REPORTS

OF

CASES IN LAW AND EQUITY

DETERMINED BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

By DAVID R. HASTINGS,
REPORTER TO THE STATE.

MAINE REPORTS,
VOLUME LXX.

PORTLAND, ME.:
DRESSER, McLELLAN & CO.,
1880.

WM. M. MARKS, PRINTER.

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, LL. D.
HON. CHARLES DANFORTH.
HON. WILLIAM WIRT VIRGIN.
HON. JOHN A. PETERS.
HON. ARTEMAS LIBBEY.
HON. JOSEPH W. SYMONDS.

ATTORNEY GENERAL,
HON. WILLIAM H. McLELLAN.

***VIRGIN, J., retired December 26, 1879, at expiration of his term of office, and was re-appointed March 24, 1880.

TABLE

OF CASES REPORTED.

TABLE OF CASES

CITED BY THE COURT.

CASES

IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

HENRY SPAULDING & another, administrators, in equity, *vs.*
NATHAN A. FARWELL & others.

Knox. Opinion June 5, 1879.

Equity. Actions of account. Statute of limitations.

By R. S., c. 81, § 79, actions of account between co-tenants, and bills in equity in analogous cases, are not subject to the six years limitation, but to the general limitation, only, of twenty years, under § 86 of that chapter; but this court, in equity, may deny a complainant's right to maintain his bill, in proper cases, on the ground of his laches, although the time that has elapsed before the commencement of proceedings is less than the statute limitation. *Lawrence* v. *Rokes*, 61 Maine, 38, re-affirmed.

BILL IN EQUITY, heard on bill, answer and proofs.

The bill is dated May 15, 1869, and was brought by William McLoon, of Rockland, in the county of Knox, merchant, now deceased, and is prosecuted by the plaintiffs as his legal representatives. The facts are recited in the opinion.

A. P. Gould, for the plaintiffs.

Peter Thacher, for defendants (Farwell and Cobb), contended that, inasmuch as the statute of limitations has been specifically pleaded, by incorporation of such plea in the answer under the

rules of court, it is a bar to plaintiffs' recovery; and cited 2 Greenl. Ev., (4 ed.) § 34. *Farnum* v. *Brooks*, 9 Pick. 242. *Johnson* v. *Ames*, 11 Pick. 181. *Dodge* v. *Essex Ins. Co.*, 12 Gray, 71. Story Eq. Juris. (4 ed.) § 751.

Courts of equity never interfere to grant either relief or discovery after an unreasonable lapse of time, such as this case presents. Story Eq. Plead. (4 ed.) § 756, *a*. *Reed* v. *Wilkinson*, 2 Wash. (C. C.) 93. *Clementson* v. *Williams*, 8 Cranch. 72. *Bell* v. *Morrison*, 1 Pet. 351. *Jones* v. *Moore*, 5 Binn. 580. *Bangs* v. *Hall*, 2 Pick. 368. *Gardner* v. *Tudor*, 8 Pick. 206. *Bailey* v. *Crane*, 21 Pick. 323. *Phelps* v. *Stewart*, 12 Vt. 263.

In the view taken by the court, other citations in the very elaborate brief of the defendants' counsel are deemed unnecessary.

LIBBEY, J. The complainant in his bill alleges that he and the defendants were owners in common of the ship Amelia from the first day of May, 1862, to the first day of June, 1863, when she was sold by the owners; that the portion owned by each was as follows: the complainant, Farwell and Cobb owned one-eighth each, Timothy Williams and Austin Williams one-fourth each, and Titcomb and Sumner one-sixteenth each; that during all that time, and for a long time previous thereto, said Farwell was duly appointed and constituted agent for the ship and acted as ship's husband; that between said first day of May, 1862, and the first day of June, 1863, the ship earned large sums of money, which came into the hands of said Farwell as agent as aforesaid, but he is unable to state how much, as no account thereof has been rendered to him by said Farwell, though he has been informed portions thereof were divided among the other part owners of the ship, but in what proportions and in what sums he is unable to state.

And he further alleges that he is informed and believes that there is a large sum due from said Cobb to said owners, and especially to him, for the freight upon, or the proceeds of, a cargo of lime which was shipped from Rockland to New Orleans on board said ship, during said period.

The prayer of the bill is that the defendants may be required

to account with the complainant, and pay over to him his share of the net earnings of the ship.

The bill was commenced May 15, 1869.

The defendant Farwell, in his answer, admits the ownership of the ship, and that he was agent thereof and acted as ship's husband as alleged in the bill; and alleges that as such agent he accounted with the complainant and the other owners for the earnings of said ship received by him, May 13, 1860, and paid over to the complainant his just proportion thereof; that he made the disbursements and received the earnings of the ship in his said capacity from that time to May 9, 1862, when the accounts were adjusted, and a balance was found due the owners of $2,579.33, the complainant's share thereof being $322.39, as appears by an account annexed marked A; that he continued to make the disbursements and received the earnings of the ship in his said capacity till November 4, 1862, when the accounts were again adjusted, and there was found due the owners the further sum of $4,968.60, the complainant's share thereof being $621.07, as appears by the account annexed marked B; that on said May 9, 1862, and November 4, 1862, he accounted with all the owners except the complainant for the sums then found due, and paid to each his proportional share thereof. He admits that he did not pay over to the complainant his share of said sums, and has not paid him such share or any part thereof; and he alleges that on said May 9 and November 4 he did expressly decline and refuse to pay to the complainant the sums aforesaid which became due to him on those days. He further alleges that all the earnings of said ship which came into his hands from November 4, 1862, to June 1, 1863, were accounted for and divided among the owners, and that he paid to the complainant his just proportion thereof.

In bar of the complainant's right to an account he sets up the statute of limitations.

