties.

The bond, given by said Peirce on his petition for review, was signed by O. M. Shaw, David Fuller and Samuel Stearns, and is of the following tenor:

"Know all men by these presents, that I, Waldo T. Peirce, of Bangor, county of Penobscot, am holden and stand firmly bound and obliged unto John P. Bent, of said Bangor, in the full and just sum of $2,848.46, to be paid to the said John P. Bent, his executors, administrators, or assigns. To which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, firmly by these presents.

"Sealed with our seal. Dated the fourteenth day of June, one thousand eight hundred and seventy-five.

"The condition of the above obligation is such that, whereas on petition filed at the April term, 1875, of the supreme judicial

court for Penobscot county, in favor of said Peirce against said Bent, praying for a review of judgment rendered at said term of court, the justices of said court have granted a *supersedeas* to stay the execution issued in said case, which execution is in favor of said Bent, and against said Peirce, for the sum of $1,389.19 damages, and $35.04 costs, as will more fully appear by reference to said petitions, and to the records of said court.

"Now if said Peirce shall pay the amount of said damages and costs, if the petition is denied or the amount of the final judgment in review if it is granted, with interest thereon at the rate of twelve per cent from this date to the time of final judgment, then this deed shall be void—otherwise in full force."

The assignment made by Bent is as follows: "Bangor, July 30, 1877. In consideration of my indebtedness to Messrs. Brown & Simpson, and F. A. Wilson, counselors at law, Bangor, for the professional legal services to me rendered, done and performed, and moneys paid and advanced in and about certain suits in law between myself and Waldo T. Peirce, of Bangor, pending in the supreme judicial court, Penobscot county, within and during the three or four years last past, as by the dockets and records of said court fully appear, viz: Due to said Brown & Simpson the sum of twelve hundred fifty-two dollars and sixty-four cents ($1,252.64) and due to said F. A. Wilson the sum of two hundred and fifty dollars ($250), in all the sum of fifteen hundred and two dollars and sixty-four cents, and as addition to the lien on the claim and demand hereinafter described, which lien I hereby recognize and affirm, do hereby sell, transfer, set over and assign unto the said Brown & Simpson, and F. A. Wilson, a certain bond, bearing date June 14, 1875, signed by Waldo T. Peirce, and David Fuller, O. M. Shaw and Samuel Stearns, sealed with their seals, for $2,848.46, conditioned among other things to pay the amount of a judgment recovered by said Bent, against said Peirce, in the S. J. court, Penobscot county, April term, 1875, for $1,389.19 debt or damages, and $35.04 costs in said action, if a petition to review said action was denied by the said court (an application or petition having been made and filed by said Peirce) with interest on said sums at twelve per cent from the date of said

bond to the time of final judgment, to wit: April term, 1877. I also assign and set over to said Brown & Simpson, and said F. A. Wilson, said judgment hereinbefore described in all its parts, also the execution issued thereon on the tenth day of June, 1875, together with all the rights and interests belonging thereto or established, vested or secured thereby, with full power to them to prosecute any and all necessary suits on said bond or judgment in my name, and for their use; or settle and discharge said bond, judgment or execution as they may see fit. Witness my hand and seal the day and year just above named. John P. Bent. [L. S.]

"Signed, sealed, delivered in presence of H. W. Mayo."

A. W. Paine, for Peirce & others.

C. P. Brown, for Bent, and *A. L. Simpson*, for assignees, contended:

I. That the matter of set-off, whether of actions in court, or of judgments, or of executions in the hands of an officer, is all regulated by statute; that the provisions there made are ample for the just protection of all, and no power therein is left to the court; and cited R. S., c. 82, §§ 48 to 61, inclusive, and c. 84, §§ 26, 27. Also R. S., c. 81, §§ 74, 75. None of these provisions, and no authority by statute, grant the request made in the motion of Peirce. No common law principle can help him because statutory law has intervened and defeated it.

But if this claim of set-off is not granted by statute, then it must stand on considerations of equity and substantial justice. *Brow* v. *Hendrickson*, (N. J.) 16 Am. L. Reg. 621.

But no such quality ever shaded the person or claim of this applicant.

II. The set-off would violate the equitable rights of third parties. *Ames* v. *Bates*, 119 Mass. 399. This case was decided in 1876, and the opinion of Devens, J., is referred to.

WALTON, J. It is well settled, both in England and in this country, that judgments in cross actions may be set off, the one against the other, when the parties in interest are the same, on motion addressed to the court in which one or both of the actions is pending. If the amounts are equal, both will be satisfied. If

the amounts are unequal, the smaller will be satisfied in full, and the larger to the extent of the smaller, and an execution will issue for the balance. Such a set-off will not be allowed to defeat an attorney's lien for his costs; but his lien extends only to the taxable costs. An assignment will not defeat the right of setoff if both causes of action existed at the time the assignment was made. An assignee can have no rights which the assignor did not have; and if the right of set-off had attached at the time of the assignment (as it always does when both causes of action have then matured), the assignee must take the demand *cum onere*,— with the right of set-off still clinging to it. Nor will it make any difference that one of the judgments is against a principal and his sureties. A judgment in favor of the principal alone may be applied in satisfaction of one against him and his sureties. And the right of set-off in this class of cases is not dependent upon statutory law. It exists at common law. All of these propositions are sustained by adjudged cases as well as the leading text books. The cases are too numerous for citation. A few only are referred to. *Mitchell* v. *Oldfield*, 4 Term Rep. 123. *Glaister* v. *Hewer*, 8 T. R. 69. *Barker* v. *Braham*, 2 W. Black. 869. *Simpson* v. *Hadley*, 1 M. & S. 696. *Bridges* v. *Smith*, 8 Bing. 29. *Goodenow* v. *Buttrick*, 7 Mass. 140. *Greene* v. *Hatch*, 12 Mass. 195. *Winslow* v. *Hathaway*, 1 Pick. 211. *Ocean Ins. Co.* v. *Rider*, 22 Pick. 210. *Moody* v. *Towle*, 5 Maine, 415. *Burnham* v. *Tucker*, 18 Maine, 179. *Hooper* v. *Brundage*, 22 Maine, 460. *Prince* v. *Fuller*, 34 Maine, 122. *New Haven Copper Co.* v. *Brown*, 46 Maine, 418. Chit. Gen. Prac., Title, Set-off. Howe's Prac. 350. 2 Par. on Con., Title, Set-off, 242. *Brown* v. *Hendrickson*, Am. L. Reg. for Oct., 1877, 619.

The right to have the set-off moved for in these cases made is unquestionable. All possible objections to it are fully answered by the foregoing propositions, and the authorities cited in support of them.

Set-off ordered as moved for.

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

BYRON CROSS *vs.* CHARLES ELLIOT.

Waldo. Opinion April 21, 1879.

Sale on writ. Remedy. Liability. Tort.

A defendant whose chattels have been regularly attached and sold upon the writ, and who prevails in the suit and recovers costs, cannot maintain an action of tort against the plaintiff in such suit for the article attached. The officer should return to the owner the proceeds of the property sold.

FACTS AGREED.

ACTION OF TROVER for the value of a cow. The writ is dated October 10, 1876.

On the 13th day of October, 1870, Charles Elliot, the present defendant, sued out a writ returnable at the supreme judicial court for Waldo county, at the January term then next to be holden at Belfast, in said county, on the first Tuesday of January, 1871, in a plea of the case against the present plaintiff, Byron Cross, for negligently setting fire upon his own land, and so carelessly managing the same that it caught and burned the trees and fence of the said Elliot. On the same day said writ was placed in the hands of A. Berry, then a deputy sheriff for the county of Waldo, who on the same day in his said capacity attached a cow, the property of said Byron Cross, the present plaintiff. Afterwards, on the 15th day of November, 1870, said Elliot made application to said Berry to have said cow appraised and sold pursuant to the provisions of R. S. of 1857, c. 81, and said officer caused said cow to be appraised. The appraisers, on the 15th day of November, 1870, appraised said cow at the sum of twenty-one dollars and sixty-six cents. On the 19th day of November, 1870, said officer, having given the notice required by the statutes, sold said cow for the sum of ten dollars and made due return thereof and all the proceedings in the case on said writ.

Said action was duly entered at the term at which the writ was made returnable, and was continued from term to term until October term, 1872, when judgment was rendered on report of referees duly appointed by the court, in favor of the defendant in that suit, the present plaintiff.

The cow attached and sold on said writ has never been returned or delivered to the present plaintiff, nor has the present plaintiff recovered from said officer or from said Elliot or from any other person any sum, either as the proceeds of said sale or in payment for said cow.

Neither has said Elliot ever received any part of the sum for which the cow was sold by said officer or from any other person, nor has any demand by any one been made upon said Elliot or said officer, either for the return of said cow or for payment of her value.

The present plaintiff brings this action to recover of the present defendant the value of said cow.

If the action is maintainable upon the foregoing statement of facts, judgment is to be rendered for plaintiff. If the court shall give judgment for the plaintiff, it shall determine whether judgment shall be for the appraised value of said cow, or for the price for which the cow was sold by the officer, or for the actual value of said cow. If the latter, damages to be assessed by the clerk at *nisi prius*, otherwise by the court. If the action is not maintained, plaintiff to become nonsuited.

W. H. Fogler, for the plaintiff.

W. P. Thompson & R. F. Dunton, for the defendant.

PETERS, J. The defendant sued the plaintiff in an action of case, had his personal property attached, procured the same to be sold on the writ, and failed in the suit. But he did no wrongful act. All that was done was legal. All the penalty that he is required to pay is the costs. This is an action of trover for the property attached. It cannot be maintained. The plaintiff (defendant in that action) may have been put to loss and inconvenience. He might have been, if no property had been attached. It involves expense to commence or defend a law suit. The injury sustained in such case is *damnum absque injuria*. The law assumes that, all things considered, the taxable costs shall indemnify the prevailing party for his expenses and losses in the litigation. Otherwise, men could not upon reasonable risks go into the courts. Of course the officer who sold the property must

restore its proceeds to the owner. And the defendant might be liable to an action for malicious prosecution if the facts were of a character to sustain such an action. *White* v. *Dingley*, 4 Mass. 433. *Lindsey* v. *Larned*, 17 Mass. 190. *Vanduzo* v. *Linderman*, 10 Johns. 106. Bigelow's Cas. on Torts, 206. See remarks of Weston, C. J., in 13 Maine, 259, (*Freeman* v. *Cram*).

Plaintiff nonsuit.

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

FRANCIS C. LEACH *vs.* WILLIAM P. FRENCH.

Hancock. Opinion April 23, 1879.

Original liability. Implied promise. Consideration.

The defendant's horse became diseased and sick while in possession of one who hired it of the defendant, and was left with the plaintiff for care and cure by the hirer, and the plaintiff claimed pay of the defendant as the owner of the horse. The defendant knew that plaintiff was keeping the horse, and wrote to him, mentioning the fact of his ownership, and inquiring as to the condition of the horse, and saying that an uncle of the hirer would pay the bill.

Held, that while it is the duty of one who hires a horse to pay the ordinary expenses of its keeping while he is using it under his contract, yet, if the horse become sick and disabled, without fault of the hirer, so that he can no longer use it for the purpose for which he hired it, the consequent loss and expense falls upon the owner, who impliedly undertakes, when he lets the horse, that it shall be capable of performing the service for which it is let, and the owner is responsible to the hirer for such necessary expense as he incurred by reason of the failure of the horse to perform the required service.

Held, that the naked fact that the horse became diseased and sick on the journey raises no presumption of negligence on the part of the hirer, but the presumption is the other way.

Held, that, under the circumstances above stated, the knowledge of defendant that plaintiff was keeping the horse, and his permitting it to remain with him for that purpose, raised an implied promise on the part of defendant to pay the plaintiff as for services done and expenses incurred by plaintiff in and about the business of the defendant; and that defendant's saying to plaintiff that somebody else would pay the bill, did not prevent the plaintiff from giving credit to defendant and holding him responsible for the keeping of the horse.

ON REPORT.

ASSUMPSIT, upon an account annexed, to recover for the board and keeping of a sick horse while alive, and the expenses of removal when dead.

Defendant was owner of the horse and let him to a young man by the name of Devereux. The horse became diseased and sick while in Devereux's hands and he left him with the plaintiff for care and cure. While the horse was on the hands of the plaintiff the defendant wrote him informing him the horse belonged to him, making inquiry about the condition of the horse and saying that an uncle of Devereux would pay his bill. After the bill was contracted, (the horse being dead) the counsel for the plaintiff wrote the defendant demanding payment of the bill. The defendant answered thus: "Please not make any cost on it (the bill) as I will call and settle the same soon." Plaintiff's attorney, after receiving the letter, wrote back to defendant, saying that he would wait. After waiting a while, in consequence of this (defendant's) letter, payment not being made, the demand was sued.

If, upon this evidence, the plaintiff is entitled to recover, then judgment is to be for him; if not, judgment to be for the defendant.

H. A. Tripp, for the plaintiff.

A. P. Wiswell, for the defendant, contended:

I. Outside of defendant's letter, the testimony shows no liability from defendant to plaintiff. There was no contract between them, but was one between the plaintiff and the hirer of the horse. Plaintiff never notified defendant that he was keeping the horse on his account. How did the horse become sick? The testimony does not show. If on account of fault of the hirer, he alone is liable for the keeping. The burden of proof is upon plaintiff. *Randall* v. *Doane*, 9 Gray, 408. Story on Bail., § 389.

II. Defendant's letter created no legal liability, nor any obligation to pay a debt which had no legal or equitable foundation. Chit. Con. 34, 36, and notes. Many decided cases hold that where one, through mistake of the law, acknowledges himself under an obligation which the law does not impose, he is not holden thereby.

BARROWS, J. The case as stated in the report is that the defendant owned the horse, for the board and keeping of which while sick and the expense of its removal when dead plaintiff brings this action under the following circumstances:

Defendant let the horse to one Devereux. The horse became diseased and sick while thus let, and Devereux left him with the plaintiff for care and cure. While plaintiff was keeping the horse defendant wrote him, informing him that he (defendant) owned the horse and inquiring about its condition, and saying that an uncle of Devereux would pay his bill. After the horse died plaintiff's attorney wrote defendant, demanding payment of the bill. Defendant answered, "Please not make any costs on it (the bill) as I will call and settle the same soon." Plaintiff's attorney thereupon wrote defendant saying he would wait. After waiting a while, in pursuance of this arrangement, payment not being made, this suit was brought. Defendant denies his liability to pay for the expenses of his horse thus incurred, and contends that there was no valid consideration for his express promise to do it. Unless there was an original liability on his part by reason of the circumstances and acts of the parties while the plaintiff was furnishing the care and board of the horse, it may well be doubted whether a valid consideration is shown for the promise in defendant's letter to the attorney.

We do not find it necessary to decide that question, for, as the case is stated, we think, upon natural and legal presumptions, it is made to appear that the plaintiff might well charge the keeping of the horse to its owner, and that the defendant would be liable for the bill without any express promise.

The first inquiry is, what were the respective rights and duties of the defendant and Devereux under the circumstances disclosed?

"If a man hires a horse," remarks Lumpkin, J., in *Mayor of Columbus* v. *Howard*, 6 Ga. 213, "he is bound to ride it moderately and to treat it as carefully as any man of common discretion would his own, and to supply it with suitable food." Thus doing, if the animal falls sick or lame, without any want of ordinary care on the part of the hirer, he is not responsible to the owner for the consequences. The owner of the animal must bear them.

But, if the horse falls sick or becomes exhausted, the hirer is bound not to use it. And if he does pursue his journey and use it when reasonable care and attention would forbid, he would make himself responsible to the owner for that act. *Bray* v. *Mayne*, Gow. 1, (5 E. C. L. R. 437.)

On the other hand, one who lets a horse impliedly undertakes that the animal shall be capable of performing the journey for which he is let; and if, without the fault of the hirer, he becomes disabled by lameness or sickness so that the hirer is compelled to incur expense to procure other means of returning, such expense may be recouped against the demand of the bailor for the services. *Harrington* v. *Snyder*, 3 Barb., (S. C.) 380.

Upon whom, then, as between Devereux and the defendant, should the expense of keeping and caring for the defendant's horse which "became diseased and sick while in Devereux's hands" fall? Up to the time when he fell sick it was Devereux's business to furnish him at his own proper expense with "meat for his work." But how was it when he could no longer lawfully use him under his contract? Unless the horse was disabled through some fault or neglect of Devereux, the owner is the one who bears the burdens occasioned by his failure to perform the work for which he was hired, and among them would be the expense of the care and cure of the animal—an expense which enures directly to his benefit. There would be good reason for holding that in such case the hirer is, *ex necessitate*, the agent of the owner to procure such reasonable and necessary sustenance and farrier's attendance as might be required until the animal could be got home; for, while the hirer is not responsible for any mistakes which a regular farrier whom he calls in may make in the treatment of the animal, still, if, instead of applying to a farrier, he undertakes to prescribe for the beast himself, and by his unskilfulness does it a mischief, he assumes a new degree of responsibility and becomes liable to the owner for the result of any want of such care as a man of ordinary prudence would take of his own horse. *Deane* v. *Keate*, 3 Camp. 4.

But it is unnecessary in this case to determine the extent of the hirer's authority as agent for the owner, for the report shows that

while plaintiff was keeping the horse defendant wrote to him mentioning his ownership and inquiring as to the condition of the animal. Since he thus knowingly availed himself of the plaintiff's services and outlay in the premises, the law will imply a promise on his part to do what was right and pay the plaintiff for them. Nor could the fact that he gave the plaintiff an assurance that Devereux's uncle, who was certainly under no legal obligation so to do, would pay the bill, make any difference with regard to plaintiff's right to charge the keeping of the horse to its owner who knew he was keeping it. "The horse became diseased and sick while in Devereux's hands." There is nothing here to show that it was by the fault of Devereux. The language used rather indicates the contrary, and the legal presumption is against it. Negligence and misdoing are not to be presumed, but there must be some positive evidence of them. *Cooper* v. *Barton*, 3 Camp. 5. *Tobin* v. *Morrison*, 9 Jur. 907. It is not enough to show that the horse became disabled, but he must show that he became so by the fault of the hirer. *Harrington* v. *Snyder*, *ubi supra*.

It is not the case of property while in the possession of a bailee for hire receiving an injury, which could not ordinarily occur without negligence on the part of the custodian, when it would be for him to show that the injury was not caused by his negligence. *Collins* v. *Bennett*, 46 N. Y. 490.

We think the case as stated shows a good consideration for an implied promise on the part of defendant to reimburse the plaintiff for his outlay in defendant's behalf. Hence, perhaps, defendant's readiness to promise payment if he could have a little delay.

Defendant defaulted.

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

HAYNES PILLSBURY & others, petitioners for appointment of trustee, *vs.* CONSOLIDATED EUROPEAN & NORTH AMERICAN RAILWAY COMPANY.

Penobscot. Opinion April 23, 1879.

Trustee. Vacancy. Successor. Appointment.

The defendant corporation mortgaged certain real and personal estate to two trustees to hold and manage for the protection and security and ultimate payment of those holding their bonds. The deed of trust provided that, in case of death, mental incapacity or resignation of either of said trustees, for the time being, in the trusts therein set forth, all the estate, right, interest, power and control of such trustee shall be divested and cease, and the supreme judicial court of this state shall, upon request in writing of one or more of its bondholders, or of the directors of said corporation, appoint such successor.

One of said trustees having deceased, and a majority in interest of said bondholders having filed a petition for the appointment of one to fill the vacancy; after notice and hearing, such trustee was appointed and accepted the trust, and the court ordered that the surviving trustee, named in the mortgage, execute forthwith all proper conveyances to vest title in such co-trustee.

Held, that R. S., c. 51, § 47, as amended, 1876, c. 105, only applies "when no other method of filling vacancies is specifically provided in the appointment, special law, or mortgage," and the appointment, in this case, being made in the mode provided in the deed of trust, is not in violation of that statute, but in accordance with Stat. 1876, c. 8, and is properly authorized by law.

Held, that the order requiring the surviving trustee to execute proper conveyances so as to vest title in his co-trustee, being in accordance with the terms of the deed of trust, and with the Stat. 1878, c. 8, § 2, is good.

Held, that the cumberous proceedings of a bill in equity, in case of this character, and for the purpose here to be accomplished, are rendered unnecessary by the laws of this state.

ON EXCEPTIONS.

On the 5th day of December, 1872, a certain indenture, under seal, was made and executed by the Consolidated European & North American Railway Company, party of the first part, and Samuel F. Hersey and Benjamin E. Smith, trustees upon certain trusts therein specified and provided, party of the second part, wherein said corporation mortgaged certain real and personal estate to said trustees to hold and manage for the protection and

security, and ultimate payment of those holding its bonds. The petition, upon which these proceedings were had, recites the nature of that indenture, which, among other things and conditions therein stipulated, provided as follows: "11th. It is hereby agreed that either of said trustees may resign; such resignation is to take effect sixty days after notice thereof in writing to said party of the first part, or to his co-trustee. In case of the death, mental incapacity or resignation of either of said trustees, for the time being, in the trusts herein set forth, all the estate, right, interest, power and control of such trustee, shall be divested and cease; and the supreme judicial court of said state of Maine, shall, upon the request in writing of one or more of said bondholders, or of the directors of said party of the first part, appoint such successor."

On the third day of February, 1875, said Hersey died.

On the fourteenth day of September, 1878, these petitioners made the following petition, to wit:

"To the supreme judicial court next to be holden at Bangor, in and for the county of Penobscot, on the first Tuesday of October, next.

"Respectfully represents the undersigned bondholders of the Consolidated European & North American Railway Company, holding and representing a majority of all the bonds issued by said railway company, a corporation established by law, and having a place of business at Bangor, in the county of Penobscot and state of Maine, that, on the fifth day of December, A. D. 1872, said Consolidated European & North American Railway Company, as party of the first part, and Samuel F. Hersey, of Bangor aforesaid, and Benj. E. Smith, of Columbus, in the state of Ohio, parties of the second part, entered into a certain indenture of that date, whereby said railway company did grant, bargain, sell and convey and transfer to said Hersey and Smith certain real estate, and lands and timber thereon standing, situated on the waters of the St. John and Penobscot rivers, containing a million acres, more or less, being the lands, &c., granted to said company by the state of Maine, together with all its right, title and interest in and to, all and singular, its property, real and personal, of whatever

nature and description, then possessed or thereafter to be acquired, including its railroad equipments and appurtenances between said Bangor and St. John, New Brunswick, together with all its rights, privileges, franchises and easements, with its branches, all buildings used in connection therewith or the business thereof, and all lands and grounds on which the same may stand or connected therewith; also all locomotives, tenders, cars, rolling stock, machinery, tools, implements, fuel materials and all other equipments for the construction, maintaining, operating, repairing and replacing the said railway or its appurtenances, or any part thereof.

"To have and to hold to said Hersey and Smith, in trust and for certain purposes named in said indenture. And in and by said indenture it was and is provided that, in case of the death of either of said trustees, parties of the second part, the supreme judicial court of said state of Maine shall, upon the request in writing of one or more of the bondholders of said bonds named in said indenture, or of the directors of said party of the first part, appoint his successor as trustee under said indenture. And your petitioners represent that, on the third day of February, A. D. 1875, said Samuel F. Hersey deceased, at Bangor aforesaid.

"Wherefore they, holding and representing a majority of all bonds issued as aforesaid, pray that your Honors will appoint some suitable person as trustee under said indenture, and as successor of said Samuel F. Hersey, and pass such other orders as required by law in the premises.

"Dated at Bangor, this fourteenth day of September, A. D. 1878. Haynes Pillsbury & Co. By F. A. H. Pillsbury."

Upon which petition the following order was made:

"State of Maine. Penobscot ss. September 14, 1878. Supreme judicial court in vacation. Ordered, that said petitioners give notice to all persons and corporations interested of the pendency thereof, by publishing an attested copy of said petition, and this order of court thereon, two weeks successively in the Bangor Weekly Courier, a paper published in Bangor, in the county of Penobscot, the last publication to be before the first Tuesday of October, next. John A. Peters, Justice S. J. Court."

At said October term it was proved that notice had been given as ordered. At said term Charles P. Stetson, a counselor of said court, appeared and entered upon the docket a desire to be heard in appointment of trustee. Said action was then continued to the following January term, when, after hearing, on the seventh day thereof, Edward Cushing of Camden was appointed trustee, and accepted the appointment, and it was ordered, thereupon, that B. E. Smith, named in said mortgage, forthwith execute all proper conveyances to vest title in such co-trustee.

Upon the twenty-third day of said term, the "Consolidated E. & N. A. R. Co., by Chas. P. Stetson, their attorney," appeared, and alleged exceptions "to the appointment of Edward Cushing as trustee, and to the order of said court 'that B. E. Smith, trustee named in the mortgage, execute forthwith all proper conveyances to vest title in such co-trustee.'" Said exceptions were allowed, with right to either party to refer to docket entries.

L. Barker, *T. W. Vose & L. A. Barker*, for the petitioners.

C. P. Stetson, for the railway company, contended:

I. The appointment of trustee should be made only on a bill in equity, filed by and against proper parties, and praying for the desired relief. Hill Trus., §§ 194, 195. Abbott, Pet. in Eq., 55 Maine, 580, 592.

II. Before application to the court, proceedings should have been had as provided by R. S., c. 51, § 47, amended 1876, c. 105. In this case no such proceedings were had. "No regular meeting of bondholders." "No election of new trustee by ballot." "No presentation of such proceedings to court."

III. The court had no authority to make the order, or decree, that "Smith should execute forthwith all proper conveyances to vest title in such co-trustee." Smith is a party directly interested, and should have been made a party to the proceedings, should have had notice and full opportunity to answer and show reason why such decree should not be made. Hill Trus., and Abbott, Pet., *supra*. U. S. Dig. N. S. 1873, page 691. *Ogden* v. *Kip*, 6 Johns. Ch. 160. Story Eq. Plead., § 75. *Morse* v. *Machias*, 42 Maine, 119, 129.

APPLETON, C. J. On December 2, 1872, the defendant corporation mortgaged certain real and personal estate to Samuel F. Hersey and Benjamin E. Smith, as trustees to hold and manage the same for the protection and security and ultimate payment of those holding their bonds.

By article eleven it is provided that, "in case of the death, mental incapacity or resignation of either of said trustees, for the time being, in the trusts herein set forth, all the estate, right, interest, power and control of such trustee shall be divested and cease; and the supreme judicial court of said state of Maine shall, upon the request in writing of one or more of said bondholders, or of the directors of said party of the first part, appoint such successor."

Samuel F. Hersey, one of the trustees, having deceased, a majority in interest filed a petition for the appointment of one to fill the vacancy. Notice to all persons and corporations interested was ordered to be and was duly given. At the time designated for hearing, counsel appeared for the defendant and, according to the docket entry, desired "to be heard on the appointment of trustees."

At the hearing a trustee was appointed, who accepted his appointment, and the court ordered that B. E. Smith, the trustee named in the mortgage, execute forthwith all proper conveyances to vest title in such co-trustee.

Notice having been duly given, and the defendants having been heard as to the person to be appointed, the decision of the presiding justice making the appointment is not subject to exception. At any rate no objection is made to the fitness of the person named.

It is objected that the prior proceedings, as provided by R. S., c. 51, § 47, as amended by the act of 1876, c. 105, have not been had. But, by c. 105, the provision for a meeting of the bondholders and the choice of a trustee does not apply, except "when no other method of filling vacancies is specifically provided in the appointment" of trustees. Here it is done, and the mode provided in the deed of trust has been followed.

By the act of 1878, c. 8, where in the deed of trust "no ade-

quate provision is made for supplying the vacancy," it may be filled by this court, "after notice to all persons interested," as has been done.

The defendants cannot except to the order requiring Smith to execute proper conveyances so as to vest title in his co-trustee. Such order is in accordance with the terms of the trust deed and with the act of 1878, c. 8, § 2, which provides that, "upon the appointment of a trustee under the preceding section, the court may order such conveyance to be made by the former trustee, or his representative, or by the other remaining trustee, as may be proper or convenient to vest in such trustee, either alone or jointly with the other, the estate and effects to be held in trust."

The proceedings in England are by bill in equity for the appointment of a new trustee, and the court usually in the decree appointing one embraces a direction for a proper conveyance to be executed to him alone, or to him jointly with the continuing or remaining trustees, by all the requisite parties, whether remaining trustees, or heirs and representatives of the last survivor or trustees, who have been removed from office. Perry on Trusts, § 284. With us the cumberous proceedings of a bill are rendered unnesessary by the provisions of our statute.

The trustee, Smith, has not entered an appearance, and if he had, it is not perceived what objections he could have to making all proper conveyances as ordered.

Exceptions overruled.

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

STATE *vs.* CHARLES M. FREDERIC.

Franklin. Opinion April 23, 1879.

Constitutional law. Evidence.

Stat. 1877, c. 187, making a certified copy of the testimony of a witness, a taken by a court stenographer in the sworn performance of his official duty, legal evidence to prove the testimony of such witness whenever proof of the same is relevant in a case on trial, is not in contravention of Art. I, § 6, of the constitution of this state.

A court stenographer's certified copy of the testimony given by a witness, called by the defendant at a former trial of an indictment for an assault and battery in which the jury disagreed, is admissible to impeach the testimony of such witness at the second trial.

Testimony of an officer that, when he went to arrest the defendant on a warrant for assault and battery, the defendant outran, and for the time escaped him, is admissible in the trial of an indictment for the same offense, without proof that the defendant had been informed that he was to be arrested on that charge.

ON EXCEPTIONS.

INDICTMENT against Charles M. Frederic and Warren M. Daggett jointly, for assault and battery. At the September term, 1877, the defendants were jointly tried, when Daggett was convicted, but the jury disagreed as to Frederic. In that trial one Orrin Leeman and Warren Daggett were called by the defendants and testified.

At the next March term Frederic was again tried; and after the two witnesses above named, again called by the defendant, had testified, the county attorney, for the purpose of contradicting them, offered a certified copy of the stenographer's notes of their testimony at the former trial, taken by J. D. Pulsifer, the stenographic reporter of the court at the September term; which the presiding justice, against the seasonable objections of the defendant, allowed to be read to the jury.

A deputy sheriff, called by the government, was allowed to testify, against the seasonable objection of the defendant, that, when he went to arrest Frederic and Daggett on a warrant for the crime for which they were indicted, Frederic outran the

officer and at that time escaped him. To which rulings the defendant, after verdict against him, alleged exceptions.

H. L. Whitcomb, for the defendant.

L. A. Emery, attorney general, *E. Field*, county attorney, for the state.

BARROWS, J. The construction which defendant's counsel seeks to give to the provision in the constitution of Maine, Art. I, § 6, clause 3, that in all criminal prosecutions the accused shall have the right to be confronted by the witnesses against him, if adopted, would exclude all documentary evidence, however pertinent, forcible, safe and even indispensable it might be.

Such is not the design or effect of the provision referred to. Its object is to guard the accused in all matters, the proof of which depends upon the veracity and memory of witnesses, against the danger of falsehood or of mistake, by bringing the witnesses when they give their testimony as to such matters face to face with him.

But there are various matters which may be competent and important evidence in cases, both civil and criminal, which do not depend for their efficacy and admissibility as evidence upon the present recollection of any man—the fact of their existence being that which gives them whatever probative force they possess.

Among these are contemporaneous public records kept by sworn officers in the performance of their regular duties.

To save and sustain his exception here, defendant's counsel must ignore all distinction between documentary and oral evidence. The constitutional provision on which he relies relates to the latter. But the former is admissible as well in criminal as in civil cases, and its admission has never been regarded as a violation of the provision referred to. Roscoe and Wharton and other writers upon evidence in criminal cases, in support of the doctrines which they lay down touching this matter of the production and use of documents as evidence, cite civil as well as criminal cases; and Roscoe says that the rules of evidence with regard to the proof of documents are the same in both.

The general doctrine as stated by them all substantially is, that

records and entries of a public nature, in books required by law to be kept, may be proved by an examined copy, and by a certified copy where the officer having charge of the record is authorized by law to make copies to be used as evidence, both for the sake of convenience and because of the public character of the facts they contain and the ease with which any fraud or error in the copy can be detected. Roscoe's Crim. Ev., (6 Am. ed.) 148, *et seq.* 157, 160. 1 Whar. Am. Crim. L., § 654. 1 Greenl. Ev. (1 ed.) § 91.

So, where a person is summoned by a *subpœna duces tecum* to produce a document, which is of itself competent evidence, or may be identified by some one else, it is not necessary to have him sworn or to put him on the stand. *Perry* v. *Gibson*, 1 Ad. & Ellis, 28 E. C. L. R. 32, cited in Roscoe's Crim. Ev. 101.

The defendant's counsel is right in saying that the constitutional provision referred to is but an authoritative declaration of a principle of the common law; but the common law recognizes the admissibility of documentary evidence in criminal as well as civil cases; and the instruments of it have often been the subject of decisions of the courts and of statute regulation, and it was never suggested that its admission was in conflict with the principle that required the accused to be confronted by the witnesses against him.

Chapter 187, laws of 1877, makes the minutes of the testimony of a witness, taken by the stenographer who is a sworn officer of court, a *quasi* record; a certified copy of which is declared to be legal evidence to prove the testimony of such witness whenever proof of the same is relevant in the case on trial. The phrase, "in the trial of any former case," fairly includes any former trial of the same case. Since the passage of that statute, certified copies of such minutes have been competent; and we do not see that they are practically any more liable to objection as dangerous evidence than the original minutes translated by the stenographer in the presence of the jury. The stenographer could seldom, if ever, give the details of the testimony from memory. His record made at the time is what must in the nature of things be the substance of his testimony.

Both of the reasons above given by the text writers, and in the decisions for the use of certified copies, apply in their full force to such cases. It is not claimed that the record is infallible. It is made under oath, and is less liable to be perverted by prejudice, partiality, or baser motives, than the testimony of those who can shelter their mistakes or want of veracity when testifying to such matters under the well known infirmities of the human memory. It is open to contradiction, and the publicity of the matter to which it relates gives ample opportunity to contradict and control it, if it is in fact erroneous. While it is competent, it is not the only competent evidence upon the topic to which it relates. Neither was the testimony of the stenographer accompanying his minutes before the passage of this statute. *State* v. *McDonald*, 65 Maine, 467.

But it is needless to discuss its advantages or disadvantages. That can be done before the jury whenever there is a conflict. It is sufficient for us here that the statute has placed a certified copy of the record kept by the stenographer in the sworn performance of his official duty upon the footing of other documentary evidence, and that this is not prohibited by the constitutional provisions in Art. I, § 6, or any other article in the constitution.

The testimony of the officer, that, when he went to arrest the defendant, he outran and for the time escaped him, was admissible without proof that the defendant had been informed "that he was to be arrested on this identical charge." Its force and value under all the circumstances appearing in evidence were for the jury to estimate. The remark of Lord Tenterden which defendant's counsel quotes has reference to its effect and not to its competency.

Exceptions overruled.

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

GEORGE H. KUHN & others *vs.* WILLIAM A. FARNSWORTH.

Knox. Opinion April 24, 1879.

Deed,—construction of. Reservation.

A deed of warranty, after describing the exterior lines of the farm conveyed by monuments, courses and distances, continued as follows: "Containing one hundred and twenty-five acres and sixty-four rods, and no more, exclusive of the county road four rods wide through the above premises, which is reserved to the said" grantor; *Held*, that the fee in the land contained in the road where it crossed the farm was not excepted or reserved to the grantor, but passed to the grantee; the easement only being excluded to relieve the warrantor from his covenant against incumbrances.

ON REPORT.

TRESPASS *quare clausum fregit.*

The facts sufficiently appear in the opinion.

Bradbury & Bradbury, for the plaintiffs.

On intention of the parties. *Winthrop* v. *Fairbanks*, 41 Maine, 307.

On exception. *Winthrop* v. *Fairbanks*, *supra*. *Hammond* v. *Woodman*, 41 Maine, 192–4, 201, 203. 2 Wash. R. Prop. 688, 689. 4 Kent Com. 550, note *f*. *Bartlett* v. *Corliss*, 63 Maine, 287. *Kempton* v. *Swift*, 2 Met. 70. *Johnson* v. *Ragner*, 6 Gray, 110. *Furbush* v. *Lombard*, 13 Met. 109. 4 Cruise's Dig. (Greenl. Ev.) Tit. 32, note. *Smith* v. *Ladd*, 41 Maine, 314. *Wooley* v. *Groton*, 2 Cush. 305. *Tyler* v. *Hammond*, 11 Pick. 193. *O'Linda* v. *Lothrop*, 21 Pick. 292. *Fennon* v. *Sheldon*, 11 Met. 521. *Swift* v. *Prentice*, 11 Met. 464. *Harris* v. *Elliot*, 10 Pet. 25. 3 Kent Com. (6 ed.) 434.

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

BARROWS, J. Action of trespass alleged to have been committed on plaintiffs' close, situated in Rockland, and described as being "so much of the land on and under the county road lying north-westerly of and contiguous to, and adjoining a lot of land," the boundaries of which are given, "and being the lot of land now occupied by John H. Adams and the Cobb Lime Company," and carrying away therefrom a large quantity of lime rock.

The case comes before us upon a report of evidence and facts agreed, substantially admitting the acts of the defendant as charged, and justifying them upon the ground of title in the defendant.

It is conceded that the land once belonged to Henry and Lucy Knox. Unless there was a valid reservation of it to Henry Knox, or an exception which excluded it from the conveyance made by said Henry and Lucy Knox to George Ulmer, June 17, 1800, the defendant has the elder and better title, and the action cannot be maintained. This deed conveys to Ulmer, in consideration of one hundred and eighty-one dollars, an oblong parcel of land, crossed by the county road, described by metes and bounds, "containing one hundred and twenty-five acres and sixty-four rods, and no more, exclusive of the county road four rods wide through the above premises, which is reserved to the said H. Knox."

It is admitted that Knox owned lands on both sides of the farm thus conveyed to Ulmer.

The question here is whether, by the language above quoted, the land occupied by the county road where it crossed the premises conveyed was excluded from the conveyance and reserved to Knox.

If it was not, the foundation of the plaintiffs' title fails.

So far as the probable intentions can affect the question, there seems little reason to suppose that the grantors, who were selling the circumjacent land at less than a dollar and a half an acre, would care to reserve the fee in the narrow strip covered by the location of the county road, and still less reason to believe that the purchaser of the farm would wish to take it thus divided by a barrier which, in the contingency of the discontinuance of the road, he might find it troublesome to cross. See *Derby* v. *Hall*, 2 Gray, 249, 250. The language, being that of the grantors, is to be construed strictly against them and beneficially for the grantee. *Wyman* v. *Farrar*, 35 Maine, 71.

The plaintiffs' counsel claims that "it would be difficult to conceive of stronger language than that used"—to indicate that the intention of the parties was to exclude from the conveyance to Ulmer not only the county road but the soil under it. But when

we look at the subsequent conveyances under which he claims, we find language much more appropriate. When Lucy Knox came to make sale, under license from the court, of all her deceased husband's interest in real estate for the payment of his debts, her conveyance is made in express terms to cover such interest as he had at the time of his decease "in the lands contained in the county road" within certain limits; and later conveyances speak of "the land and lime rock" thus purchased. If it had been the fee of the land contained in the county road where it crossed the premises deeded to Ulmer which it was designed to except or reserve, it would have been easy for the grantors to say so, instead of reserving the county road, *eo nomine*.

When we speak of a road or way, there are two distinct rights and interests which naturally present themselves to the mind—the fee in the land itself, and the easement or use (public or private) which may be made of it for the purposes of travel and transportation. The owner of the fee may put the land to any use not inconsistent with the enjoyment of the easement that exists in it. *Perley* v. *Chandler*, 6 Mass. 454. *Adams* v. *Emerson*, 6 Pick. 57. *Goodtitle* v. *Allen*, 1 Burr. 133. The same doctrine is implied in *Thompson* v. *Androscoggin Bridge*, 5 Maine, 62. *Johnson* v. *Anderson*, 18 Maine, 76. The construction and effect of grants, exceptions and reservations of "roads" or "ways," where they depend upon the use of those terms in a conveyance, have been so often discussed, and the results reached have been so uniform, that a reference to a few, in which it is declared that they import only an easement and not the property in the soil, is all that can be required here. *Leavitt* v. *Towle*, 8 N. H. 96. *Graves* v. *Amoskeag Co.*, 44 N. H. 462. *Peck* v. *Smith*, 1 Day (Conn.), 103. *Hart* v. *Chalker*, 5 Conn. 311. *Jamaica Pond Aqueduct Corp.* v. *Chandler*, 9 Allen, 159. *Stetson* v. *French*, 16 Maine, 204. *Tuttle* v. *Walker*, 46 Maine, 280.

The terms of the exception or reservation in the deed from Knox to Ulmer are so nearly similar to those used in some of the cases above referred to, that we find no reason to give it a different construction.

The ingenious effort of plaintiffs' counsel to bring the case within the construction which has been given to grants or exceptions of a mill, house, wharf, well, or town pound, does not satisfy us that the same rule should be applied where the exception is of a "road," *eo nomine*, from a deed of an entire parcel contained within certain bounds, though the width of the road is mentioned, and its metes and bounds are capable of being ascertained.

The reason why the fee in the land on which they stand is held to pass by the grant of such structures as are above referred to is well stated in *Jamaica Pond Aqueduct Corp.* v. *Chandler*, *ubi supra*, by Bigelow, J.: "Because such structures necessarily comprehend and aptly describe the entire beneficial occupation and enjoyment of the land itself continuously, exclusively and permanently, and so clearly indicate an intent to grant the whole interest in the soil;" but where the use to be made is occasional only "and does not embrace the entire beneficial occupation and improvement of the land, the reasonable interpretation is that an easement in the soil and not the fee is intended to be conveyed. Among the most prominent of this class of easements is a way."

But the plaintiffs' counsel strenuously contend that this is no mere reservation of a way, but a withdrawal of the land lying within the location of the road from the grant, by words limiting the general description of the land conveyed. This position must be carefully examined. It is plain that all the land within the lines of the lot as laid down in the deed was conveyed to Ulmer, unless the part covered by the location of the county road was excepted or reserved by the clause we have quoted. Is it sufficient for that purpose?

To constitute a valid exception in a deed, the thing excepted must be as fully and accurately described as it should be in a grant of the same thing; and, inasmuch as anything doubtful or uncertain must be construed against the grantor, there is need of language which is sufficiently explicit to make it certain what it is which is to be excluded from the conveyance for the benefit of the grantor, and whether it is the land itself, or only an easement in it. To leave it doubtful destroys the exception. The ambiguity might easily have been removed by the use of such language as

that which we find in the deed of Knox, administratrix, to Joy; and we think something of similar import would have been inserted in the deed of Knox to Ulmer, if the intention had been to except from that conveyance the land contained in the county road which intersected the farm conveyed. Plaintiffs' counsel argue that there was no occasion to except the easement, for that was secure, both to Knox and the public, by virtue of the location. But the primary object, we think, was to guard against any claim upon the covenant against incumbrances, as suggested in *Alden* v. *Murdock*, 13 Mass. 256.

Hence the reservation to the husband alone, the wife not being liable to any action on her covenant as the law then stood. *Colcord* v. *Swan*, 7 Mass. 291. 2 Kent's Com. (4 ed.) 167.

Perhaps, also, Knox's ownership of adjoining lands on both sides of the farm conveyed to Ulmer might induce him to provide against a possible discontinuance of the county road. Whatever the motives, no apt words to show an intention to except or reserve the soil in the road from the clear grant previously made by metes and bounds are used. The phrase relied on by plaintiffs simply expresses the number of acres and rods in the parcel conveyed, to which a clear title, free of all incumbrances, was given, the road only being reserved. See *Bartlett* v. *Corliss*, 63 Maine, 287, for an instance of the construction given to a conveyance of a certain quantity of land, "exclusive of water." The court there say that the meaning of the phrase "exclusive of" in that connection, is the same as if it had read "besides," or "not computing."

We do not think that the plaintiffs' position, that the land contained in the county road is excluded in the description of the farm conveyed to Ulmer, "by metes and bounds, or by the terms and obvious import of the deed," is well founded.

It is matter of curious interest to observe how carefully the learned counselor who acted as attorney for the administratrix in the execution of the deed to Joy in 1811, after limiting the grant to "the right, title and interest" which Knox "had at the time of his decease in and to the land contained in the county road" within certain limits, introduces an elaborate statement that "it is

expressly agreed and understood" that the administratrix is "not to be held to warrant the said premises by virtue of anything herein contained, express or implied,"—to warrant nothing in fact except the regularity of her own proceedings.

Holding as we do that the fee in the lands occupied by the county road within the limits of the farm conveyed to Ulmer passed to him under the deed of June 17, 1800, it is unnecessary to consider the other points so ably and elaborately discussed by the respective counsel.

Plaintiffs nonsuit.

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

JOSEPH T. WATERHOUSE *vs.* GLOUCESTER FIRE INSURANCE COMPANY.

York. Opinion April 24, 1879.

Insurance policy. Assignment. Statute.

On a fire policy of insurance stipulating: "If this policy shall be assigned, without the written consent of the company, the liability of the company shall thereupon cease and determine, and this policy shall be null and void," no action can be maintained under the common law by an assignee when the assignment is made without such written consent.

No statute in this state authorizes any such action.

ON REPORT.

ASSUMPSIT upon a policy of insurance issued by the defendants to one George L. Skillings, and by him assigned to the plaintiff.

The facts are sufficiently stated in the opinion.

E. Eastman & R. P. Tapley, for the plaintiff.

J. M. Goodwin & W. F. Lunt, for the defendants.

APPLETON, C. J. This is an action of assumpsit on a policy of insurance issued to one George L. Skillings, who before loss had conveyed the premises insured, and assigned the policy to the plaintiff.

The policy, among other things, contained this clause: "If this policy shall be assigned without the written consent of this company, . . the liability of the company shall thereupon cease and determine, and this policy shall be null and void."

An insurance company has the right to fix and establish the terms and conditions upon which alone it will issue its policies. It may determine when, what and for what length of time it will insure. It may insure as long as the party insured may hold the policy and own the estate insured. It may decline to insure a stranger, or to be and continue liable to an unknown assignee of its policy. It may be willing to insure one man and unwilling to insure another. It may reasonably be supposed to be desirous of knowing with whom it is contracting a liability, and unwilling to continue a liability assumed when the ownership of the property insured has changed without its consent.

By the common law, an insurance company may insert a clause like that in the policy under consideration, and it will be binding upon the parties.

No written consent of the defendant company has been obtained. No action, then, can be maintained in the name of the assignee. *Jessel* v. *Williamsburgh Ins. Co.*, 3 Hill, 88. *Pollard* v. *Somerset M. F. Ins. Co.*, 42 Maine, 227. Indeed, by such assignment the policy is forfeited. As Bronson, J., remarks, in *Smith* v. *Saratoga County M. F. Ins. Co.*, 3 Hill, 510, "the parties have in the strongest terms declared that the policy shall immediately, and without any act on the part of the company, become immediately void; and it is difficult to see how anything short of a new creation could impart life to this dead body." Such is the common law.

Upon examining the statutes relating to "Insurance and Insurance Companies," R. S., c. 49, there will be found no prohibition against the insertion of such a stipulation as is found in the policy under consideration.

The eighteenth section of the act relates to agents of insurance companies, and provides when and under what circumstances their acts shall be binding upon the companies whose agents they

are. Nothing has been done by any agent of the defendants by which its contracts have been modified or the rights of the assured in any respect changed.