The defendant Cobb, in his answer, admits the ownership of the ship as stated in the bill, and admits that in July, 1862, certain funds belonging to the assignees of the cargo of lime shipped in said vessel to New Orleans came into his hands; and on or about September 1, 1862, he appropriated $1,200 thereof as the

net profit of said cargo, belonging to the ship, and divided the same among the owners, and in the fall of that year paid over to some of the owners their share thereof; that the complainant's share was $150, which he did not pay and has not paid over to him. He alleges that, since the bill was brought, the complainant informed him that he did not claim to recover anything of him in this suit; that he had no claim against him, and that the only reason why he was made a defendant was because it was necessary as he was a part owner. He does not allege that he had ever informed the complainant that he had received said sum, or had any money in his hands belonging to him. He also sets up the statute of limitations as a bar to the complainant's right to an account.

No question arises as to the other defendants.

The contention between the parties is whether the suit is barred by limitation, or the complainant has lost his right to maintain it by reason of his laches.

It is claimed by the learned counsel for the defendants that this suit in equity is analogous to an action of account at law between co-tenants, which, it is said, is barred in six years; and that this court, sitting in equity, should apply the same limitation.

This proposition raises the question in the outset, whether, under the statutes of this state, actions of account at law are now subject to the six years limitation.

We think they are not. By statute of 1821, c. 62, § 7, "All actions of account . . other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants," shall be commenced within six years.

In the revision of 1841, c. 146, § 1, both actions of account and the exception of merchants' accounts are omitted from the six years limitation, and the only limitation applicable to actions of account found in that revision is the general limitation of twenty years. The statutes have been twice revised since, and, though the action of account is not obsolete in this state, (*Closson* v. *Means*, 40 Maine, 337; *Black* v. *Nichols*, 68 Maine, 227,) the provisions of the statute of 1821 have never been re-enacted. This change in the statute is too marked and material to be

deemed unintentional. The attention of this court was called to this change of the statute in *Lawrence* v. *Rokes*, 61 Maine, 38, and Barrows, J., in the opinion of the court, says: "It may fairly be doubted whether actions of account at law and the analogous remedy in equity by bill to compel an account can now be considered subject to any other than the general twenty years limitation of all personal actions on any contract."

For the reasons above stated we feel clear that these remedies are not subject to the six years statute limitation, and that, therefore, the defense, so far as it rests upon that ground, fails.

But this court, in equity, is not bound to apply the limitation of actions at common law in analogous cases. It may deny the complainant's right to maintain his bill, in proper cases, on the ground of his laches, although the time that has elapsed before the commencement of proceedings is less than the statute limitation. In *Lawrence* v. *Rokes*, *supra*, Barrows, J., declares the rule as follows: "While the court, in equity, will ordinarily give full effect to the statute of limitations affecting actions at law in analogous cases, it must be remembered that in so doing (to use the language of Shaw, C. J., in *Philips* v. *Rogers*, 12 Met. 411,) it acts in obedience to the spirit of the statute of limitations, and rather adopts the reason and principles on which, as positive rules, they are founded, than the rules themselves."

"Accordingly, if by the laches and delay of the complainant it has become doubtful whether the other parties can be in a condition to produce the evidence necessary to a fair presentation of the case on their part, or it appears that they have been deprived of any just advantage which they might have had if the claim had been put forward before it became stale and antiquated; or if they be subjected to any hardship which might have been avoided by more prompt proceedings, although the full time may not have elapsed which would be required to bar any remedy at law, the court will deal with the remedy in equity as if barred; and on the other hand where it appears beyond question or dispute that lapse of time has not in fact changed the condition or position of the parties in any important particular, and there are any peculiar circumstances entitled to consideration as excusing

the delay, they will not refuse appropriate relief, although a strict and unqualified application of limitation rules might seem to require it." A similar rule is enunciated in *Sullivan* v. *Portland & Kenn. R. R. Co.*, 94 U. S. 806.

By the complainant's delay the defendants have lost no evidence necessary to a fair presentation of the case on their part; they have been deprived of no just advantage which they would have had if the claim had been sooner put in suit, and they have been subjected to no hardship which might have been avoided by more prompt proceedings. They admit the receipt of the money and the complainant's just share of it as part owner; that they never have paid it to him, and assign no just reason why they should not pay it.

Farwell, by his appointment as ship's husband, occupied a position of express trust as to his co-tenants, and continued to occupy that position till June 1, 1863, less than six years prior to the commencement of the suit; and he shows no just reason why he should not account to his *cestui que trust* for the trust funds in his hands belonging to him.

Cobb never informed the complainant, so far as appears, that he had appropriated the funds which came into his hands, in payment of the earnings of the ship, and rendered him no account thereof, which may excuse the delay in proceeding against him.

We see no equitable grounds on which the defendants should not be required to account. Farwell should be charged with interest from the times the dividends of the earnings were made and withheld from the complainant, and Cobb should be charged with interest from the commencement of the suit.

A master may be appointed at *nisi prius* to state and report the accounts between the parties, if they do not agree upon the amount for which the defendants should be charged.

Decree accordingly.

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

CHARLES A. COLLINS, in equity, *vs.* ISAAC F. DECKER.

Kennebec. Opinion June 5, 1879.

Partnership,—real estate, equities in, and funds of. Statute of frauds.

C bargained for a grist mill and appurtenances, paid $1,000 down, and took a bond for a deed; made a verbal contract to sell it to D, and received $1,300 of him in part payment; D took the possession, laid out a considerable sum in repairs and improvements, and carried on the business a short time, when he and C made a verbal contract of copartnership in the grist mill business, and carried it on together at this grist mill for two years, neither of the parties claiming rent; the grist mill was taxed to the company, and one year's taxes were paid out of the company's funds, and payments were made on C's notes named in the bond for a deed which he held, by giving credit to the parties to whom the payments were made on the company's books. A dam tax of $75 was paid in the same manner. At the end of the two years C gave D notice that he was going to dissolve the copartnership; D proposed that it should be mutual, and that they should bid for choice of the mill property. C does not deny that he told D that he would shortly say what he would give or take, but he did not do this; yet a few days afterwards he took a deed of the mill property to himself, discharged the bond, excluded his copartner, mortgaged the mill property to secure some partnership debts, and some of his own and the balance remaining due of the purchase money, and brought this bill in equity to close the partnership affairs. The bill and answer both admit the existence of the partnership. It is satisfactorily proved that the verbal contract for the sale of the mill from C to D was abandoned by mutual consent when they went into partnership, and that the understanding between them was that the purchase of the mill property should be completed on partnership account, the sums previously paid and expended by the partners severally, toward the purchase or in the improvement of the mill property, to be regarded as so much contributed by them respectively to the partnership funds.