By § 19 statements of description and value are declared representations and not warranties, and no omissions or mistakes or concealments of the insured shall vacate the policy, unless they are fraudulent or increase the risk. But in this section are found these words: "A change in the property insured, its use or occupation, or a breach of any of the terms of the policy by the insured, shall not affect the policy, unless they materially increase the risk."

"A change in the property insured, its use and occupation," relates to a change of its structure, or of its use or occupation. It does not refer to the title. The section assumes the existing policy between the parties to it, and acts upon it. It refers to the parties originally contracting, not to those unknown to the party insuring.

Nor is an assignment a breach of any of the terms of the policy. There is no prohibition upon the insured that he shall not assign. He may assign at his pleasure, but the assignment is at his peril, unless the written assent of the party assuring is had. So he may convey the estate insured, but his conveyance is at the risk of the consequences of such conveyance as are specified in the policy. There is no agreement by the assured that he will not assign, but there is one, that there shall not be a new party against the will and without the assent of the insurer.

By § 64 agents are to be regarded as principals, and notices are to be served on them, and insurance companies are bound by their knowledge etc.; but this has no bearing upon the question in issue, for there is no evidence that the agent had knowledge of the transfer or assented thereto.

The stipulation under consideration is valid at common law. It has the deliberate assent of the parties to the policy. It is not prohibited by any statute. It is reasonable that parties should know with whom they contract, and that they should not be compelled to insure an unknown party, whom, if known, they would never insure. The same principle is applicable as where the

insured conveys the estate insured, against the terms and conditions of the policy, that it shall be void on his so doing. The policy is declared void by the act of the insured. *Brunswick Savings Institution* v. *Commercial Ins. Co.*, 68 Maine, 313.

Plaintiff nonsuit.

WALTON, VIRGIN and LIBBEY, JJ., concurred.

BARROWS, J., concurred in the result.

WILLIAM W. GROWS *vs.* MAINE CENTRAL RAILROAD COMPANY.

Cumberland. Opinion April 24, 1879.

Negligence. Pleading. Waiver. Expression of opinion.

The plaintiff, when one hundred feet from a railroad crossing, attempted to pass over it in front of the defendants' passenger train, which he saw coming thirty rods distant; *Held*, that he was guilty of contributory negligence, and could not recover for injuries caused by collision with the train.

An allegation that the plaintiff could not secure his safety in any other way than urging his horse forward to pass over the crossing before the arrival of the train, is not materially different, in a legal sense, from the allegation that he believed it impossible to control his horse.

If a presiding justice inadvertently misstates a fact in evidence, the counsel should, at the time, call his attention to it, in order that it may be then corrected; if he do not, he will waive exception thereto.

An inadvertent misstatement by the presiding justice is not the "expression of an opinion upon an issue of fact arising in the case," within the meaning of Stat. 1874, c. 212.

ON MOTION AND EXCEPTIONS.

CASE, for personal injuries received at a railroad crossing. The action was before the court on demurrer. See 67 Maine, 100.

The allegation relating to due care in the original declaration was: "And said plaintiff, knowing that he could not turn his said team in said lane, and believing that he could get his said team over and across said crossing before said train would reach the same, and that he could secure his safety in no other way, and, supposing that said train was approaching at an ordinary rate of speed, urged his said horse forward, and used his utmost exertions

to get his said team over said crossing before said train should arrive at the same, which he could well have done if said train had been moving at an ordinary rate of speed."

And in the amended declaration: "And said plaintiff, knowing that he could not turn his said team in said lane, and knowing that he had ample time to pass over said crossing before said train would reach the same, if said train was moving at an ordinary rate of speed, as he supposed it then was, and believing that it would be impossible for him to stop his said horse when thrown into a sudden fright, as he was, by the said train, which was then approaching almost in his rear, he allowed him to dash forward without any check, except so much as was necessary to guide him and prevent his overturning said wagon, and used his utmost exertions to get his said team over said crossing before said train should arrive at the same, which he could well have done if said train had been moving at an ordinary rate of speed.

The plaintiff submitted certain requests for instruction; which the view taken by the court renders it needless to report.

Upon the evidence in the case it was contended in argument by the plaintiff's counsel that the engineer, under the peculiar circumstances of the case, when he first saw the plaintiff in the way moving towards the crossing, had no right to assume that the plaintiff had seen the train or even knew that it was approaching, and that the law required him to use due care to avoid injuring the plaintiff after he saw him in peril; and that the fact that the engineer did not then sound the whistle, or give the plaintiff any warning, taken in connection with the fact that no statute signals had previously been given, and that the engineer, after he saw the plaintiff, kept no lookout to watch him, and allowed his train to continue on at the same high rate of speed as before, was a fact to be considered by the jury in support of the allegation that he ran his train recklessly, after he saw the plaintiff in peril.

Upon this point the presiding justice charged the jury in the following language, in which it is claimed that he made an erroneous statement as to the evidence upon a material fact, and expressed an opinion upon issues of fact arising in the case in disregard of chapter 212 of the public laws, 1874:

"Upon this branch of the case, I do not perceive any necessity whatever for me to consider the question whether this was a road where the statute signals were required or not. There is no evidence in the case that the conductor or the engineer saw the plaintiff sooner than the plaintiff saw the train—about thirty-eight rods distant as they were coming out of the cut, as I recollect it, is the testimony when each saw the other. From the time the plaintiff saw the train he had all the notice the statute signals would give him, and, as was said in the opinion of the law court, 'vision was better than hearing.' The object of the statute signals was to give the plaintiff notice that the train was approaching, and if as soon as the engineer saw the plaintiff, the plaintiff saw the train, then so far as this averment in the writ is concerned, that the engineer ran recklessly after seeing him, it is entirely immaterial whether the statute signals were given or not. The averment of the plaintiff upon this branch of the case is that the engineer recklessly ran his train after he saw the plaintiff. The plaintiff saw the engineer as soon as the engineer saw him, so that it does not tend to sustain or disprove this allegation to show that the statute signals were not given. If they were required before the engineer saw him it does not tend to sustain this allegation that the engineer recklessly ran his train after he saw him; and whether they were given after the engineer saw him or not is immaterial because the plaintiff had seen the train, and the ringing of the bell or sounding of the whistle would be no more warning to him than seeing the train itself."

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

F. Adams & A. W. Coombs, for the plaintiff, filed a very elaborate argument, citing: Shear. & Redf. Neg., §§ 30, 31. *State* v. *Railroad*, 52 N. H. 557. 1 Hill. Torts, 142. 1 Redf. Rail. 567. Whart. Neg., § 304. *Railroad* v. *McElwell*, 67 Pa. St. 311. *Detroit, etc., R. R.* v. *Van Steinburg*, 17 Mich. 99. 28 Eng. L. & Eq. 48. *Penn. Car. Co.* v. *Bentley*, 66 Pa. St. 30. *Railroad* v. *Stout*, 17 Wall. 657. *Webb* v. *P. & K. R. R.*, 57 Maine, 117. *Hobbs* v. *Eastern R. R.*, 66 Maine, 572. *Lar-*

rabee v. *Sewall*, 66 Maine, 376, 380. Shear. & Redf. Neg., §§ 25, 26, 27, 28 and 33. R. S., c. 51, § 17. *Bradley* v. *B. & M. R. R.*, 2 Cush. 539. *Linfield* v. *Old Colony R. Co.*, 10 Cush. 561.

J. H. Drummond, for the defendants.

VIRGIN, J. When this case was before this court on demurrer, (67 Maine, 100) it was decided that the allegations in the original declaration relating to the plaintiff's attempt to pass over the crossing before the approaching passenger train would not, if proved, sustain the action; for the reason that, instead of showing the exercise of ordinary care which the law required of him, they disclosed culpable negligence, which must preclude a recovery.

Omitting the preliminary averments, which placed the plaintiff with his horse and lumber wagon about seven rods from the crossing and the train in plain sight, seen by him to be approaching some thirty-eight rods distant, the material allegation is that he "urged his said horse forward, and used his utmost exertions to get his said team over said crossing before said train should arrive at the same," etc. In the amended count, instead of the averment that he "urged his horse forward," he has substituted the allegation that he "allowed him to dash forward without check." And the allegation that he could secure his safety in no other way, and that he believed it would be impossible to control his horse are not materially different, in a legal sense. There is no allegation that he attempted to stop his horse or to alight from his wagon. Moreover the plaintiff's own testimony is in accord with his allegations. He admits that he saw the train coming when he was one hundred feet from the crossing. To be sure, he says "his horse made a leap into a dead run," and does not pretend that he attempted to stop him, but says repeatedly that he does not know whether he did or not. But he does testify that he did not attempt to turn around and did not even look at the train after he first saw it.

The presiding justice might well rule, as he did, that there was no material difference, in a legal sense, between the averments in the original and amended counts upon the matter of care on the part of the plaintiff, and that the decision on the demurrer was decisive on this branch of the case.

That instruction being correct, the requested instructions became immaterial.

It is contended that the presiding justice "expressed an opinion upon an issue of fact arising in the case," and that the plaintiff, "being aggrieved thereby," is entitled to a new trial, in accordance with the provisions of St. 1874, c. 212. The expression of opinion was in the charge. The judge, in illustrating a principle of law, said that, so far as he recollected the testimony, "the plaintiff saw the engineer as soon as the engineer saw him." But a mistake of this kind is not such an expression of opinion upon an issue of fact as is contemplated by the statute. If the judge inadvertently misstate a fact, the counsel should at the time call his attention to it, that it may then and there be corrected by reference to the reporter, if necessary. *Bradstreet* v. *Bradstreet*, 64 Maine, 204. *State* v. *Reed*, 62 Maine, 128, 137.

The remaining question was whether, notwithstanding the plaintiff's negligence, the defendants were still liable, for the alleged reason that their engineer, after seeing the actual condition in which he then was, instead of checking the speed of the train, ran recklessly on and thereby caused the injury. In submitting this question to the jury, the presiding justice withdrew from them all consideration of the want of statute signals, as having no tendency to sustain or disprove this issue. We perceive no error in this ruling of which the plaintiff can complain. We take it for granted that other appropriate instructions were given upon this question; and to those no objection has been made.

The jury found that the defendants were not guilty. We do not readily perceive how they could find otherwise. The testimony of the plaintiff is quite inconsistent with itself.

He testified in substance that the usual gait of his horse, when harnessed to that wagon, was "six or seven miles an hour;" that when he entered the lane he "trotted along at an ordinary trot, about the same gait he ordinarily went;" that his horse became frightened, "made a leap into a dead run," and that he "let the horse go." This testimony he gave to satisfy the jury of the truth of his allegations: that his horse, "being thrown into a sudden fright by the said train which was approaching almost in his

rear, was allowed to dash forward without check," etc., and that he "used his utmost exertions to get his said team over said crossing before said train should arrive at the same." And yet he also testified that, by actual measurement, the train was thirty-eight rods distant and he only one hundred feet, when his horse took fright and ran. In other words, the train ran six hundred and twenty-seven feet to his one hundred, or six and twenty-seven hundredths faster. So that, taking it for granted that the speed of the train was, as contended by the plaintiff's counsel, forty miles per hour, the plaintiff's team went 40 divided by 6.27, equal to 6.37 miles per hour, its usual, ordinary rate of speed. And this demonstrated fact corresponds with the testimony of the engine driver.

Motions and exceptions overruled.

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

BARROWS, J., concurred in the result.

S. PERCY CROSBY, by his next friend, *vs.* MAINE CENTRAL RAILROAD COMPANY.

Penobscot. Opinion April 29, 1879.

Exceptions. Practice. Evidence.

A general exception to an entire charge, or to "all the instructions not included in brackets," will not be sustained when any independent portion excepted to is sound law. *Harriman* v. *Sanger*, 67 Maine, 442, and *McIntosh* v. *Bartlett*, *id.* 130, reaffirmed.

Where a railroad company had employed a band to attend an excursion on their road, at a fixed sum of money and a ticket for a lady to each member, and the prepared tickets for the ladies contained the following words only: "Maine Central R. R., July 30, 1877. Dexter"—which was different from common tickets—in an action by a brother of a member of the band for refusing to carry him on such a ticket: *Held*, that the instruction that the ticket did not, on its face, entitle him to a passage affords the plaintiff no ground for exception.

Also, *Held:* The exclusion of testimony offered by the plaintiff that the plaintiff was instructed by his father to ascertain, before the excursion party started in the train, whether he could ride on that ticket affords the plaintiff no ground for exception.

The judge presiding at a trial has a discretionary power to prohibit the reading of decisions of the court to the jury, the exercise of which cannot properly be reviewed on exceptions.

ON EXCEPTIONS.

CASE for not permitting the plaintiff to ride on defendants' railroad train.

The following bill of exceptions was filed:

"It appeared that an excursion train was extensively advertised by defendants to run from Dexter to Belfast, and thence by steamer to Islesboro, July 30, 1877. The Dexter band was employed by defendants to attend the excursion for the sum of twenty-five dollars and a ticket for a lady to each member of the band. Handbills were posted up previous to the excursion. Defendants' agent prepared tickets for the ladies of the members of the band, differing from common tickets—being pieces of cardboard on which were printed the following words: 'Maine Central R. R. July 30, 1877. Dexter'—and nothing more. J. Willis Crosby, then a minor fifteen years of age, was a member of

the band and a brother of the plaintiff, a minor then seventeen years of age.

"The plaintiff offered to prove by Willis and by the plaintiff that they were specially instructed by their father to ascertain before the excursion party started in the train, whether the plaintiff could ride on the ticket to which Willis was entitled for a lady. The court excluded the evidence.

"The plaintiff and Willis testified that on the morning of the excursion they went to the ticket office at Dexter station, and inquired of some one inside the ticket office about the ticket. They were answered by the person inside, of whom inquiry was made, that the tickets were not there, and he referred them to the conductor, aboard the train. Very soon, before the train started, the conductor, West, came along with the tickets for the ladies of the members of the band. Three witnesses, plaintiff, Willis and John Herring, testified that they were very near the conductor —within three or four feet; that the conductor said to Willis, 'Have you a lady?' that Willis replied, 'No, but I have got a brother;' that thereupon the conductor immediately handed Willis one of the tickets before described, and that Willis immediately passed it to his brother, the plaintiff, in presence of the conductor. The conductor testified that he did not remember any such conversation; that he did not hear Willis say that he had a brother; that he neither authorized, nor intended to authorize, nor had any authority to authorize, the plaintiff to ride upon a lady's ticket

"After the train had started, and proceeded three or four miles, the conductor came to the plaintiff who showed him this ticket. Asked him where he got that ticket. Plaintiff testified that he replied to the conductor that he received it of his brother Willis in the conductor's presence. The conductor said the ticket was for a lady, and that he would see the plaintiff again. The conductor testified that he consulted his superior, the general agent, Alden, who was on board the train, and was ordered by Alden to collect fare of the plaintiff or put him off the train. Subsequently, when between Newport and Detroit, he came to the plaintiff and told him he must pay his full fare from

Dexter, $1.50, or he should put him off at the next station, Detroit. Plaintiff contended to the conductor that he had a right to ride on that ticket—refused to pay fare. At Detroit station, 17 miles from Dexter, the conductor ordered him to leave the train, which he did.

"The charge to the jury was as follows: [This is an action of the case against the defendant corporation for forcibly expelling the plaintiff from their car.] There seems to be little dispute about the facts. [The defendants issued a notice for an excursion. The superintendent contracted with the leader of the Dexter band for their services for the excursion for twenty-five dollars and for a ticket for a lady for each of the members of the band. If you believe the evidence, such was the contract with the band through their agent, he acting for them, and they are bound by his action, if the manager had authority, as he says he had. By this agreement the brother of the plaintiff had no right to a ticket for anyone but a lady. You will consider whether this was not known to the plaintiff and his brother. So that there should be no mistake, different kinds of tickets were issued, one set for the excursionists, and one set for the ladies, to be given to one of the band.] The writ alleges the plaintiff had a ticket by which he was entitled to be carried on the excursion. If you believe the evidence, he had no such ticket. He had a ticket for a lady. It did not on its face entitle him to a passage. He had, if you believe the evidence, no right to a passage, unless by virtue of a special contract. For the purposes of this case, I instruct you that, if the conductor agreed with the plaintiff that he might go on a lady's ticket, the plaintiff would have a right to a passage. But a contract is the assent of two minds. Both parties must agree to the same thing. If one party understands the agreement to be one thing, and the other party a different thing, there is no contract.

"Did the defendants' agent expressly or impliedly agree, in violation of his duty, that the plaintiff might ride on this ticket? If he did, then the plaintiff has a right of action. If, on the other hand, the conductor neither expressly nor impliedly authorized the plaintiff to ride on the cars, then the plaintiff was not authorized to ride, and is not entitled to damage, unless undue force and violence were used in removing the plaintiff.

"The plaintiff says he entered the cars; that West was there with passes in his hand; that plaintiff's brother was there; that West asked; 'Have you any lady?' that the reply was 'No;' that he had not brought one; that he passed the ticket to Willis, and Willis to plaintiff. That is plaintiff's testimony. All was, plaintiff received a lady's ticket from his brother. The conductor testifies that he did not notice the presence of the brother; that he neither authorized, nor intended to authorize, nor had any authority to authorize the plaintiff to ride upon a lady's ticket. Did he do more than give a ticket to one entitled to it? Now, was there any contract, express or implied? If none, then the only remaining question is, was the plaintiff removed in an undue, improper manner, and with unreasonable and excessive force and violence?

"The conductor had a right, it was his duty, to remove a passenger, if he had not the required ticket, nor was he in any way authorized to ride. [The evidence of the conductor and plaintiff does not materially differ as to the facts of the removal. The conductor, shortly after the cars started, called on the plaintiff for ticket,—informed him he had not the proper ticket, and he must pay, and he also called on him again and he declined to pay.]

"If there was a contract, expressed or implied, then what is the measure of damages? $1.50 would have given him the excursion, and have avoided all the trouble—all mortification. If the conductor was acting in good faith, in the honest discharge of his duty, not maliciously, the plaintiff is entitled only to actual damage. He consulted Alden, his superior, and would have run the risk of losing his place if he had disobeyed him. [If the conduct of the conductor was arbitrary, malicious and unreasonable, you will give the plaintiff reasonable damage for the actual damage sustained, and for further punitory damages for his wounded feelings, mortification, and such damages as would deter the defendants from such conduct, if wrongful.]"

The plaintiff's counsel offered to read to the jury portions of the decisions of this court in *Goddard* v. *Grand Trunk Railway Co.*, 57 Maine, 213, 214, 218; also from *Burnham* v.

same, 63 Maine 298,—in relation to the liability of railroad corporations as common carriers, but the court would not permit it.

"This offer was made after defendants' counsel had finished his closing argument, and no notice that such authorities would be referred to had been previously given him.

"To all the foregoing rulings and instructions, especially to the rejection of evidence, the refusal to permit the reading from the decisions of this court to the jury,—to all the foregoing instructions except what is included in brackets—especially to the instructions, to what was said by the court as to the right of plaintiff to ride upon that ticket, and to what was said as to a special contract, and as to a contract being the assent of two minds, and all observations of the court bearing upon that matter in its application to this case; to what was said in relation to the measure of damages, except the portion included in brackets,—in fine, to all the instructions, except what is included in brackets, the plaintiff alleged exceptions."

J. Crosby, for the plaintiff.

Wilson & Woodard, for the defendants.

BARROWS, J. When learned and diligent counsel, being unable to find in the instructions given by the presiding judge anything which, when specifically stated, they are prepared to affirm is erroneous, resort to general exceptions to the charge, or to all the instructions given upon certain branches of the case, or, as here, "to all the instructions, except what is included in brackets," it may be regarded as reasonably certain that there is nothing of which they have any good cause to complain.

If the full court go far enough to ascertain that the proposition asserted in such exceptions (which is, in substance, that all the instructions thus referred to are erroneous) is not maintained, they ought to overrule the exceptions thus carelessly made up, without definite aim, in the forlorn hope that something or other may thereafterwards be discovered on which to base an argument for a new trial. That this court will so dispose of such bills of exceptions may be considered as settled by the cases of *Harriman* v. *Sanger*, 67 Maine, 442, and *McIntosh* v. *Bartlett*, *id.* 130.

The sufficiency of these instructions under this rule may as well be tested by an examination of one which the plaintiff makes a special subject of complaint. He objects particularly "to what was said by the court as to the right of the plaintiff to ride on that ticket."

The part "not included in brackets" runs thus: "The writ alleges the plaintiff had a ticket by which he was entitled to be carried on the excursion. If you believe the evidence, he had no such ticket. He had a ticket for a lady. It did not, on its face, entitle him to a passage. He had, if you believe the evidence, no right to a passage unless by virtue of a special contract."

The statement of the case made in the exceptions by the plaintiff's counsel is all that is needed to demonstrate that here was no error. The plaintiff's only claim of right to a passage is based upon testimony from which he seeks to show that the defendants' conductor tacitly agreed that he might ride on the ticket for a lady, to which his brother, as a member of the band accompanying the excursion, was entitled. The ticket was not a ticket for the excursion, as asserted in the writ, but a token of the perquisite bestowed on the members of the band for the use of their lady friends only.

There is no occasion to examine the exceptions to the charge any further. The testimony offered as to the instructions given to the plaintiff and his brother by their father was rightly excluded. It was, *res inter alios*, mere talk not communicated to the defendants, and not competent upon any of the rules of evidence.

Plaintiff's counsel lays most stress in argument here upon his complaint that he was not permitted by the presiding judge to read to the jury extracts from the decisions of this court in certain cases which he had neither cited nor declared his intention to cite, until after the argument for the defendants was finished. The cases bore little, if any, resemblance to the one on trial, beyond the fact that they were suits against railroad companies for alleged torts to passengers on their trains. But, however pertinent they might be, it was a matter addressed to the discretion of the presiding judge to permit or prohibit such use of them as the counsel proposed to make, and the exercise of that discretion cannot properly be reviewed on exceptions.

In the orderly course and conduct of a trial at *nisi prius* it is the privilege and duty of counsel to state to the court and jury the position which he takes upon the questions of law arising in his case, and to enforce such positions when controverted or doubtful, by such arguments and citation of authorities (addressed to the court) as he deems needful and appropriate. But arguments to the jury upon questions of law and the citation or rehearsal of authorities to them are equally out of place, and liable to divert their attention from the real questions with which they are to deal.

The law of the case they are to receive from the judge, whose duty it is to respond to all questions of law raised in the progress of the cause, and to give the jury rules which are to govern them in the consideration of it; and no one who is aware of the liability of the human mind to be misled by vague general analogies and forms of expression applicable, perhaps, to one set of circumstances and totally inapplicable to another set having a general similarity but particular radical differences, will fail to see the necessity of lodging in the hands of him who is responsible for the correctness of the law, by which the jury are to be guided, the power to prevent wrong impressions from being conveyed to them under the guise of authoritative legal decisions. Such power the justice presiding at a trial before the jury unquestionably has, and his determination in the matter and manner of its employment is, and ought to be, final; for he has before him, in the appearance of the witnesses, jury and counsel, better means of judging as to its propriety than any printed report of the proceedings, however perfect, can furnish to us.

Exceptions overruled.

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

CHESTER D. SMALL *vs.* CHESTER G. ROBINSON.

Cumberland. Opinion April 30, 1879.

Bailment. Lien.

The bailee of personal property can impose no lien on the property bailed, as against the owner, without his knowledge and consent.

REPLEVIN, for two pairs of wheels, and other parts of a hack. Writ dated June 30, 1877.

Plea, the general issue, with brief statement that the title and right of possession in the goods and chattels taken upon said writ were in the defendant. Tried by the justice of the superior court for Cumberland county, without the intervention of a jury, October term, 1877, subject to exceptions in matters of law.

On September 12, 1874, one Isaiah F. Staples purchased of the plaintiff, or agreed to purchase of him, the hack, of which the wheels and other property replevied form part, and gave to the plaintiff the following note:

"Portland, September 12, 1874. For value received I promise to pay Chester D. Small or order the sum of seven hundred and fifty dollars, with interest at rate of eight per cent per annum, as follows, viz: ten dollars each and every week from and after the date of these presents, until the principal and interest is paid, it being understood and agreed that interest shall be allowed at the end of each month on the payments so made, at the same rate of eight per cent per annum.

"The condition for which the above note is given is one bay horse called 'Tom,' one bay horse called 'Charlie,' one second hand hack, licensed No. 36, one set of double harnesses, one set of runners. Nevertheless, it is understood and agreed that the property in the said horses, hack, harnesses and runners is not to pass to me, but remain the property of Chester D. Small until the above note and interest is paid. Isaiah P. Staples. [L. S.]"

Witnessed and recorded in city clerk's office, Portland, September 16, 1874.

Said Staples was a hack driver, and, after giving the note, received and remained in possession of the hack with the knowl-

edge and consent of the plaintiff, using it in his (Staples') business, until October, 1876, when Staples left the hack in the shop of the defendant, who is a mechanic, for general repairs, which were made by the defendant, and from the testimony it appears that such repairs were suitable and necessary.

The parts of the hack which are replevied remained in the defendant's possession, he having done work upon them and claiming a lien for his pay, until June, 1877, when the plaintiff, having in January, 1877, given notice of foreclosure, as it is termed, and which notice was served and recorded on January 10, demanded of the defendant the possession of said goods and chattels, and, on defendant's claiming the right to hold them against the plaintiff by force of his (defendant's) lien as a mechanic, and refusing to yield possession, the plaintiff caused them to be taken upon the writ of replevin aforesaid.

The case shows that, after the note was given and before these repairs were ordered, said Staples had procured other repairs upon the hack to be made at defendant's shop, and defendant testified as follows in regard to a conversation between himself and the plaintiff upon the subject of repairing the hack:

Q. "State whether you knew that Small knew of his (Staples') bringing the hack to your shop for repairs from time to time?"

A. "Yes: I think he knew it a good many times in the two or three years. I had done the repairs, pretty much all, on it from the time he let it go."

Q. "Ever have any conversation with Small about it?"

A. "I think I did, pretty soon after Staples took it. I asked him if that hack was his to pay repairs on it—if he should stand repairs if they run up. He said, 'No; I have nothing to do with the repairs, you needn't look to me for any repairs.'"

Q. "Did he tell you to whom you must look?"

A. "Didn't tell me anything about it, any more than Staples had the hack and he must pay his repairs."

The justice presiding found that there was also testimony tending to show that Staples expressly agreed to defendant's remaining in possession of the property replevied, until his bill for repairs was paid, but that there was no evidence that Small ever

gave Staples authority to subject the hack to a lien for repairs, and ruled, for the purposes of the hearing at *nisi prius*, that the law implies no such authority, and that the lien of the defendant was not valid against the plaintiff, and that the said defendant did take, etc.

The defendant alleged exceptions.

G. F. Gould, for the plaintiff.

S. C. Andrews & A. F. Moulton, for the defendant, contended, *inter alia*, that the defendant had a right to hold the property replevied by virtue of a common law lien which he, as mechanic, had upon the same for repairs; that the whole purpose of the lien at common law is to benefit trade by insuring to the workman his pay. 3 Hill. (N. Y.) 491.

If an agent has a valid lien, the owner cannot maintain replevin. *Newhall* v. *Dunlap*, 14 Maine, 180.

The defendant was in possession; he had increased the value of the property by his labor and materials furnished, and at the instance and direction of the owner, or his implied and authorized agent. *Abbot* v. *Harmon*, 7 Maine, 118. *Weston* v. *Davis*, 24 Maine, 374. Story Agency (5 ed.), § 56.

APPLETON, C. J., This is an action of replevin for a pair of wheels and other parts of a hack, upon which the defendant claims a lien, by reason of work done by him upon them.

The plaintiff is the owner of the hack. It was left for repairs by one Staples, who was in possession under a contract of purchase, the terms of which were unperformed. The defendant was aware of the plaintiff's title. The presiding justice found that the plaintiff had never given Staples any authority to subject the hack to a lien for repairs, and ruled that no such authority was to be implied, as a matter of law, from the relation of the parties.

"A lien," observes Shaw, C. J., in *Hollingsworth* v. *Dow*, 19 Pick. 228, "is a proprietary interest, a qualified ownership, and, in general, can only be created by the owner, or by some person by him authorized." Here the fact of authority is negatived.

The plaintiff never became the debtor of the defendant, and never authorized the imposition of any lien on his property. *Globe Works* v. *Wright*, 106 Mass. 207. A mortgagor of horses cannot, without the knowledge, acquiescence and consent of the mortgagee, intrust the horses to be boarded so as to subject them to a lien for keeping, as against the mortgagee. *Sargent* v. *Usher*, 55 N. H. 287. Cushing, C. J., in the case last cited, says, "I have seen no case in which it has been held that a party who permits another to have possession of his personal property, by so doing in law, constitutes that other his agent to sell or pledge the property." So a bailee can give no lien upon property bailed, as against the owner. *Gilson* v. *Gwinn*, 107 Mass. 126.

The defendant could acquire no title from Staples, when he had none.

The exceptional case of the inn-keeper rests upon the principle that as he is by law bound to receive a guest and his goods, and might be liable to indictment for not so receiving them, he shall have a lien on such goods as he is bound to receive, whether owned by his guest or not.

Exceptions overruled.

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

GEORGE J. DODGE *vs.* S. HASKELL and another, executors.

Waldo. Opinion May 6, 1879.

Forgery. Burden of proof. Evidence. Instruction.

The burden of proof is upon the plaintiff to satisfy the jury that an apparent material alteration of the note declared upon was made before delivery. The paper itself may or may not satisfy them. What alteration, or degree, or kind of alteration, may exist without being suspicious enough to require explanation, is a fact for the jury to determine.

A count upon a note, as dated November 23, 1869, may be amended so as to read August 23, 1869, there being but one note and of the latter date.

Where the defense to a note is forgery, it is not admissible to exhibit other writings to show that the alleged forger has committed other forgeries, unless the papers offered present similitudes of the whole or some part of the note in question.

It is admissible to show that a note, the alleged defense to which by a surety is that it was altered by the principal after the surety signed it, was given to the payee by the surety in payment of a similar genuine note between the same parties. Such evidence would be circumstantial and not conclusive.

Where to an action on a promissory note for $2000 the defense is that it has been altered from a note for $200, and the plaintiff offers testimony tending to show that the note in suit was given to renew another for $1900 and interest signed by same persons, an instruction that, if the jury are satisfied that the note in suit was so given, they need proceed no further, provided it was taken in good faith, is erroneous.

ON MOTION AND EXCEPTIONS.

ASSUMPSIT against Going Hathorn, late of Pittsfield, in Somerset County, upon a note signed by him as a surety for one John E. Simons and others. Writ dated March 22, 1875. Note dated August 23, 1869. The writ described the note as bearing date November 23, 1869. Plaintiff's counsel asked leave to amend by changing the date in the count to August 23, 1869. Defendants' counsel objected to the proposed amendment as not legally allowable, because introducing an entirely new and distinct cause of action. Court overruled the objection and allowed plaintiff's counsel to amend as proposed, changing the date from November 23, 1869, to August 23, 1869.

The defense was that the note, when signed by Hathorn, was for $200, and was altered by John E. Simons before delivery

to the plaintiff. That said Simons attempted to alter said note to $2000, but had so mutilated it, in his attempt at alteration, and so changed it, that it did not now read either two hundred or two thousand dollars, or any other intelligible sum, and the defendants' counsel contended that, therefore, no recovery could be had upon it, and that it ought not to be allowed to go to the jury.

The court, however, allowed it to go to the jury.

A report of all evidence is made on a motion for new trial, and the original note and all the original papers used at the trial are to be submitted to the inspection of the full court, on the hearing of these exceptions and of said motion, and said report and original papers and the charge of the court make part of said motion and exceptions, and to be referred to.

The plaintiff called Daniel W. Simons, a brother of said John E. Simons, who testified that he was acquainted with the hand-writing of Going Hathorn, and that, in his opinion, the signature on the note was Mr. Hathorn's.

Upon cross examination he testified that his own name appeared, too, on said note, as one of the indorsers; that it was not his genuine signature; that he was well acquainted with the hand-writing of said John E. Simons, his brother, and he had no doubt that his (the witness') name was written on said note by said John E. Simons; that said John E. Simons had no authority or consent from him to sign his name as indorser upon said note.

He also further testified that the signatures of Henry M. Simons, who was also his brother, and of David Simons, who was his father, both of whom appear as makers of the note, were not genuine, but were put on said note by said John E. Simons; that the whole of said note, except the signature of said Hathorn and the printed portion of said note, was in the hand-writing of said John E. Simons.

The witness was then shown the papers mentioned in the stenographer's report and marked from A to Z and also from 1 to 16 inclusive, and stated that the most of them were in the hand-writing of John E. Simons; the hand-writing of a small number he did not recognize. These papers included a large number of notes bearing signatures of the witness, and of Mr. Hathorn, and of

witness' father, brothers and other relatives of John E. Simons, and of third persons, all in said John E. Simons' hand-writing; also notes partly filled up, blank forms for notes partly filled, all in the hand-writing of said John E. Simons, and extending over a period from 1866 to 1870, all of which make part of the original papers to be shown to the full court, as appears by the report of evidence in the case, which is to control.

At the close of the testimony of said Daniel W. Simons, the plaintiff was allowed to read the note in suit to the jury.

The defendants then called Hanover S. Nickerson, who testified that John E. Simons lived in Pittsfield village for several years, prior to June, 1870, and carried on the furniture business in a shop there; that he was often in said shop; that said Simons had a desk in one corner of it where he did his writing; that in the last of June, 1870, said Simons suddenly disappeared from said Pittsfield; that the witness was a deputy sheriff, and that about the time said Simons disappeared a warrant was placed in his hands to arrest said Simons for forgery; that he searched the desk which Simons had occupied, immediately after his disappearance, and found in it notes, notes partly filled up, altered notes, blank notes, bills, letters and a lot of different papers. The witness was then shown the papers marked A to Z, and 1 to 16, and was asked whether he found these, with others, in said Simons' desk at the time of the search aforesaid, immediately after said Simons disappeared. The plaintiff's counsel objected to the inquiry. The defendants' counsel stated that he expected to show by the witness that all these papers were found by him at that time in said Simons' desk. That among them were forged notes, altered notes, notes partly filled up, and blank notes, nearly all of which were upon the same kind of blank as the note in suit, and many of which were evidently experiments by said John E. Simons in altering and forging notes, and would explain precisely how the alteration was made in the note in suit.

The plaintiff's counsel still objected, and the court excluded the question, and the witness was not allowed to state where he found said papers, or anything upon that subject, except as appears in the report.

The defendants' counsel then offered the papers themselves. The court admitted so many of them as contained the words "hundred" or "thousand," in the hand-writing of said John E. Simons, and excluded all the others.

The plaintiff offered depositions of Horace Dodge and Prudence Dodge, for the alleged purpose of showing that George Dodge, the father of the plaintiff, had a $1900 note signed by the same parties, and that the note in suit was a renewal of that note. The defendant objected to the depositions as inadmissible for that purpose, or any other, that they were mere hearsay. Depositions are printed in the report, and are here referred to. The court overruled defendants' objections and admitted certain parts of both depositions which were marked; and the depositions were allowed to go to the jury. No other evidence was offered as to the existence of a previous note, or that the note in suit was a renewal of it. Upon this branch of the case the court instructed the jury as follows: "Then, further, it is claimed by counsel for the plaintiff that there is, at least, one complete answer to the whole defense—a perfect answer. And it is that fraud is not to be presumed; and that really there was no occasion for perpetrating any fraud; there was nothing to be gained by the perpetration of the fraud,—the alteration of this note, or forgery—for the reason that this note was given for another note; and that the other note amounted to the same sum that this note was given for. If it was, (it is claimed on the part of counsel) there was no motive whatever.

"If you are satisfied that this note was given for another note, you will proceed no further; if the $2000 note was taken in good faith. Your attention has been called to the evidence upon that branch of the case, going to show that there was an outstanding note signed by the same parties for between $1900 and $2000. All the evidence is for you to consider, and determine whether it warrants the conclusion arrived at by the counsel for the plaintiff, that the $1950 note was taken up and superseded with this note in suit."

At the close of the charge to the jury, the counsel for the plaintiff asked for further instructions as to the burden of proof, and the court further instructed the jury in the following words:

"You must bear in mind the remark that I made in another part of the charge. It is this: that if you should find that the note has been altered since it was written, I instruct you generally that the plaintiff would be required to explain. But instruct you if you find that the note has been altered since it was written, but that it was in the same condition when it was signed as it is now, why then, the explanation—the duty of showing this fact, the alteration and accounting for it, would not devolve upon the plaintiff. So, gentlemen, you will take the case." The jury returned a verdict for the plaintiff for $3,038.

The defendants alleged exceptions.

D. D. Stewart, for the defendants.

J. Baker, for the plaintiff.

PETERS, J. Where a plaintiff declares upon a note and offers it in evidence against the maker, there is a burden upon him to satisfy the jury that an apparent alteration of the note was made before delivery. This arises from the general burden of proof, which the plaintiff has to sustain, to show that the instrument declared on is the genuine and valid promise of the defendants. Therefore, if there is evidence, each way, upon a question of alteration, the preponderance must be in favor of the plaintiff. The jury are to be satisfied that a note is genuine and not fraudulently altered.

But the paper itself, unaided by other evidence, may satisfy the jury, or it may not. All depends upon circumstances. Alterations are rarely alike. The alteration may be immaterial, or comparatively so, or natural, or beneficial to the maker, or made by the same pen and ink as the body of the instrument, or in the hand-writing of the maker (where one maker), or in that of the witness to the instrument; and in such cases it would not be suspicious. On the other hand, the alteration may present indications of fraud and forgery. Whether it does or not is a question of fact and not of law. It cannot be a question of law to decide whether a note is in two inks or one, or two hand-writings or one, or why so written. It is said that alteration *prima facie* indi-

cates fraud. It is sure that it does not in all cases. On the other hand, it is said that fraud is not to be presumed. But it would be extreme to say that an instrument might not be so altered as to show upon its face the grossest attempt at forgery. Therefore, what alteration or degree or kind of alteration may exist without being suspicious enough to demand explanation, is for the jury to settle. There is no presumption of law, either way. There is much confusion in the cases upon this subject and a great variety of decisions. There can be no difficulty, practically, in the rule as we here state it. It will rarely happen that a case is to be tried without some evidence *aliunde* the note, and it cannot be a matter of much consequence which side proceeds first. *Crabtree* v. *Clark*, 20 Maine, 337. *Boothby* v. *Stanley*, 34 Maine, 515. 2 Washb. Real Prop. 555, and cases.

The note was declared upon as dated November 23, 1869. The date in the count was amended so as to read August 23, 1869. The amendment was allowable. It does, in one sense, permit a new cause of action to be described, but not in the sense that the rule is to be understood. The declaration, amended, describes the note correctly; unamended, it described it incorrectly. Still, it identified it, there being but one note. *Stevenson* v. *Mudgett*, 10 N. H. 338. As Jacobs' L. Dic. has it, citing ancient authorties: "If a thing which a plaintiff ought to have entered himself, being a matter of substance, is wholly omitted, this shall not be amended, but otherwise it is, if omitted only in part and misentered." The reason of it is that it appears, from what is described, what was intended to be described. *Warren* v. *Ocean Ins. Co.*, 16 Maine, 439. The nature of the cause of action was not changed. *Rand* v. *Webber*, 64 Maine, 191, has been erroneously supposed to allow an amendment to the extent of allowing the nature of the action to be changed. That case merely allowed a correction of the writ, already improvidently and improperly amended, that such a result might be avoided.

The surety, the defendant defending, desired to place before the jury a quantity of papers to exhibit a practice of the principal party to the note, the alleged forger, in the matter of forging signatures of notes. So far as they were excluded, we think the

exclusion was right. They were inadmissible for the same reason that it is not a defense to one note that the person who presents it has forged another note, or that his general character is bad. They were not introduced to show his ability to write, but that he was in the practice of forging, making preparations therefor. So far as the papers were admitted, presenting similitudes of the note, or some part of the note in suit, the admission was proper.

We are of the opinion that the court correctly allowed the plaintiff to show that he took the note in question in payment of a similar note between the same parties. It may be a matter of but slight importance; still, as bearing upon motive and the probabilities, we think the jury had a right to consider the fact.

This brings us to a point where the exceptions must be sustained. And that is the implied ruling that, if the first note was genuine, the jury need not consider any question of alteration as far as the second note is concerned. So apparent is it that this instruction is erroneous, it would seem that it might have been merely an unfinished expression. But, upon careful examination, we do not see how the result of a new trial on that account can be avoided.

Exceptions sustained.

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

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

LEVI HICKS *vs.* JOHN E. WARD.

Kennebec. Opinion May 6, 1879.

Way. User. Discontinuance. Damages. Augusta city charter.

A discontinuance of a public way by both branches of the city government of Augusta is legal, notwithstanding there was no determination as to damages, and no previous action taken upon that subject.

Less than twenty years adverse occupation will not establish a road by user. *State* v. *Brewer*, 45 Maine, 606, and *Latham* v. *Wilton*, 23 Maine, 125, reaffirmed.

ON REPORT.

TRESPASS *quare clausum fregit.* Date of writ, July 12, 1876.

Defense, general issue, and brief statement that whatever acts were committed were done in the lawful discharge of his duty as street commissioner, in repairing a public or town way under direction of the city government.

After the testimony had been taken, the case was withdrawn from the jury, to be reported to the full court, who are, upon so much of the testimony as is admissible, to draw such inferences and render such judgment as the law and facts require.

The following from the records of the city were put in evidence by plaintiff:

We, the undersigned of this date, laid out a road on the within petition of Elisha Barrows, Jr., and three others, commencing in the north line of the county road leading to Asa Parlin's, at the south end of a board fence; thence north 15 degrees west about 65 rods, to a stake in the north line of Ruel Williams' land; thence north 19 west 48 rods, to a stake in the south line of the Belfast road; said road to be four rods wide and east of said line. All persons interested were notified previous to the laying out of the same.

Voted, to accept the road on the east side of the Kennebec river, agreeable to the report of the selectmen laying out the same as recorded above. A true copy. Attest: Daniel Pike, town clerk. March, 22, 1839.

(Article in warrant dated March 1, 1841.)

Article 21. To see if the town will discontinue the road laid out in the spring of '39, leading from the new to the old Belfast road, over land of R. Williams *et als.*, agreeable to the petition of John A. Pettingill *et als.*

(Vote in the town meeting, March 8, 1841.)

Voted, that the road laid out in the spring of '39, from the new to the old Belfast road, over land of R. Williams *et als.*, be discontinued.

(Extract from journal of board of aldermen under date of June 25, 1859.)

Report of joint standing committee on new streets, to whom was referred the petition of Eben Baker *et als.* for a new street, was read and recommitted to the same committee, with instructions to report in a new draft and without damages. Sent down.

(Extract from aldermen's records under date of August 27, 1859.)

Report of committee on new streets, to whom was referred the petition of Eben Baker *et als.* for new street, was read and accepted. Sent down.

(From original paper already in evidence.)

In common council, August 27, 1859. Read and accepted in concurrence. Levi Page, clerk.

(Extract from aldermen's record of a meeting held April 28, 1860.)

Ordered, that the road laid out and established in 1859 by the city council, from the old Belfast road near Levi Hicks to the new Belfast road, be and the same is hereby discontinued, the owners of the land over which the same is laid, that adjoins said Belfast road, having both claimed damages on said Belfast roads, after having sold lots, which are occupied so that they cannot be shut in, it is not deemed necessary to retain the road if damages are to be paid. Read, passed, and sent down.

(Extract from records of common council under date of April 28, 1860.)

Ordered, that the road laid out in 1859 by the city council, from the old Belfast road near Levi Hicks to the new Belfast road, be and the same is hereby discontinued. Read and passed in concurrence.

(Extract from aldermen's records of proceedings under date of June 29, 1872.)

Ordered, that the street commissioner for the eastern district be and he hereby is authorized and directed to repair the road leading from the old Belfast road near the house of Levi Hicks to the new Belfast road, and cause the lines of said road to be run and monuments to be put up at the angles on the westerly side thereof.

(Extract from aldermen's records.)

Ordered, that the street commissioner for the eastern district repair the road leading from the north Belfast road to the south Belfast road, as laid out June, 1859, commencing near the house of Levi Hicks. Read, passed and sent down for concurrence.

(Extract from records of doings of common council under date of July 27, 1872.)

Petition of J. W. Patterson, representing that the street leading from the old to the new Belfast road, across the land of the heirs of Ruel Williams *et als.*, which was laid out in 1859 and not recorded by the city clerk, asks that the said street may be laid out anew, and that the city clerk may be directed to give notice of the intended laying out without referring the same to the committee on new streets. Read, and voted that the prayer of the petitioner be granted. Sent up for concurrence.

(Extract from the aldermen's records under date of July 27, 1872.)

Petition of J. W. Patterson, representing that the street leading from the old Belfast road to the new Belfast road, across land of the heirs of R. Williams *et als.*, which was laid out in '59, was not recorded by the city clerk, and in consequence thereof the order passed at the last meeting of the city council directing the street commissioner to have said road run out cannot be complied with. I therefore request that said street may be laid out anew, and that the city clerk be directed to give notice of the intended laying out without referring the same to the committee on new streets. Read, and voted that the prayer of the petitioner be granted.

(Extract from aldermen's records under date of June 25, 1874.

Ordered, that the committee on highways, in conjunction with the city solicitor, be and hereby are directed to investigate and ascertain what steps, if any, should be taken for the acceptance of the road that leads from the Belfast road, by and past the residence of Levi Hicks, to the south Belfast road; and also ascertain what, if any, damages had been done to the adjoining owners thereof, and report at the next regular meeting. Read and passed and sent down for concurrence.

(The above order appears on the records of the common council under the date of June 25, 1874, with the following endorsements, received from the board of aldermen. Read and passed in concurrence.

(Extract from records of common council under the date of December 31, 1874.)

The following reports were received from the board of aldermen: The report of the committee on highways and the city solicitor, who were directed to investigate and report what steps, if any, shall be taken for the acceptance of the road by and past the residence of Levi Hicks to the south Belfast road, and also to ascertain what, if any, damage has been done to the adjoining owners thereof, report that in 1859 said road was duly laid out by the city government; that in 1860 an order passed both branches of the city council discontinuing said road; since that time no road has been laid out at said place. There being no road laid out the question of damages did not come before the committee. Read and accepted in concurrence.

(Extract from records of board of aldermen under date of December 31, 1874.)

The following report was received: The committee on highways and the city solicitor, who were directed to investigate and report what steps, if any, should be taken for the acceptance of the road by and past the residence of Levi Hicks to the south Belfast road, and also to ascertain what, if any, damage has been done to the adjoining owners thereof, have attended to their duty, and report that in 1859 said road was duly laid out by the city government; that in 1860 an order passed both branches of the city council discontinuing said road; and your committee are of

opinion that said order as passed was a legal discontinuance of said road. Since that time (1860) no road has been laid at said place. There is, therefore, no public road laid out at that place at the present time. Proceedings will have to be begun anew to establish said road. There being no road the question of damages did not come before the committee. Read and accepted and sent down for concurrence.

Other facts appear in the opinion.

L. Clay, for the plaintiff.

E. F. Pillsbury, for the defendant, upon the discontinuance on town ways, cited R. S. 1871, c. 18, § 21. R. S. 1857, c. 18, § 20. R. S. 1841, c. 25, § 30. *State* v. *Bean*, 45 Maine, 606. By all these provisions towns can only discontinue "at a meeting called by warrant containing an article for the purpose." Here the city council undertook to discontinue without any notice whatever.

Damages follow on discontinuance as well as on location. Here was no notice to the land owner or the public, no opportunity to present claims for damages, and no estimation of damages. No legal discontinuance being made, the defendant, by virtue of his office, was authorized to make the repairs upon the way, and his justification is good.

APPLETON, C. J. This is an action of trespass *quare clausum fregit*. The title of the plaintiff is not denied, and the acts complained of are admitted.

The defendant justifies as street commissioner of the city of Augusta in repairing a town way under the direction of the city government.

The only question in dispute relates to the legality of the way where the trespass was committed.

In 1839 the town of Augusta located a way over the premises in controversy, which was discontinued at a town meeting held March 1, 1841. In 1859 there was a new location of the road, which, by vote of the common council and aldermen, was discontinued August 28, 1860.

By the charter of the city of Augusta, § 7, "The city council

shall have exclusive authority and power to lay out and establish any new street, public way, or town way, that the selectmen and town of Augusta could lay out and establish, and to widen, or otherwise alter or discontinue, any street or public way in said city, and to estimate the damages any individual may sustain by such laying, widening, alteration or discontinuance, and shall in all other respects be governed by and subject to the same rules and restrictions as are provided in the laws of this state regulating the laying out and repairing streets and public highways," and provision is made for an appeal by the party aggrieved.

It is objected that the discontinuance is void, because there was no determination as to damages, and nothing done on that subject; but this was held not to be necessary in *State* v. *Brewer*, 45 Maine, 607.

Nor was any previous action necessary on the part of the city. *Latham* v. *Wilton*, 23 Maine, 125.

Subsequently the question as to the existence of the road in question came before the city government, and it was voted in both branches "that, in 1859, said road was duly laid out by the city government; that, in 1860, an order passed both branches of the city council discontinuing said road; since that time no road has been laid out at said place."

No road is shown by a continued user of twenty years. By the discontinuance in 1860 all the rights of the public were at an end, and those of the plaintiff at once revived. Since 1860 there has not been sufficient time to establish a road by user.

The damages were not large.

Judgment for plaintiff for $25.

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

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

BENJAMIN F. GETCHELL *vs.* PATRICK MANEY.

Androscoggin. Opinion May 6, 1879.

Assignment. Statute. Wages.

Stat. 1874, c. 235, does not authorize the assignment of a specific sum per month for a specified number of months, "out of the moneys that may be due to" the assignor "for services as laborer," when such sum is a part only of the money due.

ON REPORT.

ASSUMPSIT, brought by the assignee of one Henry Fahey, against Fahey's employer, upon the following assignment, under seal, signed by Fahey:

"Know all men by these presents, that I, Henry Fahey, of Lewiston, in the county of Androscoggin and state of Maine, in consideration of one hundred and eight dollars to me paid by B. F. Getchell, of Lewiston, in the county and state aforesaid, the receipt whereof I hereby acknowledge, do hereby assign and transfer to said B. F. Getchell the sum of fifteen dollars for each month, for the term of six months from the date hereof, out of the moneys or demands that may be due to me from Patrick Maney, of Lewiston aforesaid, for services as laborer, to have and to hold the same to the said B. F. Getchell, his executors, administrators and assigns forever. And I, Henry Fahey, do hereby constitute and appoint the said B. F. Getchell and his assigns my attorney irrevocable in the premises, to do and perform all acts, matters and things touching the premises in like manner, to all intents and purposes, as I could if personally present. In witness whereof I have set my hand and seal, this third day of May, 1877."

If the law court should be of opinion that the action is not maintainable in its present form, the plaintiff to be nonsuited.

L. H. Hutchinson, A. R. Savage & F. D. Hale, for the plaintiff, cited *Gerrish* v. *Sweetser*, 4 Pick. 374. *Emery* v. *Lawrence*, 8 Cush. 151. *Lanman* v. *Smith*, 7 Gray, 150.

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

BARROWS, J. "This is an action of assumpsit, brought by the assignee of one Henry Fahey against Fahey's employer, upon the following assignment."

This explicit statement of the ground of the action, in the commencement of the report, we think must be regarded as excluding that portion of the ingenious argument of plaintiff's counsel, by which they seek to maintain the suit upon the ground that there was a promise, express or implied on the part of the defendant, to pay a certain portion of his employee's wages to the plaintiff by reason of his assent to the arrangement made between Fahey and the plaintiff. The action is "upon the assignment," and not upon any alleged promise of the defendant to recognize the assignment and pay according to its terms.

It is true, as contended, that the assignee of a non-negotiable chose in action, without the aid of any statute, can maintain an action on the promise of the debtor to pay the debt to him instead of the party with whom it was originally contracted. *Lang* v. *Fiske*, 11 Maine, 385. *Hatch* v. *Spearin*, *id.* 354, 356. *Smith* v. *Berry*, 18 Maine, 122. *Farnum* v. *Virgin*, 52 Maine, 577.

But in such cases the rights of the plaintiff as assignee are simply the consideration for the new contract, and the new contract is the ground of action. The suit is upon the defendant's promise to the plaintiff, and not "upon the assignment," or upon any right derived from the assignment *ex vi facti*. The inquiry here, then, is whether the assignment copied into the report is a valid assignment of a chose in action, by virtue of which the assignee can maintain an action under the provisions of c. 235, laws of 1874, in his own name.

The assignment sets out a transfer to the plaintiff by Fahey, in consideration of $108 paid by the plaintiff to him, of "the sum of fifteen dollars for each month for the term of six months from the date hereof, out of the moneys or demands that may be due to me from Patrick Maney (defendant) . . for services as laborer," and contains an appointment of the plaintiff as Fahey's attorney irrevocable touching the premises.

As the law formerly stood, if this assignment was made in good

faith, for value, its effect might be to give the plaintiff, as between Fahey or any of Fahey's other creditors and himself, a right to receive Fahey's pay, which he might earn in the service of the defendant, to the amount specified, provided that the defendant was seasonably notified of the arrangement and expressly assented to it; and the court would in such case protect and enforce the interest of the assignee in suits in which Fahey was a party of record; or, as we have just seen, these transactions might be a good consideration for a promise from the defendant to the plaintiff, which could be enforced in his own name. *Robbins* v. *Bacon*, 3 Maine, 346, 350, and cases above cited. *Crocker* v. *Whitney*, 10 Mass. 319. *Cutts* v. *Perkins*, 12 Mass. 210. *Clarke* v. *Adair*, cited by Buller, J., in *Masters* v. *Miller*, 4 D. & E. 343. But without such assent of the debtor it is clear, both upon principle and authority, that a creditor cannot assign part of a debt or chose in action, so as to give even an equitable interest in said assigned fraction of it or create any lien upon it. *Robbins* v. *Bacon*, *ubi supra*. *Mandeville* v. *Welch*, 5 Wheat. 287. *Gibson* v. *Cooke*, 20 Pick. 15. *Tripp* v. *Brownell*, 12 Cush. 381. *Bullard* v. *Randall*, 1 Gray, 605. Drake Attach. (3 ed.) § 611.

And it is equally clear that even if c. 235, laws of 1874, authorizes the assignment of wages to be earned under a contract indefinite as to time or amount, so as to enable the assignee to maintain an action in his own name against the employer by force of the assignment, (a point which we are not here and now required to determine) it does not authorize, and never was intended to authorize, the division of a chose in action among different assignees, or the assignment of a part and the reservation of a part by the assignor, so as to subject the debtor without his consent to more than one suit.

A reference to the obvious and satisfactory reason given for the establishment of the original rule by Dewey, J., in *Gibson* v. *Cooke*, *ubi supra*, is all that is needed to show that, unless express authority for such a division is given in the statute of 1874, it cannot be allowed.

Now plaintiff's counsel do not claim that any such authority

was given by that statute, but they base their claim, not "upon the assignment," but upon an express or implied promise of the defendant to this plaintiff. This position, as we have seen, is not open to them, upon this report.

Plaintiff nonsuit.

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

JAMES H. BUCK *vs.* JOHN COLLINS & others.

Kennebec. Opinion May 19, 1879.

Evidence. Exceptions.

In an action of debt upon a bond given to procure a *supersedeas* on a petition for review of an action of replevin, in which the title of the property replevied was in issue, evidence is not admissible on the part of the defendants that the property replevied was, with the knowledge and consent of the plaintiff, retaken while the replevin action was pending, on a replevin writ against the defendant, in favor of one under whom and as whose servant this plaintiff claimed the right of possession and for whose benefit this action is brought, in which second action of replevin the plaintiff had judgment for $1.00 damages and costs.

ON EXCEPTIONS.

DEBT on a bond, given to procure a *supersedeas* on a petition for review of an action of replevin, commenced by the defendant Collins against the plaintiff.

Plea, performance, and a brief statement of facts in mitigation of damages.

The remaining material facts are sufficiently stated in the opinion.

O. D. Baker, for the plaintiff.

G. C. Vose, for the defendants, contended that the evidence offered in mitigation of damages was admissible. Sedg. Dam. 628. *De Witt* v. *Morris*, 13 Wend. 496. *Squire* v. *Hollenback*, 9 Pick. 551. Sedg. Dam. 502, 628. *Hacker* v. *Johnson*, 66 Maine, 25. *Bartlett* v. *Kidder*, 14 Gray, 449. *Witham* v. *Witham*, 57 Maine, 447. *Ware R. R.* v. *Vibbard*, 114 Mass.

458. *Davis* v. *Harding*, 3 Allen, 302. *Conroy* v. *Flint*, 5 Cal. 327.

BARROWS, J. Defendants complain because they were not permitted, in the trial of this action on a bond given by them to procure a *supersedeas* in a petition for review of an action of replevin commenced by Collins against the plaintiff, to prove, in mitigation of damages, that the bark replevied in that action was, with the knowledge and consent of this plaintiff, retaken June 11, 1872, on a replevin writ against Collins in favor of one Edson, under whom and as whose servant this plaintiff claimed the right of possession, and for whose benefit the plaintiff himself testifies this suit is brought, in which action of replevin Edson's administrator had judgment for $1.00 damages and costs.

The defendants' bond here sued is conditioned, among other things, for the payment (in case Collins' petition for review should be denied or final judgment should be against him) of such sum as this plaintiff would have been entitled to recover on the bond in replevin had no stay of proceedings been asked for.

The question is whether the defendants' proffered evidence would have been relevant in a suit upon the replevin bond.

It is to be observed that that which they propose to prove occurred before the entry of judgment in the replevin suit of *Collins* v. *Buck*, where Buck had judgment for a return of the bark.

The statute rule of damages for non-return, which applies in ordinary cases where the property belongs to the defendant in replevin or he is liable to third persons as its custodian, is the value of the goods and damages for their detention, fixed in certain cases at not less than twelve per cent by the year on such value. R. S., c. 96, §§ 12, 18. *Farnham* v. *Moor*, 21 Maine, 508. *Smith* v. *Dillingham*, 33 Maine, 384.

In suits upon replevin bonds, as remarked by Mellen, C. J., in *Pettygrove* v. *Hoyt*, 11 Maine, 66, "the sureties are bound to perform what the principal was adjudged to perform, or must pay damages as an equivalent for performance." Accordingly, when upon a surceasing of his suit by the plaintiff in replevin before

entry and judgment for defendant for costs only, on a complaint, and the costs were paid, the court held that, there being no judgment for a return, the action on the bond was not maintainable. *Pettygrove* v. *Hoyt*, *ubi supra*.

Where there is an order for a return, how shall the damages, which are to be an equivalent for the performance of the order, be measured?

If the order was never made except in cases where it has been ascertained in the replevin suit that the defendant in replevin is the owner of the goods, or liable to third parties for their value, it would seem that upon familiar principles as to the conclusiveness of judgments the signers of the bond would be precluded from setting up anything that occurred before the entry of the judgment in the replevin suit, even in mitigation of damages, that would reduce them below the value of the goods and interest, unless in cases where they were excused because the act of God had made the performance of the order for return impossible. However the decisions as to the effect of a judgment against a principal in charging a surety in other instances where that relation exists may differ, "it is generally conceded that wherever the surety has contracted in reference to the conduct of one of the parties in some suit or proceeding in the courts, he is concluded by the judgment." Freem. Judg., § 180, and cases there cited.

The authorities agree also in holding that in suits upon replevin bonds, where the right of property has been determined in the progress of the replevin suit, that question cannot be opened anew in the suit on the replevin bond.

Even the cases which go furthest in letting in evidence to mitigate the damages in suits on replevin bonds, where there has been an order for a return and no restitution, like *Davis* v. *Harding*, 3 Allen, 302, *Bartlett* v. *Kidder*, 14 Gray, 449, (cited with approval in *Witham* v. *Witham*, 57 Maine, 447, and *Hacker* v. *Johnson*, 66 Maine, 26) and *Leonard* v. *Whitney*, 109 Mass. 265, all recognize this doctrine in set terms.

The difficulty of determining where the doctrine of estoppel by the former judgment ought to apply, arises from the fact that a return is oftentimes ordered in replevin suits where the question

of property was not in issue and has not been determined at all, or where the defendant is not the sole owner nor liable to third parties for the whole value of the goods.

We see no objection to permitting the defendants in a suit of this nature to show anything in mitigation of damages not necessarily inconsistent with the judgment in the replevin suit, which could not have been presented therein as a valid reason for denying the order for a return, but which tends to show that full indemnity will be given to the obligee in such bond by the payment of a less sum than the value of the goods and interest, because of the limited interest of the obligee in the property, or because the question of property was not passed upon or not determined on the merits in the first suit.

In going so far we do not deviate from the principles which sustain and regulate the wholesome doctrine of estoppels by judgment; and we believe no case in this state has ever gone beyond this, unless the cases in which the death of animals during the pendency of the suit in which they were replevied, without the fault of the plaintiff in replevin, was allowed to be shown in mitigation of damages in the suit on the replevin bond, are to be so regarded.

Such proof was allowed in *Melvin* v. *Winslow*, 11 Maine, 397; and *Walker* v. *Osgood*, 53 Maine, 422. These decisions were based on the fundamental legal principle, "*Actus Dei nemini facit injuriam*," a legitimate corollary of which is that where the performance of a contract depends on the continued existence of a certain person or creature, a condition is implied that the impossibility arising from the perishing of the person or creature, without the fault of the obligors or advantage derived by them therefrom, shall excuse the performance.

In these cases the judgment is not impugned, but its effect is avoided upon an independent ground.

But we think if we suffered matters which might have been shown in evidence before judgment for a return was entered up in the replevin suit, and which, if then proved, would have sufficed to prevent an order for a return, to be put in evidence in the suit on the bond to destroy the effect of the order, we should dis-

regard well settled principles as to the conclusiveness of judgments. It is quite true that a judgment will not operate as an estoppel unless it is a judgment "on the merits." But we must regard a judgment as rendered "on the merits" if "the status of the action was such that the parties might have had their lawsuit disposed of according to their respective rights if they had presented all the evidence, and the court had properly understood the facts and correctly applied the law." Freem. Judg., § 260, and cases there cited. Applying the doctrine to cases of this description, if the pleadings are such that no order for a return to the defendant in replevin would have been made, provided the testimony which the obligors in the bond now offer had been presented, then the judgment for a return must be deemed conclusive, and the evidence which is now offered to show that the obligee is entitled to no damages for the non-compliance with the order is not admissible.

In the case at bar Buck justified in the replevin suit as the servant of Edson, and the question litigated was Collins' title as against him. See *Collins* v. *Buck*, 63 Maine, 460. Can it be doubted that if it had been proved that, pending that suit, the property replevied had been returned to Edson, (which is what the evidence offered by these defendants tends to show) the judgment in the replevin suit would have been that as it appeared that the property had been already returned to the owner, no return to his servant was required or could be made, and judgment should be rendered for costs only?

The authorities cited by plaintiff's counsel establish the doctrine that the plea of *res judicata* applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence might have brought forward at the time.

And it is well settled that, where the evidence offered in the second case was admissible under the pleadings in the first, and necessarily enough to secure a judgment in the first, then the first judgment is a bar.

The point is, not that the judgment for the return is necessarily conclusive as to the amount of damages for non-compliance with it, but that no evidence shall be received upon the question of damages which impeaches the judgment for a return, and which, so far as it tends to affect the damages, shows also that there should have been no judgment for a return.

The evidence was rightly excluded. It was doubtless this precise difficulty which led the able counsel for the defendants to make the petition for review in which this bond was given. And this leads us to notice another matter which would be fatal to the defendants' exceptions.

The defendants must show that they were aggrieved by the exclusion of the evidence. In connection with the record in Edson's suit their counsel offered to prove the naked fact that the bark was retaken by Edson and received by him in like good order and condition as when taken on the writ in *Collins* v. *Buck*. But he prudently refrained from offering to prove that this was the end of the various captions and recaptions to which the bark was subjected in the fervor of litigation, or that the bark or its proceeds were ultimately in any way restored to the owner by Collins. We are left to infer that, even if they were disputable questions, the judgment for a return in *Collins* v. *Buck* and the refusal to review that action were both well justified, in morals as well as in law, by ulterior proceedings, in the course and disposition of which this bond remained as the final security upon which the owner of the bark must depend for indemnity.

At all events, when an offer is made to prove a certain state of facts, including a piece of testimony presented, the offer should be made broad enough to cover all that is necessary to maintain the issue on the part of the party making it.

That which alone could be expected to avail the defendants here in mitigation was that Edson, and not Collins, had finally had the bark or its proceeds, and that proposition the defendants did not undertake to establish. In that condition of things how can we say that they are aggrieved by the exclusion of evidence which tends to support the proposition to be sure, but

which their cautiously circumscribed offer seems to imply may be refuted or controlled by some other existing fact.

Exceptions overruled.

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

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

INHABITANTS OF RICHMOND *vs.* SAMUEL TOOTHAKER & another.

Sagadahoc. Opinion May 19, 1879.

Pleading,—abatement,—demurrer. Bond. Error. Unnegotiable Note. Principal and Surety. Stat.—construction.

In debt against only two of the three obligors on a joint bond, where the declaration alleged that the defendants, together with S, executed the bond on which the action is based: *Held*,

(I.) That the non-joinder might have been pleaded in abatement;

(II.) That it was good ground for demurrer;

(III.) That it was no ground for nonsuit; and

(IV.) That the bond is none the less the defendants' obligation because another was jointly bound with them.

Semble, That error will not lie to reverse a judgment against two of three obligors on a joint bond, when the non-joinder might have been pleaded in abatement; or when the case goes up on the report of the judge.

Where the collector, near the close of the municipal year, settled with the selectmen and treasurer, and he and his sureties gave to the treasurer their joint and several unnegotiable note for the balance found due from the collector; and the collector having subsequently gone into bankruptcy, the town proved the note in bankruptcy against the estate of the collector, and received a dividend: *Held*,

(I.) That the note is not, presumptively, payment, but a memorandum acknowledging on the part of the makers the sum due; and

(II.) That the town adopted the sum therein mentioned as the correct sum due.

When the collector is a defaulter and has not paid the state tax, the town may advance the balance of the state tax deficit to the state treasurer, even if the provisions of R. S., c. 6, §§ 123 and 126 have not been previously complied with, they being directory.

For such advances the collector and his sureties are liable, under the provisions of R. S., c. 6, § 128.

ON REPORT.

DEBT on the official bond of Samuel Brown, as collector of the town of Richmond for the municipal year of 1872. The bond

was duly executed by Brown as principal and by these defendants as his sureties. It stipulated that they "are holden and stand firmly bound and obliged unto the inhabitants of said town of Richmond in the sum of twenty-four thousand dollars to be paid to the said inhabitants, to the which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators firmly by these presents."

The material part of the declaration was as follows: "In a plea of debt, for that the said Hagar and Toothaker, together with one Samuel Brown, by a certain writing obligatory, made and sealed, and as the deed of the said Hagar, Toothaker and one Samuel Brown, on the thirteenth day of July, A. D. 1872, at said Richmond, delivered to the plaintiffs, which is here in court to be produced, acknowledged themselves to be bound to the plaintiffs in the sum of twenty-four thousand dollars to be paid to them on demand."

The defendants pleaded *non est factum*, with a brief statement setting out the conditions of the bond, (which was in the usual form) and alleging full performance.

The plaintiffs put in evidence the collector's warrant, containing, among other things, the following illegal directions: "And for want of goods or chattels whereon to make distress, besides those animals, implements, tools, articles of furniture and other goods and chattels which are by law exempted from attachment for debt, for the space of twelve days, you are to take the body of," etc.

They also put in the commitment, showing the state tax to be $7,137.38, county tax $1,834.60, and town tax $15,570.24, aggregating $24,542.22. It was admitted that the collector had paid to the state treasurer $2,744.02, and to the county treasurer the whole of the county tax.

The plaintiffs introduced the testimony of Samuel Brown, tending to show that there had been collected by himself and his sureties (who took the collector's book from him at a certain time) all the tax committed to him except $211.60.

It also appeared that, on February 20, 1873, Brown settled with the selectmen and treasurer, and found the sum of $2,341.04 due

to the town; that, in accordance with the usage which had been followed for several years past, the collector gave to the treasurer a joint and several unnegotiable note of that date for that sum, signed by himself, and by these defendants as sureties, payable on demand, containing the declaration that the sum for which the note was given was "the amount due the town for its portion of taxes of 1872 committed to him for collection, as per settlement with the selectmen this day."

It also appeared in evidence that, on May 14, 1873, upon the petition of his creditors, Brown was adjudged a bankrupt; that, on March 10, 1874, the note above mentioned was proved in bankruptcy by the town agent of Richmond, against the estate of Brown, bankrupt; and that, on May 19 following, the town received a dividend of $548.34.

It also appeared that the state treasurer issued his warrant against Brown in July, 1873, on which the sheriff collected $1,275.20, and that another was issued in the following October; but that no arrest of Brown was made on either.

It also appeared that the town, on July 2, 1873, paid the state treasurer $1,717.13; on December 12, 1873, $2,612.91; and on January 24, 1874, $63.32; making $4,393.36 in all.

It also appeared that the plaintiffs, on September 27, 1875, sued Brown for money had and received, and trusteed James M. Hagar, one of the defendants; that a judgment was recovered and the trustee charged for $300. The action was for money collected by Brown on the tax bills of 1872. The costs of that action were $101.54.

It also appeared that, at various times after February 20, 1873, (the date of the note) Brown paid to the town divers sums, amounting in all (including the dividend on the note) to $3,936.32.

There was testimony tending to show that Brown had held the office of collector for several successive years, and that he had appropriated divers sums collected to preceding years.

The former judgment and various other testimony was objected to by the defendants; but the view taken by the court renders a report of it unnecessary.

The case was taken from the jury and reported to the full court, who were to render judgment, upon so much of the testimony reported as was legally admissible, according to the legal rights of the parties; and that if any evidence had been improperly excluded, the case to stand for trial, at the option of the party aggrieved thereby.

J. W. Spaulding, for the plaintiffs.

W. T. Hall, with N. Whitmore, for the defendants, contended, *inter alia*, that the giving of the note was a binding settlement between the parties, and transferred the liability of the sureties from the bond to the note; that the receiving of the dividend was a ratification by the town; that the provisions of R. S., c. 6, §§ 123–127, should have been complied with; that the action is not maintainable against the defendants alone.

VIRGIN, J. Debt against the sureties on a town collector's bond, executed jointly, by Samuel Brown as principal, and these defendants as sureties.

The plaintiffs set out a joint, and not a joint and several, bond, averring, with proper allegations of time and venue, that the defendants, "together with one Samuel Brown," by a certain writing obligatory, made, sealed and delivered to the plaintiffs "as the deed of the said Hagar, Toothaker and Brown, and here in court to be produced, acknowledged themselves to be bound to the plaintiffs in the sum of $24,000, to be paid to them on demand."

The defendants pleaded *non est factum*, with brief statement of *omnia performaverunt*.

The case comes up on report, stipulating, among other things, that this court, with jury powers as to the facts, "are to render judgment, upon so much of the evidence as is legally admissible, according to the legal rights of the parties." By this stipulation the pleadings must be considered.

The defendants contended at the argument that the action is not maintainable, for the reason that the bond is joint and only two of the three obligors are made defendants.

The plaintiffs replied that the non-joinder should have been pleaded in abatement, and that the bankruptcy of Brown excused the non-joinder.

To these positions the defendants rejoined: (1) That the plaintiffs having in their declaration informed the court that Brown was a joint obligor, the defendants were thereby relieved of the necessity of pleading that fact in abatement; and (2) That the debt, created by Brown's defalcation, was fiduciary, and therefore not barred by his discharge in bankruptcy.

The rule of the common law has long been well settled that all of the joint obligors or promissors (with certain well known exceptions not essential to the decision of this case) ought to be made defendants; and that the plaintiff may be compelled to join them, if advantage be seasonably taken of any omission by proper plea. 1 Wm. Saund. 291, *b.* n. 4. *West* v. *Furbish*, 67 Maine, 17. And the general rule is that objection to the non-joinder of a defendant can be taken only by plea in abatement *White* v. *Cushing*, 30 Maine, 267. *Reed* v. *Wilson*, 39 Maine, 585. *Richmond* v. *Brown*, 67 Maine, 373.

But while there can be no doubt that, generally, in case of the non-joinder of defendants, unlike that of plaintiffs, it is essential for the party defendant to plead it in abatement, and therein give the plaintiff a better writ by giving the name of whomsoever else ought to be joined; it would seem to be equally well settled that when the plaintiff knows all who ought to be joined, and mentions them in his declaration, then there is no necessity for giving such information by way of plea in abatement; but that, in such case, the non-joinder is a good ground of demurrer, or motion in arrest of judgment; and in case of judgment, by default at least, it may be assigned for error. *Harwood* v. *Roberts*, 5 Maine, 381. Gould Plead., c. 5, § 115. 1 Chit. Plead. (16 Am. ed.) 54, note *k*.

That the objection cannot be taken at the trial, as a ground of nonsuit, on the general issue, was decided by Whelpdale's case, 5 Co. 119, and by *South* v. *Tanner*, 2 Taunt. 254, in which the non-joinder appeared on the face of the declaration, but a nonsuit was set aside and a new trial granted. *Neally* v. *Moulton*, 12

N. H. 483. And we do not perceive any reason why it should. There is no variance, as it was formerly understood. The obligation is in law regarded as the deed of the defendants, although not their deed alone. It is none the less the defendants' obligation because another was bound with them. *Hapgood* v. *Watson*, 65 Maine, 510. *Gove* v. *Lawrence*, 24 N. H. 128. "It would be very odd," said Mansfield, C. J., "if proof that a bond was executed by three should disprove that it was executed by two of them." *South* v. *Tanner*, *supra*.

The non-joinder might have been pleaded in abatement, notwithstanding it appeared in the declaration. *Harwood* v. *Roberts*, *supra*. *Neally* v. *Moulton*, *supra*. That is the means which enables one obligor to compel a joinder of all. Such a joinder may not be necessarily for the benefit of the plaintiff, but of the defendant. For, when all are joined, and judgment is rendered against all, any one of them may, by paying it, have contribution against the others; and the judgment will afford him conclusive evidence of the amount to be paid by them. If, then, a defendant omits to compel a joinder by pleading a non-joinder, he simply waives an advantage which he might have obtained. He would not thereby lose his right to contribution, to be sure, but he would have no judgment which would conclude his contributors.

The defendants did not demur. The statute forbids arrest of judgment. R. S., c. 82, § 26. Whether, if judgment be rendered against these defendants, they can reverse it by writ of error, we need not now decide, as no such writ is before us. We will suggest, however, in passing, that, generally, error does not lie on a judgment rendered on an agreed statement. *Alfred* v. *Saco*, 7 Mass. 380. *Carroll* v. *Richardson*, 9 Mass. 329. *Gray* v. *Storer*, 10 Mass. 163. Nor where facts proved before the jury are reported by the judge. *Johnson* v. *Shed*, 21 Pick. 225. Unless it be for an error disclosed by the record which will not be cured by the verdict. *Smith* v. *Morse*, 6 Maine, 275. *Warren* v. *Coombs*, 44 Maine, 88. Nor when the assigned error might have been pleaded in abatement; "for it shall be accounted his folly for the plaintiff in error to neglect the time of that excep-

tion." Bac. Abr. Error, K. 5. *Merrill* v. *Coggell*, 12 N. H. 97, 104. *Neally* v. *Moulton*, *supra*.

Under these pleadings, then, we perceive no legal objection to inquiring into the merits of this case. The question of waiver was not raised in *Harwood* v. *Roberts*, *supra*, the judgment sought to be reversed in that case having been rendered on default.

The warrant to the collector was defective, and imposed upon the collector no official obligation to collect the taxes committed to him; but he and his sureties are held to account for the money actually paid to him by the tax-payers. *Richmond* v. *Brown*, 66 Maine, 373.

The case shows that, on February 20, 1873, the collector and these defendants as his sureties settled with the selectmen and treasurer; and, in accordance with a practice of some years standing, gave their non-negotiable note for $2,341.04, declaring therein that that was "the amount due the town for its portion of taxes of 1872 committed to" the collector "for collection, as per settlement with the selectmen this day." The note, not being negotiable, was not presumptively a payment (*Bartlett* v. *Mayo*, 33 Maine, 518); but it was a memorandum signed by these defendants, acknowledging the balance due on town taxes from their principal. And the town adopted this amount as correct by proving the note, March 10, 1874, in bankruptcy, against the estate of the collector, and receiving a dividend of $548.34.

Moreover, the collector was indebted to the town, not only for the sum indicated in the note for a balance due on town taxes, but for the additional sum of $4,393.36, balance due on state tax paid by the town on default of the collector, (R. S., c. 6, § 128); thus making the balance due from the collector to the town of $6,734.40. *Gorham* v. *Hall*, 57 Maine, 58, 62. This is the debit side of the account.

But, since February 20, 1873, (date of the note) the town has received from the collector divers unappropriated sums, which, including the dividend mentioned and $300 in the trustee action, amount to $4,236.32. Appropriating this amount of payment to the indebtment of the collector, leaves a balance due of $2,498.08.

The whole sum of $300, exclusive of costs, we allow in payment, inasmuch as the sureties are not liable to costs in a fruitless action against the principal, of the pendency of which they had no notice. *Baker* v. *Garrett*, 3 Bing. 56.

The defendants cannot complain that the directions of R. S., c. 6, §§ 123 and 126, were not complied with. *Gorham* v. *Hall*, *supra*. The collector had been put into bankruptcy, and consequently he had no estate which could be destrained; and his arrest would have been fruitless. These provisions are directory. The defendants might as well complain that an assessment under § 127 was a prerequisite to payment of the state tax deficit.

Our conclusion, therefore, is that the plaintiffs are entitled to judgment for $2,498.08, and interest from the date of the writ.

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

GEORGE W. CALDWELL *vs.* ALBION P. BLAKE.

Oxford. Opinion May 26, 1879.

Execution sale. Plantation. Return of execution. Deed,—form of. Record. Spec. Stat. Judgment,—collateral impeachment. Constitutionality. Amendment of execution.

The real estate in a plantation, which has been seized on an execution against the plantation before the date when, by legislative enactment, its existence for the purposes of suing and being sued ceases, may be sold, in regular course of proceeding after that date; and the sale will be valid, like that of the property of a deceased person which has been seized on execution prior to his death.

However lots may be seized under R. S., c. 84, § 29, the officer must advertise the names of such proprietors as are known to him, in his notices of sale; but where he seizes and sells the lots as lotted out on the plan of the plantation, the omission to name a proprietor not known to him, will not prevent the interest of that proprietor from passing to the purchaser with the rest.

The failure of the officer to return the execution to the clerk's office, for more than a year after the sale, will not affect the purchaser's title, if the proceedings have been regular in seizing, advertising and selling the lands.

Nor will the failure of the purchaser to place his deed on record, for more than nine months after the sale, provided there has been no intermediate conveyance.

The "cause of the sale" is sufficiently expressed in the deed to the purchaser to answer the requirements of R. S., c. 84, § 30, when it can be ascertained from it and the papers referred to therein who were the parties to the execution, its amount, and the court and term at which the judgment on which it was issued was rendered, so that the deed will establish the right of the party whose land is sold to redeem within one year, if he sees fit, or point out to him the records and witnesses necessary to prove his claim against the town under § 31.

Spec. Stat. of 1874, c. 608,* was merely permissive; and did not take away the right of creditors of Hamlin's Grant Plantation to collect their debts by the ordinary process, so long as the plantation continued to exist for that purpose.

The title of a purchaser at a sale on the execution cannot be questioned collaterally, while the judgment and proceedings remain in force.

When the officer advertises and sells the lots as lotted on the plan of the plantation, and the whole of a lot is necessary to satisfy the execution and expenses of sale, and the proceedings are regular, his deed will pass the title of all the owners in the lot, known or unknown; and the fact that he gives, in his advertisement, the names of two persons as proprietors in the lot, one of whom has mortgaged his interest, and does not say whether the two own in common, or, if in severalty, does not describe their parcels, will not vitiate the sale.

The execution was defective in running against real estate of the inhabitants, instead of against the "real estate situated in" the plantation; and, unless amended, the defendant's title will fail.

The court may allow an amendment of a mistake committed by its recording officer, when such amendment will be in furtherance of justice, and when the party to be affected thereby will not be subjected to any loss or inconvenience other than what he would have been subjected to had the execution been originally in proper form.

The statute authorizing these proceedings is not unconstitutional.

Nor can the rights of the defendant, acquired by a purchase at a judicial sale made in pursuance of it, be destroyed because the remedy provided for the plaintiff cannot be made available against a plantation which has ceased to exist.

ON REPORT.

TRESPASS *quare clausum fregit* upon certain land in that part of the town of Woodstock, in the county of Oxford, which was formerly lot numbered four in Hamlin's Grant Plantation. Trespass alleged July, 1876. Writ dated August 22, 1876.

Plea, general issue and title in the defendant.

To sustain his action the plaintiff introduced a mortgage deed of the premises, from one John B. Merrill to himself, dated and

*See opinion.

recorded January 18, 1875, to secure the sum of $1,000 payable in two years, with interest annually at ten per cent; a notice of foreclosure for breach of condition, published in the Oxford Register, a newspaper published in the county of Oxford, dated April 4, 1876, and recorded May 1, 1876; together with the testimony of the mortgagor that the mortgage debt was unpaid, and that, after the publication of the notice, he surrendered possession of the premises to the plaintiff, under an agreement that the plaintiff should receive and apply the income of the premises towards the payment of the mortgage debt; and that the defendant, although forbidden by the plaintiff's agent, cut and carried away the hay on the premises at the time alleged in the writ, which is the trespass complained of.

The defendant claimed title to the premises in himself by virtue of a sheriff's deed to him as the highest bidder, at a sale made June 19, 1875, under the provisions of R. S., c. 84, §§ 29, 30, on an execution in favor of *Eaton Shaw* v. *Inhabitants of Hamlin's Grant Plantation.*

To sustain this claim the defendant introduced a copy of the writ, dated July 21, 1874, containing a count for an account annexed, for the sale of various quantities of intoxicating liquors, all prior to January 9, 1873; of proceedings and record of judgment recovered in favor of Shaw, as state commissioner, at the December term, 1874, of the superior court in and for the county of Cumberland, for the sum of $614.90 debt or damage, and costs taxed at $23.92; of the execution which issued on said judgment December 17, 1874. The execution was in due form, with the exception following: Instead of directing the execution against the goods and chattels of the inhabitants of the plantation, and against the "real estate situated therein," it was directed "against goods, chattels or lands of the said debtors."

The defendant also introduced a copy of the officer's return on the execution, dated July 3, 1876, so much of which as is material to the decision of this case is as follows:

"By virtue of this execution I certify that I have made diligent search for goods and chattels belonging to the inhabitants of the within named Hamlin's Grant Plantation, and for want thereof

wherewith to satisfy this execution by sale as provided by law, therefore I, on the eleventh day of February, A. D. 1875, took and seized the following described real estate, to wit: Thirteen lots of land situated in said Hamlin's Grant Plantation, as they are lotted out on the original plan of said plantation, and numbered one to thirteen inclusive, and owned, as far as known to me, to wit: . . lot numbered four, owned by John B. Merrill and Mrs. Almeda Newton, . . and advertised the same for sale by public auction, in the Oxford Register, a newspaper printed in Paris, within the county of Oxford, and the Kennebec Journal, a newspaper printed in Augusta, county of Kennebec, said Kennebec Journal being the state paper, both of said publications being three weeks in succession and the last of said publications being more than three months previous to the time appointed for said sale. And, on the nineteenth day of June, A. D. 1875, at ten o'clock in the forenoon, at the office of R. A. Frye, in Bethel, in said county of Oxford, being the time and place advertised for said sale, I sold lot numbered . . four to Albion P. Blake for the sum of two hundred and ten dollars, he being the highest bidder therefor. . . All the above named sales were made by public auction and in accordance with the aforementioned advertisement. And I have made, executed and delivered deeds to the several parties in accordance with the several sales aforementioned, and have applied the several aforementioned sums, amounting in all to the sum of $701, in full satisfaction of this execution," etc. (Signed) G. L. Blake, deputy sheriff.

The defendant also introduced copy of the notice published, dated February 11, 1875, which was in due form, which closed as follows: "And, unless previously redeemed, so much of said real estate as is necessary to satisfy said execution and expenses thereon will be sold at public auction, at the office of R. A. Frye, in Bethel, in said county of Oxford, on Saturday, the nineteenth day of June, A. D. 1875, at ten o'clock in the forenoon." (Signed) G. L. Blake, deputy sheriff.

The defendant also introduced the sheriff's deed to himself, dated June 19, 1875, acknowledged July 3, 1875, and recorded March 20, 1876. The deed was as follows:

"Know all men by these presents, that I, Gilman L. Blake, of Bethel, in the county of Oxford and state of Maine, a deputy sheriff under Josiah W. Whitten, sheriff for the same county, having in my hands an execution in favor of Eaton Shaw, of Portland, in the county of Cumberland, against the inhabitants of Hamlin's Grant Plantation, in said county, and for want of goods and chattels, after having made diligent search for the same in said plantation, wherewith to satisfy said execution, I levied said execution upon the following described real estate situated in said plantation, and, having advertised the time and place of sale in the Kennebec Journal, the state paper, and in the Oxford Register, one of the newspapers printed in the county of Oxford where said land lies, with the names of the proprietors, so far as they were known to me, of the lands I proposed to sell, with the amount of said execution, three weeks successively, the last publication more than three months before the time appointed for the sale, did, on the nineteenth day of June, A. D. 1875, by virtue of said execution, and in pursuance of said notice, sell at public auction to Albion P. Blake, of Bethel aforesaid, the real estate situated in said Hamlin's Grant Plantation hereafter described, the same being struck off to him for the sum of $210, he being the highest bidder therefor, viz: Lot numbered four in Hamlin's Grant Plantation, owned or occupied by John B. Merrill and Almeda Newton. Therefore I, Gilman L. Blake, deputy sheriff as aforesaid, by virtue of said execution, and in consideration of the aforesaid sum of two hundred and ten dollars to me paid by said Albion P. Blake, the receipt whereof I do hereby acknowledge, have given, granted and sold, and by these presents do give, grant, sell and convey to the said Blake, his heirs and assigns forever, the above described premises, with all the privileges and appurtenances to the same belonging; and I do covenant with the said Blake that I have in all things observed the rules and directions of the law in advertising and selling said real estate, and have good right and lawful authority to sell and convey the same in manner as aforesaid, to have and to hold the same in manner as aforesaid, to him, the said Blake, his heirs and assigns forever; provided the said John B. Merrill and Almeda Newton,

or the proprietors of said land sold as aforesaid, may redeem the same within one year after the said sale as aforesaid by paying the sum for which it was sold, the necessary charges and interest thereon. In witness whereof," etc.

The defendant also proved, subject to seasonable objection, that, a few days before he commenced to cut the hay mentioned in the plaintiff's writ, and more than one year after the sale of the premises to him by said deputy sheriff Blake, he went upon said premises, openly and peaceably, in the presence of witnesses, and took possession of the same, and still retains possession thereof, the same not having been redeemed by any person.

The case was withdrawn from the jury and continued on report, with the stipulation that, if the action cannot be maintained, the plaintiff should be nonsuit.

Spec. Stats. 1873, c. 269, and 1874, c. 608, sufficiently appear in the opinion.

D. & E. Hammons, for the plaintiff, contended, *inter alia* :

I. That the plaintiff being a resident of Boston, Mass., and the execution running against the real estate of the inhabitants of Hamlin's Grant Plantation only, it did not authorize the seizure and sale of the plaintiff's land in controversy. R. S., c. 84, § 29. The acts of the officer were without authority, and hence void.

II. At the date of the alleged sale Hamlin's Grant Plantation had no existence, it had ceased to exist more than three months prior thereto. Spec. Stat. of 1873, c. 269.

III. The plantation having ceased to exist, the plaintiff, if this sale be upheld, cannot have the remedy provided in R. S., c. 84, § 31, or any other redress. This is in violation of the constitution.

IV. The Spec. Stat. of 1873, c. 269, required of the assessors an impossibility; therefore they did nothing—made no settlement, paid no debts, assessed no tax and collected no dues. Spec. Stat. of 1874, c. 608, was intended to relieve the plantation. Yet Shaw neglected to commence his action until July 21, 1874, neglected to take judgment until December term, 1874, and to make seizure on his execution until February 11, two days before the

plantation ceased to exist for any and all purposes. Shaw should have availed himself of the provisions of c. 608, and could not properly resort to any other. The passage of this act took away all other remedies. *Russell* v. *Smith*, 42 Maine, 414. *Andrews* v. *Marshall*, 43 Maine, 278. *Williams* v. *Amory*, 14 Mass. 20. *Whitten* v. *Varney*, 10 N. H. 296. *Russell* v. *Dyer*, 40 N. H. 173.

V. His notice was defective. R. S., c. 84, § 30. He gave the names of the proprietors in part and the number of lot, and omitted the name of Caldwell, although the registry of deeds disclosed it. He could sell only the interest advertised. The plaintiff's interest not being advertised, he had no notice.

The sale took place June 19, 1875, and the officer's return of execution was July 3, 1876, more than a year after the sale. The deed bears date June 19, 1875, its registration March 10, 1876, nine months after the sale. In the absence of any statutory requirement, the return of execution and registration of deed should have been made within a reasonable time.

VI. The deed should recite all the facts necessary to authorize and perfect the sale. "It should express therein the cause of sale." R. S., c. 84, § 30. This deed does not comply with this provision. Date of execution, nor court, nor amount of execution, nor date of advertisement or place of sale is given.

It does not state that the officer could not find goods and chattels within his precinct, but none in the plantation. He could not take real estate if he could find personal.

It does not state the mode of seizure.

VII. The seizure is made when notice of the sale is given. R. S., c. 76, § 35. The publication could not have been made legally after dissolution of plantation, February 13. He does not state date of either publication. It should affirmatively appear to have been made prior to February 13; that the first notice at least was published before that day.

VIII. The interest of each owner should have been sold separately, that each might redeem, as in case of equities. *Smith* v. *Dow*, 51 Maine, 21.

IX. It does not appear in what manner Merrill and Newton

owned lot No. 4, whether in common or in severalty. How could they redeem? *Stone* v. *Bartlett*, 46 Maine, 439. *Fletcher* v. *Stone*, 3 Pick. 250.

R. A. Frye, for the defendant.

BARROWS, J. To support this action of trespass upon lands situated in that part of Woodstock which was formerly Hamlin's Grant Plantation, the plaintiff introduced a mortgage deed of the premises from one John B. Merrill to himself, dated January 18, 1875, and recorded same day, to secure the sum of one thousand dollars, payable in two years, with interest annually at ten per cent; a notice of foreclosure for breach of condition, recorded May 1, 1876, and the testimony of said Merrill that the mortgage debt was unpaid; that he gave possession of the premises, after the publication of the notice of foreclosure, to the plaintiff, under an agreement that he should apply the income from them to the payment of the mortgage debt, and that defendant, though forbidden by plaintiff's agent, cut the grass on the premises in 1876, which is the trespass complained of.

Defendant claims title to the premises in himself by virtue of a sheriff's deed to him as the highest bidder at a sale made June 19, 1875, on an execution in favor of Eaton Shaw against the inhabitants of Hamlin's Grant Plantation.

To maintain his title he produces copies of the writ and proceedings, and record of the judgment in said suit, and the execution and officer's return thereon, from which it appears that Shaw's claim against the plantation accrued prior to January 9, 1873; that the suit was brought July 21, 1874, and upon regular proceedings had resulted in a judgment in Shaw's favor for debt and costs, at the December term of the superior court in Cumberland county, and that execution was issued December 17, 1874. In his return the officer certifies that he made diligent search for goods and chattels belonging to the inhabitants of Hamlin's Grant Plantation, the execution debtors, and for want thereof, on February 11, 1875, "seized the following described real estate, to wit: thirteen lots of land situated in said Hamlin's Grant Plantation, as they are lotted out on the original plan of said plantation,

and numbered one to thirteen, inclusive, and owned, as far as known to me, to wit: . . lot numbered four owned by John B. Merrill and Mrs Almeda Newton. . ."

He further returns that he advertised these lots for sale, (and herein his doings seem to be conformable to the requirements of the statute) and, at the appointed time and place, "sold . . lot numbered four to Albion P. Blake for the sum of two hundred and ten dollars, he being the highest bidder therefor, . ." and then follows the further return that he gave deeds of the several lots sold to the various purchasers, and applied the proceeds in satisfaction of the execution and all fees. This return is dated at the bottom July 3, 1876, and the officer appends a copy of the published notice of sale dated February 11, 1875. The sale took place on the nineteenth of June, 1875, and the defendant's deed from the officer bears date on that day, was acknowledged July 3, 1875, and recorded March 20, 1876. The defendant proved, subject to plaintiff's objections, that, subsequent to June 19, 1876, a few days before the cutting of the hay here complained of, he went, in the presence of witnesses, and openly and peaceably, under his deed from the sheriff, took possession of the premises, the same not having been redeemed by any one, though more than a year had then elapsed since the sheriff's sale; and that he still holds the possession of the same.

By chapter 269, private and special laws, approved February 13, 1873, the legislature annexed the territory known as Hamlin's Grant to the town of Woodstock, and provided that "the corporate powers and organization of said plantation shall cease on the passage of this act, except that they shall continue for the period of two years for the sole purpose of collecting its dues and paying its debts, of suing and being sued.

By § 2 it was enacted that Woodstock should not be liable for any portion of the debt of the plantation, nor the property or inhabitants of the plantation for any part of the existing debt of the town. By § 3 the assessors of the plantation were required to settle with all persons having unsettled dealings with the plantation, and assess a tax sufficient to pay its indebtedness, and the collector and treasurer were to continue in office until March

4, 1875, if necessary, to collect the tax and pay the debts. These duties do not appear to have been performed; and by c. 608, private and special laws of 1874, the assessors of Woodstock elected that year were "authorized to audit all claims against Hamlin's Grant Plantation, . . and to assess a tax upon all the polls and estates as they existed in said plantation February 13, 1873, . . sufficient to pay all said indebtedness," etc.

The plaintiff urges several objections against the defendant's title: 1. Because the execution was issued in the common form against the goods, chattels or lands of the inhabitants of Hamlin's Grant Plantation only, and so did not authorize the officer to seize and sell property mortgaged to the plaintiff, who was a non-resident.

R. S., c. 84, § 29, provides that executions against towns shall be issued against the goods and chattels of the inhabitants thereof, and against the real estate situated therein, whether owned by such town or not. The last clause in the original act, approved February 27, 1833, reads, "whether owned by inhabitants or other persons." The effect is the same, however, and makes all the real estate situated in a town or plantation (without regard to its ownership) liable on an execution for its debts, in the absence of goods or chattels of the inhabitants, not exempt.