Held, that there is nothing in the statute of frauds to prevent partnership equities from attaching to the grist mill property, and that it should stand charged, as between these parties, for the payment of partnership debts, and any balance that may be found due to either of the partners upon the final adjustment of the partnership accounts; the legal title not to be disturbed except as may be necessary for these purposes.

BILL IN EQUITY, heard on bill, answer and proofs.

The bill alleges that plaintiff on November 17, 1875, formed a partnership with the defendant under the firm name of Collins & Decker, manufacturing flour, corn, meal, and grain, and dealers in the same, and doing custom work in a mill belonging to

the plaintiff in Clinton in said county of Kennebec; that said defendant had on hand at the time about $300 worth of corn which he turned into the partnership, also paid from his own means about $70 for freight on a car load of wheat, and these two sums are all that he put into the partnership from his private funds; that the plaintiff had purchased a car load of wheat prior to the formation of the partnership, and afterwards paid $175 from his private funds towards the same, and the balance was paid out of the partnership funds. Also during the first three months of the partnership, the plaintiff purchased and paid for two thousand bushels of corn amounting to $1,325, for which he has not received any compensation, and that amount is still due him; and afterwards from time to time he put into the firm's business about $375 more in money, as near as he can now estimate. The partnership ran on in this way, doing a large business, amounting on an average to $15,000 a year. That the plaintiff becoming dissatisfied with the management of the defendant, and believing that it was not safe for the plaintiff to continue the business with him, on November 15, 1877, he gave said defendant written notice that the partnership was dissolved from that day, and also notified all persons of whom the firm had purchased goods, and all with whom they had had any dealings, of such dissolution.

That on said November 15, 1877, at the time of the dissolution of the partnership, there was stock on hand, manufactured and unmanufactured, consisting of flour, wheat, oats shorts, rye, and some other articles, amounting to $1,150, and at the same time there were demands due to the firm consisting of book accounts chiefly and a few notes and an execution which had been levied on real estate of the debtor, amounting in all to about $3,000. The firm at the same time was indebted to various parties to the amount of about $1,900, and plaintiff is ready and willing to pay his part of said debts and liabilities as the court may direct when the deficiency is ascertained.

That after November 15, 1877, the day of the dissolution, he had possession of the mill, and of the fifty-six barrels of flour in the same and of the cash-book, day-book and ledger belonging to the firm in the office connected with the mill and in a safe with

a combination lock; and that on November 19, 1877, in the absence of the plaintiff, the defendant took away from said safe and office and mill the three books above mentioned and a few small notes and a mortgage bill of sale of personal property, and carried them away from the premises, and has posted notices in the town of Clinton, forbidding all debtors to the firm from paying the plaintiff and calling on them to pay to him, and is about to collect all accounts that are due said firm. And on the same November 19, in the absence of the plaintiff, and knowing that he was absent, took from said mill thirty-six barrels of flour and hauled it to the depot in said Clinton, with orders to forward the same to Fairfield, but said flour is still at the depot and will be sent out of the county unless prevented immediately.

That said defendant intends to collect all the debts due to the firm and take possession and dispose of all the property belonging to the firm, and leave the debts of the firm unpaid; that said defendant has no attachable property and cannot be compelled by any legal process to pay the debts of the firm if he once converts the assets into money, and that the plaintiff and the creditors of the firm will suffer irreparable loss, unless the defendant is restrained immediately from converting said assets into money.

Wherefore plaintiff prays that a temporary injunction may be issued to restrain said defendant from collecting any of the debts due to the firm, and from converting any of the property of the firm into money or disposing of either by himself or servants or agents or attorneys, until the further order of this court, or the appointment of a receiver; and further prays that a receiver may be immediately appointed to take possession of all the assets of said firm, and dispose of the same to the best advantage and interest of all concerned, collect all the dues and pay all the debts of the same, and distribute the balance, if any, according to the rights of all parties concerned.

Prayer, that the respondent may answer; and that the court will thereupon decree a dissolution of the partnership, and the closing up of its business, the payment of all the debts of the

firm and a distribution of the balance, if any, to the plaintiff and defendant, according to their equitable rights.

The defendant answers:

That on September 10, 1875, he made a parol agreement with the plaintiff for the purchase of said plaintiff's mill and mill privilege or lot situate in Clinton, the price which he was to pay said plaintiff being $3,000, and he paid down at that time $1,300, and has the plaintiff's receipt therefor. The defendant thereupon entered into possession of said mill. The defendant learned a short time after he made the aforesaid agreement that all the title which the plaintiff had to said mill property was a bond for a deed of the same, from Japhet M. Winn and William Lamb, of said Clinton. At the time when the defendant paid to the plaintiff the said sum of $1,300, it was agreed by and between the plaintiff and defendant that the balance thereof should be paid as the same should be needed by the plaintiff to pay his notes given to said Winn and Lamb, described in the aforesaid bond, the amount of said notes being the sum which said Collins was to pay said Winn and Lamb for a deed of said mill property, being $2,500. During the two months next following his entry into the possession of said mill property, the defendant made extensive and valuable repairs and improvements to said mill, to the amount of $800.

On November 18, 1875, the plaintiff and defendant entered into a partnership under the firm name of Collins & Decker, for the manufacture of flour, corn, meal, and general dealing in grain, in said mill; and it was then and there agreed between them that the previous contract between them as to the purchase of said mill property by the defendant of the plaintiff should be abandoned, and that the aforesaid bond should be owned by them as partners, and that the amount due said Winn and Lamb on said bond should be paid by them equally, and that in making said payment due allowance should be made to the defendant for what he had paid to said plaintiff and for the repairs and improvements made on said mill as before specified, and that when the amount of said notes specified in said bond should be fully paid, the deed of said property should be taken to the plaintiff and defendant as

partners, and that such an adjustment of their previous doings and relations should be made as would be equitable and just.