But the execution here did not conform to the requirement of the statute, and did not run against the real estate of the non-residents situated in the plantation as it should have done. That the title of the creditor levying such an execution upon property of non-residents will not be good without an amendment was settled in *Hayford* v. *Everett*, 68 Maine, 505, where the subject of such amendments is fully discussed, and where it appears to be well settled, both on principle and authority, that while the defect in the execution, unless amended, avoids the title of the purchaser, because the officer could not lawfully sell property against which his precept did not run, yet the court will amend the mistake of its clerk in all proper cases, where the amendment would be in furtherance of justice between the parties, even where no motion to amend has been made. *Lewis* v. *Ross*, 37 Maine, 230. *Hall* v. *Williams*, 10 Maine, 278. *Rollins* v. *Rich*, 27 Maine, 557.

Morrill v. *Cook*, 31 Maine, 120. *Thompson* v. *Smiley*, 50 Maine, 71, and numerous other cases in this and other states. If it turns out upon examination of the other objections urged by the plaintiff that the levy was rightly made, and the defendant's title is in all other respects good, we ought not to let this mistake in a judicial writ affect the rights of the parties, and must authorize the proper officer to correct it.

Applying the reasoning of the court in *Hall* v. *Williams*, 10 Maine, 286, to this case, we say it is not perceived that the plaintiff can suffer injury by this amendment, or any inconvenience other than what he would have been subjected to if the execution had been originally in proper form. The real estate of non-residents was by law subject to be seized on execution for the debts of the plantation for want of goods and chattels of the inhabitants which might be taken, and the plaintiff's property should stand just as it would if the recording officer of the court had not committed an error, which as to him was certainly harmless. See *Sawyer* v. *Baker*, 3 Maine, 29. Freem. Ex., §§ 63, 67, 72.

The plaintiff's next objection is that, at the time of the sale, the legal existence of the plantation had ceased, and he is therefore deprived of the remedy which he might otherwise have under R. S., c. 84, § 31, against the plantation to procure a reimbursement. But the lien upon the property, created by its seizure by the officer on the execution, is not affected by the subsequent demise of the debtor. *Parks* v. *Morse*, Cro. Eliz. 181. *Waghorne* v. *Langmeade*, 1 Bos. & P. 571. *Becker* v. *Becker*, 47 Barb. 497. *Dodge* v. *Mack*, 22 Ill. 93. *Den* v. *Hillman*, 2 Halst. 180. *Black* v. *Planters' Bank*, 4 Humph. 367.

If the appropriation of the plaintiff's property to the partial payment of a debt of the plantation where it was situated, for which it was by law made liable, is to be regarded as taking it for public uses, still the law under which it was done cannot be deemed unconstitutional, for due provision was made, by § 31, c. 84, for his reimbursement, and it is not perceived how the rights acquired by the defendant by a purchase at a judicial sale made in pursuance of it can be destroyed because the remedy provided for the plaintiff cannot be made available against a plantation

which has ceased to exist. The same result would have been likely to follow if the levy and sale under which defendant claims had been made any time during the last year of the legal existence of the plantation. The question as to the constitutional right of the legislature to dissolve one of these municipal corporations, leaving its liabilities unprovided for, does not properly arise here. If the act was invalid the plaintiff still has his remedy. Valid or invalid, it is not one upon which the defendant bases any claim.

The plaintiff further objects that only Merrill and Newton are named in the notice as proprietors of the lot, and therefore the plaintiff's estate under Merrill's mortgage was not taken. Not so; it was lot numbered four, "as lotted out on the original plan of the plantation," which was advertised for sale, and this is one of the modes in which § 29, c. 84, authorizes the seizure and sale of the land in a town on an execution against it. Under § 30 the officer is to advertise "the names of such proprietors as are known to him of the lands which he proposes to sell," but the validity of the sale, it is evident, is not to depend upon the extent or accuracy of his knowledge of the proprietors, when he seizes, advertises and sells the lots "as lotted on the town plan." The "names of such proprietors as are known to him" are to be given by way of further identification of the lot, and, perhaps, to call their attention to the notice; but where he does not undertake to sell the lots "as they are owned or occupied," the number of the lot upon the plan of the town or plantation and the names of such proprietors as are known to him will suffice to meet the requirements of the statute.

The plaintiff further argues that he had no notice of the sale and no opportunity to redeem, because the officer's return on the execution is dated July 3, 1876, and it does not appear that it was returned to the clerk's office until that time; and the purchaser did not record his deed until March 20, 1876, leaving only three months of the year, within which the owner of the lot was entitled to redeem, unexpired.

But the only notice of sale which the statute requires is that which is given by advertising the time and place of sale three

months beforehand in the state paper and in one of the newspapers printed in the county where the land lies, if any, and if this is not effectual, there is little probability that the return of the execution to the clerk's office, or the record of the officer's deed in the registry of deeds, would be. At all events, the statute does not make them essential to the validity of the purchaser's title. No question arises as to the effect of any conveyance by Merrill or the plaintiff after the sale on execution and before the purchaser's deed was placed on record. Looking at the good understanding between the plaintiff and his mortgagor, John B. Merrill, as shown by the ready surrender of possession for breach of condition, by non-payment of first year's interest, it is difficult to believe that the plaintiff did not have actual as well as constructive notice of the sale in season to redeem if he had desired to do so. He does not testify that he had not. But, if he had so testified, the court would not be at liberty to add another requisite to the validity of the purchaser's title beyond those specified in the statute. Where an extent is made upon lands, the return of the officer must be seasonably made and recorded. Not so where property is sold upon execution. The statute does not require it, and the decisions are that "the purchaser's title is not dependent on the performance of this duty by the officer. The purchaser has no control over the officer, and is not prejudiced by a deficient or incorrect return, nor by the entire absence of any return whatever." Freem. Ex., § 341, and numerous cases cited in note. *Wheaton* v. *Sexton*, 4 Wheat. 503. *Gibson* v. *Winslow*, 38 Penn. 49.

Again, the plaintiff objects that the officer does not express the cause of sale in the deed given to the purchaser, as required by § 30, c. 84. The requirement is somewhat indefinite. The object is, probably, to enable the party whose land is sold to establish his right to redeem by the same instrument that takes away his title, and, perhaps, to direct him to the witnesses and records necessary to prove his claim against the town under section 31. We think this is sufficiently done by the recitals in the deed to the defendant. The cause of the sale was the execution claim of Eaton Shaw against the inhabitants of Hamlin's Grant Plantation, and

the officer sets out at some length his course of proceeding, pointing out the newspapers in which his notices of the sale, containing a statement of the amount of the execution and the court and term at which it was recovered, were published. We think the requirements of the statute and its objects are answered.

But the plaintiff insists that the officer's return does not show that the notice of sale was published prior to February 13, 1875, and that such publication must be regarded as the date of the seizure. We do not think it is competent for him in this action to dispute the truth of the officer's return, which is that he seized the real estate on the eleventh of February; and that is the date of his notice.

The plaintiff claims that the act of 1874, (c. 608, P. & S. L.) authorizing the assessors of Woodstock to audit claims against Hamlin's Grant Plantation, and to assess a tax on the polls and estates there, as they existed in 1873, sufficient to pay its indebtedness, deprived Shaw of the power to pursue his claim by the ordinary process of law. There is no indication in the act of any intention on the part of the legislature to limit creditors of the plantation to this mode of enforcing their demands. In any view of it, when Shaw had been permitted to proceed to judgment and execution, without the interposition of any such suggestion, the title of a purchaser at a sale on the execution cannot be questioned collaterally for that reason.

Finally, the plaintiff claims that the giving of the names of John B. Merrill and Mrs. Almeda Newton as owners of lot four in the notice of sale, without stating whether they owned in common or what portions each owned in severalty, is fatal to defendant's title. The objection would be formidable if the officer had undertaken to seize and sell the real estate in the plantation "by lots as they are owned or occupied," or if only a part of lot four had been required to satisfy the execution.

But, as we have before seen, he adopted the other mode permitted by the statutes. It was lot four on the plan of the plantation that was advertised, and so long as the officer gave the names of such owners as were known to him, errors or omissions in the names would not affect the sale. It was lot four that was sold,

not the interest of Merrill and Newton in the lot only, but that of all other unknown owners as well; and, under such circumstances, if the owners or any of them desired to redeem, it would be necessary for them, where the law, as here, authorized a sale of the lot as an entirety, (if it was all needed to pay the execution) to adjust among themselves their shares of the redemption money. The case is not analogous to the sale of two equities of redemption in gross. Here the right in equity was created by the sale, and was a right to redeem lot four as it was sold.

We think the defendant's justification under his title may be regarded as established. For, "where an amendment is proper, it will, in collateral proceedings, be treated as if actually made." Freem. Ex., § 72, and cases there cited.

Plaintiff nonsuit.

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

SABATTIS SUSUP JOHN & others *vs.* TOMER SABATTIS.

Penobscot. Opinion May 29, 1879.

Statutes,—construction of. Indians,—tenure of. Parol partition. Title by disseizin. Forcible entry and detainer.

The collection of the various acts respecting the Indians into R. S., c. 9, and their condensation in the process of revision, do not affect their meaning.

R. S., c. 9, §§ 22 and 23, respecting the assignment of house and garden lots in Oldtown island, are not affected in their construction by §§ 15-18, derived from an act passed years before relating to other property, *diverso intuitu.*

The production of the certificate, provided in § 17, is not essential to prove an assignment of a house lot under § 22; but it may be presumed from undisturbed possession, originating more than forty years since, and improvements made upon the lot before the passage of Stat. 1839, c. 396, with possession of the lot and improvements, continued to the present time in the party, or his descendants or grantees, and those claiming under them.

The approval of the Indian agent is not necessary to the validity of a sale of such house lot to an Indian of the same tribe.

The tenure which Indians have in these lots under Stat. 1839, c. 396, and the subsequent revisions thereof, is a qualified fee, determinable at the pleasure of the legislature; but until the will of the legislature is expressed by legislation, it is capable of being conveyed to an Indian of the same tribe, and of descending to his heirs.

Indians may acquire title to such lots against each other by disseizin and adverse possession, and make partition of their interests in common therein.

While a parol partition of real estate is invalid by the statute of frauds, the exclusive possession in severalty after such partition will bar either of the former co-tenants from asserting any right or interest in the share of the other.

Land necessary for the support and use of the same may pass by the grant of a house, or barn, or a mill, if such be the intention of the parties; when the structure only is named, and no land is granted, *eo nomine*, but only as incident to the building, and an abandonment of the site for the use of the structure will be followed by a failure of title to the site.

Under R. S., c. 94, § 1, forcible entry and detainer may be maintained against a disseizor who has not been long enough in possession to be entitled to improvements.

ON FACTS AGREED.

FORCIBLE ENTRY AND DETAINER, to recover possession of three rooms on the ground floor of the west half of the dwelling house formerly occupied by Sabattis Peol Susup, Fransway Peol Susup and Francis Xavier Susup, and the outbuildings connected with the same in possession of Tomer Sabattis, and the lot of land on

which the buildings stand and appurtenant thereto, all situated on Oldtown Island.

Plea, not guilty.

Five brothers, Peol Mitchell Susup, Francis Xavier Susup, Fransway Peol Susup, John Peol Susup and Sabattis Peol Susup, members of the Penobscot tribe of Indians, built a large house, some forty years or more ago, upon a lot of land occupied by them on Indian Oldtown Island.

Some ten years later, being also in possession of other real and personal property, they made a division of all their possessions. The said Peol Mitchell Susup and John Peol Susup took for their portion certain lots upon an island farther up the river. Said Francis Xavier Susup took for his portion other property on the lower islands, leaving Fransway Peol Susup and Sabattis Peol Susup in exclusive occupancy of the large house and lot aforesaid. This division was presumably made by parol.

Being thus left with the house and lot aforesaid, said Fransway and Sabattis divided the premises (presumably by parol), Fransway taking the east half of the house and lot and Sabattis taking the west half of the house and lot, on which west half also stood a barn; and thenceforward they occupied their respective portions in severalty.

On the eighteenth of October, 1864, Francis Xavier Susup, by deed of quitclaim, duly executed and stamped, in the common form, conveyed to Fransway Peol Susup and Sabattis Peol Susup, their heirs and assigns, "all my right, title and interest in and to a certain house and barn and lot situated on Oldtown Island, being the same house and lot now occupied by said Fransway and Sabattis."

They had no title to these lands other than as members of said tribe, occupying the same under the laws relating to the Indian tribes, contained in chapter nine of the revised statutes. Nor does it appear that any certificate was ever issued to them, such as is prescribed in said chapter, but they were never molested or disturbed in their occupancy.

On December 12, 1871, Sabattis Peol Susup, being in declining health and having no children, made certain conveyances of his half of the aforesaid house and lot, to wit:

To his brother Fransway Peol Susup he conveyed, by quitclaim deed in common form, "that portion of my house above the second floor, *i. e.* rooms in the second story, and one-half the barn connected with said house."

Also on the same day he conveyed to his wife, Moddlin Susup, by like quitclaim deed, a life estate in "three rooms on the ground floor of my house, one-half of barn, and the lot on which said house and barn stand, on Oldtown Island,—the balance of the house and barn conveyed to his brother Fransway Susup."

Said Sabattis afterward (in 1872) died. His wife Moddlin continued to occupy the premises conveyed to her, and his brother Fransway the portion conveyed to him, in addition to the east half so long occupied by him as aforesaid.

On September 26, 1873, said Fransway made a quitclaim deed in common form to said Moddlin, her heirs and assigns, in which, for the consideration of six dollars, he conveyed to her "all my right, title and interest in and to one-half of the lot and barn thereon on Indian Oldtown Island, being the same property conveyed to me by Sabattis Peol Susup December 12, 1871."

Under this deed there was no change of possession in any property except the "half of barn." Said Fransway during his lifetime, and his heirs since his decease, continuing in the occupancy of the east half of the house and lot, and the rooms above the second floor of the west half.

Said Fransway died in April, 1875. Said Moddlin took down the barn and wrought the materials into a shed adjoining her rooms.

On December 6, 1875, said Moddlin, in writing on the back of the quitclaim deed dated December 12, 1871, from her husband to her, assigned to her brother Tomer Sabattis, the defendant, "all my interest in the within."

On the following day, December 7, 1875, she gave said defendant a warranty deed, which was duly executed and recorded in Penobscot registry of deeds, conveying, among other property, "a certain lot or parcel of land, situated in Oldtown, the half of the lot and the barn thereon, on Indian Oldtown Island, conveyed to me by Sabattis Peol Susup September 26, 1873, and

constituting the shed attached to my three rooms on the ground floor of my house—half the barn and lot aforesaid."

Said Moddlin afterward died leaving the defendant in the possession of the estate she had conveyed to him.

When Sabattis Peol Susup died he left only one brother surviving, Fransway Peol Susup, before mentioned; no children, no sisters, no father or mother. There were, however, children representatives of his deceased brothers as follows: Charles Fransway Susup and Mary Sockbasin Swassian, (plaintiffs) children of Francis Xavier Susup, Sabattis Susup John, Joseph Susup John and Peol Susup John, (plaintiffs) children of John Peol Susup who died in 1851.

On the death of Fransway Peol Susup, the only surviving brother, he left the following named children: Joseph Peol Francis Susup, Swassian Fransway Susup and Elizabeth Sabattis Tomer (plaintiffs).

All these children (8), nephews and nieces of said Sabattis Peol Susup, join in this action.

The conveyances before named were all approved by the then agent of the Penobscot Indians, except those from said Moddlin to the defendant, which were not approved by him.

None of these deeds were recorded in the Penobscot registry prior to the giving of the warranty deed by said Moddlin to the defendant.

Upon the foregoing facts the court is to enter such judgment as the rights of the parties demand.

C. A. Bailey, for the plaintiffs.

Sewall & Blanchard, for the defendant.

BARROWS, J. The wandering and improvident habits of the remnants of the Indian tribes within our borders led our legislature at an early period to make them, in a manner, the wards of the state, and especially to take the control and regulate the tenure of their lands. Numerous acts looking to this end were passed in different years, which are now gathered together in chapter 9, of the revised statutes. But the collection into one

chapter of statutes passed respecting different parcels of property or different tribes of Indians will not have the effect of carrying provisions relating to one such parcel or tribe into the statutes designed to affect others. These changes of collocation or even of phraseology in a revision of the statutes will not change the law unless the intent of the legislature to change it is apparent. *Hughes* v. *Farrar*, 45 Maine, 72.

Chapter 158 of the laws of 1835 was designed to promote an interest in agricultural pursuits among the Penobscot Indians. But it relates to lands other than those which are the subject of this suit. The assignment of the house and garden lots on Indian Oldtown Island (part of one of which is the subject of controversy in this suit) was regulated by chapter 396 of the laws of 1839, and the provisions of §§ 15–18 of chapter 9, R. S., have no connection with those of §§ 22 and 23 in the same chapter. They relate to different subjects, and are grouped together in chapter 9 only because they have reference to one of the Indian tribes; but the construction of §§ 22 and 23 does not in any manner depend upon §§ 15–18, any more than it does upon sections in the same chapter relating to Passamaquoddy Indians. The lots assigned under c. 158, laws of 1835, according to § 4 of that chapter, could not be sold by the Indians to whom they were assigned, to any person in or out of the tribe, with or without the permission of the agent, and we must give the same construction to § 18, c. 9, R. S., so far as the sale of lots there ordered to be assigned for agricultural purposes is concerned. "The permission of the agent" relates to the carrying off of the growth faster than is necessary for cultivation and to the leasing of the lots assigned for agricultural purposes, which might be done with the permission of the agent, by virtue of § 2, c. 331, laws of 1838. The reading of § 4 of the original act of 1835 demonstrates this beyond all possibility of mistake. The right to sell, even with the permission of the agent, has never been conferred expressly or by implication, and the broad prohibition of § 4, "It shall not be in the power of any Indian to sell his or her lot," is still the law touching the lots assigned for agricultural purposes.

But touching the house and garden lots assigned under c. 396, laws of 1839, and to which §§ 22 and 23 relate, while it is not requisite that a certificate should be issued in the form prescribed by § 17, provided the lot was originally assigned by the agent to the possessor or applicant, the only restriction upon the Indians' power of sale is that such sale shall be made only to some member of the tribe, and the purchaser as well as the seller shall hold it subject to the will of the legislature. The act of 1839 provides that "the lots so assigned by said agent shall be held and enjoyed by the person or family to whom they are allotted, during the pleasure of the legislature." This, in substance, gives to the person or persons to whom such lot is assigned a fee therein, determinable at the pleasure of the legislature. For legislative grants may convey lands without making use of technical words required in a deed. *Rutherford* v. *Green*, 2 Wheat. 196.

But, aside from the requirement of law that the determinable quality of the estate follows it in the hands of all to whom it may be transferred, the proprietor of such a qualified, base, or determinable fee, has the same rights and privileges over the estate as if he were tenant in fee simple. 4 Kent Com. (4 ed.), 10. Such a fee will descend in the regular line of succession like a fee simple. 1 Wash. R. E. (1 ed.), 64, c. 3, § 89. We see no reason why a family to whom one of these lots has been assigned may not make partition of it in the same manner and with the same effect as other tenants in common may.

While a parol partition of lands between co-tenants is invalid by reason of the statute of frauds, we think that there is no good reason why, if it is followed by twenty years continuous, adverse, exclusive possession by each of their respective shares in severalty, such possession will not operate as a bar to the claim of either upon the other for the share so occupied. See *Jackson* v. *Harden*, 4 Johns. 202. *Jackson* v. *Vosburg*, 9 Johns. 270.

The case finds that, more than forty years ago, five brothers named Susup, of the Penobscot tribe of Indians, built a large house on a lot occupied by them on Oldtown Island. Ten years later, (or more than thirty years ago) being possessed of other real and personal estate, they made a parol division of all their possessions,

in pursuance of which Sabattis and Fransway were left in the exclusive possession of the house in question, and they thereupon divided the premises (so far as it appears, by parol), Sabattis taking the west half of the house and lot, on which stood a barn, and Fransway the east half, and thenceforward they occupied their respective portions in severalty for more than twenty years before the death of either. We think the result was that, independent of any conveyances, the heirs of Sabattis and Fransway respectively would have an estate in fee, determinable at the pleasure of the legislature, in that portion of the premises held by their ancestor in severalty. The brothers were in possession of the lot and had built the house before the passage of the law of 1839, and were by virtue thereof entitled to have it assigned to them by the agent, and the presumption is that he did his duty and assigned it to them. *Treat* v. *Orono*, 26 Maine, 217. A certificate, though a convenient muniment and evidence of title, is not essential to their title under the legislative grant of 1839.

Sabattis Susup at his death in 1872 left no child, father, mother, sister, or any brother but Fransway. His property descended to his brother Fransway, and to the children of his brothers Francis Xavier and John Peol Susup. The plaintiffs are the children of these brothers and the children of Fransway, who died in 1875. The defendant claims title under certain conveyances, the force and effect of which must be ascertained.

In December, 1871, shortly before his death, Sabattis Susup, then having, by virtue of the assignment and his exclusive occupancy in severalty of the west half of the lot on which stood the barn for more than twenty years after the division between himself and Fransway, a qualified fee in said west half which he might lawfully convey, made a quitclaim deed to his brother Fransway, the owner of the east half of the house and lot, of "that portion of my house above the second floor, *i. e.* rooms in the second story, and one-half the barn connected with said house."

Sabattis Susup, on the same day, conveyed to his wife Moddlin a life estate in "three rooms on the ground floor of my house, one-half of barn and the lot on which said house and barn stands on

Oldtown Island,—the balance of the house and barn conveyed to his brother," as above. After the death of Sabattis, his wife Moddlin continued to occupy the premises conveyed to her, and Fransway the portion conveyed to him, in addition to the east half which he had so long held, until September 26, 1873, when Fransway, in consideration of six dollars, by quitclaim deed in common form, conveyed to Moddlin "all my right, title and interest in and to one-half of the lot and barn thereon on Indian Oldtown Island, being the same property conveyed to me by Sabattis Peol Susup December 12, 1871." Under this deed there was no change of possession of any property except "the half of the barn." Fransway during his lifetime, and his heirs since his decease, have continued to occupy the east half of the house and lot and the rooms above the second floor of the west half, and their right to do so is not here in controversy. But, after the deed from Fransway to her, Moddlin took down the barn and wrought the materials into a shed adjoining her rooms.

In December, 1875, Moddlin, in writing on the back of her husband's deed to her, assigned to her brother, the defendant, "all my interest in the within," and the next day gave him a warranty deed, conveying, among other property, "a certain lot or parcel of land situated in Oldtown, the half of the lot and the barn thereon on Indian Oldtown Island, conveyed to me by Sabattis Peol Susup September 26, 1873, and constituting the shed attached to my three rooms on the ground floor of my house, half the barn and lot aforesaid."

This conveyance has not been approved by the Indian agent, but as the conveyance was made to a member of the tribe, this was not necessary, and the deed passed whatever interest in the premises therein described Moddlin had to convey.

Moddlin has since died, leaving the defendant in possession of the premises which are the subject of this suit, to wit: the three rooms on the ground floor of the west half, and the outbuildings connected with said half, and the lot of land on which said buildings stand and appurtenant thereto.

Whatever right the defendant had in the three rooms, or in any property conveyed to Moddlin by Sabattis Peol Susup, expired at

the death of Moddlin, for Sabattis gave her only a life estate. The reference in Moddlin's deed to the defendant to a conveyance from Sabattis September 26, 1873, is plainly a mistake, for Sabattis was then dead; that was the date of Fransway's quitclaim deed to her of his "right, title and interest in and to half of the lot and barn thereon, . . being the same property conveyed to (him) by Sabattis Peol Susup December 12, 1871."

The question here is whether Fransway conveyed to Moddlin any interest in the land on which the half of the barn stood, for we think the statement of the date of the deed makes it sufficiently certain that it was the deed of Fransway, and not that of Sabattis, which is referred to in Moddlin's deed to the defendant, and that the latter deed should be construed accordingly. Whatever it was that Fransway thus released to Moddlin, it was none other than "the same property conveyed to (him) by Sabattis Peol Susup December 12, 1871," and that, so far as the description of it relates to any property here in controversy, was "one-half the barn connected with said house."

The deed of Sabattis to Fransway dated December 12, 1871, conveyed no interest in real estate, except as incident to the structures standing thereon. No doubt that the land necessary for the support and use of the same may pass by the grant of a house or a barn or a mill, if such was the intention of the parties. But when the structure only is named, and no land is granted, *eo nomine*, but only as incident to the building, an abandonment of the site for the use of the structure will be followed by a failure of title to the site. *Miller* v. *Miller*, 15 Pick. 57.

If this be so, when Moddlin, after Fransway's conveyance to her, pulled down the barn and converted the materials into a shed adjoining her rooms, and abandoned the use of the lot on which the barn stood for the purpose of sustaining such a structure, the title to that part of the lot on which the half of the barn conveyed to Fransway stood, reverted to the heirs of the original grantor, Sabattis.

But it is not altogether clear that anything passed by Sabattis' deed to Fransway, except the right to use the structures named in the conveyance while they stood. No land is mentioned in connec-

tion with either of them, and Sabattis evidently did not intend that any right therein should pass; for by his conveyance to Moddlin, made the same day, he gave to her a life estate in the "lot on which said house and barn stands." "What shall pass by a conveyance, is purely a question of intention," remarks Shepley, J., in *Derby* v. *Jones*, 27 Maine, 357, where the question was whether buildings only, or the land on which they stood, also passed by a conveyance of "the house and stable on the mill lot at Great Works, built and now occupied by me."

It is true that the inquiry is as to the intention of both parties to the conveyance, and that the language of the deed, if ambiguous, is to be construed most strongly against the grantor. But there is plainly nothing in the deed of Sabattis to Fransway of December 12, 1871, which should be construed to carry anything more than the use of the real estate, so far as necessary for the occupancy and support of the structures which are conveyed.

We think that Sabattis Peol Susup made no conveyances which, according to the facts agreed, would prevent his property in the lot, so far as it is here in dispute, from reverting to his heirs, the plaintiffs, on the death of Moddlin, and that the defendant acquired by Moddlin's deed only an estate for her life, which was at an end before the plaintiffs brought this process against him.

Besides the question of his title as against that of the plaintiffs, which we have discussed, defendant objects that, even if they could maintain a writ of entry against him, he is not liable in this process, because he says that the provision of c. 94, § 1, giving this process against a disseizor, must have a reasonable construction, or it will operate to abrogate the remedy by writ of entry.

The construction must be such as accords with the plain import of the statute and gives effect to the remedy thereby provided. The arguments of counsel as to the effect of the provision in substituting this process for a writ of entry against a disseizor who has not been long enough in possession to be entitled to betterments, would be more properly addressed to the law making power than to us.

The suggestion that the entry is tolled by a descent cast, and that the same disability attaches to the rights of an heir in this

case as would attach if the defendant had disseized the ancestor so far as it is sound, does not apply. Sabattis was not disseized; nor were the heirs disseized during the lifetime of Moddlin. The defendant was rightfully in possession under her deed until her death, and then only did the property revert to the plaintiffs as the heirs of Sabattis.

There was never any joint disseizin committed by Sabattis and Fransway, nor were they ever joint tenants with right of survivorship in any manner. Sabattis held the west half and Fransway the east in severalty for more than twenty years before the date of Sabattis' deed to Fransway. It is true, as suggested by defendant's counsel, that neither of them could acquire any rights as disseizors against the state. But as against their co-tenants and each other under the state grant, we see no reason why they should not. The defendant's estate in the premises is at an end. The plaintiffs are entitled to possession.

Judgment for plaintiffs.

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

JOHN A. BUCK & others *vs.* FREDERICK W. LEACH.

Hancock. Opinion May 29, 1879.

Deceit. Compromise settlement.

A master of a brig, who had been sailing her on shares, represented in a letter to the owners that he was indebted, on a settlement of his accounts, to them in a large sum named, "besides losing his time;" whereupon a claim for a compromise was yielded to: *Held*, that, in action by the owners for deceit, a verdict for the owners is justified if the representations were proved to have been false in fact, known by the defendant to be so, and if made with a design to deceive the plaintiffs, provided they, acting at the time with due care, were deceived and induced to settle as they did, when they otherwise would not have done so.

When a creditor has been induced by deceit of his debtor to accept a part of his debt in full payment, the unpaid portion of the sum due is the measure of damages in an action on the case for the deceit.

ON EXCEPTIONS.

CASE for deceit.

The defendant sailed upon shares the brig L. Warren, belonging to the plaintiffs. He made a settlement of the vessel's accounts at New York, bringing himself indebted to the owners in the sum of $1,431.36. He thereupon wrote the following letter to John A. Buck, agent of the owners, dated January 10, 1875:

"New York January 10th, 1875. John A. Buck, Esq.: We have done nothing yet in way of charter, hav'nt even had an offer. We are caulking her deck. Mr. Ward said if we didn't have it done they would cut her rate down. We have made up the brig's accounts to the time the cargo was discharged here, and it brings me in debt to the brig $1,431.16, besides the second mate's order, Mr. Ward paid $249; that is rather hard on me, besides losing my time. I think under the circumstances, considering how and where I was obliged to take the brig on shares, you and the rest of the owners ought to compromise the matter. Please give this due consideration. . ."

Relying upon the representations contained in the letter, the plaintiffs were thereby induced to compromise and settle their claim

upon the defendant for fifty cents upon the dollar, receiving the sum of $715.68, and giving their receipt for such sum in full. But the plaintiffs were misled by such representations. Sometime after the settlement the plaintiffs ascertained that instead of being the loser represented he had saved up from his share of the earnings the sum of seventeen hundred dollars, which fact and the state of the captain's private accounts were unknown to the plaintiffs when they settled with the defendant; the defendant continued a while in the vessel after such settlement; after demand the suit was brought.

The judge presiding instructed the jury that they might regard the representations sufficient to justify a verdict for the plaintiffs, if proved to have been false in fact, and known by the defendant at the time to be so, and if made with a design to deceive the plaintiffs, provided the plaintiffs were deceived and induced to settle as they did, when they otherwise would not have done so, acting at the time with due and proper care; and that the rule of damage would entitle the plaintiffs to recover in this form of action the unpaid portion of their account to the same extent as they would have been entitled to collect if the receipt had been for the sum actually paid to them instead of in full.

Verdict for plaintiffs; to which rulings the defendant alleged exceptions.

H. D. Hadlock, in support of the exceptions, cited *Long* v. *Woodman*, 58 Maine, 49. *Cooper* v. *Lovering*, 106 Mass. 79. *Mooney* v. *Miller*, 102 Mass. 220. *Fisher* v. *Brown*, 1 Tyler, 387. *People* v. *Clough*, 17 Wend. 37. *Bishop* v. *Small*, 63 Maine 13.

E. Hale & L. A. Emery, contra.

BARROWS, J. The defendant does not complain that the instructions were in any respect erroneous or defective, if an action for deceit could under any circumstances be maintained on account of such a representation as the defendant made to the plaintiffs, to operate, apparently, on their sympathies and generosity, and induce them to discharge the debt he owed them upon payment of a percentage. He claims that his letter to the plaintiffs

contains only such vague and indefinite appeals to their liberality "as a person desiring to obtain favorable consideration in a settlement would be likely to make, and so plainly so that a person in the use of ordinary care should not be deceived by them."

But the instructions require, and the jury must have found that the representations were proved to have been false in fact and known by the defendant at the time to be so, and that they were made with a design to deceive the plaintiffs, and that plaintiffs were thereby deceived, acting at the time with due and proper care, and induced to settle as they did when they otherwise would not have done so.

The import of the letter is unmistakable. It amounts to an assertion that, upon the settlement of the accounts of the plaintiffs' brig, which he had been sailing on shares for a year or more, the result was that he had lost his time, besides falling heavily in debt to the plaintiffs. The idea evidently intended to be conveyed was that he had nothing in his hands of the earnings of the vessel to meet this indebtedness, and that, as they shared the chances of profit with him, they ought in justice to divide the loss. If the statement was true, the appeal was apparently a reasonable one. But the jury have found it was not true, and that the defendant knew it was not when he made it, and made it with a design to deceive the plaintiffs.

The defendant takes considerable credit to himself that this deception was not accompanied with an assertion that he was unable to pay the debt, and thereupon contends that the false statement did not affect the interest of the plaintiffs, but related to his own losses only, and hence cannot be the foundation of an action if they were foolish enough to believe it.

Perhaps the nearest approach to a legitimate defense is that the fraud was one which ordinary care on the part of the plaintiffs might have detected. But the case is not before us on a motion to set aside the verdict as against evidence; and on that point the jury had proper instructions.

The naked question is whether a false representation as to existing facts under the circumstances proved is actionable, when parties, in the exercise of due care, are deceived by it, and induced,

by an appeal to their liberality based upon falsehood, to surrender their entire claim upon payment of a part only.

Those who argue that swindling a man by an appeal to his benevolence, based upon false and fraudulent statements as to matters of fact, is not actionable, forget that even a downright gift is a contract.

We do not think there is any essential difference in the actionable quality of false and fraudulent representations, whether they are made to induce a man to part with his property, rights or credits from benevolence or from self interest. He who acts upon the faith of the false statement is just as much defrauded in the one case as in the other. Not that every bald lie which a beggar tells at your door, and which you accept because too indifferent to inquire about or consider it before dismissing him with charity, would be a proper foundation for an action. But the cheat escapes the punishment he deserves in such cases, not because his appeal is to the benevolence of the defrauded, but because the latter does not use ordinary care to ascertain the truth before giving. It is not the innocence of the cheat, but the carelessness of the cheated, that defeats the action. That element, as we have seen, is out of this case, being disposed of by the verdict rendered upon testimony not reported.

We hold that, upon common law principles, when one exercising ordinary care has been induced to part with his money or other things of value, including choses in action, by false statements as to matters of fact, made by one who, at the time of making, knows them to be false, with a design to defraud, he has his remedy against the wrong doer, whether the statements are intended to move him by appealing to his self interest, his benevolence, his fears, or his hopes, for himself, or others, including the cheat as well as the rest of mankind. To hold a man civilly responsible for the goods thus wrongfully obtained, it is not necessary to inquire whether he has brought himself within the scope of penal statutes, which are to be strictly construed, or whether he can be allowed to escape, as in *People* v. *Clough*, 17 Wend. 37, the doctrine of which has been doubted. See Big. Ov. Cas. 376.

The gradual corruption of commercial integrity, which more than any other one thing has contributed to bring about the stagnation of business of which many complain, by inducing a general distrust and want of confidence in the results of business enterprise, cannot serve as an excuse to one who, like the defendant, was acting in a fiduciary capacity towards the plaintiffs, for making false statements as to the condition of their business, to secure an advantage for himself in the settlement. The frequency of false representations by debtors to secure compromises of their debts on favorable terms is no defense.

In *Denny* v. *Gilman*, 26 Maine, 149, where the alleged false representations related to the ability of the debtors to meet their payments, the case was held not cognizable in equity because there was a perfect remedy at law; and it was incidentally held that a statement might be literally true and yet be of such a character that those making it might know that it would convey a false idea to the party to whom it was made, and if they did know it and made it with an intention to deceive and induce those to whom it was made to give up a portion of their claim, and the statement did deceive, and the party was defrauded thereby, the literal truth of the statement furnishes no excuse.

But in the case before us it is only by omitting essential parts of the defendant's statement that it can be made to appear even literally true.

The rule for assessing damages was correct, for the same reason that was given in *Stephenson* v. *Thayer*, 63 Maine, 147.

If the business is finally closed upon worse terms for the defendant than he might have secured by a truthful statement, it is due to his own wrongful act.

Exceptions overruled.

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

CLARA A. JONES *vs.* JOHN LEEMAN.

Washington. Opinion May 31, 1879.

Trespass q. c. Will,—construction of. Exception. Disseizin,—purging.

Generally, possession, either actual or constructive, by the plaintiff of the land described in his writ, is essential to enable him to maintain an action of trespass thereon.

A mere right of entry derived from the conveyance of the title of the owner who was out of possession when such conveyance was made is not sufficient without a previous re-entry by the grantee to purge the disseizin.

A testator's will, after devising to his son G twenty-five acres (described by metes and bounds) of his homestead farm, which G was to have at the age of twenty-one years, continued as follows: "I give to my wife M all the remainder of my homestead farm," with the stock and numerous other articles of personal property, "and everything belonging or attached to said farm except the twenty-five acres given to G." The wife was required to pay all debts and certain legacies "and to give to my son T a good school education and clothing, . . and at the day of her death all goes into the hands of my son T:" *Held*, that the language was sufficient to give to the wife a fee simple in all the homestead except the twenty-five acres given to G.

Further on the will continued: "If my son T comes to the age of twenty-one years during my wife's lifetime, then he shall have from the real estate given my wife the following" (describing the locus on which the trespass is alleged to have been committed): *Held*, that this is to be read as a valid exception out of the property devised to the wife, and that T, when he became twenty-one years old, was entitled to the same in fee.

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TRESPASS *quare clausum fregit.*

ON REPORT to the law court with jury powers, with the stipulation that, if the action is maintainable, it is to stand for trial.

The facts sufficiently appear in the opinion.

A. McNichol, for the plaintiff, cited *Pickering* v. *Langdon*, 22 Maine, 413. *Morton* v. *Barrett*, 22 Maine, 257. *Orr* v. *Moses*, 52 Maine, 287.

J. & G. F. Granger, for the defendant.

BARROWS, J. An action of trespass is a proper remedy for an injury done to one's possession of things, real or personal. To maintain it here the plaintiff must show that she had the possession, either actual or constructive, of the land described in her writ, rightfully as against the defendant.

A mere right of entry derived from the conveyance of the title of the owner, who was out of possession when such conveyance was made, is not sufficient without a previous re-entry by the grantee to purge the disseizin. Except for the original act of disseizin, the owner of land who is out of possession cannot without a re-entry maintain the action, nor can he recover damages for injuries done by the disseizor while in possession. 2 Greenl. Ev. (2 ed.) 577, § 619. 3 Black Com. 210.

This doctrine is recognized in numerous cases in this state and in Massachusetts, and seems to arise necessarily from the nature of the action. See *Taylor* v. *Townsend*, 8 Mass. 411, 415. *Allen* v. *Thayer*, 17 Mass. 299. *Bigelow* v. *Jones*, 10 Pick. 161. *Blood* v. *Wood*, 1 Met. 528. *Tyler* v. *Smith*, 8 Met. 599. *Prop. Ken. Purch.* v. *Call*, 1 Mass. 483. *Bartlett* v. *Perkins*, 13 Maine, 87. *Brown* v. *Ware*, 25 Maine, 411. *Abbott* v. *Abbott*, 51 Maine, 575. *Howe* v. *Farrar*, 44 Maine, 233.

The case seems to have been somewhat carelessly and hastily made up, and it is not clear that the questions which the parties may have designed to present can be regularly reached.

The plaintiff relies upon a constructive possession arising from proof of title, which, if the title were established, would answer the purpose and make a *prima facie* case, provided the evidence she offers did not show herself and her grantor actually disseized before the time of the acts complained of, and fail to show the necessary re-entry. She presents a deed from Clarissa S. Kerr purporting to convey the locus, as administratrix of Thomas Kerr, to Clara M. Jones. If, making allowance for rather more than the usual amount of heedlessness and consequent mistakes, we assume the identity of divers persons described by different names and the regularity of the proceedings of the administratrix in making the sale, we may conclude that the plaintiff has the title which Kerr had in his lifetime. That title depends upon the construction to be given to the will of John Kerr, who owned the farm of which the locus is a part, and by his will dated November 20, 1844, undertook to dispose of his worldly estate, in total disregard of everything like technical precision, and to some extent of consistency also. In the outset he gives to his two

daughters, Ann and Elizabeth, trifling bequests from the personalty, and to his son George "twenty five acres from my homestead farm," (described by metes and bounds) "which the said George is to have at the age of twenty-one years, which will be the 23d day of August, 1846." To the same son he gives two hundred acres of land in New Brunswick, and then proceeds: "I also give to my wife Margaret all the remainder of my homestead farm on which I now live at the day of my decease, with all the farming utensils, and stock, sheep, horses, swine and fowls of all description, and all articles of household furniture of every description, and wagon, sleigh, and all the other articles now used on the said place, together with all the buildings on said place, and all the hay and grain that is in the said barn or house or other buildings, and everything belonging or attached to said farm, except the twenty-five acres given to my son George. My wife Margaret is to give my daughter Ann the one cow which is before mentioned. . . I appoint my wife Margaret to be my only executrix of this my last will and testament; and my wife Margaret is to pay all of my debts and to collect all my debts from all persons, and my wife Margaret is to give to my son Thomas N. a good school education and clothing from the estate which I have given her, and at the day of her death all goes into the hands of my son Thomas N. If my son Thomas N. comes to the age of twenty-one years during my wife's lifetime, then he shall have from the real estate given my wife the following real estate, viz:" (here follows a description of the locus). "At the expiration of my wife's lifetime all the property given to her goes to my son Thomas N. My daughter Margaret is to have her living from the property I have left my wife until she shall get married; then she is to be fitted out as the other girls, Ann and Elizabeth, have been, with one cow, bedding and other articles of furniture."

"A devise of land must be construed to convey all the estate of the devisor therein, unless it appears by his will that he intended to convey a less estate." R. S., c. 74, § 16. It was held that, by a devise, made before this provision was enacted, of the whole of the testator's estate of every name and nature, both real and personal, after the payment of debts, without words of inheritance,

the devisee took an estate in fee. *Josselyn* v. *Hutchinson*, 21 Maine, 339. See, also, *Butler* v. *Little*, 3 Maine, 239. *Russell* v. *Elden*, 15 Maine, 193. Aside from this, it is well settled that, if the devisee is charged with the payment of debts and legacies, with the payment of any sum whatever, he will take a fee, and this without regard to any disparity between the value of the estate devised and the charge imposed. *Moone* v. *Heaseman*, Willes, 140. *Doe* v. *Holmes*, 8 D. & E. 1. *Goodtitle* v. *Maddern*, 4 East. 496.

There can be no doubt that the language first used by John Kerr imports the giving to his wife Margaret of a fee in all the homestead farm, "except the twenty-five acres given to . . George." Margaret was personally charged with the payment of debts, and with the maintenance and education of Thomas, and divers other matters which the testator required. But Kerr afterwards thought that some provision should be made for Thomas if he arrived at the age of twenty-one years, living with his mother, and he thereupon provides that, in that contingency, he "shall have from the real estate given my wife" the parcel upon which it is alleged the defendant has trespassed.

The plaintiff contends that the intention of the testator is clear, and that at all events the last expression of his will, if there is a conflict, must govern; and defendant claims that the devise to Thomas N. is inoperative and void within the doctrines laid down in *Ramsdell* v. *Ramsdell*, 21 Maine, 288, and *Shaw* v. *Hussey*, 41 Maine, 495. To this specific devise to Thomas we do not think the doctrines of the cases just cited apply, whatever effect they may have upon the attempted devise over to Thomas of a supposed possible remainder at the death of his mother.

We are not compelled, in order to sustain the devise of the locus to Thomas N., to resort to the arbitrary rule of construction invoked by the plaintiff, that the last expression of the testator's will shall govern. It is a well established rule that, when the testator makes a general devise or bequest of his property which would include the whole of his estate, and in other portions of his will makes specific disposition of some part or parcel, the specific disposition shall be regarded as making an exception or qualifica-

tion of the general and sweeping clause, which must be read and construed as subject to the more specific and particular disposition. *Wallop* v. *Darby*, Yelv. 209.

Accordingly, when a testator, after devising the whole of his estate to A, devises Blackacre to B, the latter devise will be read as an exception out of the first, as if he had said, "I give Blackacre to B, and, subject thereto, all my estate, or the residue of my estate, to A." *Cuthbert* v. *Lempriere*, 3 Maule & S. 158.

If it had not appeared by the testimony of plaintiff's witnesses that the locus was in the open and notorious possession of a disseizor prior to the time when the plaintiff took her deed, we should say that the plaintiff had made a *prima facie* case.

But it does not appear that Thomas N. Kerr was ever in possession of the locus, claiming it as his own under the devise. On the contrary, it would seem to have been with the rest of the farm in the possession of Margaret, his mother, the widow of the testator, and not of Thomas N., except so far as he "lived there with the old folks," and, as his widow Clarissa testifies, "the fall before I went there she (the old lady) gave the whole place up to my husband to maintain her."

This arrangement lasted some years and then Thomas N. left, and died elsewhere. Leeman, the defendant, married a daughter of John Kerr, and for some four years before the trial seems to have been carrying on the place under some arrangement with Margaret Kerr, the widow of the testator, who lives with him and her daughter.

Clarissa Kerr, the plaintiff's mother and principal witness, while testifying to the acts of Leeman which are alleged as trespasses, says: "I attempted to take possession of this property described in the writ, and the family that lived there would not give it to me. Leeman lived on it. I forbid his cutting there once, and he said he would fix that and me too."

The plaintiff does not seem to have moved in the matter at all, and there is no evidence of a re-entry to purge a disseizin, which seems to have amounted to an actual ouster.

The plaintiff's rights can more properly be tried in a writ of

entry to recover the possession as suggested by Weston, C. J., in *Bartlett* v. *Perkins*, 13 Maine, 89.

Plaintiff nonsuit.

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

LEMUEL COBB, in equity, *vs.* CATHARINE F. DYER & another.

Cumberland. Opinion May 26, 1879.

Equity. Cancellation of mortgage. Subrogation. Mistake.

Equity may annul the cancellation of the record of a mortgage, against a grantee whose deed is made "subject to the mortgage," when the cancellation was made in ignorance of the existence of such deed.

And this, too, even though the deed was duly recorded, if the junior mortgagee, who paid and caused the senior mortgage to be cancelled, was not guilty of culpable negligence in the premises.

When such subsequent mortgagee, ignorant of a prior deed, and *bona fide* relying upon his mortgage, pays the sum due on the senior mortgage for his own benefit, and allows it to be discharged and its registration cancelled, the cancellation and discharge may be annulled, and he subrogated to the rights of the senior mortgagee.

BILL IN EQUITY, heard on bill, answer and proof, whereby the complainant seeks to establish, as an existing charge upon the land mortgaged, two mortgages given by the defendant Wallace, one to the city of Portland and the other to the complainant.

When Mr. Dyer was about to convey the land in controversy to Wallace, Mrs. Dyer declined to execute the deed, and thereby relinquish her right of dower therein, unless Wallace would agree to reconvey the premises to her after he had raised money on the premises by mortgaging the same to the city of Portland. Wallace finally consented, and thereupon Mrs. Dyer signed the deed with her husband, and relinquished her right of dower.

Wallace testified, in substance, that he did not know the contents of his deed to Mrs. Dyer, but supposed it conveyed the land and not the house. But Mrs. Dyer, her daughter and Mr. Stackpole testified that the deed was read to Wallace and fully explained to him before he signed it.

The remaining material facts appear sufficiently in the opinion.

S. C. Strout & H. W. Gage, claimed that both mortgages should be made a charge upon the land.

On upholding the city mortgage they cited *Twitchell* v. *Mean*, The Reporter, July 10, 1878, 40. Jones Mort., §§ 736, 751. *Sweetsir* v. *Jones*, 35 Vt. 317. *Cox* v. *Hoxie*, 115 Mass. 120. 2 H. & W. Lead. Cas in Eq. 242.

On estoppel to deny the mortgage in amount. *Freeman* v. *Auld*, 44 N. Y., 50. Jones Mort., §§ 874—876, 877. *Ellsworth* v. *Lockwood*, 42 N. Y. 89–97. *Russell* v. *Pistor*, 7 N. Y. 171. *Barus* v. *Mott*, 64 N. Y. 294. *Cox* v. *Hoxie*, *supra*. *Bailey*, v. *Myrick*, 50 Maine, 171. 2 H. & W. Lead. Cas. in Eq. 230, 231.

On construction by registry. *Champlin* v. *Leighton*, 18 Wend. 421. Jones Mort. §§ 971–969. *Bruce* v. *Nelson*, 35 Iowa, 157. *Banta* v. *Garnio*, 1 Sandf. c. 383. *Bruce* v. *Barney*, 12 Gray, 107. *Smith* v. *Smith*, 15 N. H. 55. *Lambert* v. *Leland*, 2 Sweeney (N. Y.), 218.

Counsel contended that deed to Mrs. Dyer was a voluntary conveyance and actually fraudulent.

A. A. Strout & G. F. Holmes, for the defendant, Mrs. Dyer, submitted an elaborate brief, contending, among other things, that no accident placed the plaintiff in his present position. There were here no "such unproven events, misfortunes, losses, acts, or omissions, as are not the result of any negligence or misconduct in the party." 1 Story's Eq., § 78.

It was the deliberate act of the complainant, acting in his own interest, disregarding the dictates of common prudence, shutting his eyes to what the law says he shall see.

In law, and in equity, too, a party dealing in real estate is informed of all conveyances duly executed and recorded. *Scamman* v. *Cole*, 3 Cliff. 472. *Davis* v. *Rodgers*, 64 Maine, 159. 1 Story's Eq., § 105. *Sedam* v. *Williams*, 4 McLean, 51. *Hunt* v. *Hunt*, 2 Wash. 127.

Common prudence directed him to search the record. *Dick* v. *Balch*, 8 Pet. (U. S.), 30, 38, 39.

Ignorance is not mistake. *Perry* v. *Martin*, 4 Johns. c. 566.

VIRGIN, J. On September 28, 1867, one J. W. Dyer, husband of the female defendant, agreed in writing with the defendant Wallace—who had been brought up in the Dyer family—to convey to him a certain vacant lot of land described therein, "as soon as said Wallace shall erect thereon a tenement for his own use." Thereupon Wallace took possession of the lot, and having some $600 in money belonging to himself and wife, commenced the building of a "story and a half frame house" upon it. Having finished the house as originally intended—with a few rooms left unfinished—Dyer, pursuant to his agreement, by his deed of warranty, dated November 7, 1867, but acknowledged November 18, and duly recorded, conveyed the lot to Wallace.

On November 19, 1867, Wallace conveyed the premises in mortgage to the city of Portland, to secure his note of the same date for the sum of $300, money hired and applied to the construction of the house; which mortgage was duly recorded November 30, 1867.

On November 18, 1867, Wallace, by his deed of warranty bearing this date and acknowledged the same day, but not recorded until the sixth of the following January, "in consideration of one dollar," conveyed the same premises to Catherine F. Dyer, the female defendant, "subject to" the mortgage to the city.

In January, 1868, the house was completed, and Wallace occupied it until the death of his wife, in June, 1872, when he rented it, and received the rents and made repairs until the fall of 1877, when Mrs. Dyer took possession to collect the rents.

On January 24, 1868, Wallace, having previously hired $300 of the plaintiff—$275 of which were paid in October and November before to the builders—conveyed the premises in mortgage, with the usual covenants of warranty, to the plaintiff, to secure the payment of the money hired.

On January 23, 1871, the plaintiff, at the request of Wallace, as the plaintiff testifies, and having no knowledge of the deed to Mrs. Dyer, paid to the city $326.99—the amount due on the city mortgage—and, instead of taking an assignment thereof, received the note thereby secured with the sum paid by him indorsed

thereon by the city treasurer, but allowed the mortgage to be discharged on the record.

On the next day Wallace mortgaged the same premises, with like covenants, to the plaintiff, to secure the sum of $373.16, which included the sum paid on the city mortgage.

The plaintiff prays, among other things, that, in view of his mistake in relation to the existence of Wallace's deed to Mrs. Dyer, the city mortgage be decreed as subsisting for his benefit, and that the sum paid on that mortgage, and interest thereon, be decreed a subsisting charge upon the real estate in question.

Mistake is one of the fundamental grounds of equity jurisdiction. "No one is more appropriate. Human sagacity is inadequate to the attainment of a perfect knowledge and comprehension of every combination of circumstances under which it may become necessary to act, and especially when the influence of the acts and wiles of the designing and knavish are superadded." Shepley, C. J., in *Robinson* v. *Sampson*, 23 Maine, 388.

Ordinarily the mistake from which relief will be given must be one of fact and not of law. *Freeman* v. *Curtis*, 51 Maine, 140. *Jordan* v. *Stevens*, 51 Maine, 78. And it must not be imputable to the plaintiff's culpable negligence. *Western R. R.* v. *Babcock*, 6 Met. 352. 1 Story's Eq., § 146. And it must appear that his conduct was determined by the mistake; but this need not be established by direct evidence when the facts can be fairly implied from the nature of the transaction. 1 Story's Eq., § 162. *Bruce* v. *Nelson*, 35 Iowa, 157.

The cases are numerous wherein courts of equity have corrected the cancellation and discharge of mortgages on the record, when done by mistake, and protected parties from the consequences thereof, especially when such relief would not result prejudicially to third persons. *Kinnear* v. *Lowell*, 34 Maine, 303. *Bruce* v. *Bonney*, 12 Gray, 107.

In *Robinson* v. *Sampson*, *supra*, this court as then constituted assented to the proposition, and adopted the language of the learned chancellor of New Jersey (in *Trenton Banking Co.* v. *Woodruff*, 2 N. J. Eq. 1 Green, 117), "that the cancellation of a mortgage on the record is only *prima facie* evidence of its dis-

charge, and leaves it open to the party making such objection to prove that it was made by accident, mistake or fraud. On such proof being made, the mortgage will be established, even against subsequent mortgagees, without notice," who became such anterior to the cancellation. Illustrating the first part of the same proposition, the court in New Jersey subsequently held that, where a mortgagee who was an aged man and ignorant of business, under a mistaken impression that the mortgage was satisfied, consented to its cancellation, it should be upheld—the case not falling within the principle of culpable negligence, against which equity does not relieve. *Banta* v. *Vreeland*, 15 N. J. Eq. 107.

So in *Bruce* v. *Nelson*, 35 Iowa, 157, a senior mortgagee, in ignorance of a junior mortgage, released his mortgage, consented to its discharge on the record, and took a new one to secure the original notes and a small additional sum loaned; and the court restored the lien of the first mortgage.

It is a familiar principle that a junior incumbrancer has a right to redeem a prior incumbrance; and when he does so, he thereby acquires the right to the security held by the other. 1 Jones Mort., § 874, and cases there cited. Moreover, his title need not necessarily be a legal one. On the contrary, if the junior mortgage is received for money loaned and put into the property mortgaged under the full belief that the mortgagor had the title, and the transaction was *bona fide* in all respects and without negligence on the part of the second mortgagee, and under that state of facts he purchases the prior mortgage to sustain and protect his supposed title, he has such a colorable title as will in equity authorize the mortgage thus purchased to be kept on foot, when such a result will not prove prejudicial to subsequent parties.

This view is substantially entertained by the court in Indiana. In *Muir* v. *Berkshire*, 52 Ind. 149, Biddle, C. J., says: "Subrogation generally takes place between co-creditors, where the junior pays the debt due to the senior to secure his own claim. . . It is not allowed to volunteer purchasers or strangers, unless there is some peculiar equitable relation in the transaction, and never to mere meddlers. But, while this is true generally, we think that a

person who has paid a debt under a colorable obligation to do so, that he may protect his own claim, should be subrogated to the rights of the creditor." See the cases cited in that opinion.

Applying these principles to the facts in the case at bar, the city mortgage must be upheld, unless the constructive knowledge contained in the registry of deeds prevents. For the deed to Mrs. Dyer being expressly made "subject to the mortgage," the land thereby became charged with the mortgage debt (1 Jones Mort., § 736, and cases); and by sustaining this mortgage she is deprived of nothing to which she is justly entitled. The plaintiff, relying upon the validity of his own mortgage, had a colorable right to and did pay the city mortgage debt, for his own benefit and not for hers; and, as she loses nothing by the transaction, she has no equitable right to be benefited by its payment. *Lambert* v. *Leland*, 2 Sweeny (N. Y.), 218. He did it in ignorance of the very material fact of the intervening deed to Mrs. Dyer, taken after the record of city mortgage and expressly subject to it. Who can doubt that, if the plaintiff had known of the existence of that deed, he would not have consented to the discharge of that mortgage and taken a subsequent one. *Bruce* v. *Nelson*, *supra*.

But it is said he had constructive knowledge thereof through the registry of deeds, and cannot obtain the relief sought. To be sure, he might have learned the fact of the existence of the deed had he exercised the prudence of a man of business dealing with a stranger in relation to land the title of which he knew nothing. But a searching of the record is not indispensable. *Grimes* v. *Kimball*, 3 Allen, 518, 522. And he was dealing with his cousin—both old men. He knew of the deed from Dyer to Wallace, and of the mortgage from Wallace to the city; saw Wallace in possession, building a house to live in. Instead of being put on inquiry, every fact within his knowledge served to inspire the belief that Wallace had the title, and he never suspected that so material a fact as the existence of the deed would be suppressed. We do not think his ignorance of that fact, under the circumstances, was the result of negligence.

In Iowa, where the holder of a first mortgage, in ignorance of

the existence of a subsequent recorded one on the premises, released his mortgage and took a new one, the court held that the party was entitled to have the mortgage restored and given its original priority. In answer to the point of constructive knowledge afforded by the registry, Day, J., said: "This position proves too much. In order that a debt may attach as a lien prior to a mortgage, it must always, in some way, appear of record; so that, in every case in which the claim is in a condition to be asserted in preference to the mortgage, the mortgagee has the means of ascertaining its existence. The argument then would amount to this: that a mortgage released in mistake could never be restored against a prior claim which was in a condition to become a lien. In other words, that the lien of a mortgage could never be restored except when the restoration is unnecessary and unimportant."

In relation to the mortgage of January 24, 1868, from Wallace to the plaintiff, taken after the record of the deed to Mrs. Dyer, whatever may be our opinion of the moral right or of what is just and equal, we know of no rule in equity by which the premises in question can be charged with that debt.

Our conclusion, therefore, is that the discharge on the record be declared void; that the premises be charged with the sum paid on said mortgage, with interest thereon until paid; and that, if the same, with the costs of this suit, be not paid within sixty days from final decree in this suit, that the premises be sold according to the provisions in said mortgage.

Decree accordingly.

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

TIMOTHY SHAW, JR., & another *vs.* DANIEL W. O'BRION.

York. Opinion May 31, 1879.

Attachment. Name. Misdescription. Abbreviation.

The certificate by an officer to the register of deeds of an attachment of the real estate of Augustu Moulton, (the word Augustu being so written as to make it difficult to determine whether it was Augusta or Augustu) is not a sufficient compliance with R. S., c. 81, § 56, to create a valid lien upon the real estate of Augustus Moulton, when the register is thereby misled, and the only attachment appearing of record is of the real estate of Augusta Moulton.

ON REPORT.

WRIT OF ENTRY. Plaintiffs and defendant claim title from same owner.

Title of defendant depends upon the question whether a valid attachment, so as to create a lien upon the real estate of one Augustus Moulton, was made February 15, 1875, in a suit, *Daniel W. O'Brion*, administrator, v. *Augustus Moulton*. The plaintiffs claim that the attested copy of the officer's return, filed in the office of the registry of deeds, represents the names of the parties in the suit to be *Daniel W. O'Brion* v. *Augusta Moulton*.

The defendant claimed that the names of the parties, as thus represented, are *Daniel W. O'Brion* v. *Augustu Moulton*, the final "s" being left off in the name Augustus.

The presiding judge *at nisi prius*, on inspection of the paper produced in court from the registry of deeds, found and ruled that the name therein written by the officer, as defendant, was so written that he could not decide whether it was Augusta or Augustu. Said copy of return had the names *Daniel W. O'Brion* v. *Augusta Moulton*, indorsed thereon by the register, when filed, and the record of the attachment, in the book for entering and recording attachments, contained the names of said O'Brion and Augusta Moulton only as parties.

If the law court finds that a valid attachment was thus made, and lien created, on the real estate of Augustus Moulton, defendant to have judgment, otherwise judgment to be for plaintiffs; and

the parties consent that the original copy of return, filed with the register of deeds, may be by him produced and submitted for inspection by the court at the hearing.

J. M. Goodwin & W. F. Lunt, for the plaintiffs.

L. S. Moore, for the defendant, contended that the description of Moulton in the officer's return was simply a diminished one, but correct and truthful as far as it went, and was no real misdescription, because it was so patent on the face of the papers as to correct itself; and cited *Dutton* v. *Simmons*, 65 Maine, 583. *Com.* v. *Gleason*, 110 Mass. 66. *Collins* v. *Douglass*, 67 Mass. 171.

BARROWS, J. According to the agreed statement submitted by the parties the plaintiffs are entitled to judgment unless there was a valid attachment so as to create a lien upon the real estate of one Augustus Moulton, made February 15, 1875, in the suit of this defendant against said Moulton. If there was a valid attachment of Moulton's estate made, and a lien upon it thus created, defendant is to prevail; and the parties consent that the original "copy of return" filed with the register of deeds by the officer who made the attachment may be produced and inspected at the hearing in this court.

The question to be determined is as to the validity of the attachment.

The original paper filed by the officer in the registry of deeds, in pursuance of the requirements of R. S., c. 81, § 56, having been produced and inspected, justifies the finding of the judge at *nisi prius* that the name of the defendant in the action, Moulton, was so written that he could not decide whether it was Augusta or Augustu. It certainly was not Augustus. It might be read Augusta. The register seems to have read, filed and recorded it as an attachment of the real estate of Augusta Moulton.

Was a valid lien upon the real estate of Augustus Moulton thereby created? It cannot be said that the officer complied with the requirement of the statute, c. 81, § 56. The "names of the parties" do not appear in the copy which he was required to file in the registry of deeds. The name of the defendant is not there,

nor any recognized abbreviation of it. It will be time enough to determine whether such abbreviations as the defendant's counsel suggests would answer the purpose of creating a valid lien when such a case is presented. Meantime, officers had better understand that the safe way is to make a copy of the name as it stands in the writ.

The law requires this return for the benefit of the public and the protection of purchasers. There might as well be not any attempt at compliance with the mandate of the statute as to send a return written so blindly or carelessly that it either conveys no information at all or misleads in any important particular like that of the name of the party whose property is attached.

Nor is the misdescription one which will correct itself. The interpretation which the register gave the return was the one which most readers, who saw the original without being acquainted with the parties to the suit, would probably give, and it was erroneous; and the record entirely failed to give the notice contemplated by the statute. See *Dutton* v. *Simmons*, 65 Maine, 583.

Judgment for demandants.

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

City of Lewiston *vs.* Inhabitants of Harrison.

Androscoggin. Opinion June 2, 1879.

Pauper supplies. Settlement. Husband and wife. Payment. Jury,—inquiry by and answer.

The reception of pauper supplies by a man's wife, when he knows of her necessities, and fails to relieve them, will interrupt the process of his gaining a settlement under R. S., c. 24, § 1, clause 6; and this, although she has temporarily left his home and gone to her mother's without his consent, and against his remonstrance, provided he knows that she is in need, and provided, also, that he has not abandoned the marital relation, but reclaims his rights and removes and lives with her after she has been aided by the town.

Nor, in such case, does the fact that he afterwards paid the town for the supplies furnished her affect the result.

It is the non-reception of pauper supplies, directly or indirectly, during five successive years residence that is required in order to give a settlement; the reception of them interrupts the residence, though they are afterwards paid by the pauper.

In answer to the inquiry by the foreman of the jury what effect, if any, a repayment by Pitts to the town of Naples of the supplies which were furnished his wife would have upon the question, the judge, presiding at *nisi prius*, replied: "It would have no effect; that, if they were pauper supplies when furnished, a subsequent payment of them would not change their character." *Held*, that this was not error, and did not take from the jury the consideration of the fact of the repayment as bearing upon the necessity of the supplies furnished, or ability of husband to support her.

On exceptions.

Action to recover for supplies furnished Nason A. Pitts and his family, as paupers. Legal notice from plaintiff and legal denial from defendant town were admitted. No question was raised as to the poverty of Pitts, or that the supplies were duly furnished.

The plaintiffs proved that, on the 30th day of April, 1860, Daniel Pitts, father of Nason A. Pitts, who was then a minor, had his settlement in Harrison, and it was proved that on that day Daniel Pitts removed with his family, including said Nason, from Harrison to the town of Otisfield, and there remained with his family till after said Nason arrived at twenty-one years of age.

The defendants claimed that Nason A. Pitts acquired a settlement in Otisfield, by five years continued residence after he became of age.

It was claimed by plaintiffs that, in the fall of 1866, Nason A. Pitts' wife received supplies from the town of Naples while she was with her mother, and that these supplies rendered Nason A. Pitts a pauper, and interrupted the settlement he was acquiring at Otisfield.

The defendants denied the fact of the supplies as pauper supplies, and claimed that if any supplies were furnished under the circumstances shown by the evidence, they were not supplies indirectly furnished said Nason, and did not interrupt or affect the settlement he was then gaining in Otisfield.

Upon this question the court instructed the jury as follows: "It is claimed by the learned counsel for the town of Harrison that, if it be true that Nason A. Pitts' wife left him without his consent, and went to her own mother's and was there taken sick, and did actually have help from the town, and actually needed such help; still, if this was unknown to her husband, and he was able and willing to help her, it would not make him a pauper. That is true. I instruct you that such is the law.

"But if he knew her situation, knew that she was destitute, and did not provide her with the necessaries of life, but left her to be cared for by others, and the supplies came from the town, it would make him a pauper. In other words, if a man's wife leaves him in a pet and goes off, and falls suddenly into distress, and is relieved by the town, it will not make him a pauper if he does not know of her distress, and is of sufficient ability and willing to supply her wants.

"But if she does leave him without his consent, and he knows that she is in distress and needs the necessaries of life, and does not supply them, but leaves others to do it, and it is done by the overseers of the poor of the town, then such supplies not only make his wife a pauper, but they also make him a pauper.

"If he is able and willing to supply his wife's wants but does not know of their existence, and they are supplied by the overseers of the poor of a town, such supplies will not make him a pauper; but if he knows of her necessity, (although he has the means to supply her wants) but neglects to do it, and leaves her to be supplied by the overseers of the poor of a town, supplies

thus furnished will constitute pauper supplies indirectly furnished to him, and affect his settlement.

"If, having the ability he refuses to supply her wants, and leaves her to starve, or suffer, or to be supplied by the overseers of the poor; or, he not having the ability, she is thus supplied, then the supplies furnished her are in contemplation of law indirectly furnished to him, and will interrupt the running of the five years residence necessary to acquire a settlement.

"You will apply these rules of law to the circumstances of this family, (Nason A. Pitts and his wife) and determine in the first place whether she received any supplies as a pauper from the town of Naples, and if so, whether by reason of his want of ability he could not supply her, or, having the ability he declined and refused to do it, so that others were obliged to do it; and if you so find, then I instruct you they were supplies indirectly furnished him and would interrupt the running of the five years. Whether they were pauper supplies indirectly received by him, is, you see, partly a question of law and partly a question of fact. I have given you the rules of law by which you are to be guided, and you must determine the facts."

The foreman of the jury inquired what effect, if any, a repayment by Pitts to the town of Naples of the supplies which were furnished his wife would have upon the question, and the presiding judge replied, that it would have no effect; that, if they were pauper supplies when furnished, a subsequent payment for them would not change their character.

The foregoing contains the entire instructions upon this branch of the case.

The verdict was for the plaintiffs; and the defendants alleged exceptions.

A. A. Strout & M. T. Ludden, for the plaintiffs.

S. C. Strout & C. A. Chaplin, for the defendants, contended that, if a man's wife leaves him, without his consent and against his remonstrance, and goes into a neighboring town, and he knows that she has no means of her own and nothing but the proffered charity of her friends upon which to live, and she is there sup-

plied by the town, that these supplies thus furnished would not make him a pauper, and cited *Berkley* v. *Taunton*, 19 Pick. 490. *Taunton* v. *Middleborough*, 12 Met. 39. *Wareham* v. *Milford*, 105 Mass. 295. *Dixmont* v. *Biddeford*, 3 Maine, 205, (marginal note). *Raymond* v. *Harrison*, 11 Maine, 192. *Eastport* v. *Lubec*, 64 Maine, 264. R. S., c. 24, § 4.

BARROWS, J. Nason A. Pitts had not abandoned his wife when she received supplies from the town of Naples. He was only neglecting her. Though he knew that his wife and mother, with whom he lived, quarreled and had hard talk, and his wife had told him if he did not get a house for her she would not stay, and though he knew that she had no means of support, and was soon to be confined with their first child, he suffered her to go on foot to her mother's in a neighboring town; he made no arrangement with her mother for her support, and furnished no supplies until after the emergency which made supplies from the town of Naples necessary had arisen. Then he visited her and afterwards removed her, and paid the bill to the town authorities of Naples; and seems to have continued to live and cohabit with her at various places up to the time of the trial of the cause. The case therefore does not come within the rule laid down in *Raymond* v. *Harrison*, 11 Maine, 190. It was neither an abandonment nor a permanent separation, with or without cause, but a simple failure on the part of the husband to provide for the wife's necessities. The reception of pauper supplies by her under such circumstances made him a pauper, and interrupted the process of his gaining a settlement in Otisfield.

In the Massachusetts and Maine cases cited by defendants, where supplies to the wife were held not to prevent the husband's gaining a settlement in the town where he lived, there had either been an entire abandonment and separation or the supplies were furnished without the man's knowledge of the existing necessity. But here there is no reason apparent why the law as laid down in *Eastport* v. *Lubec*, 64 Maine, 244, and in the cases of *Garland* v. *Dover*, *Sanford* v. *Lebanon*, and *Clinton* v. *York*, there cited, should not be applied.

Defendants' counsel contend that the reception of supplies by a

wife who has left her husband's home, without his consent and in spite of his remonstrance, should be regarded, so far as they tend to affect his settlement, differently from the reception of supplies by minor children who have thus left their father's home. We see no reason for the distinction claimed. Counsel agree that the parent has "a right to restrain the movements of his child and the right to its custody, and ample remedies to assist him in enforcing those rights against the child's will." But see 1 Black. Com., Book 1, c. 15, 444, 445, for a statement of the authority of the husband and his right to control the movements of his wife.

Chancellor Kent says: "As the husband is the guardian of the wife and bound to protect and maintain her, the law has given him a reasonable superiority and control over her person, and he may even put gentle restraints upon her liberty, if her conduct be such as to require it, unless he renounces that control," etc. 2 Kent's Com. (4 ed.), Part IV, 180, § 28.

To enable him to control her movements there is a legal authority almost paternal, and in most cases there is also a personal influence still more powerful to aid him. In any event, so long as the husband sees fit to continue the marital relation, not regarding his wife's ill conduct as sufficient to induce him to abandon her, it is incumbent upon him to see to it that her wants are so supplied that she shall not become a burden upon public charity. So long as he continues to claim the performance of a wife's duties from her, if he knows of her necessities, he must keep her off the town upon peril of incurring pauper disabilities himself.

The only other question is whether there was error in the reply of the judge to the inquiry made by the foreman of the jury, what effect, if any, a repayment by Pitts to the town of Naples of the supplies which were furnished his wife would have upon the question. The judge said "it would have no effect; that, if they were pauper supplies when furnished, a subsequent payment for them would not change their character." So the court in Massachusetts seem to have held in *West Newbury* v. *Bradford*, 3 Met. 428. Such would seem to be the necessary construction and effect of the statute. It is the five years succes-

sive residence without receiving, directly or indirectly, supplies as a pauper that gives a settlement. No exception is made in favor of a man who receives such supplies and afterwards pays for them.

Counsel labor to show that this answer took from the jury the consideration of the fact of the repayment as bearing upon the ability of the husband, and so upon the question whether the supplies when furnished were in truth properly to be regarded as pauper supplies. Not so. Both the inquiry made by the foreman and the answer of the judge proceed upon the hypothesis that the question of the reception of pauper supplies had first been passed upon, and the fact of such reception had been found to be established. We must presume all necessary and proper instructions as to what was requisite to constitute pauper supplies were given. The exceptions do not indicate otherwise.

Exceptions overruled.

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

ROBERT MONTGOMERY *vs.* ISABELLA REED, administratrix.

Lincoln. Opinion June 4, 1879.

Deed. Flats. Shore. Covenant of seizin,—breach of. Eviction. Warranty. Damages.

In tide-waters the shore is the ground between the high and low water mark—the flats.

A call in a deed, commencing at a known monument and running thence in a certain course "to the shore of the Damariscotta river—thence northerly and westerly as the shore lies, around the head of a cove," etc., includes none of the shore or flats.

The owner of "flats" holds them subject to the rule that, until he shall build upon, or inclose them, the public have a right to use them for the purpose of navigation, while they are covered by the sea.

The right of the public thus to use them is not an incumbrance within the usual covenant against incumbrances.

The covenant of seizin in a deed of general warranty is broken when the deed is delivered, if the covenantor then had no title or possession.

A judgment in a civil action declaring certain erections upon flats to be a nuisance, does not constitute an eviction of the party in possession of the flats.

Eviction, actual or constructive, is essential to a breach of the covenant of warranty.

The rule of damages for breach of the covenant of seizin is the consideration and interest therein.

ON REPORT.

COVENANT BROKEN.

The declaration is sufficiently recited in the opinion, together with the pleadings.

The plaintiff introduced a deed of warranty, dated July 17, 1834, duly acknowledged and recorded, from Samuel Murray to Benjamin Reed, (defendant's intestate) conveying certain land situated on an inlet of the Damariscotta river, in Boothbay, the second and third calls in which were "thence north twenty-two degrees east seventeen and one-half rods to the shore of Damariscotta river—thence northerly and westerly, as the said shore lies, round a point of land and round the head of a cove to the northeast corner of land of," etc.

Also a deed of warranty, dated May 5, 1863, duly acknowledged and recorded, from Benjamin Reed to the plaintiff, of a

certain piece of flats, or known and used as a dock privilege, in said Boothbay—describing the premises by metes and bounds. The premises described are flats adjoining the land described in the former deed mentioned. The consideration of the deed purporting to convey the flats was two hundred dollars.

The remaining facts sufficiently appear in the opinion.

J. Baker & O. D. Baker, for the plaintiff.

A. P. Gould & J. E. Moore, for the defendant, submitted an elaborate brief, and, among others, argued the following propositions:

The right claimed by Hodgdon in his writ to the use of the waters of the stream and cove was not an incumbrance upon the title to the flats, and is not a breach of any of the covenants in Reed's deed. *Dunklee* v. *Wilton R. R. Co.*, 24 N. H. 487, 508. *Kellog* v. *Ingersoll*, 2 Mass. 97, 99. *Boston & Hingham S. B. Co.* v. *Munson*, 117 Mass. 34, 39. *Ballard* v. *Child*, 46 Maine, 152. *Prescott* v. *Williams*, 5 Met. 429. Wash. Ease. (2 ed.), 276.

No eviction is alleged or proved. *Emerson* v. *Prop. in Minot*, 1 Mass. 464. *Marston* v. *Hobbs*, 2 Mass. 433. *Twambley* v. *Henley*, 4 Mass. 441. *Beara* v. *Jackson*, 4 Mass. 408. *Chapel* v. *Bull*, 17 Mass. 213. *Boothbay* v. *Hathaway*, 20 Maine, 251. 2 Wash. R. Prop. 717, 665*.

In case of breach of covenant of seizin the measure of damages is the consideration and interest. *Stubbs* v. *Page*, 2 Maine, 378. *Cushman* v. *Blanchard*, 2 Maine, 266. *Bickford* v. *Page*, 2 Mass. 455, 460, 461.

VIRGIN, J. This is an action of covenant broken, and comes before us on report.

Facts: Some four miles up from the mouth of the Damariscotta river is an inlet, in which the tide ebbs and flows eight to ten feet, extending westerly about one-fourth of a mile. A few hundred feet from the western shore of the river, a town way running northerly and southerly, parallel with the river, spans the inlet with a bridge. Immediately west of the bridge are Hodgdon's Mills, comprising a grist mill and saw mill, driven by the tide-water ponded by a dam. Next southeast of the bridge is

a cove, forming a recess of about one hundred feet in length and the same in width, in the southern shore of the inlet, the town way bounding it on the west.

On May 5, 1863, Benjamin Reed, the defendant's intestate, executed and delivered to the plaintiff a deed of warranty of so much of the "flats" in the cove as extended back sixty-four feet from its mouth, describing the same by metes and bounds.

Within three years next succeeding, the plaintiff filled up most of the flats described in the deed to him with piles, stone and earth and erected thereon two buildings.

Thereafterwards, on April 13, 1867, Caleb Hodgdon, proprietor of "Hodgdon Mills," sued the plaintiff in an action on the case under R. S. of 1857, c. 17, claiming that the erections on the "flats" were a nuisance. The writ contained two counts. One for obstructing the free course of the water from the grist mill, causing back-water and hindering the speed of the mill; and the other for depriving Hodgdon of the use of the cove for the storing of logs and lumber to be sawed, and for obstructing the passage of rafts, etc., to and from the saw mill.

At the October term, 1869, the defendant's intestate, having been notified of the pendency of that action, engaged counsel, caused witnesses to be subpœnaed, and he and his counsel actively participated and aided the plaintiff and his counsel in defending the action at the trial. The jury found the defendant in that action (present plaintiff) guilty; and found specially: (1). No damages for back-water thrown back upon the grist-mill; (2). Two hundred dollars for preventing use of the cove for storing logs and lumber to be sawed; and (3). Twenty-five dollars for obstructing the passage of rafts and timber to the mill. At the April term, 1871, the buildings, etc., were declared to be a nuisance and ordered to be abated within sixty days; which, however, was not done, as the matter was compromised by the parties.

On October 7, 1871, the plaintiff brought this action. The declaration contains two counts, which are substantially alike in their allegations. After setting out the execution and delivery of the deed by the defendant's intestate, with its consideration, description of premises, covenants of seizin, right to convey, freedom

from incumbrances and warranty; the filling up of the flats and the erections thereon by the plaintiff; the nuisance action, due notice of its pendency, etc., to the defendant; the declaration alleges that the defendant did not defend the premises to the plaintiff, but suffered judgment to be rendered in favor of Hodgdon against the plaintiff, and then proceeds as follows: "Which said suit the plaintiff could not defend by reason of a want of title in said premises in the defendant at the date of the said deed, the said defendant, at the time of the execution of said deed, having no right, title or interest in said premises, or to the possession thereof, or any part of the same; and could and did convey no right, title or interest to said plaintiff; whereby said plaintiff has lost the consideration named in said deed and the interest thereon," etc., (setting out his damages); "and so the plaintiff says that the said defendant his covenant aforesaid has not kept but hath broken the same."

The defendant pleaded: (1). *Non est factum;* (2). *Non infregit conventionem;* and (3). A brief statement alleging non-eviction of the plaintiff, and non-interruption of the plaintiff's right to use said premises according to the true intent and meaning of said grant.

The action is between the immediate parties to the covenants. The declaration is somewhat peculiar, but, as it negatives the language of the covenant of seizin, a breach of that covenant is sufficiently assigned, (*Blanchard* v. *Hoxie*, 34 Maine, 376,) although the pleader evidently undertook to assign a breach of the covenant of warranty. The plea, as before seen, is not the affirmative one of performance, but that he has "not broken his covenants," while the plaintiff, by his joinder, avers that he has; and (as in *Boothbay* v. *Hathaway*, 20 Maine, 251, and *Bacon* v. *Lincoln*, 4 Cush. 212,) assumes the burden of establishing his allegation.

To sustain his allegation that the defendant had no seizin or title, he put in evidence a copy of a deed of warranty, dated July 17, 1834, duly acknowledged and recorded, from Samuel Murray to Benjamin Reed (defendant). The second call therein commences at a certain point south of the inlet and runs thence north twenty-two degrees east, seventeen and one-half rods, etc., "to

the shore of the Damariscotta river "—calling the inlet the river. The "shore" is the ground between the ordinary high and low water mark—the flats—and is a well defined monument. "To" is a word of exclusion when used in describing premises—"to" an object named excluding the terminus mentioned. *Bradley* v. *Rice*, 13 Maine, 198. *Bonney* v. *Morrill*, 52 Maine, 256. "To the shore," then, includes no part of the "flats." The third call is "thence northerly and westerly, as the shore lies, round a point of land and round the head of a cove, to the northeast corner of land," etc.

This obviously does not include any of the shore or "flats" in the cove, for the line called extends along the outside limit or margin of the shore, or of high water mark. Thus a call—"to the margin of the cove, then westerly along the margin of the cove," etc., was held to bound by a line without the edge of the water, and that the flats were not included. *Nickerson* v. *Crawford*, 16 Maine, 245. See, also, *Storer* v. *Freeman*, 6 Mass. 436. *Bradford* v. *Cressy*, 45 Maine, 9.

To be sure, by force of the colonial ordinance of 1641, the owner in fee of upland adjoining tide waters, whether of sea or stream, became owner also of the adjacent flats one hundred rods in extent, if the tide ebbed and flowed that distance there; and a conveyance of upland bounded by such waters (and not by the shore) passed the grantor's title to the same extent. *Lapish* v. *Bangor Bank*, 8 Maine, 85. *Storer* v. *Freeman*, 6 Mass. 435. *Com.* v. *Alger*, 7 Cush. 63. *Clancey* v. *Houdlette*, 39 Maine, 451. But upland and flats may be severed by the owner. He may sell either or both or any part of each at pleasure. *Deering* v. *Long Wharf*, 25 Maine 51. *Com.* v. *Alger*, *supra*. Whether or not flats pass depends of course upon the descriptive terms of the conveyance, expressly or constructively embracing or excluding them.

The case also shows that a real action was commenced by *Hodgdon* v. *Montgomery*, and the defendant's intestate was vouched in at the October term, 1868, and appeared by his counsel, and at the October term, 1870, the plaintiff became nonsuit. This evidence tends to show that Hodgdon did not own the fee in

the flats, or he would have prosecuted this action instead of the other to judgment.

It appearing, then, that the defendant's intestate had no seizin at the time of the delivery of his deed to the plaintiff, the covenant was broken at that time; although if he had been seized in fact, though not of an indefeasible estate, had been in possession even, the covenant would not have been broken. *Cushman* v. *Blanchard*, 2 Maine, 266. *Hacker* v. *Storer*, 8 Maine, 232. *Griffin* v. *Fairbrother*, 10 Maine, 95. *Boothbay* v. *Hathaway*, 20 Maine, 251. *Wilson* v. *Widenham*, 51 Maine, 566. And there is no pretense in the evidence that the defendant was in possession. If he were, he could have very readily overcome the negative testimony of the plaintiff.

Was the covenant of warranty broken? We think there is no evidence of it. The deed purported to convey certain "flats." Those flats were subject to a public easement—to the right of the public as an incident of the tenure by which such property is held by all. The owner may, however, erect wharves, piers, etc., upon his own flats, not, however, to the material interruption of general navigation. *Deering* v. *Long Wharf*, *supra*. *State* v. *Wilson*, 42 Maine, 9, 26. *B. & H. Steamboat Co.* v. *Munson*, 117 Mass. 34. Until so occupied the easement continues. Cases *supra*. Flats therefore are a peculiar property. Covenants in a deed conveying them are restricted to their peculiarity. *Ballard* v. *Child*, 46 Maine, 152. The judgment declaring the erections upon the flats a nuisance did not evict the plaintiff of the flats themselves. And until eviction, actual or constructive, there can be no breach of the covenant of warranty. The defendant's appearance to defend the action of nuisance made him privy thereto, and he is only concluded from disputing what such judgment ascertains. *Veazie* v. *Penob. R. R. Co.*, 49 Maine, 125. Rawle Cov. 227, note. The judgment in question ascertained only that the erections were a nuisance and obstructed the rights of Hodgdon.

The only remaining question is that of damages for breach of the covenant of seizin. And this is settled to be the considera-

tion and interest thereon. *Stubbs* v. *Page*, 2 Maine, 378. *Wheeler* v. *Hatch*, 12 Maine, 389.

Case to stand for the assessment of damages at nisi prius.

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

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

RACHAEL RACKLIFF *vs.* CHARLES V. LOOK.

Franklin. Opinion June 4, 1879.

Dower. Detention. Damages,—mitigation of. Limitation. Tax deed.

The separate action, given by R. S., c. 103, § 20, to recover damages for detention of dower after the commencement of the action of dower, does not accrue until the plaintiff has recovered judgment in her action of dower. Such recovery is a condition precedent to its maintenance.

The defendant makes himself liable in this action for damages for the detention of dower until he yields the possession to the plaintiff under her judgment in the action of dower. The fact that the plaintiff has been suffered by him to have the use of the premises a portion of the time before judgment in the action of dower goes only in mitigation of damages.

The mere introduction of a tax deed, under provisions of R. S., c. 6, §§ 162, 174, does not avail where there is no evidence to show that the legal proceedings, set forth and recited in said deed as having been had and done, were in fact had and done.

ON EXCEPTIONS.

ACTION OF ASSUMPSIT, wherein plaintiff seeks to recover the rents and profits of certain lands assigned and set off to her as and for her dower. Subsequent to her writ demanding such assignment and being for the years 1870, 1871, 1874, 1875, and 1876, —she alleging that defendant withheld the premises assigned to her after the demand during those years. Writ dated February 17, 1877.

In her writ and declaration plaintiff alleges and admits that she entered into the premises assigned and set out to her and had the rents and profits thereof during the years 1872 and 1873, by virtue of such assignment.

Defendant pleaded the general issue and also pleaded specially:

I. The statute of limitations as a bar to any recovery for the rents and profits of the year 1870.

II. That the plaintiff, admitting that she had once entered into possession of the premises assigned to her as the lands in which she was entitled to dower, and having received the rents and profits thereof for the years 1872 and 1873, by virtue of the assignment to her of said premises, and such in truth being the fact, she could not recover of this defendant in this action, for any year subsequent to such entry and occupation by herself; even if it should appear that he did receive the rents and profits, defendant contended that if he obtained possession of said premises subsequent to her entry and occupation under the assignment, he must be regarded as a disseizor and must be proceeded against, if at all, as a disseizor, and not for withholding lands assigned to her by virtue of her right to dower.

III. That during the years 1875 and 1876, defendant owned the lands in fee, and unincumbered by plaintiff's right to dower, by virtue of a tax deed,—given by the treasurer of the town, wherein the premises are situate, to said defendant—said deed being dated March 21, 1875, and recorded March 26, 1876.

Defendant introduced in evidence the deed described in his pleadings, and evidence tending to show that it included and covered all the premises assigned and set off to the plaintiff as lands in which she was entitled to dower.

The presiding justice instructed the jury:

I. That the statute of limitations did not bar the plaintiff from recovering for the rents and profits of the year 1870.

II. That, notwithstanding the fact that she entered into possession of the premises assigned and set out to her as the lands in which she was entitled to dower, and received the rents and profits thereof, still, if they were satisfied by the evidence that the defendant subsequently entered into said premises and received the rents and profits thereof, the plaintiff might in this action recover a reasonable sum for such rents and profits—such sum as said rents and profits were reasonably worth.

III. That the deed introduced by the defendant showed no title

and would be of no avail to him as a defense to this action, for the reason that he had not put in any evidence to show that the legal proceedings set forth and recited as having been had and done in said deed were in fact had and done.

The verdict was for the plaintiff for the rents and profits of the premises assigned and set out to this plaintiff as the lands in which she was entitled to dower, for all the years claimed, to wit: the years 1870, 1871, 1874, 1875 and 1876. The defendant alleged exceptions.

H. L. Whitcomb, for the plaintiff.

S. C. Belcher, for the defendant, contended:

I. The writ is dated February 17, 1877, and the statute of limitations is a bar to the recovery of rents and profits for the year 1870. R. S., c. 81, § 79.

II. Plaintiff having once entered into possession of the premises assigned to her as and for her dower, she cannot maintain this action, which is brought against the defendant under R. S., c. 103, § 21, for "rents and profits while he held the premises after demand." The plaintiff, having once entered into and enjoyed the premises, cannot say to defendant that he holds the same after demand, and have this action therefor. If defendant afterwards unlawfully obtained possession, he must be regarded as a disseizor, and recovery must be had against him, if at all, as such. If plaintiff was disseized by the defendant, she has her remedy. R. S., c. 104, § 1. And damages for rents and profits. In this action plaintiff cannot recover for any year subsequent to 1873, when she admits she was in possession by her assignment.

III. Defendant owned the lands during years 1875–6, in fee, by virtue of a tax deed, the introduction of which, with evidence identifying the land covered by the deed, was sufficient to show *prima facie* title in him. Stat. 1878, c. 35.

BARROWS, J. By R. S., c. 103, § 20, touching actions of dower, it is provided that, "if the demandant (in such action) recovers judgment for her dower, she may recover damages for its detention in the same action to the time of its commencement, and the

subsequent damages in a separate action." Only one such separate action seems to be contemplated, or would in ordinary cases be necessary; and it should comprehend all the damages accruing between the time of the commencement of the action of dower and the time when the demandant of dower is finally placed in possession of her estate under a judgment of the court, and the writ of seizin requiring the proper officer to cause her dower to be assigned and set out to her by three disinterested persons has been issued, executed, returned, and the return accepted, according to the requirements of § 23. Not until this has been done and final judgment in the action of dower has been entered up is it ascertained what the property is for the detention of which damages are to be recovered in the separate action under § 20.

The rendition of such judgment is a condition precedent to the maintenance of the separate action. Hence the action does not accrue until the final judgment is rendered, which, in the present case, was at the March term, 1876. The statute of limitations only began to run against it at that time; and the result is that the ruling allowing the plaintiff to recover for the detention of the dower in 1870 was correct.

The statute giving a separate action for the detention of the dower subsequent to the commencement of the action of dower was never designed to authorize the multiplication of suits by permitting the demandant in the action of dower to commence a separate action of this sort as often during the pendency of the first as her whims may dictate. She can only maintain it by showing that she has recovered judgment for her dower in the first, and that is not until the action has gone off the docket of the court with a rendition of final judgment in her favor.

As long as the parties are in court litigating the first suit it cannot be said that she has recovered judgment for her dower in the sense in which the phrase is used in § 20; because an order of the judge presiding at any term of court might strike off the interlocutory entry, for cause shown, at any stage of the proceedings prior to final judgment. This view of the separate action, and of that which it was designed to include, to wit: all the damage suffered by the detention of dower during the pendency of

the action of dower, and until the defendant yields the possession to her under the judgment therein, disposes of the defendant's second exception also, which at first sight seemed tenable.

The date of judgment in the action of dower shows that, however it was that the plaintiff was suffered by the defendant to have the use of the lands set out to her for dower during the years 1872 and 1873, it was not under the judgment by which the assignment was accepted and confirmed. Yet, if she had the rents and profits of the land during those years, the defendant is not responsible therefor in this action, and it was proper that the claim for them should be excluded from the declaration in the present case. The defendant's claim to be exempted from the payment of damages for the detention since 1872 and 1873 is based upon the idea that he should have been from that time regarded as a disseizor; but that assuredly could not be until the rights of the plaintiff in the particular parcel assigned to her had been established by the judgment of court; and it may well be that the statute contemplates that he should be regarded as detaining the dower so as to subject himself to repeated actions of this description therefor, after the rendition of judgment in the action of dower, until he has yielded possession of the assigned premises under the final judgment in said action.

Whether the remedy for a subsequent intrusion by him should be sought in another form, is not the question here. He does not seem to have given her possession under her judgment and must be regarded as still detaining her dower.

His exception to the ruling of the judge upon this point must fail, because it is not made to appear that the plaintiff has ever been in possession since the rendition of judgment in the original action.

The ruling with respect to the effect of the tax deed produced by the defendant was correct under R. S., c. 6, §§ 162, 174. *Smith* v. *Bodfish*, 27 Maine, 289. If chapter 35, laws of 1878, could affect a pending action in this particular, still the exceptions fail to show that the tax deed was "duly executed," or to negative the payment of the taxes by plaintiff to enable her to contest the validity of the deed. It is not made to appear that the ruling was erroneous, and the presumption is the other way.

And it has been held that the law of 1878, c. 35, does not apply to pending cases. *Treat* v. *Smith*, 68 Maine, 394, 396.

Exceptions overruled.

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

ALVAN CALL, JR., *vs.* JAMES M. HAGAR.

Sagadahoc. Opinion June 5, 1879.

Arbitration. Contract. Revocation. Damages.

A mutual agreement, in writing, to refer to certain specified referees is a contract binding on the parties to the same.

For a breach of this contract damages may be recovered.

No set form of words is necessary to constitute a revocation. The intent is to govern.

The party revoking a submission, without good cause, is liable to the other party for damages arising from such revocation,—including loss of time and trouble, expenses of witnesses, reasonable fees of counsel and other expenses necessarily incurred.

ON REPORT.

ACTION on the case for the alleged revocation of a written agreement of submission. Writ dated October 10, 1870.

Plea, general issue, and brief statement denying revocation of the submission declared upon.

Facts are stated in the opinion.

J. W. Spaulding & F. J. Buker, for the plaintiff.

J. Baker, N. M. Whitmore & W. T. Hall, for the defendant.

APPLETON, C. J. The parties to this suit having matters in controversy between them, entered into the following agreement of reference: "We do hereby agree to submit to Charles Davenport and Jarvis Patten of Bath, the accounts of ships May Flower and Jamestown, and all claims and demands incurred and growing out of the said ships while Alvan Call, Jr., was master, and all other claims between the undersigned, to the judgment and arbitration of said referees above named,—their award to be

made as soon as possible. It is understood the papers shall be placed in the hands of said arbitrators at once. And we hereby promise and agree to abide by and pay their award." (Signed) Jas. M. Hagar, Alvan Call, Jr. Richmond, July 14, 1877.

This was a binding contract. The promise of each to the other to abide by and pay the award which might be made, is a sufficient consideration for such promise. Damages are recoverable for a breach of this as of any other contract. The referees gave due notice to the parties. The parties were present before them and a partial hearing of the case was had, when the defendant sent them the following letter:

"Richmond, Sept. 3, 1877. Messrs. Davenport & Patten: Dear Sirs—Being satisfied that no practical result can come from a further examination of ships' accounts with Capt. Call before you, shall therefore withdraw from further attendance, unless the matter is placed in a shape where some good can come from a hearing. The form of submission to you is not one known to the law, being neither a statute nor common law reference, and any award cannot be enforced, hence nothing is accomplished by it. I wished a quiet and peaceable and fair adjustment without controversy, hence adopted the course taken. Finding that is not possible by the proceedings before you, will not trouble you for them, as any award might be opposed by either party, and nothing gained by it. Truly yours, J. M. Hagar."

Upon receiving this communication the referees, notwithstanding the protestations of the plaintiff to the contrary, declined to proceed with the hearing.

The law is well settled that whichever party, without right, revokes the authority of the arbitrator or prevents him from acting, such party is liable therefor to the other in an action for damages. *Pond* v. *Harris*, 113 Mass. 114.

No particular form of words is required to constitute a revocation. Provided a clear intention to revoke is to be gathered from the whole document, it will suffice. *Frets* v. *Frets*, 1 Cow. 335. *Miller* v. *Canal Co.*, 53 Barb. 590. The letter was understood, and intended to be understood, as a revocation of all further proceedings in the premises. It prevented action by the referees. No justification is shown for such revocation.