The defendant at that time had on hand some four or five hundred dollars worth of grain and other property connected with the business, which he turned into the partnership; and the plaintiff turned into the partnership about $900 worth of grain, and these elements were by said agreement to be equitably adjusted with all other rights and equities between them.

That during the continuance of said partnership there was paid out of the partnership funds on said notes the sum of about $400, as nearly as the defendant can now remember.

That, during the continuance of said partnership, said Collins sold on his own account quite a quantity of grain and other property of the partnership, the amount of which the defendant can not definitely state, and the plaintiff at various times used the monies of the firm, and has rendered no account thereof.

The whole amount of means of any kind which said plaintiff put into the partnership business out of his own private funds is as follows, so far as the defendant has any knowledge of the same, and no more, to wit: four car loads of corn, amounting to about $940. The bill of $175, which the plaintiff in his bill alleges he paid out of his own private funds, the defendant says was paid out of the partnership funds. The plaintiff's claim in his bill that subsequently to the formation of the partnership he put into the firm business, from time to time, about $375, has no foundation in fact, so far as this defendant has any knowledge and so far as he has any belief.

The defendant admits that said partnership continued till November 15, 1877, when the same was dissolved by the plaintiff. The stock on hand and the other means and the liabilities of the firm at the time of said dissolution, so far as the defendant is able to judge, are correctly stated in the plaintiff's bill.

That on November 15, 1877, the plaintiff excluded him, the defendant, from said mill by putting thereon a new lock to which the defendant had no key, and informed the defendant that he had no rights therein, and gave public notice that all debts due the late firm should be paid to the plaintiff.

That at the dissolution of said firm, on November 15, 1877, defendant had fully paid his proportional part of the consideration for the purchase of said mill, yet notwithstanding that fact, a short time thereafter, and as the defendant now understands the time to have been on November 17, 1877, the plaintiff took a deed of said mill property to himself alone, instead of to them as partners, as had been previously agreed between them and as in justice and equity he should have done.

That he is ready at any time to go into an account and submit all their accounts to a master; and he will account for all he ever received of the partnership funds, and he claims that the complainant shall do likewise; and that a fair settlement will show a balance due the defendant, and he prays the court to decree this balance paid to him.

Facts, outside of bill and answer, sufficiently appear in the opinion.

J. Baker, for the plaintiff.

S. S. Brown, for the defendant.

BARROWS, J. In 1875 the plaintiff had the possession and a bond for a deed of a grist mill and its privileges, for which he had paid $1,000, and was to pay, in order to entitle himself to a conveyance, $800 more April 7, 1876, and $770 April 7, 1877. In September, 1875, he made a verbal contract to sell the property to Decker, the defendant, for $3,000; received $1,300 from him, and gave him a receipt for that amount "as pay towards mill." Under this arrangement Decker took possession, and was engaged in running the mill and making repairs and improvements upon it, at considerable expense, until November 18, 1875, when the parties plaintiff and defendant made another verbal contract to carry on the business of the grist mill in partnership, which they did for about two years. Then the plaintiff notified defendant that he was going to dissolve the partnership, and defendant proposed that the dissolution should be mutual, and that they should "bid for choice of the mill property." Plaintiff does not contradict defendant's testimony that he (the plaintiff) said he would shortly "say what he would give or take." He did

not do this, however, but, a day or two after, took a deed of the mill property in his own name, discharged the bond, and mortgaged the property back to secure certain indebtedness of the firm, and some of his own, and what remained unpaid of the purchase money, excluded his late copartner from the possession, and at once brought this bill in equity to close the affairs of the copartnership.

Thus far no material conflict as to facts. But defendant claims, and plaintiff denies, that when they went into partnership it was verbally agreed and understood between them that the previous contract as to the purchase of the mill by defendant from plaintiff was to be abandoned by mutual consent; that the bond for the deed was to be regarded as partnership property, the balance due on the purchase money under the bond was to be paid by the partners equally, and when paid the deed should be taken to them as partners; that it was agreed that the $1,000 paid by Collins towards the purchase money and the $1,300 paid by the defendant to Collins should be regarded as so much of the company funds furnished by them respectively, as well as the grain stock and personal property which they turned in; that defendant was to be allowed, as contributed by him to the company funds, the amount expended by him for repairs and improvements on the mill, and that all these matters were to be equitably adjusted as partnership transactions.

To such a partnership, a place to carry on the business would be indispensable, and it is natural to suppose that the attention of the parties would be given in the outset to securing it. Yet the plaintiff testifies that neither then nor ever during the time they were in partnership was anything said about the rent of the mill, though it was worth $300 a year, and that he never called upon defendant for money on account of the purchase of the mill after they went into partnership, though he had done so a number of times before. A disinterested witness testifies that the plaintiff told him, in the afternoon of the day that the partnership agreement was entered into, that "he (Collins) was to take one-half of the mill back, allowing Decker one-half of the amount which he had paid him for the mill and one-half of the cost of the improve-

ments and repairs which Decker had put on the mill, and that they were going on in partnership, Collins to do the mill work and Decker the outside work, and each one to furnish one-half the capital to run the mill."

Taking the natural probabilities into the account in connection with the testimony, we regard it as satisfactorily proved against the plaintiff's denial that the contract for the sale of the mill by him to the plaintiff was abandoned by mutual consent when they went into partnership, and thenceforward the understanding was that the purchase of the mill was to be completed by them jointly, and that it was to be their joint property when paid for, so much as had been paid for or laid out upon it by each to be treated as contributed to the capital of the company, and to be finally adjusted on equitable principles as partnership business.