The plaintiff, then, is entitled to damages. The expenses necessarily incurred in preparing for trial before the referees, his loss of time and trouble in the hearing, reasonable payments made to counsel, witnesses, and expenditures of a like nature, are proper matters of claim. *Pond* v. *Harris*, *supra*. A suit was afterwards brought, embracing the subject matter of the reference, in which the plaintiff recovered judgment. So far as the preparation for a trial before the referees rendered the same labor unnecessary on the trial of the action subsequently commenced, he is not damaged. That he was detained from his business is or may be incidental to all litigation. That such detention may lead to collateral loss is undoubtedly true, but we think that such loss is too remote and uncertain to constitute the basis of a claim for damages.

The plaintiff is entitled to recover for damages sustained, including reasonable amount paid for counsel fees, for his loss of time and for the expenses necessarily incurred. It is not shown that anything was paid to the referees or to witnesses.

Judgment for plaintiff for $100.

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

STATE *vs.* INTOXICATING LIQUORS.

Somerset. Opinion June 5, 1879.

Liquors. Possession. Ownership. Claim.

It is not necessary that the claimant of liquors seized should set forth in his claim the person of whom, the place where, or the time when, such liquors were purchased.

The fact of ownership constitutes the foundation of his claim.

The right to possession rests in such ownership, with no intention to keep or sell the same in violation of law.

ON REPORT.

This action originated before a magistrate, under R. S., c. 27, § 37, by whom a decree was rendered against the claimant, Noah Chandler, who took an appeal according to law. It is admitted that the following facts are true so far as the same are provable under the claim and no further, viz:

The claimant owns the liquors. He bought them in the province of New Brunswick in the year A. D. 1878, in the original package, and he imported them into this state in the original package; said liquors at the time of the seizure thereof were in said original package, which said original package, at the time of said seizure, had not been opened, but was unbroken and in the same condition as when imported as aforesaid. He owns the liquors and the box and bottles containing the same, having never parted with his title thereto. The claimant's business at the time of the importation and seizure was and now is that of an importer of intoxicating liquors. At the time of said seizure he was, now is, and for five years last past has been, duly licensed by the U. S. Government to sell intoxicating liquors within this state in packages or quantities of five gallons or less. At the time of the seizure thereof said liquors were deposited in the express office, where he, as an importer thereof, intended to sell them in the original package.

The claim filed before the magistrate is as follows:

"State of Maine. Somerset, ss. At a court before A. P. Fuller, Esq., a trial justice in and for the county of Somerset,

holden at Fairfield, in said county, on the 2nd day of January, A. D. 1879. And now comes Noah Chandler of Houlton, in the county of Aroostook, whose business is that of importer of liquors, and specifically claims the right, title and possession in the items of property hereinafter named, as having a right to the possession thereof at the time when the same were seized. And the foundation of said claim is that they were at the time of seizure and still are his property, and were taken from his lawful possession on the ninth day of December, A. D. 1878, from the office of the Eastern Express Company in said Fairfield, by Lorenzo Dow, a deputy sheriff for the county of Somerset, and the claimant declares that they were not so kept and deposited for unlawful sale as is alleged in the libel of said Lorenzo Dow and in the monition issued thereon.

"The property claimed as aforesaid is as follows: One green box containing twelve quart bottles filled with gin, and the gin and bottles in said box, said box being marked 'James Mulholland, Fairfield, Somerset county, Maine;' and that his business and place of residence are as above." (Signed) Noah Chandler.

"On the second day of January, A. D. 1879, the said Noah Chandler made oath that the statement in the above claim, by him signed, is true. Before me, A. P. Fuller, trial justice."

The law court to render such a decree as the law and the aforesaid facts provable under the claim shall warrant.

L. L. Walton, county attorney, for the state.

S. S. Brown, for the claimant.

APPLETON, C. J. It is provided by R. S., c. 27, § 37, that "if any person shall appear and claim such liquors, or any part thereof, as having a right to the possession thereof at the time when the same were seized, he shall file with such magistrate such claim in writing, stating specifically the right so claimed, and the foundation thereof, the items so claimed, and the hour and place of seizure, and the name of the officer by whom the same were seized, and in it declare that they were not so kept and deposited for unlawful sale, as alleged in said libel and monition, and also state his business and place of residence, and shall sign and make

oath or affirmation to the truth of the same before said magistrate."

The claim as set forth is in strict accordance with the provisions of the above section. The foundation of the plaintiff's claim is his ownership of the property in controversy. The statute does not require a statement of the place where, the person of whom or the time when the purchase was made, by which the claimant acquired his title. The fact of ownership, with the further statement that the goods "were not so kept and deposited for unlawful sale as alleged in the libel of said Lorenzo Dow and in the monition issued thereon," is a specific statement of his right to the possession of the goods seized. The other facts required by the statute are fully set forth.

The facts admitted to be true are properly provable under the claim as filed, and establish the claimant's right to the possession of the liquors seized.

Judgment for claimant. The liquors claimed to be delivered the claimant within forty-eight hours after demand.

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

MARY E. LITTLEFIELD *vs.* ELIZABETH PAUL & another.

York. Opinion June 7, 1879.

Dower,—bar of. Statute.

The statutory provisions of this state cover the whole subject of dower; and the court must look to them alone for the extent of the right of a widow to dower, and for the modes and manner in which she may be legally barred of her action therefor.

If the Stat. of Westminster 2, 13 Edwd. I., c. 34, was in force in Massachusetts when our constitution was adopted, the subject embraced in it is fully covered by our statutory provisions, and the provisions of that statute are thereby superseded.

"If a wife willingly leave her husband and go away and continue with her adulterer," she is not thereby "barred of action to demand her dower" by the law of this state, unless her husband procures a divorce therefor.

ON FACTS AGREED.

ACTION OF DOWER. Marriage, seizin, death of husband and demand of dower admitted. Also, that demandant was married to Rosewell M. Littlefield, of Wells, in York county, deceased, October 30, 1837, and cohabited with him in this state several years; that she afterwards left the house of said Rosewell and went to Massachusetts, and there lived in adultery, although having gone through the forms of marriage, with another man, by whom she had several children, and never returned to her husband; that said Rosewell also lived in adultery with two other women, with whom he had gone through the forms of marriage, and had children by them; that said Rosewell became seized of all the real estate in which dower is demanded in this action under the will of one Isabella Littlefield, with whom he lived in adultery, which will was dated October 15, 1853, and subsequently proved in probate court, except thirty-five square rods, which he purchased of Samuel Weeks, by deed of April 22, 1851; that no divorce was ever decreed between the demandant and said Rosewell; that said Rosewell conveyed to the tenant February 23, 1863. Judgment to be entered by the full court, as the law may require. Plaintiff to carry the case to the law court.

Charles C. Hobbs, for the plaintiff.

George C. Yeaton, for the defendants, among other things, said:

This action presents the single question whether elopement and adultery are a bar of dower.

Statute of 13 Edwd. I., c. 34, provided that a wife, voluntarily leaving the husband and living in adultery, was thereby barred of her dower. "The best construction of which statute," says Willes, J., in *Woodard* v. *Dowse*, 10 C. B. (N. S.) 100 E. C. L. 722, 732, "seems to be that the leaving *sponte* is not of the essence of the offense which leads to the forfeiture. It is enough if, having left her husband's house, the woman afterwards commits adultery."

That the facts bring the case at bar fully within the provisions of this statute cannot be questioned. Is this statute law in Maine? The question is *res integra*. It should be so held.

I. From the nature of the dower itself.

1 Wash R. Prop. 146, defines dower as the "provision which the law makes for a widow, out of the lands or tenements of the husband, for her support and the nurture of her children." And substantially similar definitions are given by all the text writers. *Vide passim*, Bouv. Dic. Tit. Dow. Schoul. Dom. Rel. 183. 2 Black. Com. 130; which latter authority still more pointedly inserts before children the word "younger."

To assert that the law of any civilized society could ever contemplate appropriating a portion from the estate of a man, wronged as only a wife could wrong a man, for the support of an adulteress, and the nurture of the very children (the word "younger" imports it) whose guilty parents, while procreating them, the same law suffers the outraged husband to slay with comparative impunity, is a proposition so monstrous that it can scarcely stand without the support of an absolutely mandatory statute. No court could to-day arrive at such a conclusion otherwise.

II. Upon authority.

The Stat. 13 Edwd. I., c. 34, has been in terms re-enacted in some states, and declared to be the common law in others. 1 Wash. R. Prop. 196. Note to *Woodward* v. *Dowse*, 100 E. C. L. 722, 733.

In 1 Greenl. Cruise R. Prop. 156, Mr. Greenleaf says, in a note under the text referring to this Stat.: "Such is understood to be the common law of the United States;" again, 176, n., "It is believed to be held as the common law of this country in all the states originally settled by English colonists or their descendants," citing 4 Dane's Abr. 672, 676. 4 Kent. Com. 53. *Coggswell* v. *Tebbetts*, 3 N. H. 41.

Kent (loc. cit.) says: "There is so much justice in it that an adulterous elopement is probably a plea in bar of dower, in all the states of the Union, which protect and enforce the right of dower."

But, after a tolerably diligent search, we are unable to find any state barbarous enough to deny that this statute was the common law in that state, except only in those states which have held that no English statute, unless expressly adopted, was law, and those states where the whole subject of dower was expressly provided for in their own statutes.

But *Lakin* v. *Lakin*, 2 Allen, 45, holds the statute in question not law in Massachusetts.

Mr. J. Chapman in that case, while admitting that "the authorities seem to indicate that the provisions of this statute have been in force" in Massachusetts, claims that "the question has never been thoroughly discussed" by the Massachusetts court, and distinctly places the decision upon three grounds:

(1.) Express statutory provision, c. 76, § 32, that "she shall not be entitled to dower in any other case of divorce" than divorces against the husband for his fault.

(2.) At common law adultery "was not a cause of divorce," so that it could not be made a bar by means of a divorce obtained by the husband.

(3.) By failing to apply for his divorce, which he might have had, the husband had preferred to bury the scandal, and third parties should not be suffered to first raise the question.

As to ground (1), it is to be observed that our statutes, while providing dower for the wife in case of divorce from husband, (R. S., c. 60, § 7,) and for husband's interest in the wife's estate, when divorced from her (R. S., c. 60, § 8), not only contain no

provision denying her dower in such case, but are wholly silent as to the effect of a divorce for her fault upon her dower.

As to ground (2), with great deference, it is suggested that this is not an accurate statement of the common law, for it was only in 1602 that adultery ceased in the courts of England to be ground for either a divorce *a vinculo*, or a divorce, though in terms *a mensa et thoro*, yet consequent upon which followed the right to remarry; and certainly both wives (if the husband had two) could not have dower at his death in such cases. Vide Art. 6, 1 Law Review (English) 353, 360. 3 Salk. 138. Glanv. 44. Bract. 92. 18 Edwd. IV., 45. Macqueen, H. L. & P. C. 470, 473.

Hence the Stat. 13 Edwd. I., c. 34, having been passed in 1285, was in force more than three hundred years, during which a man could have barred dower by availing himself of existing law in the courts; and when, in 1602, ecclesiastical aggression robbed the courts of their jurisdiction to grant divorces *a vinculo*, or with equivalent privileges, immediately grew up the parliamentary practice of granting them, which continued down to 1858. So that the statement that "her mere adultery could not be made a bar by means of a divorce" must be declared inaccurate.

As to ground (3), in the case at bar, the husband could not have had a divorce, for his own adultery was a bar; R. S., c. 60, § 18, has been law since 1821, c. 71, § 4, so that, whatever force the reason may have abstractly, it has no application here.

In New York the statutes expressly bar the wife of dower only upon a conviction of adultery." *Pitts* v. *Pitts*, 52 N. Y. 593. *Schiffen* v. *Pruden*, 64 N. Y. 47.

In Pennsylvania also the statutes expressly control. *Reed* v. *Elder*, 62 Penn. St. 308.

In Rhode Island it is held that this statute was never introduced. *Bryan & wife* v. *Batchelder*, 6 R. I. 543. But in that state, it seems, no English statute is held to be law, unless expressly re-enacted there, and in this case the court declared: "It may at first seem singular that our law should be so regardless of what seems so just and reasonable a ground of forfeiture."

In New Hampshire the statute was admitted to apply to that state in *Coggswell* v. *Tebbetts*, 3 N. H. 41.

In *Cochrane* v. *Libby*, 18 Maine, 39, at *nisi prius*, the jury were instructed that this statute was "the law in this state," and the opinion of the full court impliedly recognized the soundness of the instruction.

III. Public policy forbids that such a woman should be enabled to deplete a dead man's estate, to the detriment of innocent heirs-at-law; as no man would incline to accumulate property if it were subject to such depredation.

Adoption of English statutes (generally). *Sackett* v. *Sackett*, 8 Pick. 309, 316. *Going* v. *Emery*, 16 Pick. 107, 115. *Com.* v. *Chapman*, 13 Met. 68.

All existing at date of settlement of the country, not unsuited to the character of our institutions.

Con. Maine, Art. 10, § 3: "All laws now in force . . remain until altered or repealed by legislation." *Colley* v. *Merrill*, 6 Maine, 50, 55.

No repeal by implication "if the implication does not necessarily follow from the language used." *Pratt* v. *A. & St. L. R. R. Co.* 42 Maine, 579, 587.

LIBBEY, J. The defendants claim that by the statute of Westminster 2, 13 Edward I., c. 34, the plaintiff is barred of her dower. The fourth clause of that statute reads as follows: "And if a wife willingly leave her husband and go away, and continue with her adulterer, she shall be barred forever of action to demand her dower that she ought to have of her husband's lands, if she be convict thereupon, except that her husband willingly, and without coercion of the church, reconcile her and suffer her to dwell with him, in which case she shall be restored to her action."

If this statute is a part of the common law of this state, as construed by the English courts, the plaintiff is barred of her action. So far as we are aware, in this state it has been invoked as a defense to an action of dower but once. *Cochrane* v. *Libby*, 18 Maine, 39. In that case the question whether it was in force in this state was not discussed by the counsel or the court. Weston, C. J., says: "The second marriage of the demandant is

relied upon as evidence of adultery. If this is a bar to her claim, and set up as such, the tenant is bound to prove the fact affirmatively. This he has not done." So the question may be regarded as fairly before the court for the first time.

The question was before the court in Massachusetts, from which we derived our common law, in *Lakin* v. *Lakin*, 2 Allen, 45. In the opinion of the court, Chapman, J., says: "The authorities seem to indicate that the provisions of this statute have been in force in this commonwealth. 4 Dane Ab. 676. 1 Cruise Dig. Green. Ed. Tit. 6, c. 4, § 4, note 2. 1 Wash. R. Prop. 196. But the question has never been thoroughly discussed in our judicial tribunals; and there are strong arguments, growing out of our colonial and provincial legislation in regard to dower, adultery and divorce, and also out of the other circumstances of the colony, which show that its adoption here was not in conformity with the condition and habits of our people."

We think it may well be doubted whether this statute was ever a part of the law of this state. But it is unnecessary to decide this question, as it appears to us that the legislation of this state has covered the whole ground embraced in that statute, and has established the rules by which the rights of the parties must be determined. Our first legislature, in 1821, by its acts, defined and regulated the subjects of dower and divorce.

Chapter 40 defined the rights of a widow to dower in the lands of her deceased husband, and prescribed the manner in which it should be assigned her. Section 6 provides "that the estate in which a widow shall have the right to claim dower by this act is all such lands, tenements and hereditaments of which the husband was seized in fee, either in possession, reversion or remainder, at any time during the marriage, except where such widow, by her consent, may have been provided for by way of jointure, prior to the marriage, or where she may have relinquished her right of dower by deed under her hand and seal."

Chapter 38, § 15, gave her the right in all cases to waive the provision made for her in the will of her deceased husband and claim her dower and have the same assigned her in the same manner as though her husband had died intestate.

These acts contain the only grounds on which a widow could be barred of her dower. She was entitled to dower in the lands of her deceased husband unless she was barred in one of the modes named in the statute. The provisions of the statute of Westminster 2 were not recognized as a bar. *French* v. *Peters*, 33 Maine, 396.

But chapter 61 of the acts of that year, regulating divorces, embraces the same subject, so far as to enable a husband to bar his wife of right to dower for her adultery, whether she eloped and continued with her adulterer or not. By section 3 a divorce may be granted for the adultery of either party. By section 5 when a divorce shall be granted for the adultery of the husband, the wife shall have dower in the lands of her husband, to be assigned to her in the same manner as if he was naturally dead. "And when the divorce shall be occasioned by adultery committed by the wife, the husband shall hold her personal estate forever, and her real estate during his natural life, in case they have issue born alive of her body during marriage; otherwise, during her natural life only, if he shall survive her; provided, nevertheless, that the court may allow her for her subsistence so much of such personal or real estate as they shall judge necessary."

This statute defines and limits the rights of either party in the property of the other when a divorce is granted for adultery, and in case of adultery of the wife, even though she does not continue with her adulterer, the husband, if he desires to do so, may, by divorce, bar her of dower in his lands; or he may, as he might do under the provisions of the statute of Westminster, condone the offense so that her right to dower shall not be impaired. True, the statute does not in terms say that a wife, divorced for her adultery, shall not have dower in her husband's lands after his death; but that is not necessary. It follows as a legal result, for, to entitle her to dower, she must have been the wife of him under whom she claims at the time of his death; otherwise she is not his widow. 2 Black. Com. 130. 4 Kent Com. 54. *Stilphen* v. *Houdlette*, 60 Maine, 447.

The provisions of R. S., c. 60, §§ 7, 8, defining the rights of husband and wife in the property of each other in case of divorce,

are the same as the act of 1821, except that the wife is entitled to dower when the divorce is for the fault of the husband; and if the divorce is for adultery of the wife, the husband has no rights in her property held under the provisions of c. 61.

Chapter 103, R. S., defines the rights of a widow to dower in the lands of her deceased husband, and prescribes the modes and manner in which she may be legally barred thereof.

By section 1, "every woman shall be entitled to her dower at the common law in the lands of her husband, with the exceptions hereafter mentioned, to be assigned to her after his decease, unless lawfully barred."

By section 6, a married woman of any age may bar her right of dower in an estate conveyed by her husband, by joining in the same deed or a subsequent deed, or by her sole deed.

By section 7, a woman may be barred of her dower in her husband's lands by a jointure settled on her by her consent before marriage, in the manner therein specified.

By section 8, she may be barred of dower by a pecuniary provision, made for her by her intended husband in lieu of dower, consented to by her as provided in § 7.

By section 9, if such jointure or pecuniary provision is made before marriage without the consent of the intended wife, or if made after marriage, it shall bar her dower, unless within six months after her husband's death she elects to waive such provision as therein provided.

By section 10, when a specific provision is made in her husband's will for the widow, within six months after probate thereof, she shall make her election whether to accept it or claim her dower.

By c. 61, § 6, a husband and wife, by a marriage settlement executed in the presence of two witnesses before marriage, may determine what rights either shall have in the other's estate during the marriage, and after its dissolution by death; and may bar each other of all rights in their respective estates not so secured to them.

We are of opinion that these statutory provisions cover the whole subject of dower, and that the court must look to them,

and to them alone, for the extent of the right of a widow to dower, and for the modes and manner in which she may be legally barred of her action therefor. If the statute of Westminster 2 was in force in Massachusetts when our constitution was adopted, the subject embraced in it is fully covered by the statutory provisions cited, and its provisions are thereby superseded.

But it is urged against this conclusion that the plaintiff could not have been barred of her dower by her husband by a divorce for her adultery, because he had committed the same crime, having lived in adultery with two other women, with whom he had gone through the forms of marriage, and had children by them. R. S., c. 60, § 18.

This is true; but if the husband, by his own crime, deprived himself of the right to a divorce for the adultery of his wife, and thereby acquire rights in her estate and bar her of dower in his lands, after his death, it was his own fault and he could not complain. It is the policy of the law that, where husband and wife are equally guilty of adultery, neither shall be permitted to go into court and accuse the other, and thereby affect their rights to property; and the same policy requires that neither their heirs, devisees nor grantees should be permitted to do so.

It is unnecessary to discuss the wisdom or morality of the policy which induced our legislature to enact our statutory provisions upon this subject rather than the provisions of the statute of Westminster. The reasons that may have induced such action are well stated by Chapman, J., in *Lakin* v. *Lakin*, *supra*. It is sufficient for us that the legislature has clearly declared the rules by which the rights of the parties must be determined.

The facts contained in the agreed statement constitute no bar to the plaintiff's action.

Judgment for the plaintiff for her dower.

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

CHARLES WINCHESTER, in error, *vs.* F. B. SHAW.

Penobscot. Opinion June 7, 1879.

Error. Costs.

By an inspection of the items of costs, taxed and allowed by a trial justice, which was referred to in, and made a part of, the record, the amount was found to be $3.92, and judgment was rendered on default for the debt claimed and for $4.96 costs of suit: *Held*, that this was error, and that the judgment is reversed.

ON REPORT.

WRIT OF ERROR to reverse a judgment rendered by Robert Knowles, Esq., a trial justice in and for this county.

So much of the record as is material is as follows:

"And, after hearing the evidence introduced by both sides, the plaintiff and defendant both testifying in the case, it is considered by me, the said trial justice, that the said F. B. Shaw do recover of the said Charles Winchester, under said writ and declaration therein, the amount of the items, with interest, as there charged and claimed in the account annexed to the writ, to wit: the sum of $13.36, debt or damage, and $4.96, costs of suit, a copy of the items of which costs as entered on the original writ hereunto annexed as aforesaid," etc. The aggregate of the items of costs was $3.92.

The view taken in the opinion renders a report of the other facts unnecessary.

D. D. Stewart, for the plaintiff in error.

J. Crosby, for the defendant.

LIBBEY, J. This is a writ of error to reverse the judgment of a trial justice. One of the errors assigned, as matter of law, is that judgment was rendered for costs illegally taxed, and for a larger sum than the amount of all the items taxed and allowed by the justice.

By an inspection of the items of costs taxed and allowed by the justice, and referred to in the judgment and made a part thereof, the amount is found to be $3.92. Judgment was ren-

dered for the debt claimed and for $4.96 costs of suit. This is manifest error apparent upon the record. *Valentine* v. *Norton*, 30 Maine, 194. *McArthur* v. *Storrett*, 43 Maine, 345.

As the judgment must be reversed for this error, it is unnecessary to consider the other errors assigned.

Judgment reversed.

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

APPLETON, C. J., did not concur.

ANN S. FRENCH *vs.* CHARLES V. LORD & another.

Penobscot. Opinion June 23, 1879.

Dower,—release of, nature of. Attachment. Levy. Stat. 1838, *c.* 344,—*construction of. Assignment of dower.*

A widow is not dowable of land taken by the right of eminent domain for a railroad.

When a wife releases her right of dower by joining in her husband's deed, only the estate which actually passes by the deed is affected by the release.

Thus, where the deed purports to convey all of a certain parcel of land, but prior to the delivery of the deed most of it was attached, and subsequent thereto the attachments ripened into levies: *Held*, that the estate actually conveyed by the deed comprised only such land as was not covered by the levies, and that the release of dower was confined to the land actually conveyed.

A release of dower conveys no estate; and neither is it an utter extinguishment of the right of dower forever, for all purposes and as to all persons; but it operates against the releasor by estoppel only, and in favor of those only who are parties and privies thereto.

An attachment of real estate upon a writ containing a general count without any specification attached, was valid if made before Stat. 1838, c. 344, (R. S. 1841, c. 114, § 33, R. S. 1857, c. 81, § 31, R. S. 1871, c. 81, § 56,) took effect, though the judgment was not recovered and the levy made until after.

Poor v. *Larrabee*, 58 Maine, 543, is overruled so far as this point is concerned.

Where an execution debtor owned land in common, and the appraisers described the whole lot by metes and bounds and as held in common, and then appraised and set off to the creditor a specified fractional undivided part thereof, the levy is valid within the provisions of R. S. of 1841, c. 94, §§ 10, 11.

A widow's dower in lands which were held in common by her husband must be set out to her to hold as tenant in common during her life.

ON REPORT for the legal adjudication of the rights of the

parties by the law court which is to decide of what portion, if any, the demandant is dowable, and upon what principles the dower is to be assigned and damages to be assessed, the damages for detention to be assessed by the commissioners who may be appointed to assign the dower in the land.

The demandant claims to be endowed of 31-35 parts of 1-3 of the wharf and lot at the foot of Exchange street, in Bangor, known as City Point Wharf, at the junction of the Kenduskeag stream with Penobscot river.

The general issue was pleaded with specifications setting forth a release of dower, and that the E. & N. A. Railway Company had located its track over the lot, and thus appropriating a large part of the premises to its use.

It was admitted that the premises were formerly the property of Zadoc French, at the time of his death; that he died intestate in 1830; and that the premises descended to his three sons, Ebenezer, Frederic F. and George S. French, the demandant being the widow of George, who died February 15, 1849.

Demand of dower August 9, 1871, admitted. Writ dated September 12, 1871.

On May 24, 1836, Frederic F. French conveyed his one-third to Ebenezer, his wife not signing the deed.

On September 28, 1836, Geo. S., by deed of warranty recorded October 8, 1836, conveyed his one-third to Ebenezer, and his wife (demandant) joined in the deed, releasing her right of dower; and on December 26, 1836, Ebenezer released or reconveyed to the demandant, by deed of that date, recorded December 27, 1836, her right of dower which she had released to him as above.

The defendants introduced the following levies made on executions against George S. in actions in which there were attachments made prior to the deed from George S. to Ebenezer, as above stated, all of which levies were duly recorded:

I. On September 20, 1836, E. H. Sleeper attached 1-5 of George S. French's 1-3 and perfected the same by levy February 3, 1842.

II. On September 27, 1836, James Crosby attached 1-7 of George S. French's 1-3, and perfected the same by levy on July

3, 1838. Sleeper conveyed his levy to Crosby, thus giving him 12-35 of George's 1-3, or 4-35 of the whole lot; and by subsequent proceedings in partition this was set off to him in severalty.

III. On December 22, 1835, Samuel Coney attached 1-10 of 1-3, or 1-30 of whole, and levied July 7, 1840.

IV. On September 2, 1836, Moody and LeBicton attached 3-7 of 1-3, or 1-7 of whole, and levied July 11, 1840.

V. On September 17, 1836, Rufus Davenport attached 1-8 of 1-3, or 1-24 of whole, and levied March 12, 1841.

These levies were all subsequently conveyed by quitclaim deeds by the creditors to A. M. Roberts, prior to 1850.

The defendants also introduced the following attachments and levies made on writs and executions against Ebenezer:

VI. On August 20, 1836, Charles Mustard attached, and on February 12, 1838 levied on 1-30 of whole.

VII. On October 26, 1836, J. Faulkner attached, and on July 7, 1838, levied on 1-43 of whole.

VIII. On October 26, 1836, Isaac Chase attached, and on July 7, 1838, levied on 1-24 of whole.

IX. On November 1, 1836, Fiske & Bridge attached, and on August 2, 1841, levied on 19-40 of whole.

X. On November 28, 1836, A. M. Roberts attached, and on June 30, 1838, levied on 1-9 of whole.

XI. On December 9, 1836, Towle & Parsons attached, and on June 30, 1838, levied on 1-24 of whole.

XII. On December 21, 1836, R. C. Johnson attached, and on October 2, 1839, levied on 1-7 of whole.

XIII. On December 26, 1836, D. B. Hinckley attached, and on July 23, 1840, levied on 1-40 of whole.

Levies VI to XI, inclusive, were afterwards, but prior to 1850, conveyed by quitclaim deeds to A. M. Roberts, who, on October 29, 1852, conveyed the premises to Gideon Mayo, from whom by several intervening conveyances and descents the same title has come to, and is held by, these defendants. But the defendants have never received any conveyance of the interest of Johnson and Hinckley, the last two levying creditors.

On the first of December, 1849, while Roberts held the title,

he took a written lease under seal from this demandant, agreeing therein to pay her seventy-five dollars per year for her dower, for the term of five years; and in accordance with the terms of this lease, this rent was paid by said Roberts, the last payment endorsed on said lease being September 1, 1854; this rent was afterwards increased by Samuel Veazie, defendants' intestate, to one hundred dollars per year, the last payment being in January, 1871. There was no agreement that by receiving these sums, demandant should be barred from claiming dower or from increasing her demands, but each was at liberty to put an end to the arrangement; and at the time named the plaintiff did so.

After the death of George S. the railway company located its track over the premises and built its railroad across it, the railroad bridge at the mouth of Kenduskeag stream being built upon or to it. A strip of land across the center of the lot ninety-nine feet in width was taken for the road, and is now used by the company according to the terms of its charter.

In the writs in favor of Charles Mustard and Amos M. Roberts against said Ebenezer there was in each, in addition to the specific count, a count for money had and received, without any specification of the claim.

In Isaac Chase's writ against Ebenezer French were two specific counts on a bill of exchange. In the several other writs there were no general counts, but specific counts in which the nature of the damage was set out.

The deed of A. M. Roberts to Gideon Mayo contained the following clause: "To have and to hold the aforegranted premises, with all the privileges and appurtenances thereof, unto the said Gideon Mayo and his heirs and assigns to their use and behoof forever, and I do hereby, for me and my heirs, executors and administrators, covenant and engage to and with the said Mayo and his heirs and assigns that I am lawfully seized in fee the aforegranted premises that they are free from all incumbrances except as below; that I have good right to sell and convey the same to the said Gideon, and that I and my heirs, executors and administrators shall and will warrant and defend the same premises to the said Gideon Mayo, his heirs and assigns forever, save any and all dower, real or contingent."

The deed from Courtland Palmer to Samuel Veazie contained the following clause:

"Also all the premises in full which are described in a deed from Amos M. Roberts to Gideon Mayo, which is particularly referred to for description of the premises hereby conveyed. The said premises are conveyed subject to all dower and rights of dower of Mrs. French, which the party of the second part assumes."

J. F. Godfrey, for the demandant.

A. W. Paine, for the defendants.

VIRGIN, J. This demandant in her action against Crosby (61 Maine, 502,) having recovered her dower in the land held under levies numbered one and two in this record, being one-seventh and one-fifth or twelve-thirty-fifths of her husband's former interest, now seeks to recover it in the remaining twenty-three-thirty-fifths.

A portion of the land in which dower is here claimed was taken, after the death of her husband, by a railroad company for railroad purposes, and has been so occupied ever since.

A widow is not dowable of lands taken for public use. And the reason is obvious. In all such cases a division of the estate thus taken would destroy it for the use to which it has been appropriated. Private interests must give way to the public convenience and necessity,—rights in dower as well as any other interest in real estate. It has been well held that, when the estate is taken before the decease of the husband, the value of the widow's inchoate right of dower is deemed too uncertain to admit of compensation; that the husband must be regarded as the owner of the entire estate; and that as such he is entitled to full compensation for it. But immediately upon the husband's decease, her right of dower being then consummated, no reason is perceived why she, like any other party, should not be entitled to compensation for her interest. 1 Scrib. Dow. 554. 1 Wash. R. Prop., c. 7, § 37, and cases cited. Having a valuable interest, she had her remedy; but she cannot obtain it in this action against these defendants.

Is she entitled to dower in the whole or any portion of the residue?

The attachments numbered three, four and five were made prior to the conveyance by the demandant's husband to Eben, of September 28, 1836. The executions, issued on the judgments recovered in the several actions on which these attachments were made, having been seasonably and regularly extended upon the land attached, the levies by relation operated as statute conveyances of the dates of the respective attachments. *Nason* v. *Grant*, 21 Maine, 160. And by the express provisions of the statute a married woman shall not be deprived of dower by a levy on her husband's real estate. R. S. 1841, c. 94, § 48. *French* v. *Crosby*, 61 Maine, 502.

It is true that the demandant joined in her husband's deed of September 28, 1836, and thereby barred her right of dower "in the estate conveyed by her husband." R. S. 1841, c. 94, § 9. But it is also true that "the estate conveyed by her husband" by that deed was not in fact his entire one-third interest, though such was the description of the premises in the deed; for by the first two levies 12-35, and by the next three 183-280, making 279-280 of his one-third, were conveyed to the levying creditors; and there remained only 1-280 to be conveyed by the deed and in which her dower could thereby be barred.

Moreover, this statute bar, instead of being an "utter extinguishment of the right of dower forever, for all purposes and as to all persons," as held in some states (*Morton* v. *Noble*, 57 Ill. 176. *Elmeredorf* v. *Lockwood*, 57 N. Y. 322), in this state and several others, on account of the peculiar nature of the right, operates against the releasor by estoppel only, and therefore in favor of those only who are parties or privies to the release. *French* v. *Crosby*, *supra*. So that these defendants cannot invoke any release in the deed as to the land covered by the above mentioned levies, for the double reason that the deed not conveying the land, the release did not pertain to it; and were it otherwise, the defendants not holding their title to that land under, but in spite of, the deed, are not privies. Our conclusion, therefore, is that the demandant is entitled to recover her dower in 183-280

of her husband's former interest covered by levies three, four and five, or 61-280 of the whole.

Is she entitled to recover in the remaining 1-280 conveyed by her husband's deed of September 28, 1836, in which she joined and released her dower to Eben?

The first five attachments against the demandant's husband ripened into levies, taking the dates respectively of the former. The premises, including the 1-280, were then held by Eben and the levying creditors as tenants in common. *Strickland* v. *Parker*, 54 Maine, 263. So much of the common estate as the defendants hold under a valid levy against Eben, dating subsequent to September 28, 1836, is free from the incumbrance of the demandant's right of dower by virtue of her release to Eben and the defendants' privity; but as to any one or more of such levies as shall be found to be invalid, or to which they had not, prior to the commencement of this action derived title, they not being privies cannot invoke the estoppel against the demandant; and as to all such she is entitled, under the pleadings, to recover, with an exception hereafter to be noticed.

If the several attachments against Eben were valid, his deed to the demandant, executed on December 26, but not recorded until December 27, 1836, whether possessing any inherent force or not, becomes immaterial to the decision of this case, inasmuch as all of the attachments and (by relation) levies were made prior to the registration of the deed.

Attachments. It is contended that the attachments in favor of Mustard and Roberts, though valid on August 20 and November 28, when respectively made, became void when the Stat. 1838, c. 344, became effective, for the reason that the writs contained a general money count, without any specification which the statute required should be annexed to the writs. Such was the effect given to this statute in *Poor* v. *Larrabee*, 58 Maine, 543. But by its terms the statute did not take effect until sixty days after approval, and it was approved March 23, 1838. The Mustard levy having been completed February 12, 1838,—more than three months before the statute became operative—the attachment could not of course be affected by it.

Moreover, we are also satisfied that this statute did not affect the Roberts attachment. It is a familiar general rule that all statutes are to be considered as prospective, and are to be held not to prejudice the past transactions touching their subject matter, unless the contrary intention is clearly and unequivocally expressed. On recurring to the statute, instead of finding any such expression, the first section expressly limits the application of its provisions to attachments "thereafter made;" while the provisions of § 4, invoked in this case, are made applicable only to the attachments mentioned in § 1, by the words "attachments made as aforesaid." And such was the express decision of the court in *Smith* v. *Keen*, 26 Maine, 411, promulgated in 1847. That decision quieted the titles of numerous estates depending on similar attachments of about the date of the statute; and though one member of the court, as then constituted, did not concur, we should deem it bad policy to overturn it after it had been so long acquiesced in.

The objection that there were two special counts on one bill of exchange in the Chase writ is not within the spirit of the statute, and cannot avail the demandant. No objection is made to any other of the attachments.

Levies. The Mustard levy having been made, as admitted by counsel, upon Eben's land as he owned it before the demandant's husband conveyed to him, she cannot be entitled to dower therein.

The objection to the levies by Faulkner, Chase, Towle and Parsons is that they are void for indefiniteness,—that there was set off in each case an uncertain estate, as in *Rawson* v. *Lowell*, 34 Maine, 201. But we do not so understand them. In the case cited, the levy took "four-fifths of all the interest which Truxton held in the land jointly with J. C. Lowell and others," without stating what part Truxton held, or what part of the whole was set off, or what territory the whole comprised. The court might well say, in relation to such a proceeding, that "the levy of a fractional part of an uncertain estate in land is not sustainable." In each of the levies in question, however, the whole common estate was described by metes and bounds, and declared by the appraisers to be held by the debtor in common with others, thus

rendering the territory certain instead of "uncertain," as in *Rawson* v. *Lowell*; and there a specified fractional undivided part of the whole is appraised as the property of the debtor and the same is set off to the creditor. We do not perceive why the objection raised to these levies is not fully answered, and why they are not saved under the provisions of R. S. of 1841, c. 94, §§ 10, 11, as construed in *Swanton* v. *Crooker*, 49 Maine, 458, and the cases which have succeeded that.

The levy of Fiske & Bridge is much more full than the preceding, many facts stated therein being surplusage.

The only remaining levies,—of Hinckley and Johnson—were made in the same manner. But it is further urged in relation to them that the title thereto never having been transferred to the defendants, they cannot set them up in defense. Such fact could not have been proved under the pleadings; but the fact that the defendants were not tenants of the freehold as to the land covered by these two levies having been admitted without qualification, it thereby becomes available to them the same as if pleaded and proved.

The clause "save any and all dower, real or contingent," in the deed of Roberts to Mayo, and that "the said premises are conveyed subject to all dower and right of dower of Mrs. French, which the grantee assumes," in the deed of Palmer to Veazie, are mere qualifications of the covenants. They do not so affect these defendants' rights as to estop them as privies to the demandant's releasee from setting up the release. *Knight* v. *Mains*, 12 Maine, 41, is not applicable to this case.

Our conclusion, therefore, is that the demandant is entitled to judgment for her first dower in the premises covered by levies three, four and five only, making the just deductions on account of the land held by Crosby in severalty, as well as of that taken and held by the railroad.

By the terms of the report, the court is "to decide in what portion (if any) the demandant is dowable; and upon what principles the dower is to be assigned and damages to be assessed."

As before seen, the attempted alienation by the deed of September 28, 1836, failed as to the land covered by levies three, four

and five; but the levies took the title as of the date of the attachments, when the husband held as tenant in common. Dower cannot be assigned by metes and bounds in lands thus held. When dower in lands thus held is assigned by the probate court, partition is first made and then dower is assigned to the widow in severalty. R. S., c. 65, § 19. No express provision is made in R. S., c. 103, authorizing *in totidem verbis* an assignment of dower in lands thus held. But by § 1 every woman is entitled to her dower "at the common law" in lands of her husband to be assigned to her after his decease. And by § 16, when it is not set out to her by the heir or tenant, "nor assigned to her by the probate court, she may recover it by a writ of dower." After judgment it is to be "set out by three disinterested persons, to be appointed" as provided in § 23. There being no statute provision to govern the commissioners in assigning dower in lands held in common, they must look to the common law; and that requires endowment by metes and bounds when the husband was seized in severalty; but when he was seized in common with others, her endowment must be in common; for she being in, *pro tanto*, for her husband's estate, cannot take it otherwise than he had it. 1 Inst. 32, *b.* 34, *b.* 37, *b.* 1 Greenl. Cruise, Tit. VI, c. 3, § 10. *Ib.* Tit. XX, § 25. In other words, she is entitled to dower in 61-280 of the residue after deducting the land held by Crosby in severalty, together with that taken by the railroad, to hold in common during life.

The demandant cannot share in the increased value, if any, caused by improvements actually made upon the premises since the statute alienations; but she has the benefit of their natural rise in value. *Mosher* v. *Mosher*, 15 Maine, 372. *Carter* v. *Parker*, 28 Maine, 509. If, therefore, no improvements have been made since the husband parted with his title by the levies, the commissioners should assign to her such a fractional part of 61-280 of the residue above named as will produce an income equal to one-third part of the income which the 61-280 of such residue will produce, or 61-840 of such residue. But if improvements have been made which materially increase the income, then her share should be proportionally less. Whatever it shall prove to

be, it must be set out to her to hold as tenant in common during her life.

Damages for detention are to be assessed upon the same principles, the demandant to recover one-third of the annual income from September 9, 1871, one month after demand, to the date of the judgment. Though, in the absence of the stipulation in the report, the damages would be assessed only to the commencement of the action. R. S., c. 103, § 20.

Judgment for demandant.

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

PETERS, J., submitted the following opinion:

I concur in the opinion of the court. Investigation removes a hesitation I had upon a point, upon which I will add some thing.

George French conveyed by deed of warranty to Eben French, George's wife relinquishing her right of dower. The estate was at the time under attachments by creditors of George. The attachments became perfected by levies upon the property. The same estate was also levied upon by the creditors of Eben. Those against George took the estate, and those against Eben failed to take it. The present defendants, under sundry intervening conveyances, became purchasers under the levies made upon George, and also under those made upon Eben. The opinion decides that under the first named levies the defendants get all their title, and that under the others they get no title, excepting as to a small undivided interest not included in the levies against George. And the opinion holds that the defendants do not get the benefit of the release of dower by George's wife to Eben with the exception before named, for the reason that they hold the estate, not under the deed of George to Eben, but in opposition to and in spite of it.

The position of defendants' counsel is; that they hold under Eben as well as under George; that some of the levies upon Eben were made before those upon George; that Eben and his levying creditors were, or might have been, in possession, receiving rents and profits, before the levies upon George; that they

became the owners of the estate, subject to the attachments against George; and that, the subsequent levies upon George being purchased by those who held those made upon Eben, the two titles became mingled and merged into one.

This would have been so had the creditors levying upon Eben purchased in the attachments upon George, or had they redeemed the levies made under those attachments before they ripened into an absolute fee. But that did not take place. What was at first an incumbrance only, was permitted to become a title. This title displaced and defeated any other claim to title. An estate cannot be occupied by two inconsistent titles at the same time. The principle of merger does not apply. That is where a greater and lesser thing meet, and the latter loses its separate existence and sinks into the former. They must meet in one and the same right. There can be no merger where the estates are successive and not concurrent, nor where one estate is valid and the other void, or has been avoided. Bouv. Law Dic. Merger. *Richardson* v. *Wyman*, 62 Maine, 283.

The levies upon George and those upon Eben were not in the same right. They were not concurrent rights. They were not one a dominant and the other a servient estate. They were hostile to each other. The levies upon George found nothing to merge with. The most that could be claimed would be that the deed of George to Eben created a conditional title in Eben until the levies upon George were perfected, making possibly consecutive but not concurrent estates. It is clear that the deed of George conveyed no estate to Eben which now subsists in Eben's successors, with the exception named before. The records may show, as far as forms go, that the defendants have a deed representing such a title, but none in reality exists. Blank paper would convey as much title to them. The fact that the defendants have a valid and also a pretended title, cannot make the pretended title good for anything. It is no more in their hands than if in the possession of other persons.

The defendants, having no title to the fee through George's deed, can have no relinquishment of his wife's dower from that source. It must be borne in mind that a relinquishment of

dower conveys no estate at all. It is merely a bar or release of a future contingent interest in an estate. It is not independent of the fee, but is an inseparable accompaniment of it, an incumbrance upon it. When the fee is conveyed, the dower is relinquished. When the fee conveyed ends, the dower is no longer relinquished. The release amounts to no more than a covenant of non-claim. The wife binds herself that whatever estate the grantee and his privies shall have and enjoy through her husband's deed in which she joined, shall be exempted from future claim by her. She releases dower in the kind and quantum of estate that passes by her husband's deed. From the very nature of the claim its release can only apply to land legally conveyed, and cannot apply to land not conveyed by the deed. So far as Eben got a title from George's deed to him, so far did he get the title free from his wife's dower. If the deed amounted to conveying a base or determinable fee, terminating when George's creditors became seized under their levies, thus far did the release of dower extend and no farther. After that there was no estate in Eben from George for the relinquishment to attach to or operate upon. It could not operate on the contingent dower alone. In 2 Scrib. Dow. 295, the author says; "Her (the wife's) renunciation of dower is to attend the conveyance of her husband; to endure while that endures and no longer. Hence, if the conveyance of the husband be inoperative, or if it is set aside, or avoided, the right of dower remains unimpaired." He cites numerous cases in support of the text. See *Clowes* v. *Dickerson*, 5 Johns. c. 247.

There are various decisions showing that the release of dower is co-extensive with the estate actually and legally conveyed. A widow is not barred from dower against the assignee of a foreclosed mortgage, in which she did not join, though she joined with her husband to release dower to a third person in the equity of redemption. *Littlefield* v. *Crocker*, 30 Maine, 192. It has been many times held that, where the wife joined with the husband in a mortgage, she is dowable in the right of redeeming from that mortgage. *Smith* v. *Eustis*, 7 Maine, 41. Dower will be defeated in an estate where her husband's seizin is lost by the

restoration of a prior seizin, as in case of a re-entry for condition broken. 4 Kent, 48. Even if she has been actually endowed, and the title of her husband is defeated by a paramount title, her dower terminates upon the eviction. *Brown* v. *Williams*, 31 Maine, 406. If the husband is seized of a determinable fee, and it is determined by the happening of the event upon which it is limited, the right of dower on the part of the wife or widow ceases. Wash. R. Prop. Tit. Dow. Where a creditor avoids a deed from the husband to his wife on the ground that it is fraudulent and void as to him, the wife is nevertheless entitled to dower. *Richardson* v. *Wyman*, 62 Maine, 280. *Robinson* v. *Bates*, 3 Met. 40. If a conveyance of the husband during coverture by error omits a parcel from the description, it cannot be reformed as to the wife. 2 Scrib. Dow. 297, and cases.

In *Stinson* v. *Sumner*, 9 Mass. 143, where one had conveyed land with covenants of warranty, his wife joining in the deed to relinquish dower, and the purchaser afterwards recovered damages of the vendor for a defect of his title to the land, it was held that the widow was not barred of her dower. The decision was not upon the ground especially that damages had been recovered on the warranty. The court there say: "The estate did not pass from Parsons to Hinkley as appears on his own allegations and proceedings; and the relinquishment of dower by the wife cannot now avail, since there is no estate in Hinkley for it to operate upon." It was enough that an action on the covenants might be maintained. That right existed in Eben under his deed of warranty from George. That case shows that there was an attempt there, as here, to prevail against the dower by a union of titles under opposing deeds. The party there, who held the title without a release of dower, obtained a quitclaim from the person to whom the land had been conveyed with a relinquishment of dower, but whose title had been defeated by prior attachments upon the estate. And in that case, as in the case before us, the deed was not wholly defeated, but carried the fee to one parcel not disturbed by the attachments.

In Ohio an estate was deeded with dower relinquished. The grantee was evicted therefrom by the creditors of the grantor

upon the ground of a fraudulent conveyance. After levies were made, in a creditor's bill, the court ordered the grantee to release all his right to the creditors, who thereby united, as far as forms could produce it, the title by levy with the title by deed. The court held that the title by deed became defeated by the proceedings of the creditors, and that the widow of the fraudulent grantee was entitled to her dower, and that the conveyance by order of the court was to quiet the title, but could not have the effect of an independent or substantial title that would take the right of dower from her. *Woodworth* v. *Paige*, 5 Ohio St. 70. 1 Scrib. Dow. 613, and cases cited.

The case of *Harriman* v. *Gray*, 49 Maine, 537, has been widely promulgated as deciding that, although a release of dower to a stranger to the title does not extinguish the right of dower, if the releasee afterwards acquires the title, the release operates to bar the dower as to him, by way of estoppel. That was not the point decided. The most that the case decides is that a deed relinquishing dower to a person who held the title, but had conveyed it away without warranty, would not enure to such person's grantee. That case furnishes no support to the position of the defendants here. Eben French was the releasee in this case, but the title did not come to him, nor were there any covenants from him to his successors. *Crocker* v. *Pierce*, 31 Maine, 177. Undoubtedly, after a sale by the husband or after his estate has been taken on execution, the wife may relinquish her claim to dower by a separate deed to the person owning the title. *Stearns* v. *Swift*, 8 Pick. 532. *French* v. *Peters*, 33 Maine, 396. R. S., c. 103, § 6. But that is not this case.