The questions for determination are how far this verbal agreement was binding on the defendant, and whether in consequence of it and the acts of the parties subsequently the mill property is to be regarded as company property, notwithstanding the plaintiff finally took the conveyance to himself alone.

Some sums were paid out of the partnership funds in part payment of the plaintiff's notes given for the balance of the purchase money when he took the bond for a deed, and also a dam tax of $75; and the mill property was taxed to the partnership, and the tax of 1876 was paid out of the company's money. Some of these payments were made by giving credit on the books of the copartnership to the parties to whom the payments were made. Bill and answer alike assert the existence of a copartnership formed for the purpose of carrying on the grist mill business, and the proof is plenary that the mill property in question was that which was used by the partnership, without the payment of rent to any one, or the assertion of a claim for rent by any one, for the purposes of their business as long as they continued in partnership, and that it was partly paid for as above stated out of company funds.

Is it to be regarded as partnership property in the settlement of the partnership estate? The plaintiff relies upon his legal title and the statute of frauds as conclusive that it should not be so regarded.

There are not a few cases in which there has been more or less elaborate discussion of the effect of the existence of a copartnership, sometimes proved by written articles of agreement and sometimes established otherwise, upon the beneficial interest in, and ownership of, real estate, where such interests were claimed and found not to correspond with the legal title. The effect of the statute of frauds in such cases has necessarily been much considered. It would be difficult, if not impossible, to reconcile all the decisions and dicta upon this topic emanating from courts whose great learning and high authority are nevertheless conceded.

Much of the apparent discrepancy, however, will disappear if the position of the parties litigating towards each other and their relation to the subject of controversy, the purposes for which the statute is invoked, and the limitations of the doctrines laid down, are all carefully observed.

Sometimes the contention has been between the widow and heirs of a deceased partner and the surviving partners as to the mode of disposition of real estate not needed in the form of cash for the payment of debts or the adjustment of the affairs of the partnership between the partners themselves, as in *Shearer* v. *Shearer*, 98 Mass. 107, and *Wilcox* v. *Wilcox*, 13 Allen, 252; sometimes between the copartnership creditors and creditors of the individual copartners as to the disposition of the proceeds of lands bought by one of the copartners in whole or in part with partnership funds, but not used for the purposes of the copartnership, as in *Richards* v. *Manson*, 101 Mass. 482, and *Fall River Whaling Co.* v. *Borden*, 10 Cush. 458; sometimes where the existence of the copartnership was in dispute and not clearly established, as in *Smith* v. *Burnham*, 3 Sumn. 435.

If we adopt the English doctrine as laid down in *Dale* v. *Hamilton*, 5 Hare, 369, the defendant's claim that this mill, thus occupied and used by the copartnership, and partly paid for with partnership funds as appears by the partnership books, should be regarded as partnership property in winding up its affairs is at once clearly established. In the case just cited the doctrine to be gathered from a review of all the cases is declared to be that where a copartnership is proved, though but by word of mouth,

the equitable consequences follow and partnership equities attach, the statute of frauds notwithstanding, the case being held to be that of a trust arising by implication of law, and so within the exception expressed in the statute.

Attention is called in the elaborate and learned opinion of Cushing, J., in *Fall River Whaling Co.* v. *Borden*, *ubi supra*, to the fact that in *Dale* v. *Hamilton* the partnership alleged was in a single transaction of the purchase and sale of land, "standing on parol merely, unsupported by any general partnership subsisting, or any collection and combination of general partnership writings and acts, and with no pretense of any partnership funds, either contemporaneously existing or subsequently acquired."

It is not necessary for the decision of this case to inquire whether we could go so far as the Vice Chancellor did in *Dale* v. *Hamilton*, or whether its doctrine is practically denied in *Farnham* v. *Clements*, 51 Maine, 426.

A verbal agreement to form a copartnership for the purpose of trading in land, whether generally or in a single instance, presents a different question as to the attaching of partnership equities to land bought in pursuance of such agreement by one of the parties and conveyed to him individually, from that which is presented where the existence of a copartnership is admitted by the parties respectively in bill and answer, and the land in question has been used for partnership purposes rent free during the entire existence of the partnership, and more or less of the money of each of the partners and of the partnership funds has been expended in paying for and improving it.

Touching interests in lands acquired for the purposes of the partnership by one partner in his own name see *Forster* v. *Hale*, 3 Ves. 308, and Lord Loughborough's opinion in the same case on appeal, to the effect that "the partnership being established by evidence by which a partnership may be proved, the premises necessary for the purposes of the partnership are by operation of law held" for all such purposes.

In *Smith* v. *Tarlton*, 2 Barb. Ch. R. 336, it was held that real estate purchased with partnership funds for the use of the firm, although the legal title is in the members of the firm in whose

names the conveyance is taken, is in equity considered the property of the firm, for the payment of its debts and for the purpose of adjusting the equitable claims of the copartners as between themselves. And this was a case where a parol agreement for a partnership to carry on a certain kind of manufactures, and to that end to purchase a water privilege and site and erect buildings was proved; and those members of the firm in whose names the title to the real estate was taken were endeavoring to misappropriate the property.

As to the effect of the statute of frauds in these cases it is obviously a matter of no practical importance whether the requirements of the statute are complied with by such a memorandum or declaration in writing, as it calls for, or whether the case falls within the recognized exception of trusts arising by implication of law. "In either view of it," remarks Cushing, J., (10 Cush. 471,) "the question recurs, what proof of copartnership shall suffice to satisfy the demands of the statute." It is generally understood that if the articles of copartnership are in writing, there is a sufficient compliance with the requirements of the statute to subject the partnership lands to all the equities growing out of that relation. Why is not the admission by the parties of the existence of the partnership upon the record in bill and answer a full equivalent?

Here are written recognitions of the fact of its existence subscribed by the respective parties and so placed before us that the existence of a partnership in the present case, so far as these parties are concerned, is indisputable.