The defendants are strangers to the title so far as they undertake to hold under the deed from George French to Eben French. The estate upon which the relinquishment of the demandant's dower was intended by that deed to operate, became defeated, leaving no estate for her release to operate upon. The widow is not barred except as to those who claim under the deed (in which she joins) as a valid deed conveying the title or some part of it. She is barred as to the small undivided portion of the premises in the deed of her husband, which the attachments against him did not take, and is no further barred.

SAMUEL EATON *vs.* TURNER BUSWELL, administrator.

Somerset. Opinion June 5, 1879.

Administration. Claim. Notice. R. S. 1872, *c.* 85, § 32.

The giving the notice to an executor, or administrator, required by R. S. 1872, c. 85, § 32, of a claim against the estate before suit, is essential to its maintenance.

The want of such notice may be taken advantage of under the general issue.

ON EXCEPTIONS.

ASSUMPSIT against defendant as administrator of Joseph P. Buswell, late of Solon, deceased. Writ dated September 30, 1874, and contains count for $3,000 money had and received, and nothing else, and alleging the money was due from said Joseph P. Buswell and to the plaintiff.

It was admitted that defendant was administrator, and that said Joseph P. Buswell died September 13, 1872; but the defendant denied that any previous notice in writing and demand of payment were made by the plaintiff, as required by statute, before bringing this suit against him as administrator. The notice and demand relied on by the plaintiff was a letter, of which the following is a copy:

"Norridgewock, February 21, 1874. Mr. Buswell, Dear Sir: Jona. Eaton is here with statement of his affairs with estate of your father. From this statement it seems to me desirable for all parties that a settlement should be effected as early as practicable. I have suggested that a submission of all questions in dispute should be submitted to some impartial referee, with authority to determine what was equitable between you. Mr. Eaton, I think, will agree to this, and if you should assent it would easily be arranged. Yours truly, S. D. Lindsey."

No other evidence whatever was offered in relation to a previous notice and demand, or in relation to this letter, except the fact that it was produced in court by the defendant's counsel upon notice asking for it, and the plaintiff's counsel admitted that no other was given.

In order to allow the jury to pass upon the various questions

in dispute between the parties, the presiding judge, *pro forma*, overruled the objections to the alleged notice and demand of payment. The plaintiff claimed that in March, 1868, he was owing Judge Tenney about $1,300, which was secured by mortgage on land in Solon, the farm on which he lived; that he procured said Joseph P. Buswell to advance the money and take up said mortgage.

That, in order to secure said Buswell for said sum of money, Moses Eaton, brother of plaintiff and of Jonathan Eaton, on March, 18, 1868, conveyed to said Buswell, by deed of warranty, the farm aforesaid and other real estate in Solon; that previous to this time other real estate in Solon had been conveyed by said Samuel and Jonathan Eaton to said Buswell, as security for other sums loaned. That in the fall of 1869 said Buswell wanted his money, and on December 4, 1869, the plaintiff got Moses and Luther P. French to advance $3,000, which said Buswell claimed to be then due him, and on receipt of which he conveyed all of said real estate to said Samuel Eaton, who at the same time conveyed the same to said Moses and Luther P. French. And said Eaton claimed that the whole sum of $3,000 was not due said Buswell, and that he promised at the time of receiving it to look over his claims and debts, and pay back whatever sum he had received more than was due him.

And he claimed that he was to pay said Buswell only six per cent, on the sums due him, and that those sums amounted only to $2,609.65 on December 4, 1869, leaving a balance of $390.35 which, with interest from that time, he claimed to recover under the count for money had and received.

The defendant denied any agreement to pay back any part of the $3,000, but claimed that it was all due said intestate. He also claimed that the rate of interest agreed upon between his father and the Eatons was eight per cent annually; and that Jonathan Eaton, brother of the plaintiff, was jointly interested in the subject matter of the suit, and should have been made co-plaintiff with Samuel; that he was left out in order to make him a witness.

The case had been previously sent to an auditor, with instructions to report the amount due, if anything, and whether there

was any such agreement as the plaintiff claimed, and what was the rate of interest, if any, agreed upon by the parties. He found for the plaintiff on the question of the agreement to repay; and he also found that there was an agreement to pay eight per cent annually. And allowing the eight per cent, he reported as due the plaintiff on December 4, 1869, $141.24 with interest from that time. Computing at six per cent simple interest, he reported $390.35 as due the plaintiff on December 4, 1869, with interest since, if the agreement to pay the eight per cent was illegal, and should be disallowed.

The auditor's report was read by the plaintiff, and then he introduced evidence to controvert it upon the question of the rate per cent.

And evidence was introduced by both parties upon all the foregoing issues, including the testimony of Jonathan Eaton, who was called by the plaintiff, the defendant objecting. The jury found a general verdict for the plaintiff for $217.85; and found specially in answer to questions submitted by the court, and under instructions not excepted to by either party, that Jonathan Eaton was not interested in the subject matter of the suit; and that the plaintiff Samuel Eaton agreed to pay said Buswell eight per cent.

Questions and answers of jury are as follows:

Ques. Was Jonathan Eaton jointly interested with Samuel Eaton, the plaintiff, in the subject matter of this suit?

Ans. No.

John A. Fletcher, foreman.

Ques. What was the rate of interest, if any, agreed upon between Eaton and Joseph P. Buswell?

Ans. Eight.

John A. Fletcher, foreman.

To the ruling of the court allowing said letter to be admitted as evidence of a previous notice and demand under the statute, and as sufficient evidence of such notice and demand, the defendant alleged exceptions

J. Baker, for the plaintiff.

D. D. Stewart & A. H. Ware, for the defendant.

APPLETON, C. J. The statute of 1872, c. 85, § 12, provides

that "no action against an executor or administrator on a claim against the estate shall be maintained, unless such claim is first presented in writing and payment demanded at least thirty days before the action is commenced, and within two years after notice is given of his appointment."

The language is clear. Its meaning is unmistakable. In the past such action might have been maintained without such notice. In the future it shall not be.

The only notice produced fails in all the essential requirements of the statute. No claim whatever is set forth therein. The plaintiff is not indicated as the claimant. Payment is not demanded. A proposal to refer is no demand of payment. Nor is the want of such notice pleadable in abatement. The giving the required notice is essential to the plaintiff's right to recover. It should be averred in the writ and proved in the trial.

Exceptions sustained.

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

JAMES W. WOOD, in error, *vs.* NATHAN LEACH.

Knox. Opinion June 5, 1879.

Error,—writ of. Record. Taxation of costs.

To reverse a judgment for error in law, the error must be one apparent upon the record, which, or a transcript thereof, the plaintiff must produce; and if no error there appears, none will be presumed.

Documents and records filed in a case form no part of the record thereof unless incorporated in it.

Nothing can be assigned for error in law which contradicts the record.

An irregularity in entering up a judgment is not ground for error.

Error in computation or amount is to be corrected on review.

An erroneous taxation of costs not disclosed by the record affords no ground for the reversal of a judgment.

ON FACTS AGREED.

WRIT OF ERROR, dated March 10, 1878, to reverse a judgment recovered in supreme judicial court, Knox county, March term, 1876, wherein said Nathan Leach was plaintiff and said James W. Wood was defendant, in which action the writ was dated August

18, 1875, entered in Knox county, September term, 1875. Service personal on defendant August 27, 1875; and in that action plaintiff's claim was a promissory note, and defendant filed an account in offset, which was contested.

At said March term, 1876, said action of *Leach* v. *Wood* was defaulted under an agreement that the defendant should be heard in damages by some suitable person, and the clerk was named, but he was unable to assess them, and D. N. Mortland was selected to assess damages in said action by the following agreement in writing, filed in said action, viz:

"Supreme judicial court, March term, 1876, *Nathan Leach* v. *James W. Wood.* In the above action we agree that the damages shall be assessed by D. N. Mortland, Esq. Rice & Hall, attorneys for plaintiff. Gould & Moore attorneys for defendant."

Said March term of court, 1876, adjourned finally April 5, 1876.

After due notice said Mortland heard the parties and witnesses on April 13 and 19, 1876, in vacation, and assessed the damages, and found a balance due the plaintiff Leach, and made his report in writing, including therein his fees as assessor, and filed it in the clerk's office April 22, 1876, in vacation. The following is a copy of said report:

"*Nathan Leach* v. *James W. Wood.* I find amount of note and interest to day of judgment to be $50.73. Upon the account in set-off filed by the defendant I find to be due the defendant $11.00. I find the whole amount for which judgment should be rendered $39.73. Amount charged for assessing damages $6.00. D. N. Mortland, assessor."

The clerk entered up judgment upon said report as of said March term, 1876, for $39.73,—the amount of damages found by said Mortland and for $27.36 costs; which said costs included fees for witnesses, viz: Helen W. Davis $1.34, and John Leach $1.34, at hearing before said Mortland, and also included $6.00, the fee charged by said assessor for assessing damages, all under the objection of said Wood.

No report was made by said Mortland to the court, nor was his report acted upon by any judge of the court.

Execution issued on said judgment April 25, 1876, and the

property of said Wood levied upon to satisfy the same. Other facts sufficiently appear in the opinion.

The court to enter such judgment in the case as the legal rights of the parties require.

A. P. Gould & J. E. Moore, for the plaintiff, contended, *inter alia :*

I. Illegal costs were allowed. The agreement or rule under which the assessor acted had no provision for his finding as to costs, and without this he could not award them. Morse Ar. and Award, 622–632, and authorities cited.

The clerk, in entering up judgment, could not consider anything that took place before the assessor and not reported by him. The clerk's award as to witness fees is entirely unauthorized.

II. The assessor's award was never returned to, or acted upon by, the court. *Begg* v. *Whittier*, 48 Maine, 314, 316. *Price* v. *Dearborn*, 34 N. H. 486. *Gorham* v. *Hall*, 57 Maine, 58. *Price* v. *Dearborn*, 34 N. H. 481. *Gardner* v. *Fields*, 1 Gray, 151. *Hadlock* v. *Clement*, 12 N. H. 68–73.

L. M. Staples, for the defendant.

Appleton, C. J. This is a writ of error to reverse a judgment rendered on a default.

To reverse a judgment for error in law, the error must be one apparent upon the record. *Kirby* v. *Wood*, 16 Maine, 81. *Conway F. Ins. Co.* v. *Sewall*, 54 Maine, 352. If no error appears upon the record, none will be presumed. *Peebles* v. *Rand*, 43 N. H. 337.

Before a judgment will be reversed, the record, or a transcript of the record, must be produced, for, without the record or its transcript, the court cannot know there is an error or what it may be. It is the duty of the plaintiff in error to furnish the record or its transcript. *Rochester* v. *Roberts*, 5 Foster, (N. H.) 495. The judgment must be brought before the court by the writ of error. *Thompson* v. *Browne*, 39 N. J. 2. Where the error is one of law, the court can only act upon the record or its transcript. *Starbird* v. *Eaton*, 42 Maine, 569. The plaintiff must affirmatively show the error on which he relies. He must there-

fore furnish the record. *Aiken* v. *Stewart*, 63 Penn. 30. *Kille* v. *Ege*, 78 Penn. 15.

The plaintiff in error has furnished neither the record nor a transcript of the same, nor shown reason why it was not done.

In error of law nothing can be received to contradict the record. *Paul* v. *Hussey*, 35 Maine, 97. *Wetmore* v. *Plant*, 5 Conn. 541. *Claggett* v. *Simes*, 31 N. H. 22.

As the plaintiff in error has not furnished the court with the record, or a transcript of the record, we must assume it to have been in the usual form.

The original action was defaulted to be heard by the clerk, but by agreement of parties a hearing was had before D. M. Mortland, Esq., after due notice to the parties, and judgment rendered for the amount fixed upon by the individual agreed upon to assess damages. A copy of the agreement of the parties, and of the amount found due, in accordance with which, as to the sum due, judgment was rendered, is made part of the agreed statement of facts; but it is nowhere asserted or admitted that these facts are incorporated in, or made a part of, the record. It is for the plaintiff in error, if he would seek to take advantage of them, affirmatively to show that they are incorporated in the record; for, if not, and the agreement and decision are merely on file, they constitute no part of the record. Documents and records filed in a case form no part of the record unless incorporated in it. *Valentine* v. *Norton*, 30 Maine, 195. *Kirby* v. *Wood*, *supra*. *Pierce* v. *Adams*, 8 Mass. 383.

An irregularity in entering up judgment is not ground for error. *Claggett* v. *Simes*, 31 N. H. 23. *Collins* v. *Walker*, 55 N. H. 437. The remedy is for the party to move in the court where proceedings were had to have the irregularity corrected and the record amended accordingly.

If there was an error of computation, or in the amount, the mistake is one to be corrected by review. *Starbird* v. *Eaton*, 42 Maine, 265. *Lowell* v. *Kelley*, 48 Maine, 265. If damages were not formally assessed by the court or the jury, it should specially so appear of record, for the presumption of law arising from the record as usually made up is that they were legally

assessed. *Fairfield* v. *Burt*, 11 Pick. 246. *Collins* v. *Walker*, 55 N. H. 437.

II. The judgment is sought to be reversed on account of an erroneous taxation of costs. If a mere error of taxation were to be deemed sufficient ground for the reversal of a judgment, the evils resulting from such a doctrine would be incalculable.

This question first arose in *Field* v. *First Mass. Turnpike*, 5 Mass. 389, upon a petition to correct an erroneous taxation of costs,—certain witnesses having been omitted to be taxed. The question was not argued, and there is a *per curiam* decision that the remedy for a mistaken taxation is by error, and the relief to be given will be by reversing the erroneous judgment and entering a right one. In *Southworth* v. *Packard*, 7 Mass. 95, the court refused to reverse a judgment because the items of the bill of cost did not appear. "The objection to the bill of costs should have been made at the common pleas, when the report was made and the costs taxed." In *Jacobs* v. *Potter*, 8 Cush. 236, it was held that a writ of error would not lie to correct a taxation of costs by the clerk, but that the remedy was by appeal. The same question arose in *Day* v. *Berkshire Woolen Co.*, 1 Gray, 421, and the decision in *Jacobs* v. *Potter* was re-affirmed. It may be regarded as authoritatively settled in Massachusetts that an erroneous taxation of costs affords no ground for the reversal of judgment. In this state the question arose in *Valentine* v. *Norton*, 30 Maine, 195, when the court held that error might lie to correct an erroneous taxation of costs. If the error in this case is to be treated as an error in law, as no transcript of the record has been produced, there is no evidence that there is error in the record, and it is for the party alleging error to show its existence. If it be said that there is an error of fact in the taxation, it was decided in *McArthur* v. *Starrett*, 43 Maine, 345, that error would not lie for such erroneous taxation of costs.

The losing party has a right to be heard in costs, and to appeal to a judge if dissatified. Or he may move to have costs taxed in term time, and if the taxation is allowed by the justice presiding, he may except to such allowance. When the remedy for erroneous taxation can be heard by exceptions or appeal, error for its

correction will not lie. *Peebles* v. *Rand, supra. Conway F. Ins. Co.* v. *Sewall*, 54 Maine, 353. It is usually in the power of a party by seasonable diligence to raise the question of costs so that it can be presented on exceptions. But that a judgment is not reversible for an erroneous taxation of costs we think the better conclusion.

It is thus seen that the writ of error is not maintainable upon the agreed statement of the parties without a copy of the judgment sought to be reversed.

III. The record has, since the preceding opinion was prepared, been furnished, which shows the entry of the action *Leach* v. *Wood;* that there was an appearance by counsel; that an account in set-off was duly filed; that the action was continued from term to term to the March term of this court; that the defendant was defaulted; that the damages were to be assessed by the clerk; that then a written agreement was entered into that the damages were to be assessed by D. N. Mortland; that an assessment of damages was duly filed by said Mortland, and, "therefore," it was "considered by the court that the said plaintiff recover against the said defendant the sum of thirty-nine dollars and seventy-three cents debt or damage and costs of suit taxed at thirty-seven dollars and thirty-six cents." The judgment was for the debt assessed by the person agreed upon to assess damages.

The plaintiff had a right to have his damages assessed by a jury. Not claiming that right, the court might refer the matter to a master or assessor "for informing the conscience of the court, and his doings, being approved and adopted by the court, become theirs." *Price* v. *Dearborn, supra. Begg* v *Whittier*, 48. Maine, 314. Much more, then, may the parties agree upon an individual by whom damages, as in this case, were to be assessed.

The record states by whom damages were assessed, and then proceeds: "It is therefore considered by the court that the said plaintiff recover against the said defendant the sum of thirty-nine dollars and seventy-three cents debt or damage." This is an express and full approval and adoption of the assessment of damages as made by the person agreed upon by the parties.

The record upon its face discloses no error. The facts admitted in the agreed statement contradict the record. The extended records of the court can neither be contradicted nor impeached. If erroneously drawn up, the remedy is by application to the court to amend the record. *Dudley* v. *Butler*, 10 N. H. 281. In *Claggett* v. *Simes*, *supra*, the plaintiff assigned for error, that the judgment to reverse which the writ of error was brought, and which purported to have been rendered and entered up against him was entered by the clerk without the authority or order of the court. It was there held that the assignment was bad as contradicting the record, and that the plea *in nullo est erratum* does not confess the fact. "This assignment," observes Eastman, J., "is a clear impeachment of the record, and therefore bad; for it is well settled that nothing can be assigned for error which contradicts the record." The authorities are uniform on this subject. *Lavett* v. *Pell*, 22 Wend. 369. *Jarvis* v. *Blanchard*, 6 Mass. 4. "In a writ of error upon a judgment in the palace court held *coram* Jacob Dun Osmond, it cannot be assigned for error that the Duke was not there because that is contrary to the record, though in fact the court was held before his deputy, according to the patent." 3 Bac. Abr. 372. *Molins* v. *Wheatly*, 1 Lev. 76.

It appears by the report of Mr. Mortland that he charged six dollars for assessing damages. It nowhere appears from the record that this sum was included in the costs as taxed. In *Southworth* v. *Packard*, 7 Mass. 95, the court, referring to the costs, say: "We must presume them to be the regular costs of this process."

The alleged error as to costs, not being apparent of record, affords no ground for the reversal of the judgment, even had that been a cause, which it was not.

The parties agreed that the damages should be assessed by an assessor agreed upon. The costs before such assessor, as well as his reasonable fees, are equitably as well as legally to be taxed as a part of the costs in the suit. They are costs resulting from the agreement of the parties, and are as justly taxable as the costs of a reference or a trial. But, whether so taxable or not, the better

opinion is that a judgment should not be reversed for an erroneous taxation of costs.

Writ denied.

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

JOSIAH BRUCE *vs.* ALBERT L. SOULE.

Lincoln. Opinion June 5, 1879.

Slander. Actionable words,—amendment.

To speak of and concerning the plaintiff, "he has not been able to do any work for the last three or four years; that he was about dead with the bad disease, and that his died with it;" is not actionable. The words do not import a charge of having a loathsome or contagious disease,—this being necessary in actions for such slanders.

Motions for amendments should be passed upon by the court at *nisi prius*. Amendments which do not appear to be for the same cause of action set out in the declaration are not allowable.

Where the words spoken, upon which the plaintiff relies, are proved, if there appears to be a variance between the allegations in the declaration and such word in the tense of the verb, or in some other particular, and still the judge can see that the cause of action is substantially the same, it will be competent for him to allow the necessary amendment to obviate the variance on such terms as he may deem just.

ON REPORT.

ACTION OF SLANDER. When the case came up for trial at *nisi prius*, after issue joined, the presiding judge, on inspection of the writ, ruled that, if all the facts were proved as alleged, the plaintiff would not be entitled to a verdict. To this ruling the plaintiff duly excepted.

The plaintiff then offered three additional counts as amendments. Whereupon, at the suggestion of the court, without any ruling on the amendments, it was agreed that the whole case should be reported to the full court; the writ, pleadings and amendments to be a part of the case, and the court to decide whether the action was or was not maintainable on the original writ, and to have full power to allow or disallow the amendments or any of them, and, if allowed, upon such terms or without terms as they deem proper.

There were two counts in the plaintiff's writ which, leaving out the formal and immaterial parts, charged the slanderous words as follows:

I. "He (meaning the plaintiff) has not been able to do any work for the last three or four years; that he (meaning the plaintiff) was about dead with the bad disorder (meaning the venereal disease or pox), and that his (meaning the plaintiff's wife) died with it (meaning that the plaintiff, while he was a married man and his wife was living, had committed adultery with some woman of bad character and contracted the venereal disease and communicated it to his wife from the effects of which she died); by means of which false, scandalous and malicious words so spoken of and concerning the plaintiff by the defendant, the plaintiff has been brought into public scandal and disgrace and greatly injured in his good name and otherwise."

II. "He (meaning the plaintiff) has not been able to do any work for the last three or four years; that he (meaning the plaintiff) was about dead with the bad disorder (meaning that the plaintiff was about dead with the venereal disease or pox); that his (meaning the plaintiff's wife) died with it (meaning that the plaintiff, while he was a married man and had a lawful wife living, had committed adultery with some bad woman, not his wife, and had thereby contracted the venereal disease, and had communicated it to his wife, from the effects of which she had died); by means of which false, scandalous and malicious words so spoken by defendant," etc.

Plea, the general issue, and following brief statement:

And said defendant, for a brief statement of his further defense, by leave of court pleaded, protesting that he did not utter or speak the words set forth in the plaintiff's declaration of and concerning the plaintiff, says that there are no sufficient allegations in said plaintiff's writ and declaration of any matter or thing to constitute slander, and that the words in said declaration alleged to be slanderous are not slanderous as therein set forth.

Amendments filed and offered were as follows, leaving out the formal parts:

I. "He (meaning the plaintiff) has had the pox for the last ten

or fifteen years and gave it to his wife, and that is what his wife died with (meaning that the plaintiff, while he was a married man and having a lawful wife living, had committed adultery with some bad woman not his wife, and had thereby contracted the pox, and had communicated it to his wife, from the effects of which she died); and that he still had said disease; by means of which false, scandalous, and defamatory words," etc.

II. "He" (meaning the plaintiff) has not been able to do any work for the last four or five years; that he (meaning the plaintiff) is about dead with the pox; that he (meaning the plaintiff) gave it to his wife and she died with it (meaning that the plaintiff, while he was a married man and had a lawful wife living, had committed adultery with some bad woman not his wife, and had thereby contracted the pox and communicated it to his wife, from the effects of which she died, and that said disease still remained on him); by means of which false, scandalous and defamatory and malicious words so spoken by the defendant," etc.

III. "Also for that the plaintiff, on the 10th day of April, 1875, was a citizen of Somerville, in good standing and character and ever had been, and during more than forty years prior to said day, and until within a few months of said day had been a married man having a lawful wife living, who had died less than a year prior to said day, yet said defendant, well knowing the premises, and wickedly and maliciously intending to injure the plaintiff in his good name and character in the community where he resided, and to deprive him of public confidence and respect, and to expose him to punishment, heretofore, to wit: on the 10th day of April, 1875, in a certain discourse, which he then and there had of and concerning the plaintiff, and of and concerning him as a married man and having a lawful wife then living, did, in the presence and hearing of divers persons, falsely and maliciously charge and publish that the plaintiff had committed the crime of adultery, by saying, in substance, that the plaintiff, while he was a married man and had a lawful wife still living, had criminal intercourse with some bad woman not his wife, and contracted the pox and communicated it to his wife, by which she had died, and that the plaintiff still had said disease; by means of which false, scan-

dalous and defamatory and malicious words so spoken by the defendant the plaintiff has been brought into public scandal and disgrace and greatly injured in his good name and character and exposed him to punishment for adultery."

O. D. Baker, for the plaintiff, contended, *inter alia*, that, even if the words "bad disorder" were equally susceptible of two meanings, the innuendo may properly explain in which of the meanings the words were actually used, and this without special prefatory averments, and cited *Thompson* v. *Lurk*, 2 Watts, 17–20. *McKennon* v. *Greer*, 2 *Id.* 350. *Hayes* v. *Brierly*, 4 *Id.* 392. *Kennedy* v. *Gifford*, 19 Wend. 296–299. *Griffith* v. *Lewis*, 8 A. & E. 841–851. *Clegg* v. *Laffer*, 10 Bing. 250. *Dollam* v. *Bushey*, 16 Pa. St. 208. *Vanderlip* v. *Roe*, 23 *Id.* 82. *Van Slyke* v. *Carpenter*, 7 Wis. 173.

The averment must be by introduction, if it seeks to introduce new matter, but by innuendo, if it is only to explain the old. Barhanis' Case, 4 Co. 20. (*a*). *Bloss* v. *Tobey*, 2 Pick. 320–329. *Rex* v. *Horne. Camp.* 672–679.

Amendments are allowable. *Pullen* v. *Hutchinson*, 25 Maine, 249–252. *Brewer* v. *East Machias*, 27 Maine, 489. *Bolster* v. *China*, 67 Maine, 551. *Lister* v. *McNeal*, 12 Ind. 302. *Conroe* v. *Conroe*, 47 Pa. St. 198. *Dougherty* v. *Bently*, 1 Cranch. C. Ct. 219. *Gay* v. *Homer*, 13 Pick. 535.

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

I. The words set out in the plaintiff's original declaration are not actionable. *Bloss* v. *Tobey*, 2 Pick. 320–328. *Barnes* v. *Trundy*, 31 Maine, 321–323. *Poland* v. *Lyon*, 1 Otto, (9 U. S.) 225. *Bloodworth* v. *Gray*, 8 Scotts, 9, cited in Am. Lead. Cas. (3 ed.) 123. *Carslake* v. *Mapledoram*, 2 Term. 473. Hill. Torts, 303. *Nichols* v. *Gray*, 2 Carter (Ind.), 82. *Taylor* v. *Hale*, 2 Strong. 1189. Stark. Slan. 100, 101 [115]. 2 Saund. Ev. & Pl. 322.

"A difference in the tense of the words proved and that alleged will defeat a recovery, as the use of 'has' for 'had.'" Hill. Rem. for Torts, 375. 2 Saund., *supra*. *Whiting* v. *Smith*, 13

Pick. 364. *Allen* v. *Perkins*, 17 *Id.* 369, and many other cases cited.

II. Innuendo cannot enlarge meaning of words, or supply omissions of necessary inducement. *Emery* v. *Prescott*, 54 Maine, 389. *Van Vechter* v. *Hopkins*, 5 Johns. 211–219. *Patterson* v. *Wilkinson*, 55 Maine, 42. *Sturtevant* v. *Root*, 27 N. H. 69–73. *Emery* v. *Prescott*, 54 Maine, 392. *Brown* v. *Brown*, 14 Maine, 317. *Wing* v. *Wing*, 66 *Id.* 62. *Britten* v. *Anthony*, 103 Mass. 37.

III. Amendments. Not allowable, because a new cause of action is set out. *Milliken* v. *Whitehouse*, 49 Maine, 527. *Nye* v. *Otis*, 8 Mass. 122. *Allen* v. *Perkins*, *supra.*

The cause of action, in the case at bar, is the speaking of certain words; these words are set out in the writ. By the amendments offered the plaintiff charges that the defendant used other and very different words, and words actionable, while the slanderous words in the writ are not.

LIBBEY, J. An action will lie, without proof of special damage, for speaking words charging the plaintiff with having a loathsome or contagious disease, the effect of which imputation, if believed, would be to exclude him from society. Stark. Slan. 97. *Chaddock* v. *Briggs*, 13 Mass. 248. *Joannes* v. *Burt*, 6 Allen, 236.

"The ground of the action being the presumption of the plaintiff's exclusion from society, no action will lie for an imputation in the past tense, since such an assertion does not represent the plaintiff, at the time of speaking, as unfit for society, and therefore the substance of the action is wanting." Stark. Slan. 98. *Carslake* v. *Mapledoram*, 2 T. R. 473.

In the declaration the words alleged to have been spoken by the defendant, without the innuendoes, are as follows: "He has not been able to do any work for the last three or four years; that he was about dead with the bad disorder, and that his died with it." These words are included in quotation marks, and are set out as the precise words spoken by the defendant. They do not charge the plaintiff with having the "bad disorder" at the

time of speaking, but that "he was," in the past tense, about dead with it. We think they are not, therefore, actionable.

But the defendant did not demur to the declaration, and by so doing raise the question of its sufficiency directly. He pleaded the general issue, which was joined; and, after an intimation from the presiding judge that no cause of action was set out in the declaration, the defendant asked leave to amend by adding three new counts; and one of the stipulations in the report is that this court shall have full power to allow or disallow the amendments.

All motions for amendments should be passed upon by the court at *nisi prius*. *Crooker* v. *Craig*, 46 Maine, 327. *Thompson* v. *McIntire*, 48 Maine, 34.

As the case comes to us, we cannot determine whether the new counts are for the same cause of action set out in the original declaration or not. So far as we can determine from a comparison of the allegations in the first and third amendments with the allegations in the original declaration, those counts do not appear to be for the same cause of action, and we think they are not allowable. The second amendment offered may or may not be for the same cause. It can only be determined when the words spoken, upon which the plaintiff relies, are proved. Then, if there appears to be a variance between the allegations in the declaration and the words proved, in the tense of the verb used, or in some other particular, and still the judge can see that the cause of action is substantially the same, it will, undoubtedly, be competent for him to allow the necessary amendment to obviate the variance, on such terms as he may deem just; and he can then confine the plaintiff to proof of one slanderous charge in support of his action.

If this court should allow the amendments, we see nothing to prevent the plaintiff, on trial of the action, from proving as many distinct slanders as he has counts in his writ; when, by his original declaration, he can recover for but one. This would introduce a new cause of action.

Action to stand for trial.

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

ALBERT W. PAINE, insurance commissioner, *vs.* MAINE MUTUAL MARINE INSURANCE COMPANY.

Penobscot. Opinion June 7, 1879.

Evidence. Auditor,—hearing before.

Invoices, bills of lading, or protests, are not admissible as evidence, in a suit upon an insurance policy, to show the loss sustained by the person insured.

An auditor cannot receive in a hearing before him any but legal evidence.

ON REPORT.

APPEAL by Andre Cushing & Co., of St. John, N. B., from the decision of receivers upon claims filed in insolvency against said respondent company for losses on policies, only a part of which was allowed by the receivers; objections were duly filed in accordance with the provisions of the statute, c. 148, acts of 1873, § 10.

The appeal having been entered in this court sitting at *nisi prius*, the claimants moved for the appointment of an auditor to adjust the claims and to report, according to R. S., c. 82, § 62.

The receivers objected to such appointment, for the reason that the case was not such an one as contemplated by the statute authorizing the appointment of auditor. The objection was overruled, and an auditor appointed, who heard the parties, made his report, and also a supplementary report upon a recommitment.

The case coming up for trial at the April term, 1878, the claimants offered the auditor's reports, and these make a part of the case.

The receivers offered no evidence, but insisted upon the objections made to the appointment of auditor, and also to the objections offered by them to the evidence as set forth in the supplementary report; objections were duly filed in writing. The protest, bill of lading and invoice, in one of the cases, are to make a part of the case, to be referred to by either party. The case is submitted to the full court on law for decision. It was agreed that the reports were not accepted, when offered, or at any time, but motion having been made by the plaintiff to have them accepted, the question of their acceptance and all the rights of the

parties are submitted for the decision of the full court, as before stated.

If the objections are both overruled by the court, then judgment is to go upon the auditor's report; otherwise, for the amount found and reported by the receivers. The court also to decide questions of cost.

Report of auditor, indorsed upon warrant. "To the honorable judge of the supreme judicial court in and for the county of Penobscot: Pursuant to the within commission to me, I gave the parties therein named notice of the time and place when I would attend to the business therein named; at which time and place Charles P. Stetson, Esq., in the interest of the Maine Mutual M. Ins. Co., and Andre Cushing & Co., in behalf of themselves, appeared, the said Charles P. Stetson protesting that by his said appearance he waived no rights, but reserved full permission to object to the proceedings, and to any submission to the auditor. And now, having heard the parties and examined their respective vouchers and proofs, I have stated the accounts and all credits between said parties, as appears in the annexed accounts and the account current, and do hereby report that the said annexed statement shows the true and correct accounts between the said parties, as found by me. For services as auditor, I ask the allowance of one hundred and twenty five dollars. Albert Marwick, auditor. February 5th, 1878."

Supplementary report of auditor. "To the honorable justice of the supreme judicial court in and for the county of Penobscot: In the action, *Albert W. Paine*, insurance commissioner, complainant, v. *Maine M. M. Ins. Co.*, the report heretofore made by me, as auditor on the claims of Andre Cushing & Co., having been re-committed, I have further to report, that at the hearing of the parties, as stated in my previous report, the claimants, in addition to other evidence, also offered certain protests, bills of lading, and invoices, as vouchers relating to the several cargoes for the loss of which, wholly or partially, the claims under consideration were made. To the admission of these papers as evidence, the receivers objected. But finding that the papers are such vouchers as are received by adjusters of marine losses, and also by marine

insurance companies as proof of claims such as made in the case, and being found genuine, and regarded by me as pertinent to the inquiry, I accepted the same as competent evidence, properly to be considered by me as auditor; and I have accordingly so treated them in making my report. Albert Marwick, Auditor. Portland, April 15, 1878."

A. W. Paine, for the claimant, cited *Field* v. *Holland*, 6 Cranch. 8. *Whitwell* v. *Willard*, 1 Met. 219. *Quimby* v. *Cook*, 10 Allen, 32, 33. *Corbett* v. *Greenlow*, 117 Mass. 173. *Washington Co.* v. *Dawes*, 6 Gray, 376. *Lazarus* v. *Insurance Co.*, 19 Pick. 81.

As to course of procedure before the auditor. *Field* v. *Holland*, *supra*. *Howard* v. *Kimball*, 65 Maine, 326. *Jones* v. *Parker*, 6 N. H. 20. 11 N. H. 246. 18 N. H. 135. 31 N. H. 419–423. *Field* v. *Porter*, 32 N. H. 381. 38 N. H. 418. 27 N. H. 244. *Locke* v. *Bennett*, 7 Cush. 451. *Barnard* v. *Stevens*, 11 Met. 298. *Allen* v. *Hawkes*, 11 Pick. 361. *Holmes* v. *Hunt*, 122 Mass. 514. *Commonwealth* v. *Cambridge*, 4 Met. 35. *Doyle* v. *Doyle*, 56 N. H. 567. *Perkins* v. *Scott*, *Id.* 55.

C. P. Stetson, for the defendant, contended that the documents offered by the claimants and received by the auditor, were not sufficient or legal evidence of the loss. 2 Greenl. Ev. § 385. 2 Pars. M. Law, 489. *Whitwell* v. *Willard* 1 Met. 218. *Field* v. *Holland*, 6 Cranch. 8. *Allen* v. *Hawkes*, 11 Pick. 359.

The court will examine whether the master has admitted incompetent testimony, or based his conclusion upon facts not sufficient; and if he has, will set aside or re-commit the report. *Fair* v. *Manhattan Ins. Co.*, 112 Mass. 331. *Merrill* v. *Russell*, 12 N. H. 75. *Breed* v. *Gove*, 41 N. H. 453. *Jones* v. *Stevens*, 5 Met. 379. *Ropes* v. *Allen*, 9 Allen, 502. *Morrill* v. *Keyes*, 14 Allen, 222. *Kendrick* v. *Tarbell*, 27 Vt. 514. *Cottrel* v. *Vanduzen*, 22 Vt. 515. *Gilbert* v. *Tobey*, 21 Vt. 307. *Bradley* v. *Bassett*, 13 Conn. 560. *Cary* v. *Herrin*, 59 Maine, 361.

PETERS, J. The auditor, at the hearing before him, admitted certain invoices, bills of lading, and protests as documentary evidence to establish the losses alleged to have been sustained by the

claimants under their insurance policies. The papers were not legal evidence. They were merely the statements of the plaintiffs themselves or of third persons. An invoice is usually a paper made out by the owner or shipper of the cargo. Lord Ellenborough (*Dickerson* v. *Lodge*, 1 Stark. 226) said a bill of lading was "nothing more than the declaration of the captain." Lord Tenterden (Abb. Ship. 380 English paging) styles a protest "a declaration or narrative by the master," and says "it cannot be received in evidence for the master or owners, but may be received against him or them." Lord Kenyon entertained the same view. *Christian* v. *Coombs*, 2 Esp. 489. In *Senat* v. *Porter*, 7 T. R. 158, its admissibility was not regarded as "an arguable question." A ship's log (similar to a protest in character) is only evidence to contradict a witness who has kept it. *Rundle* v. *Beaumont*, 4 Bing. 537. *United States* v. *Gibert*, 2 Sum. (C. C.) 19. Dickerson, J. in *Stephenson* v. *Piscataquis F. & M. Ins. Co.*, 54 Maine, 73, speaking of a survey (a document of similar import) says, "neither plaintiff nor defendant can use such a document in evidence without consent of parties." It is the general and well nigh universal doctrine. 2 Phil. Ins. 663, and cases cited. Fland. Ship. 284. 2 Pars. Mar. Law, 489, and cases there cited. 3 Kent Com. 389, note. Abb. Ship. *supra.*

An auditor cannot receive any but legal evidence. He is not an independent tribunal like a referee chosen as such by the parties. He is a part of the court itself which intrusts him with its commission. Like any other tribunal of law, he must be governed by legal principles. Extreme injustice might be suffered by parties if it was otherwise. If it was as contended by the claimants, a report might be made by an auditor against a party founded entirely upon illegal evidence, and the burden created by it could be removed by such party in this court only by legal evidence; a case made out by illegal proof to stand until overcome by legal proof. Besides, if an auditor can set himself at all above the law, what limits can be prescribed to the exercise of such discretion? He must be required to act within the law, or he must have the right without limitation to act outside of it. The general proposition is nowhere denied that an auditor must decide

legal questions according to law. Whether testimony is admissible or not is but a question of law.

Claimants' counsel puts great stress upon the fact that there are decisions sustaining auditors in allowing parties to testify before them when such parties could not testify in court. But this power was not one usurped by auditors. It was one entrusted to them by the courts. It was legal and not illegal for auditors to do so. When the legislature authorized the appointment of auditors the power to examine parties as witnesses was granted by implication. And parties testifying could explain their accounts and vouchers. In the case before us the papers were received as evidence *per se* of the matters contained in them, not in connection with other evidence and as a part thereof, but, as the report declares, "in addition" thereto. By the earlier common law, auditors were not even allowed to administer an oath to parties but in few instances. The rule was extended to still other cases by the statute of Anne, and the power became in this country more and more enlarged by legislatures and courts. Bac. Ab. Accompt. G. 1 Story Eq. Jur., § 447, and note thereto. *Wheeler* v. *Horne*, Willes, 208.

We have been cited to no case, nor have we met with one, that permits auditors to receive and consider illegal evidence. The rule is correctly stated in Oliver's Precedents (Account), that "their (auditors') report may be objected to, either on account of any mistake of the law, or any improper admission or rejection of evidence, or because they have taken into consideration matters not submitted to them." This accords with the practice observed in many cases. An auditor cannot decide the question of costs. *Fisk* v. *Gray*, 100 Mass. 191. Has no authority to disallow an item allowed by the pleadings. *Snowling* v. *Plummer Granite Co.*, 108 Mass. 100. Could not allow a person to testify who was interested as bail of the party calling him. *Newton* v. *Higgins*, 2 Vt. 366. Nor allow an interested witness to testify, although the party himself could. *McConnell* v. *Pike*, 3 Vt. 595. Nor receive oral testimony of the contents of a paper that could be produced. *Putnam* v. *Goodall*, 31 N. H. 419. Depositions (for defects) should be objected to before auditor, or the objection is

removed to afterwards using them in court. *Gould* v. *Hawkes*, 1 Allen, 170. If the evidence is immaterial and not prejudicial to the dissenting party, its wrongful admission is not sufficient to set an award aside. *Kendrick* v. *Tarbell*, 37 Vt. 512. Very many cases might be added. These, for illustration, will suffice.

Appeal dismissed; with costs to respondents.

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

STATE *vs.* CHARLES DOLAN & DANIEL HURLEY.

Penobscot. Opinion June 7, 1879.

Intoxicating liquors. Former conviction. Duplicity. Averment. Proof.

After verdict it is too late to complain of duplicity in an indictment, or complaint and warrant.

Upon trial of two jointly charged with unlawfully keeping and depositing intoxicating liquors by them intended for unlawful sale in this state, an averment that "the said C D and D H has been before convicted," etc., (following the form given in the statute) may be supported by proof of their conviction severally at different times more than six years before the complaint was instituted.

It is not necessary that the previous conviction should be of an offense committed by them jointly; it being the purpose of the provisions in R. S., c. 27, §§ 55, 57, to obviate the merely technical objections that might otherwise be made upon common law principles to the allegations and proof of such previous convictions.

Hence, when D H was alleged, in statute form, to have been previously convicted, and the record produced was of the conviction of D C H: *Held*, that oral evidence of identity was admissible, without an averment in the complaint, to prove that D H was convicted by the name of D C H; and that an instruction, that, if the person before prosecuted should be found to be the same person and should be found guilty of the present offense, the record would authorize a finding of the alleged prior conviction, was correct.

ON EXCEPTIONS.

This was a trial upon a complaint for having liquors in the respondents' possession, with intent to sell the same in violation of law.

It is alleged in the complaint that the respondents had been before convicted of the same kind of offense. In evidence of this

allegation, the state offered a record of a conviction against one of the respondents, procured at one time, and a record of another conviction against the other respondent at another time, upon several and distinct and independent offenses.

This testimony was objected to upon the ground that, under a joint prosecution for the same offense, the proof should be of a previous offense jointly committed, and not of previous offenses severally committed.

It appeared by the same records that the date of the judgments in each case was considerably more than six years prior to the date of the complaint in the present case, and they were also objected to, because the previous offenses and the evidence of them were barred by the statute of limitations.

It also appeared that the record of judgment put in against the respondent Hurley, with all the papers in that case, were descriptive of Daniel C. Hurley; while the present complaint was against Daniel Hurley, without the middle initial letter C.

This was offered in evidence by the state, with oral proof that the first judgment was in fact recovered against the present respondent.

The judgment was objected to on account of the variance, and the oral evidence was objected to because there was no allegation in the present complaint that the previous judgment was recovered against the present respondent under a different name; thus accounting for the variance.

All of these objections were overruled, and the evidence admitted; and the court instructed the jury that the records were sufficient to authorize a finding of the alleged prior conviction, if the respondents were found guilty of the present offense and the persons before prosecuted should be found to be the same persons.

The verdict was that both respondents are guilty.

After verdict, a motion in arrest was filed for duplicity in the complaint and warrant, and because same are uncertain, irregular, and in other respects insufficient in law.

The complaint alleges that the respondents "unlawfully kept and deposited upon their persons, and in a certain shop and appurtenances situate on the southerly side of Main street, in said Bangor," intoxicating liquors, etc.

This motion was also overruled. To all which admissions and rulings and instructions the respondents alleged exceptions.

J. Hutchings, county attorney, for the state.

P. G. White, for the defendants, contended: 1. That there was a variance. 2. That the variance could only be reconciled by extrinsic evidence. 3. No allegation of identity; and 4. That the parol evidence received was inadmissible and should have been excluded, and cited R. S. 1877, c. 215. *Tuttle* v. *Com.* 2 Gray, 506. *Garvey* v. *Com.* 8 Gray, 382.

The fact of a prior conviction being a substantive part of the offense charged, and one necessary to be alleged, it must be proved as laid in the complaint and warrant. 2 Russell Cri. 658–713. 3 Stark. Ev. §§ 534–1551, note *x*. 1 Whar. Crim. L. §§ 609, 275, 309, and cases cited. *Pope* v. *Foster*, 4 T. R. 590. *Woodford* v. *Ashley*, 11 East. 508. 2 Saund. 291–296. *U. S.* v. *Bowman*, 4 Wash. C. C. 382. *U. S.* v. *Gallison*, *Id.* 387.

Two persons jointly indicted, when the proof is of separate offenses committed at different times, cannot both be found guilty. *King* v. *Messingham*, 1 Moody, 257. *Regina* v. *Dovey*, 2 Den. 92. *Com.* v. *Slate*, 11 Gray, 63. *Com.* v. *Cotton*, *Id.* 1. *Com.* v. *Brown*, 12 *Id.* 135. *Com.* v. *Cobb*, 14 *Id.* 386. 1 Whar. C. L., § 436.

Daniel, and Daniel C., Hurley are different names. *Com.* v. *Hall*, 3 Pick. 262. *Com.* v. *Shearman*, 11 Cush. 546. *State* v. *Homer*, 40 Maine, 438. *State* v. *Dresser*, 54 *Id.* 569. *Dutton* v. *Simmons*, 65 *Id.* 584. *Collins* v. *Douglass*, 1 Gray, 167. *Hubbard* v. *Smith*, 4 *Id.* 72. *State* v. *Jaggart*, 38 Maine, 298. *Ryder* v. *Mansell*, 66 *Id.* 167.

BARROWS, J. This was a complaint instituted before the municipal court against three persons for having intoxicating liquors in their possession with intent to sell the same in violation of law, brought into this court, on appeal, by two of the defendants and tried before court and jury upon their respective pleas of not guilty. Being found guilty, they move in arrest of judgment upon the ground of duplicity in the complaint and warrant, because it is therein alleged that said liquors were by them

"unlawfully kept and deposited upon their persons and in a certain shop and appurtenances situate," etc. If the objection was ever tenable, it comes too late after verdict. *Com.* v. *Tuck*, 20 Pick. 361, 362. *State* v. *Jackson*, 3 Hill (S. C.), 1.

Indeed, defendants' counsel does not claim in argument that the exception to the overruling of the motion in arrest can be sustained.

But he insists upon his objections made at the trial to the evidence offered in support of the allegation in the complaint that the respondents had been before convicted of the same kind of offense, and to the ruling that the records were sufficient to authorize a finding of the alleged prior conviction if the respondents were found guilty of the present offense and the persons before prosecuted should be found to be the same persons. The allegation in the complaint is "that the said Charles Dolan and Daniel Hurley has been before convicted . . of having unlawfully kept and deposited intoxicating liquors in said state, intending them for sale in said state in violation of law, to wit: once in the supreme judicial court of said state held at said Bangor." The proof offered consisted of records of the convictions of the defendants severally, at different times, of distinct and several offenses of this description, more than six years prior to the date of the complaint in the present case. And it was objected that, under a joint prosecution for an offense, the proof should be of a previous offense jointly committed, and not of previous offenses severally committed, and also that the previous offenses were barred by the statute of limitations.

This last objection is not insisted on in argument, and could not avail in any event; for, if they are found to have been properly convicted, they are to be punished for their last offense, and not in any sense for those previously committed. Ross' Case, 2 Pick. 165. *State* v. *Woods*, 68 Maine, 409.

The other objection would seem to be well founded were it not that by the provisions of §§ 55, 57, c. 27, R. S., "the common law technicalities of pleadings are very considerably abrogated" in respect to these averments of previous convictions. "It is obvious that the legislature did not require technical accuracy" in alleg-

ing them. *State* v. *Gorham*, 65 Maine, 273. *State* v. *Wentworth*, *Id.* 247.

The allegation of previous conviction is not an essential part of the offense with which these two defendants and another were jointly charged in the complaint, which was for the keeping and depositing of intoxicating liquors with intent to sell the same in this state in violation of law. It is matter in aggravation of that offense as to those who are found to have committed it after having been once before convicted of a similar offense. Upon such a complaint, one, all, or neither of the respondents may be convicted, with or without the aggravating circumstances, as the evidence may require. The commission of the offense jointly with the other respondents named in the complaint is not of the essence of the charge. The matter in aggravation also may be established as to one and not as to another. Where contumacy in criminal practices makes a man liable to a heavier penalty, as it often does practically even in the absence of statutory provisions, he and he only must suffer who has thus aggravated his offense.

In such a case as this it is the personal act of the individual, and not the participation in it with another, that is essential, both as to the offense and to the alleged aggravation. Aside from the peculiar statute provisions to which we have referred, the cases cited by defendants' counsel, where the accused were charged with a joint reception of stolen goods, or with the commission of adultery with each other, have little analogy to the one before us.

In *Com.* v. *Brown*, 12 Gray, 135, the court say (referring of course to cases where the charge does not involve from its character the united act of two or more individuals to constitute an offense in either): "It is a well established principle in all cases, criminal as well as civil, that a charge of tort against two is several as well as joint against all and each of them."

With statute provisions like those in §§ 55 and 57, c. 27, the same may be said of the matter here alleged in aggravation. The ungrammatical charge that "the said Charles Dolan and Daniel Hurley has before been convicted," is several as well as joint, and may be satisfied by proof of several convictions. The accuracy with which the common law requires matters appearing of record to be alleged is dispensed with under this statute.

The defendant Daniel Hurley further objects that in the record of conviction produced against him the criminal was named Daniel C. Hurley, and that this indictment contains no averment that the conviction was obtained against him by the name of Daniel C. Hurley, so as to authorize the admission of oral evidence of identity. The presiding judge admitted the record and the accompanying oral evidence of identity, and instructed the jury that, if the persons before prosecuted should be found to be the same persons and should be found guilty of the present offense, the records would authorize a finding of the alleged prior conviction. It may be conceded that this objection, like the other, in the absence of a statutory provision dispensing with formality and accuracy in the allegation of a prior conviction, would be sustained. But, after all, Daniel Hurley, this respondent, was charged in the precise manner which the statute directs, and the practically important question so far as he was concerned was whether he was the same person who was once convicted, and not whether he was rightly named in this indictment, or the other, or in neither. It was the purpose of the statute to which we have referred to obviate the technical objections which might otherwise be made; and it is not for us to disregard it and return to the doctrines of the common law, though they may seem more symmetrical and scientific.

Exceptions overruled.

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

SAMUEL F. GIBSON *vs.* NORWAY SAVINGS BANK.

Oxford. Opinion October 10, 1879.

Real action. Pleading. Possession prima facie evidence of title. Evidence. Deed,—acknowledgment of. Ratification.

In a writ of entry, the plea of general issue admits the defendant to be in possession of the premises described in the declaration.

Possession being *prima facie* evidence of title, the plaintiff must prove a better one or he cannot recover.

Where, in the trial of a writ of entry, the defendant claims title under a mortgage, its execution, delivery and acceptance, at its date, are *prima facie* established by its being found in the mortgagee's possession and introduced in evidence without objection.

Where the description of the premises in the mortgage is an exact transcript of that in the deed under which both parties claim the premises are *prima facie* identical.

Whether the treasurer of a savings bank may take the acknowledgment of a grantor's deed to the bank, *quere.*

In a real action against a savings bank the setting up in defense of a mortgage of the demanded premises is a ratification of the loaning of the money secured by the mortgage and of the acceptance of the mortgage.

ON REPORT.

WRIT OF ENTRY to recover possession of a certain messuage in Bethel: "Beginning at a point on the southerly side of the county road leading from the depot in said Bethel to Bethel common, twenty-five and one-half feet westerly from the westerly side of the two-story house thereon situated, and on a line parallel with the westerly side thereof," thence certain courses and distances to the first mentioned bound.

The plaintiff relied upon a deed of warranty from Samuel S. Dunn to Charles P. Knight, dated February 9, 1869, duly acknowledged and recorded, in which the premises were described the same as in the declaration, with the exception of the word "parallel." Deed of assignment from John W. May, register in bankruptcy, to Charles E. Holt, assignee of Charles P. Knight, a bankrupt, duly acknowledged and recorded. Quitclaim deed from Charles E. Holt, assignee of Charles P. Knight, dated October 9, 1875, duly acknowledged and recorded; in which the releasor quitclaimed all his "right, title and interest in and to a certain

piece or parcel of land, with the buildings thereon, situated in Bethel aforesaid, to wit: on the corner of Main and Spring streets, in the village of Bethel Hill, and being the same premises the said Knight now occupies,—my interest being the equity of redemption in said premises as deeded to me April 1, A. D. 1875, by the U. S. district court of Maine, and being the same I sold October 2, 1875, by order of said court, at public auction, to the highest bidder for the sum of three hundred and two dollars, and to said Samuel F. Gibson." The certificate of the clerk of district court of the United States for the district of Maine, by which it appeared that Charles P. Knight was adjudged a bankrupt, upon the petition of his creditors, on February 4, 1875.

The defendant relied for title upon a mortgage deed from Charles P. Knight to the Norway savings bank, dated November 2, 1874, and which purported to be acknowledged November 2, 1874, "before Henry M. Bearce, justice of the peace," and recorded in the Oxford registry of deeds November 3, 1874.

The description of the premises in the mortgage is a transcript of that in the deed of Dunn to Knight, together with the following clause: "Being the same premises conveyed to me by Samuel S. Dunn, deed dated February 9, 1869, and recorded with Oxford records, book 154, page 84, reference to said deed and the record thereof being hereby made."

It was admitted that the savings bank advanced the amount of money ($1,500) mentioned in the mortgage, to Knight, in good faith, at the date of the mortgage, without knowledge that Knight was in failing circumstances; that the conditions of the mortgage have never been fulfilled; and that this was the only mortgage on the premises.

The view taken by the court renders report of foreclosure unnecessary.

The court were to render such judgment as the legal rights of the parties demand.

S. F. Gibson, pro se.

Plaintiff and defendant rely upon title derived from the same grantor. Which has the better title? R. S., c. 104, § 8.

If the defendant goes to trial upon the general issue, he admits that the demandant has been ousted by him, and that he is tenant of the freehold from which demandant was ousted. 8 Cranch, 243. 5 Mass. 352. 13 Mass. 259, 443. *Mills* v. *Pierce*, 2 N. H. 10. Stearns R. Act. 205, § 22.

It nowhere appears that the corporation defendant authorized any one to act for them in loaning the money and accepting the mortgage. *Dwinal* v. *Holmes*, 33 Maine, 172, 452. *Randall* v. *Lunt*, 51 Maine, 246.

Nobody but the trustees could loan the money. Sect. 4 of the charter.

The proceedings for foreclosure are signed by Henry M. Bearce, treasurer. Being treasurer, he could not take the acknowledgment of Knight's mortgage to the bank. *Beaman* v. *Whitney*, 20 Maine, 413. The acknowledgment not being legal, the plaintiff is not chargeable with the constructive notice of the registry.

The Knight mortgage does not cover premises described in declaration. The starting places are different, and the Knight mortgage covers only a part of the premises demanded.

On construction of deeds, plaintiff cited *Chadbourn* v. *Mason*, 48 Maine, 389. 27 Maine, 405. 34 Maine, 305. 29 Maine, 169. 2 Saund. 401, note 21. *Vose* v. *Handy*, 2 Greenl. 322. *Wing* v. *Burgess*, 13 Maine, 111. 54 Maine, 301. 7 Pick. 276. 46 Maine, 374.

H. M. Bearce, for the defendants.

VIRGIN, J. This is a real action brought to recover possession of certain land, which, by the express stipulation of the parties, as well as by the plea of general issue, is admitted to be in the possession of the defendant. The main question, therefore, is which party, upon the facts agreed and the testimony introduced, has the better title. *Marshall* v. *Wing*, 50 Maine, 62. *Chaplin* v. *Barker*, 53 Maine, 275. And the defendants' possession being *prima facie* evidence of title in him, the plaintiff must show a better one, or he cannot recover. *Tibbetts* v. *Estes*, 52 Maine, 566.

Both parties derive their respective titles from one Dunn, who

it is admitted owned the title, and who, by his deed of warranty of February 9, 1869, duly acknowledged and recorded, conveyed it to one Knight.

The plaintiff claims under a deed of quitclaim of October 9, 1875, from C. E. Holt, as assignee in bankruptcy of Knight, who was duly adjudged bankrupt February 24, 1875.

The defendants claim under a mortgage from Knight to them, dated November 2, 1874. The defendants having advanced to Knight in good faith, at the time of the execution of the mortgage, the sum of $1,500 mentioned therein as the consideration thereof, the mortgage is not affected by Knight's bankruptcy, if it is otherwise valid and duly recorded. U. S. Stat., § 5052. And if otherwise valid and duly recorded, then the defendants have the elder and consequently the better title, provided the mortgage covers the premises.

I. Identity of the premises. Both parties claim under Dunn's deed to Knight. And the description of the premises in the mortgage being an exact transcript of the description in the deed of Dunn to Knight makes them *prima facie* identical (*Rand* v. *Skillin*, 63 Maine, 103); and if any other evidence was necessary, it is found in the express reference made in the mortgage to the Dunn deed and its record. The plaintiff can claim no other land than that described therein, as the case finds that both parties claim under that, and there is no pretense that he has any other source of title.

II. Execution, delivery and acceptance of the mortgage are *prima facie* established by the facts that it was found in possession of the defendants and was introduced in evidence without objection. These facts, in the absence of any evidence to the contrary, prove the execution, delivery and acceptance of the mortgage at the time of its date. *Cutts* v. *York Manf'g Co.*, 18 Maine, 190. 3 Wash. R. Prop. 263, and notes.

III. The plaintiff's positions in relation to the loaning of the money and the taking of the mortgage are not tenable. Sect. 4 of the charter has express reference to deeds, etc., made in behalf of the bank as grantor, and is not applicable to conveyances to the bank as grantee. And, even if the original loaning of the money and the taking of the mortgage as security therefor were

not sufficiently previously authorized, the setting up the mortgage as a defense in this action is ample evidence of ratification on the part of the bank. *Cutts* v. *York Manf'g Co.*, *supra*.

IV. Acknowledgment and registration. Unless the deed is recorded no conveyance in fee is effectual against any person except the grantee, his heirs and devisees and persons having actual notice thereof. R. S., c. 73, § 8. The deed must be acknowledged before a justice of the peace, unless the grantor dies, or departs from the state without acknowledging it, or refuses to acknowledge it; in which exceptional cases its execution may be proved as provided in R. S., c. 73, §§ 18–22. And it cannot be recorded in the registry of deeds unless a certificate of acknowledgment, or proof of execution in the exceptional cases mentioned, is indorsed on or annexed to the deed. R. S., c. 73, § 22.

The object of the acknowledgment of a deed being to give such authenticity to its execution as to entitle it to registration, and that of registration to give notice of the title, neither is required as between the immediate parties thereto (who must necessarily be conusant of their own acts) and all others having actual notice of its existence. Acknowledgment gives no efficacy to the deed, but immediately upon its due execution and delivery the estate therein described passes to the grantee and does not remain in the grantor until acknowledgment and registration. *Pidge* v. *Tyler*, 4 Mass. 541, 546. *Marshall* v. *Fish*, 6 Mass. 24. *Montgomery* v. *Dorion*, 6 N. H. 250. *Brown* v. *Manter*, 22 N. H. 468. If there were no other ground by which to prevent the defendants from losing the benefit of their mortgage given to secure the sum of $1,500 advanced in good faith to a party who purchased only the right to redeem that mortgage, we should not look in vain into the admitted facts and other testimony in this case for evidence that the plaintiff had actual notice of the existence of the mortgage before he purchased of the assignee. But we have no occasion to express any opinion on this point.

It is urged that the plaintiff is not chargeable with the constructive notice derivable from a legally registered mortgage, for the alleged reason that the certifying justice, at the date of the acknowledgment, was treasurer of the bank. To be sure a grantee cannot lawfully take the acknowledgment of his grantor.

Beaman v. *Whitney*, 20 Maine, 413. But the statute does not in terms require an acknowledgment to be made before a disinterested justice of the peace. And the authorities concur in declaring the act purely ministerial and in nowise judicial. Hence relationship is no objection. *Lynch* v. *Livingston*, 6 N. Y. 422. But without passing upon the question whether an officer of a corporation may take the acknowledgment of its grantor, but assuming that the legal conclusion contended for will follow, the objection cannot avail the plaintiff, for the reason that there is no evidence that the justice was treasurer at the date of his certificate. We therefore perceive no legal objection to the mortgage or its registration.

Neither need we consider the numerous objections raised against the foreclosure of the mortgage. If the mortgagee were plaintiff seeking to recover judgment on his mortgage, we might find it necessary to pass upon the legality of the foreclosure in order to ascertain whether the judgment should be conditional or otherwise; but being defendant, only one kind of judgment is involved.

Finally, it is contended that the land described in the mortgage does not cover all that is described in the plaintiff's declaration; and the chalk appended to the plaintiff's written argument would seem to show a different starting point; and of course two descriptions starting from different points and following thence the same distances and courses cannot include exactly the same land. But this chalk and survey were never put into the case; and even if they were, and the difference were palpable from the language used in the two descriptions, still the plaintiff cannot prevail. For, as before stated, the express admission of the parties and the plea of general issue both declare that the defendant is in possession of the premises demanded claiming title; and unless the plaintiff has shown a better title, he cannot oust the defendant, for he must rely upon the strength of his own title and not upon the weakness of the defendants'.

Judgment for defendants.

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

APPENDIX.

OPINIONS OF THE JUSTICES OF THE SUPREME JUDICIAL COURT.

On questions proposed by the legislature.

A resolve in favor of the town of Alexander and eighteen other towns, pending before the last legislature, with the whole subject matter relating thereto, was referred by the legislature to the undersigned as a commission, to determine questions both of law and fact, and to report our findings to the governor and council.

We have given notice, as directed to do, to all parties concerned, of the time and place of hearing, and have heard the claimants and the state, by counsel appearing for them, and we herein submit a report.

A history of the matter is this: Soon after the early calls for men for the war of the rebellion, towns quite generally began to offer bounties for volunteers. After the beginning of the year 1863 (and no doubt before that), men for the field could not be obtained without extra compensation, except by draft. From the nature of things there could hardly be exceptions. If one town would not pay for men offering themselves, other towns would. It was notorious, also, that not a few men left the state to obtain higher bounties obtainable elsewhere. Nor did it seem reasonable for a portion of the towns to pay bounties, without all paying. Evidently a race of competition was being run by the towns, the sure result of which was to greatly increase the price to be paid for the enlistment of volunteers. In this posture of affairs the governor of the state, acting upon the advice of his civil and military councilors, endeavored to exercise some control over the amount of bounty which towns should pay for volunteers. The desire was that volunteers everywhere should receive a uniform

amount. With this view, the executive, through the adjutant general, (see general order No. 22, division 8, adjutant general's printed report of 1863, page 13 of Appendix A) on October 31, 1863, said to the citizens of the state: "It is probable that bounties, uniform in amount, and not less than $100 nor exceeding $200 per man, will now be paid volunteers by the respective cities, towns and plantations in the state. Great injustice will be wrought to the smaller and poorer localities by exceeding this amount in any instance, as such towns and plantations may find it impossible to fill their quotas, by reason of their citizens seeking larger bounties elsewhere than are offered them at home." The object at headquarters was to get towns to pay less rather than more bounty than they were disposed to pay. And again, in general order No. 23, dated December 1, 1863, the municipalities of the state were admonished against further violations of the previously promulgated order, and it is therein stated that measures had been adopted to prevent them in the future. (See page 18 of said Appendix A).

It is evident that these orders and the provisions contained therein had, as a general thing, the desired effect. It became quite a uniform thing that $200 were offered and paid per man for volunteers by the municipalities to fill their quotas for the call of October 17, 1863. By this means the contention between towns to a great degree ceased. Men generally enlisted on the quotas of their own towns, and the general order last named expresses an earnest desire of the state authorities that they should.

Another object in having a uniformity of town bounty, and a certainty that a town bounty would be paid, was that the term of service of many men in the field was about expiring, and it was the policy of the state to get from among such men as many re-enlistments as possible. In order to do so, it became of paramount importance that a bounty should be offered to them before they left the field, and that the offer should be made to all such men alike, in order to retain them upon the quotas of the towns where they were inhabitants when they originally enlisted. These men could be reached and their enlistment obtained through the methods and assistance of the adjutant general's office better than

in any other way. Accordingly, in the military orders and circulars of Adjutant General Hodsdon of that period, it will be found that efficacious measures were adopted and most zealously and successfully pursued, for the benefit of the state and of the towns in that behalf.

To fill the call of October 17, 1863, the state was allowed by law to pay but $100 bounty to each volunteer, while the towns were generally paying $200 (a few towns more), making the state and town bounty $300 in all. Before the October call was filled, and while the work of recruiting for it was actively going on, the call of February 1, 1864, came along for an additional two hundred thousand men. On February 20, 1864, by legislative act, the policy of law as to bounties was changed. By the act of that date it was provided that to all persons enlisting on that (February) and any future calls, the state should pay a single bounty of $300, and that the towns (and by this term, when used, we mean city, town or plantation) were not to be allowed to pay any bounty at all.

The new policy worked unfortunately for some of the towns. The state could pay $300 to a recruit who was assigned upon the February call, but could not pay but $100 to a recruit who was assigned to the October call, and the towns were recruiting for both calls at the same time. Of course a man would not knowingly enlist upon his town's quota for October, without $300 bounty, when an enlistment on the February quota would give him $300 from the state. And the state had a better credit in the minds of volunteers than the towns had. Serious difficulties were in the way where towns from any cause omitted to pay a bounty to their October recruits. Many, if not most of the recruits, enlisted at this period without regarding the particular call on which they were to be assigned, not knowing or appreciating any difference. In very many cases the bounty was not to be paid until the recruit had gone from his home to Augusta, or some other place of rendezvous, and been mustered in. Some of their towns, although willing to pay them the town bounty, from inability or some other cause, had omitted to do so. Many men also re-enlisted while in the field for the benefit of and upon the

quotas of their towns, not definitely understanding through what medium they would receive the bounty to be paid them, but implicitly trusting the honor of the town and the state. This latter class could not be so readily and easily paid by the towns as by the state.

It is evident enough that these facts presented at the time a serious and difficult dilemma. If the movement of the towns was waited for, the result would be that one volunteer would go to the field with $300 from the state, and another volunteer, a neighbor of the other, might go from the same town, at the same time, upon the same field and into the same company, with but $100 from the state, and with or without any promise from his town. In this emergency what was the executive of the state to do? He was well aware that most of the towns had voted to pay the bounty; that they were willing to pay it, and that they had paid it to the great majority of the men recruited. He had good reason to believe that, if advanced by the state, it would be reimbursed by the towns.

As a matter of necessity, as it was then deemed, the governor and council took the responsibility to advance the requisite sums to such enlisted men who had been mustered in, as were to be assigned upon the October call for volunteers. For Alexander, $800 were advanced; for Anson, $400; for Brooksville, $800; for Fort Fairfield, $2,400; for Harrington, $600; for Bradley, $1,000; for Linneus, $2,400; for Lexington, $1,200; for Milford, $1,200; for Marshfield, $600; for Marion, $200; for Mt. Desert, $200; for Northfield, $200; for Smyrna, $600; for Vinalhaven, $1,400; for Solon, $400; for Sullivan, $200; for Eustis Plantation, $400; for Lubec, $2,800. These towns (and plantation) repaid the state for the sums advanced for them, and now seek to recover the same back. They (by counsel) set up several reasons of law and fact why they should do so.

I. It is said that there was no law permitting towns to pay bounties when these sums were advanced by the state. It is true that no statute ever authorized towns, in advance of paying or agreeing to pay, to do it. The legislature was fearful of possible excesses if such power was granted. But every one expected that

legalization would come. It did come in all the sessions of the legislature during the war and immediately after the war was closed. The ratification was full and complete, rendering legal all that in this regard these towns have done. The preamble of the legalizing act of 1863 indorsed the unauthorized action of the municipalities in this respect as "just, humane and necessary." Well might the towns be expected to go on in such well-doing after that time.

II. It is said that the sums charged against these towns by the state were not real payments of bounties to men enlisted upon the quota of 1863. This position is not sustained by the evidence. To be sure, the charges on the books in the adjutant general's office, as made up some time after the war, might indicate, to the mind of a stranger to the facts of the case, that the sums were due the state for filling the quotas for the towns, instead of for bounties paid. That is a matter of form only. The meaning, in the light of the facts, is different. The fact is otherwise. We are well and conclusively satisfied that, as far as these claimants are concerned, the charge is in point of fact for so much money actually paid by the state to actual men, assigned upon the quotas of the towns for the October call, and that the state only paid it to such men as the towns had not paid it to, and to men only where an omission or refusal to pay would necessarily have been a disappointment to the soldier; and the payments were methodically made through authorized official paymasters in the service of the state, each recruit giving receipts in duplicate for the money advanced to him. And, upon a pretty full and careful investigation, we do not perceive that in a single instance did these towns in question fail to be allowed the one hundred dollars per man, under the equalization bounty act of 1868, upon all the men whose town bounties were prepaid for them by the state.

But the counsel for the claimants, whose brief is exhaustive and able for his clients, takes the position that the state might have regarded the volunteers as recruited for the February call and pay them for itself, instead of regarding them as recruiting for the October call and pay them for the towns.

But the authorities who bore the heavy responsibilities of

executive duty at the time thought and decided otherwise, and it would seem too late in the day to go back and reverse their official action. If to be done in one case, the claim might be asserted in all cases where a discretionary course was pursued during the war, and the consequences be generally detrimental. Nor do we perceive any wrong or injustice in the decision that a first call should be first filled. The state, by the act of 1864 (chapter 227), could not pay exceeding $100 bounty upon the October call, nor could it pay to recruits beyond the call of February, 1864, unless the towns had first filled their October quotas; and several other calls came along in quick succession. It is true that at army headquarters in Washington no distinction was kept up between the two calls of October and February, the two being upon their books consolidated in one, but our legislature made and kept up a distinction, which was regarded by the adjutant general's office, and also by the United States provost marshals who were upon duty in this state. Further, such a policy as now advocated by the claimants would have entailed confusion and complications, inasmuch as most towns furnished men exceeding the number called for upon either quota, and some of them men exceeding the call upon both quotas; and that is true of these particular towns. And it must be borne in mind that any policy or method or routine at the time adopted was made applicable, not only to these towns who are now petitioners, but to all the towns in the state.

III. It is said that the paying towns did not know that they were paying the state for actual bounties advanced to their actual men. We do not see how they could have understood it otherwise. The correspondence put into the case shows that in one or two instances town officers may not have fully appreciated what the demands upon them were, as they wrote for fuller information, and there is no reason to doubt that the needed information and explanation were supplied. The letters found in the adjutant general's office from the towns generally indicate an understanding and an appreciation of the situation. For instance, the selectmen of Alexander, under date of August 1, 1864, writing for explanation, say: "We voted in town meeting last fall to issue

town scrip to the recruits of $200, but did not get a man;" and then go on to say that, under the encouragement that the state would pay bounties, they had overfilled the two quotas, which was true. It will thus be seen the town could get men but not money.

The selectmen of Bradley, August 19, 1864, write: "We have this day sent one thousand dollars to the state treasurer, to reimburse the state treasurer for bounties paid on the following named persons, who have enlisted from this town to fill our October quota," naming the five men.

The Brooksville selectmen, August 1, 1864, write: "Will you please inform us the amount required of the town to reimburse to the state treasurer to fill our quota under the call of October?"

Mt. Desert, August 12, 1864, writes: "We have this day paid to the treasurer of state two hundred dollars to make up the quota of the town of Mt. Desert for October call, and name Albert L. Brown as the one to be placed on the book. John M. Noyes, selectman," etc.

Marshfield selectmen, August 8, 1864, write to the adjutant general: "We can only say that it is almost impossible to enlist men at present, and we shall return to the state treasurer the money that has been paid to our men and claim them on the October quota in a few days."

It seems that, in both the office of the state treasurer and that of the adjutant general, letters were written and receipts given as if the claim was for money "to fill the October quota," and, as before said, the books in the adjutant general's office were kept by his book-keeper in the same way. (In the vast mass of business then carried on in the adjutant general's office, the bulk of letter writing was done by clerks.) That was an unfortunate wording, and undoubtedly led, as the correspondence shows, to some inquiries for information. But the fact was made certain and clear. Take, for instance, the adjutant general's letter to Vinalhaven, put in by the counsel for the claimants, where he writes thus: "In answer to yours of the 3d inst., I will answer that, if you were to reimburse $1,400 to the state treasurer and return the names of any seven persons who are now credited on the October

call, the matter will be settled." So we find on the files a subsequent certificate, thus: "Augusta, August 24, 1864, this may certify that I have caused the following named men to be entered to the town of Vinalhaven, to fill the October quota of that town, and have reimbursed to the state treasurer the sum of $1,400 for the same." Then follows the names of seven men,— the letter signed by Elisha Smith for the town. Now these seven men were actual volunteers, living in that town, recruited by that town, and, being on the October quota, promised to be paid by that town, but paid by the state, and the state reimbursed by the town. There are numerous certificates of a like effect by the different localities, but the already great length of this report forbids a further notice of them.

IV. It is contended that the money was obtained of the towns by the state by threats and misrepresentation. This pretense is based upon a letter or two read at the hearing, like this one to the selectmen of Lubec, dated July 21, 1864: "Towns must reimburse to the state treasurer $200 each for men to fill their October call, otherwise all credits beyond the February call will be transferred to towns that will pay. Yours, etc., John L. Hodsdon, adjutant general. Per C a—"

The language of this letter would seem to indicate that a previous notice of the sum due had been given, or that it was written upon a supposition of the writer that the towns were already aware of the amount of their respective indebtedness to the state, and was intended merely as an earnest and emphatic dunning letter. The statute of 1864 (chapter 227) provided that no person residing in this state, and enlisting in this state since February 2, 1864, should be credited to a place outside of his residence until the October and February quotas of his own town were filled. And the general orders before named, and others, contained urgent requests from the military department that men should only enlist upon their own local quotas. See general orders 22, 23 and 26, Appendix A, before named. All these facts were constantly spread before the people of this state in numerous official circulars and by the press, and are presumed to have been seen or heard of in those exciting times by almost everybody. We are

satisfied that the payments were made by the towns, because at the time it was deemed to be reasonable and just. Most of the towns who are now claimants had themselves paid the town bounty to many of their October volunteers, and had voted to pay and were willing to pay to the balance of them. Could it be supposed that the town of Anson would pay to twenty men upon her October quota and be unwilling to pay to the other two? or that Mt. Desert would pay to eleven out of twelve and leave but one man unpaid? or that Solon would pay twelve out of fourteen and turn her back upon the other two? or that any town would pay to a portion of her October recruits and not to all of them? The letters of such towns show no such thing. The selectmen of Harrington write, under date of April 20, 1864, that they had paid a town bounty of $300 to a number of men on the October quota, and had enlisted several more and "sent them on," to whom "they intend to pay the town bounty after receiving a guarantee that they have been credited to our town." The certificate of the selectmen, dated August 17,1864, shows that some of these men "sent on" were the identical men paid by the state and reimbursed by the town. The selectmen of Solon, July 26, 1864, write the adjutant general as follows: "Will you have the goodness to see if the town of Solon, has anything to reimburse to the state, and if anything, how much. Please write immediately and let us know, and we will attend to it if there is anything due the state."

The town of Marion writes, under date of July 26, 1864, that their quota for October call was three, that they recruited three men, paid to each $200, and add about the third man, "there was not any certificate of mustering service sent, or any call made for his $200, therefore it was not paid; if the state has paid it the town is ready to reimburse it." Lubec is much the largest claimant of these nineteen towns, but her agent, Mr. Mowry, writes under date of April 21, 1864, "I am still in funds to pay as they call for the town bounty as voted for the October call, or what money that may be wanted for men to make up our quota." May 2, 1864, he writes: "The town voted to pay $200 to each man who would enlist and was mustered into United States service, to fill up the October call of 1863. The former board paid five men, and the

present board have paid six men, and all who fill up that quota are to receive the $200." Again, under July 26, 1864, he writes: "I have no doubt the state treasurer may have paid some men belonging to this town, and as soon as I know the amount and to whom, will make arrangement to pay up the same."

Other letters could be added, but these clear and significant ones explain the matter as fully as need be. It will be readily noticed therefrom how it might often happen that the state paid the bounty to a recruit instead of his getting it from his town before leaving his home.

Out of these nineteen towns the only towns that did not themselves directly pay a town bounty to any volunteers on October call, were Alexander, Fort Fairfield, Linneus, Milford and Smyrna. But Alexander, as seen before, voted to pay. The state paid for Fort Fairfield $2,400, finally getting but $1,000 therefor, procuring twelve men for her by re-enlistments on the field; and if Fort Fairfield should recover the $1,000 of the state, it would have to be divided among the great many men she furnished, as it appears that under the act of 1868 she received more money from the equalization bounty fund than she ever paid for bounty to her men. This latter remark is true, we think, of Smyrna and Alexander, and perhaps of one or two others of the nineteen towns. It appears that all of the above towns had paid some bounties on other calls. Milford paid bounties heavily during the war, and probably would have paid those to whom the state paid for them, but for the fact that they were cases (probably) of re-enlistment upon the field. While, therefore, it might appear that those five towns, or some of them, have more ground to stand upon in asserting their present claims than the others, still we see no very substantial nor legal difference between the classes of cases.

Lastly, it is contended by the claimants that they should be paid back, in order to stand upon an equality with other towns. One hundred and forty-six delinquent towns were called upon. Twenty-one only responded and paid. It is regarded as unequal that twenty-one towns should pay and one hundred and twenty-five towns should fail to pay. It is not necessary to discuss the position of the non-paying towns. Some would not, some could

not pay. It must at the same time be borne in mind that all the remaining municipalities in the state, either directly or indirectly, did pay the October volunteers on their quotas in full. The equality between the towns can never be exact. While the nineteen towns are bearing an unequal burden with one hundred and twenty-five towns, their burden is equal with all the remaining places in the state, being two or three hundred in number, more or less. Again, there would not be an equality among even the nineteen towns, should they recover back, for, while some of them paid to most of the men who were assigned to their October quotas, others paid none of theirs at all. And here the attorney general invokes the act of 1868, and section 15 of article 9 of the amended constitution of Maine, (see laws of 1876, p. 23,) as a bar and satisfaction of the present claims, where it is provided that the amount paid towns "shall be in full payment for any claim upon the state on account of its war debts by any such municipality." While this clause might not bar any claim for money fraudulently taken or received by the state, it certainly has great force at least upon any question as to how far it would be a good public policy to go into a review and reconsideration of these old questions. We see in the evidence before us nothing to indicate in the least any wish or motive, on the part of any of the political departments of the days of the war, to do aught but justice to the state and all its inhabitants.

Perhaps we have pursued this subject at undue length. But the importance of the case, and the fact that the same claims have been frequently before the legislature, as well as the comprehensive requirements of our commission, would seem to demand it.

We have, therefore, to say that, if the state stood as a defendant, in a court having between it and these towns a jurisdiction at law and equity to decide the issue, the claimants upon either equitable or legal grounds would not be entitled to recover. Of course, upon any question of mere public policy, which we have merely alluded to, we are not asked to advise, as of such matters the legislature and the executive are the most suitable judges to act for themselves.

JOHN A. PETERS.
ARTEMAS LIBBEY,
WM. WIRT VIRGIN.

December 23, 1878.

On questions proposed by the Executive.

EXECUTIVE DEPARTMENT.
AUGUSTA, March 8, 1879.

To the Honorable Justices of the Supreme Judicial Court:

In compliance with an order passed at a regular session of the executive council, and in accordance with my own wishes, you are requested to give your opinion at as early day as practicable, as to the proper meaning of chapter 115, section 6, of the revised statutes, relating to the traveling expenses of members of the council, senators and representatives of the legislature.

I. Does the language used in that section, "and two dollars for every ten miles' travel *from* his place of abode" mean that each member shall be entitled to receive two dollars for every ten miles going from his place of abode to the place of meeting, and also two dollars more for every ten miles travel returning therefrom?

II. If there be two or more public thoroughfares or mail routes, between the abode of a member and the place of meeting of the legislature, the distance by the one being ten, twenty, or or a hundred miles, and by any other twice or thrice the distance, by which route is he entitled by law to mileage?

ALONZO GARCELON.

By the Govenor:

P. A. SAWYER, *Deputy Secretary of State.*

BANGOR, March 10, 1879.

Hon. Alonzo Garcelon, Governor of Maine:

Sir: To the questions proposed we have the honor to answer as follows:

By revised statutes, chapter 115, section 6, "each member of the senate and house of representatives shall be paid an annual salary of one hundred and fifty dollars for the regular annual session of the legislature, and two dollars for every ten miles' travel from his place of abode ONCE in each session." The limitation of "once" in each excludes the idea of more than once. "He is entitled to mileage on the first day of the session," and this mileage is all to which he is entitled.

That such is the true construction, is made manifest by recurring to the provisions relating to fees and costs in chapter 116. It is there seen that when the legislature intended fees for travel both ways, this intention is expressed in language, which leaves no doubt on the subject.

Thus by section 5, the travel of the sheriff and his deputies is four cents a mile, "the travel to be computed from the place of service to and from the place of return by the *usual* way." Appraisers on execution levy are entitled to "travel at the rate of four cents a mile going and returning home." Jurors and witnesses by section 11, are allowed "six cents a mile for their travel out and home."

When there is to be travel but one way, it is specially so limited as by section 6, when a coroner is allowed "ten cents a mile for travel from his residence to the place of inquest," while by the same section the juryman is to receive "four cents a mile for travel each way."

The members of the house and senate are therefore not by existing law entitled to two dollars for every ten miles of travel returning home to their respective places of abode.

The travel of members of the legislature to the place of meeting, is to be computed as that of sheriffs and others, "by the usual way."

JOHN APPLETON,
C. W. WALTON,
WILLIAM G. BARROWS,
CHARLES DANFORTH,
WM. WIRT VIRGIN,
JOHN A. PETERS,
ARTEMAS LIBBEY,
JOSEPH W. SYMONDS.

RULES IN CHANCERY PERTAINING TO INSOLVENCY.

I. *Notice.* In all bills, petitions or other processes, commenced under Stat. 1878, c. 174, § 11, the subpœna or notice may be made returnable at chambers on a day certain in or out of term time.

II. *Appearance, answer and hearing.* Any defendant who does not enter his appearance on the docket on the return day, may be defaulted, and any defendant appearing shall, within such time thereafter as the notice shall designate, make answer to the whole bill, petition or process on the merits, and thereupon the case shall be heard.

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ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADMINISTRATOR DE BONIS NON.

See REVIEW.

ADVERSE POSSESSION.

See SETTLER, 4. INDIAN, 6.

AGREEMENT.

1. Where parties about to enter upon the marriage relation, but before marriage, mutually agreed in writing under seal, that neither they nor their heirs, executors or administrators, would, "in any event, take, claim, control, hold or intermeddle with, any of the real estate, personal property, or any property whatever, which either has or may thereafter derive by inheritance, devise, donation, purchase or otherwise, nor with the rent, profit or interest thereof, intending thereby to bar each other of all right, title and interest which they might otherwise have in each other's estate by reason of marriage:" *Held*, that marriage is sufficient consideration for the agreement. So is the reciprocal character of the stipulations.
Wentworth v. *Wentworth*, 247.
2. A mutual agreement, in writing, to refer to certain specified referees is a contract binding on the parties to the same. *Call* v. *Hagar*, 521.
3. For a breach of this contract damages may be recovered. *Ib.*
4. No set form of words is necessary to constitute a revocation. The intent is to govern. *Ib.*
5. The party revoking a submission, without good cause, is liable to the other party for damages arising from such revocation,—including loss of time and trouble, expenses of witnesses, reasonable fees of counsel and other expenses necessarily incurred. *Ib.*

See PRINCIPAL AND SURETY. ROCKLAND WATER CO., 1. TRUSTEE, 2.

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ARBITRATION AND AWARD.

1. The plaintiffs had two suits in their joint names against the defendant A. Each of them had an individual suit against him. The cases were taken

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See JUDGMENT.

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See INTOXICATING LIQUORS, 5, 6.

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COLLECTOR.

1. Where the evidence fails to show any money in the hands of the collector not accounted for, and it is admitted that in the valuation books of the assessors there is no description whatever of the real estate taxed, such omission on the part of the assessors will relieve the collector of the duty of completing his collection, and his neglect to do so is not a breach of his official bond, and will not support an action against his sureties. *Harpswell* v. *Orr*, 333.
2. Where the collector, near the close of the municipal year, settled with the selectmen and treasurer, and he and his sureties gave to the treasurer their joint and several unnegotiable note for the balance found due from the collector; and the collector having subsequently gone into bankruptcy, the town proved the note in bankruptcy against the estate of the collector, and received a dividend: *Held*,

(I.) That the note is not, presumptively, payment, but a memorandum acknowledging on the part of the makers the sum due; and

(II.) That the town adopted the sum therein mentioned as the correct sum due. *Richmond* v. *Toothaker*, 451.

3. When the collector is a defaulter and has not paid the state tax, the town may advance the balance of the state tax deficit to the state treasurer, even if the provisions of R. S., c. 6, §§ 123 and 126 have not been previously complied with, they being directory. *Ib.*
4. For such advances the collector and his sureties are liable, under the provisions of R. S., c. 6, § 128. *Ib.*

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COMPOSITION.

See ATTACHMENT, 1.

COMPROMISE.

See DECEIT, 1.

CONDITION.

1. A condition in restraint of marriage, subsequent and general in its character, annexed to a devise or conveyance from parent to child, is void unless there be a valid limitation over. *Randall* v. *Marble*, 310.

COUNTY TREASURER.

COVENANT.

DAM.

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DEBT.

See EVIDENCE, 21. GUARDIAN, 2. PLEADING, 8. SCIRE FACIAS, 1.

DECEIT.

1. A master of a brig, who had been sailing her on shares, represented in a letter to the owners that he was indebted, on a settlement of his accounts, to them in a large sum named, "besides losing his time;" whereupon a claim for a compromise was yielded to: *Held*, that, in action by the owners for deceit, a verdict for the owners is justified if the representations were proved to have been false in fact, known by the defendant to be so, and if made with a design to deceive the plaintiffs, provided they, acting at the time with due care, were deceived and induced to settle as they did, when they otherwise would not have done so. *Buck* v. *Leach*, 484.
2. When a creditor has been induced by deceit of his debtor to accept a part of his debt in full payment, the unpaid portion of the sum due is the measure of damages in an action on the case for the deceit. *Ib.*

DECLARATION OF TRUST.

See TRUSTEE, 1.

DEED.

1. A deed of that portion of a farm lying on the north side of the road excepted one-half of a house and barn thereon, the grantor owning the residue of the farm on the other side: *Held*, that the term barn included the sheep-shed connected with it; and that the land on which it stood and the barn-yard, fenced and used with the barn, were within the exception under the general term barn, as applicable to the purposes for which the building and land were used at the time of the grant. *Cunningham* v. *Webb*, 92.
2. A condition in restraint of marriage, subsequent and general in its character, annexed to a devise or conveyance from parent to child, is void unless there be a valid limitation over. *Randall* v. *Marble*, 310.
3. A father conveyed to his daughter, with a proviso that the gift should stand if she remained single, otherwise the land to be divided among his three children, the grantee to have fifty dollars the most: *Held*, that the condition was subsequent, general, and void; that a limitation over to one's heirs is of no effect, as a title by descent is the worthier title. *Ib.*
4. A conveyance of a specified portion of real estate, described by metes and bounds, will not carry with it a right of way over the grantor's adjoining land (although such way may be highly convenient, and apparent upon the face of the earth, and in actual use at the time of the conveyance, and although the deed contains the words "with all the privileges and appurtenances"), unless such way is clearly necessary to the beneficial use and enjoyment of the estate conveyed. *Stevens* v. *Orr*, 323.
5. A and other grantors conveyed to B a parcel of land described thus: "Beginning at the north-west corner of lot number six; thence easterly on the line to the north-east corner of said lot, thence southerly on the east

See EVIDENCE, 13. EXECUTION, 5, 6, 9. LAW AND FACT, 4. PATENT, 2. ROCKLAND WATER CO., 4. SETTLER, 1, 3.

DEXTER AND NEWPORT RAILROAD.

The charter of the Dexter & Newport Railroad Company first states what taxes the corporation shall be required to pay, and then adds that no other tax than that therein provided for shall ever be levied or assessed upon the corporation, or any of its privileges or franchises, and that no other or further duties, liabilities, or obligations shall be imposed upon the corporation. *Held*, that these provisions create an express limitation upon the power of the legislature, in relation to taxation, and secure to the corporation a perpetual and irrepealable exemption from any other tax than that provided for in its charter. *Held*, further, that it is now too late to question the constitutionality of such exemptions, the supreme court of the United States, in recent decisions, having fully and repeatedly sustained their constitutionality. *State* v. *Dexter & Newport R. R. Co.* 44.

DIVORCE.

1. A libel for divorce, inserted in a writ, is to be regarded as pending after service on the libellee. *Russell* v. *Russell*, 336.
2. After such service and before the return day of the writ, a justice of this court can in vacation, after notice to the libellee, order him to pay money for the support of his wife and for the expenses litigation pending of the libel. *Ib.*
3. The husband neglecting or refusing to pay as ordered is in contempt for such neglet or refusal, but he may purge himself from contempt by proof of inability to comply with such order. *Ib.*
4. No exceptions lie to the judgment of the presiding justice determining such ability or inability. *Ib.*
5. In libels for divorce, commitment for contempt is an "appropriate process," to enforce the payment of money; or an execution in the usual form, may issue for the amount ordered to be paid and remaining unpaid. *Ib.*

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See PRACTICE, 34.

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See DEED, 7. REAL ACTION, 1. ROCKLAND WATER CO., 1, 2.

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See DOWER 12.

EQUALIZATION OF WAR DEBTS.

A soldier having received $300 as bounty under the act of 1864, c. 227, is not entitled to any money under the provisions of the act of 1868 for the equalization of municipal war debts, c. 276. *Canwell* v. *Canton*, 63 Maine, 305, reaffirmed. *Smart* v. *Patten*, 41.

EQUITY.

1. All the owners of the equity of redemption must be made parties to the bill in equity to redeem the mortgage, otherwise the bill will be dismissed. *Welch* v. *Stearns*, 193.
2. This court sitting in equity can relieve against a forfeiture of land for condition broken, when the proper sum to be paid is susceptible of definite calculation, and the breach was not gross and wilful. *Rowell* v. *Jewett*, 293.
3. In a bill in equity to redeem a mortgage, one apparently having an equitable interest in the premises liable to be affected by the decree for redemption should be made a party. *Ib.*
4. Equity may annul the cancellation of the record of a mortgage, against a grantee whose deed is made "subject to the mortgage," when the cancellation was made in ignorance of the existence of such deed. *Cobb* v. *Dyer*, 494.
5. And this, too, even though the deed was duly recorded, if the junior mortgagee, who paid and caused the senior mortgage to be cancelled, was not guilty of culpable negligence in the premises. *Ib.*
6. When such subsequent mortgagee, ignorant of a prior deed, and *bona fide* relying upon his mortgage, pays the sum due on the senior mortgage for his own benefit, and allows it to be discharged and its registration cancelled, the cancellation and discharge may be annulled, and he subrogated to the rights of the senior mortgagee. *Ib.*

See ESTOPPEL, 1. SETTLER, 4. TRUST, 4. TRUSTEE, 6.

ERROR.

1. *Semble*, That error will not lie to reverse a judgment against two of three obligors on a joint bond, when the non-joinder might have been pleaded in abatement; or when the case goes up on the report of the judge. *Richmond* v. *Toothaker*, 451.
2. By an inspection of the items of costs, taxed and allowed by a trial justice, which was referred to in, and made a part of, the record, the amount was found to be $3.92, and judgment was rendered on default for the debt claimed and for $4.96 costs of suit: *Held*, that this was error, and that the judgment is reversed. *Winchester* v. *Shaw*, 536.
3. To reverse a judgment for error in law, the error must be one apparent upon the record, which, or a transcript thereof, the plaintiff must produce; and if no error there appears, none will be presumed. *Wood* v. *Leach*, 552.

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CONSTITUTION OF THE UNITED STATES. 14 AMENDMENT.

CONSTITUTION OF MAINE.

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PUBLIC LAWS OF MAINE.

PRIVATE AND SPECIAL LAWS.

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See ASSAULT, etc., 1, 2. ASSIGNMENT. ASSUMPSIT, 1. ATTACHMENT, 2. 3. COLLECTOR, 3, 4. CONSTITUTIONAL LAW, 1, 3. DOWER, 3, 8, 10. EQUALIZATION. EVIDENCE, 22. EXCEPTIONS, 7. EXECUTION, 3, 6, 7, 14. FORCIBLE ENTRY AND DETAINER. GUARDIAN. HAMLIN'S GRANT PLANTATION, 1. INDIAN, 1, 2, 3, 5. INDICTMENT, 1, 4. INTOXICATING LIQUORS, 1,, 2, 4, 6. JUDGMENT. LIEN, 1, 2. LORD'S DAY, 1. OFFICER, 3. PAUPER, 1, 3, 5, 6. PRACTICE, 30, 36. PROMISSORY NOTE, 4. REVIEW, 2. SCIRE FACIAS, 1, 2. TAX, 1, 4, 5. TOWN, 3. TRUST, 4. TRUSTEE, 4. 5. WAY, 4.

TAX.

1. The statute (R. S., c. 6, § 26,) declares that "the undivided real estate of any deceased person may be assessed to his heirs or devisees without designating any of them by name." *Held*, in construing the statute, that such estate may be taxed to the heirs without naming them when, and only when, it descends to them by operation of law; and that it may be taxed to devisees without naming them when, and only when, it comes to them by will. *Elliot* v. *Spinney*, 31.
2. In an action of debt for taxes to the heirs of Francis Spinney, the defense claimed that the tax should have been assessed to the devisee, and offered a certified copy of the will devising the real estate taxed, and claimed that the will, approved and allowed, without other notice to the assessors, of the diversion of any portion of the deceased's estate from his heirs, constituted a defense to the action. *Held*, on exceptions by the plaintiffs, that the ruling of the presiding justice sustaining the defense was correct. *Ib.*
3. Notice on the part of the surveyor, and his proper return to the assessors, are conditions precedent to their authority to assess a highway tax as a money tax. *Hayford* v. *Belfast*, 63.
4. But, if they so do, and without a compliance with this condition, it is an error of theirs, which, by R. S , c. 6, § 114, does not render the assessment void, but might subject the surveyor or town to a different form of action for the damages caused by such error. *Ib*
5. The plaintiffs, residents of Fairfield, are owners of the Fairfield boom, on the Kennebec river, erected by the Fairfield Boom Co. by virtue of its charter granted in 1836, giving it power to take land for its charter purposes, paying damages therefor, and the right to use the shores on either side of the river for the management of its business, paying a reasonable rent therefor. The boom consists of a line of permanent piers across the river with logs attached thereto and to the shores. The right to maintain the boom is without limitation: *Held*, that by R. S., c. 6, § 3, and c. 1, § 4, Rule X, the boom is taxable as real estate, and that part situated in the town of Benton is properly taxed in that town. *Hall* v. *Benton*, 346.

See ASSUMPSIT, 1. DEXTER & NEWPORT RAILROAD. EVIDENCE, 14.

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WITNESS.

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See REAL ACTION.