In *Smith* v. *Burnham*, 3 Sumn. 435, cited by the court in *Farnham* v. *Clements*, 51 Maine, 428, the partnership asserted in the bill was repudiated in the answer, and it did not appear that there were any partnership funds or any land used for the purposes of the copartnership, and there was no proof offered of any dealings between the parties as copartners except the alleged verbal agreement to form a copartnership for the purchase and sale of lands on speculation, the case in many respects resembling that of *Dale* v. *Hamilton*, *ubi supra*. Yet while Judge Story found no sufficient proof of the existence of a copartnership and

nothing to satisfy the requirements of the statute of frauds, he did not dispose of the case without a distinct declaration that had it been proved that part of the purchase money of the land had been paid by the plaintiff, or that the land had been purchased for partnership purposes with the funds of an existing partnership, he should have recognized a resulting trust arising by operation of law within the exception of the statute.

Cushing, J., in *Fall River Whaling Co.* v. *Borden*, 10 Cush. 475, thus states the doctrine derived from an examination of the whole subject: "A partnership satisfactorily proved, and certainly if proved by writings, is to be held as raising in equity a partnership trust in partnership lands whatever the state of the legal title. If such writings of the copartnership refer directly to the land by name as partnership property, then the trust is proved by the statute memorandum; if the writings do not by name refer to the land, then it is a trust therein by implication of law."

The various *indicia* of partnership property in this grist mill, (which was the seat of the partnership business) to which we have referred and which need not be recapitulated, satisfy us that it ought, in equity, as between these partners, to be so regarded. We cannot doubt that it was understood by and between the parties when they went into copartnership, that the previous verbal contract for the sale of the mill by the plaintiff to the defendant should be treated as abandoned by mutual consent, and that the purchase of the mill should be completed for and on account of the copartnership, the sums paid and expended by the parties severally up to that time to be regarded as so much contributed to the partnership funds.

"When the legal title is held by one partner in excess of his beneficial interest, it is held in trust for the purposes of the partnership, and is chargeable in equity with all obligations growing out of that relation," says Wells, J., in *Shearer* v. *Shearer*, *ubi supra*.

What the actual condition of things in regard to indebtedness of the partnership to third parties or to the partners individually may require as to the disposition of the property, will depend upon future developments in the case.

In *Buchan* v. *Sumner*, 2 Barb. Ch. R. 165, while it was held that real estate purchased with partnership funds or for the use of the firm is in equity chargeable with the debts of the copartnership and with any balance which may be due from one copartner to another upon the winding up of the affairs of the firm, yet a court of equity will leave the legal title undisturbed except so far as is necessary to protect the equitable rights of the several members of the firm and those of the partnership creditors therein.

The only decree that we are called upon at present to make is that the affairs of the partnership shall be closed up and the relation of the several partners as debtors to, or creditors of, the firm shall be ascertained, and that the mill property conveyed to the plaintiff stand charged with all partnership equities, its disposition to depend upon the respective beneficial interests which the partners may be found to have therein upon the settlement of all the partnership accounts.

Decree to be framed accordingly.

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

NANCY C. AMES *vs.* BENJAMIN F. HILTON.

Lincoln. Opinion June 5, 1879.

Deed,—construction of. Description. Trespass. Punitive damages. Estoppel. Agency.

Where the description of the premises in a deed is as follows: "To Great Spring bridge at the middle of the highway; then as the highway runs, north thirty-seven degrees east, twenty-eight poles, and north twenty-seven degrees east, fourteen poles, to the road leading from the highway to said Andrew's house; then in said road northwest, twenty and a half poles, to the fence near said Andrew's shed; then north three degrees west, seven and a half poles, to a white oak tree in old fence;" and the said "road" from the highway to said Andrew's house being a lane or leading way over the land of the grantor and in which no other person had any rights: *Held*, that in such case the first call, in the deed, to said road stopped at the side line of the lane; but that as the next call commenced "in" said way, an ambiguity arises as to the precise point in the way where the first call terminates, and that it becomes a question for the jury to determine where it did terminate in the road; and then the distances and courses become material elements for their consideration in determining that fact; when determined, and the point thus established, the line by the second call, runs in the lane, northwest, twenty and one-half rods, to the fence near the shed as located at the time of the conveyance, and by the next call, from that point by the course and distance named to the white oak tree.

The clear and unambiguous calls in a deed cannot be set aside, and different ones substituted in their place by parol proof of the acts of the parties, either before or after the deed was made.

For trespass committed willfully, wantonly or maliciously, the jury have the right, and are entitled, in making up their verdict to add to the actual damages, just such an amount as, in their sound discretion and good judgment, under all the circumstances, the defendant ought to pay (and the plaintiff receive) as punishment for the wrong doing.

In the trial of an action of trespass *quare clausum*, wherein a line was in dispute, the plaintiff contended that the defendant was estopped to deny the location claimed by the former by reason of his acts and silence when the survey was made preparatory to the conveyance. The instruction of the presiding justice in relation to such an estoppel did not require the jury to find that the defendant then knew where the true line was: *Held*, that, in the absence of any specific request upon that point, the defendant has no ground of exception when he did in fact have such knowledge and so testified and that fact was not in contention.

In such case, it appeared that the plaintiff, her husband, and the defendant were present on the premises the day before the conveyance to the plaintiff; that the husband acted for her during the survey. There was conflicting evidence whether the defendant then claimed to the husband that the line

was where he claimed it to be at the trial, and the evidence tended to prove that such fact was not communicated to her and that she was ignorant of it: *Held*, that the instruction that, if the husband was agent of his wife in running and fixing the lines, and claim was made to him, it would be the same as if made to her—unless the defendant knew that the agent was not acting faithfully, was permitting her to pay for land which she was not to take; and if he knew that, and knew that she was personally relying upon it, it would not excuse the defendant for not making known to her his title, affords defendant no grounds for exceptions.

On exceptions, and motion to set aside verdict as against evidence, and on account of excessive damages.

Trespass on real estate, and wrongs thereon alleged to have been committed by the defendant "wantonly, willfully and maliciously."

The premises upon which the alleged trespass was committed are described in the deed of Isaac Hilton to Andrew Hilton, and from which the plaintiff derives her title, as follows: "Beginning at a pine stump on Israel Howard's line and standing in his field and running southeast twenty-three poles to a stake and stone, then southwest three poles to a stake by an old fence, then southeast thirty-five poles to a stake and stone about one pole southeast of Daniel Howard's corner; thence northeast thirty-six poles to an old fence, then north eighty-seven degrees east twenty-four and a half poles to the great spring bridge at the middle of the highway, then as the highway runs north thirty-seven degrees east twenty-eight poles and north twenty-seven degrees east fourteen poles to the road leading from the highway to said Andrew's house, then in said road northwest twenty and a half poles to a fence near said Andrew's shed, then north three degrees west seven and a half poles to a white oak tree in old fence, then north twenty-four degrees east about three hundred and twenty poles to a stake and stones in the northern line near a place called the bluff head, then west-northwest eighty-five poles to a pile of rocks on the west side of a ledge, then south-southwest about four hundred and sixty poles to the first bounds, containing one hundred and fifty acres more or less."

And in the plaintiff's writ said premises are described as follows: "Beginning at Dudley Hayward's Corner, so called; thence

north twenty-seven degrees east, bounded by the Chism lot, so called, and land of Solomon Potter, one hundred and sixteen and half rods to a stake and maple tree spotted for a corner; thence south sixty-three degrees east eighty-two rods to the east line of said tract to land of Benjamin F. Hilton's at the fence; thence south thirty-nine degrees west on said east line as said fence then run and by the same to a white oak tree near the house; thence south two degrees west six rods and ten feet to the place where the northeast corner of a shed stood May 12, 1866; thence south forty-four degrees east twenty rods to the county road; thence southeasterly by said road forty-two rods ten links to the northeast corner of said Benj. F. Hilton's field; thence north eighty-four degrees west by said field twenty-four rods to northwest corner of said field; thence by the west line of said field to the road leading to Israel Hayward's; thence by said road westerly by land of David Ware and land of said Hayward to the first named bound; being the plaintiff's homestead as then inclosed and fenced."

The plea was the general issue, with a brief statement as follows: "And the defendant further says, by way of brief statement under the statute, that, at the time of the supposed trespasses set forth in the plaintiff's writ, he was the owner in fee to the center of the lane leading from the highway to the plaintiff's dwelling house to a point in the center of said lane which a straight line drawn from the oak tree mentioned in the plaintiff's writ to and by the northeast corner of the shed now standing on the northerly side of said lane as it stood May 12, 1866, would intersect, and thence on such straight line to said oak tree, and a right of way in common with the owner of the plaintiff's lot over the whole of the same lane; and that all he did was within and in the exercise of his legal rights."

A statement of the case and the nature of the evidence appear in the opinion.

Before the presiding justice charged the jury the defendant requested that the following instructions be given:

I. That the call in the deed of Isaac Hilton to Andrew Hilton "in the road (or lane) N. W. twenty one-half rods" legally

requires that this line shall run in the center of such lane, even if such center is not exactly in the course named in the call.

II. Where a deed calls for a line in a fenced lane, it is, by legal intendment, to run in the center of such lane.

III. And when in a line running thus in the center of a fenced lane, the next call of a deed is " to " a monument, and that monument is found on the side of the lane, the meaning of the call is that the line shall run in the center of the lane to a point opposite the monument.

IV. And thence to the monument.

V. And that the same rule applies to the fenced lane in this case, in the respect named in the third request, as applies to rivers, streams, ditches and highways.

VI. That, if the parties to the old deed of 1822, or the plaintiff's deed of 1866, went on the ground just before making the deed and located and marked on the face of the earth the land intended to be conveyed, and a deed was afterwards made intended to cover the same land, and the locating and marking and the description in the deed do not agree, the location and marking will control the deed, and the land thus located and marked will be the land conveyed.

VII. If the jury find that the parties to the deed of 1822, just before making the deed, went on to the land and run the line from the Great Spring bridge in the highway to the lane and thence in the middle of the lane towards the house to a stake put down by them, and then run a straight line from that stake close by the northeast corner of the old shed to the oak tree, as and for the dividing line of the conveyance, then that was the true line between the lots.

VIII. Especially so, if the parties immediately after built a fence from the oak tree on the line so run to the lane close by the corner of the shed, as and for a line fence, and occupied to it on both sides and recognized it as the true line for twenty years or more.

IX. That, if they find that the lane mentioned in the deed from John Trask to the plaintiff was a way in common for the owners of the plaintiff's lot and the defendant's lot; or if they find that

it was a private way, said deed would only convey the land to the center of the lane.

X. That a deed bounding land on a private way will give a title to the center of that way and no more.

XI. In an action of trespass *quare clausum fregit*, the gist of the action is the breaking and entering, and unless such breaking and entering are proved, the action must fail.

XII. That, if they find that the plaintiff permitted her husband to act for her in running out the land which she was about to purchase, then a notice to him of the lines and boundaries of the land are the same in law as if given to her personally.

XIII. If Isaac Hilton and his grantor and his grantees have occupied up to the certain fences as the division lines for twenty years and more, the statement by Isaac Hilton in the trial of this case that he did not intend to claim more than his deed gave him cannot affect the rights and title of the defendant.

The instructions refused by the judge, and those given, of which the defendant complains, are stated in the opinion.

The verdict was for the plaintiff for the sum of $254.16 damages; and the defendant alleged exceptions, and also moved to set aside the verdict as against evidence and the weight of evidence, and because the damages were excessive and unreasonable.

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

J. Baker & B. F. Hilton, for the defendant, contended, *inter alia:*

I. Error in the presiding justice in not giving requested instructions. *Cottle* v. *Young*, 59 Maine, 110. *Robinson* v. *White*, 42 Maine, 209. *Johnson* v. *Anderson*, 18 Maine, 77. *Luce* v. *Carly*, 24 Wend. 451. *Newton* v. *Eddy*, 23 Vt. 319. *Cold Spring Iron Co.* v. *Tolland*, 9 Cush. 492. *Newhall* v. *Ireson*, 13 Gray, 262. *Com.* v. *Alger*, 7 Cush. 97. *Inhbts. Ipswich*, Pet's, 13 Pick. 431. *Child* v. *Storr*, 4 Hill, 369. *Bradford* v. *Cressey*, 45 Maine, 13. *Knowles* v. *Toothaker*, 58 Maine, 175. *Emery* v. *Fowler*, 38 Maine, 102. *Fisher* v. *Gray*, 9 Gray, 441. *Lowell* v. *Robinson*, 16 Maine, 357. *Magill* v. *Heinsdale*, 6 Conn. 464. 3 Wash. R. Prop. (3 ed.) 360.

II. The requested instructions, Nos. 6, 7, 8, were sound law and well supported by authorities. *Knowles* v. *Toothaker*, *supra*. *Blaisdell* v. *Bissell*, 6 Penn. St. 258. *Thompson* v. *McFarland*, *Id.* 478. *Dawson* v. *Mills*, 32 *Id.* 302. *Ogden* v. *Porterfield*, 34 *Id.* 191. *Ken. Purchase* v. *Tiffany*, 1 Maine, 219. *Dunn* v. *Hayes*, 21 Maine, 76. *Blany* v. *Rice*, 20 Pick. 62. *Hale* v. *Dexter*, 10 Hump. (Tenn.) 92. *Richardson* v. *Chickering*, 41 N. H. 235. *Frost* v. *Spaulding*, 19 Pick. 445.

III. The instructions upon the point of punitive damages were erroneous. The rule is correctly stated in *Johnson* v. *Smith*, 64 Maine, 553, 554. To the same effect the following cases are cited: *Pike* v. *Dilling*, 48 Maine, 539. *Goddard* v. *Grand Trunk*, 57 Maine, 202. *Harmon* v. *Harmon*, 61 Maine, 233.

No case can be found where the court has decided that the plaintiff is entitled, or has a legal right, to punitive damages; the whole matter is left to the discretion of the jury to find punitive damages or not, even if they find the acts to have been committed maliciously.

LIBBEY, J. In 1822 Isaac Hilton, Sr., the father of Andrew Hilton and Isaac Hilton, Jr., owned a large farm in Jefferson, with a county road running through it. His dwelling house and farm buildings were situated on the west side of the county road, with a lane or leading way from the road to them. March 15, 1822, he conveyed the principal part of his farm lying on the west side of the county road, including his dwelling house and farm buildings, to his son Andrew. So far as material to the rights of the parties in this case, the boundaries and description of the premises in the deed are as follows: "To the Great Spring bridge, at the middle of the highway; then, as the highway runs, north thirty-seven degrees east twenty-eight poles, and north twenty-seven degrees east fourteen poles, to the road leading from the highway to said Andrew's house; then, in said road, northwest twenty and a half poles to the fence near said Andrew's shed; then north three degrees west seven and a half poles to a white oak tree in old fence." The oak tree referred to was standing at the time of the trial, and there was no controversy between the parties as to

that monument; but it was claimed that there had been some change in the shed, and the precise location of the shed and the fence near it, referred to in the deed, was in controversy; and also the exterior lines of the lane or leading way, as located at the time of the conveyance.

Soon after the conveyance to Andrew, Isaac Hilton built a dwelling house and farm buildings on the east side of the county road, which he occupied, and April 9, 1826, he conveyed that part of his farm not conveyed to Andrew to his son Isaac, Jr., bounding the premises, so far as is in controversy, by Andrew's land.

The parties agree that the premises conveyed by Isaac Hilton to Andrew, so far as involved in this case, are owned by the plaintiff; and the premises conveyed by him to Isaac, Jr., are owned by the defendant, except so far as the dividing line may have been affected by the acts of the parties at the time of the conveyance from John Trask to the plaintiff May 12, 1866.

The acts of trespass complained of were mainly done on the north half of the lane, and between the lines respectively claimed by the parties as the boundary line between their lands. This statement of the case is deemed material as bearing on the question of the construction of the deed from Isaac Hilton to Andrew Hilton.

It is claimed by the plaintiff that by the true construction of that deed the location of the dividing line upon the face of the earth is to be found by measuring from the point at Great Spring bridge in the middle of the highway, by the courses named in the deed, the distance of forty-two rods to a point in the lane, and thence in the lane northwest twenty and a half rods to the fence near the shed, and thence, by the course given, seven and a half rods to the white oak tree.

On the part of the defendant it is claimed that the first call in the deed of forty-two rods by the courses named, to the road, goes to the center of the lane, and the second call, "then in said road northwest twenty and a half poles to the fence near said Andrew's shed," bounds the plaintiff by the center of the lane the given distance to a point opposite the fence near the shed; and that from that point the line runs by the course given to the white oak

tree; that the deed should receive the same construction, as far as the lane is an element of the description, as it should if the bound had been by a highway; and several requests for instructions were made by the defendant's counsel based upon this theory, which were not given; and to the refusal to give the requests, and to the charge of the judge on this point, exceptions are taken.

The great rule for the interpretation of written contracts is that the intention of the parties must govern. This intention must be ascertained from the contract itself, unless there is an ambiguity; and then evidence *aliunde* may be received and considered, so far as it has a legitimate tendency to show such intention. In ascertaining the meaning of the parties as expressed in the contract, all of its parts and clauses must be considered together, that it may be seen how far one clause is explained, modified, limited or controled by the others.

In the description of the premises conveyed in a deed, monuments named, if they can be found, control courses and distances. If the monuments cannot be found, then courses and distances may govern; and in all cases where the location of the monument upon the face of the earth is in doubt, or there is more than one monument which will answer the call in the deed, courses and distances given may be resorted to as important in ascertaining the true location of the monument called for by the deed. These rules are so familiar and so well established that no citation of authorities is needed.

The main question raised by the requests for instructions is whether a deed, bounding the premises by a lane or leading way used by the grantor between his dwelling house and the highway, over his own land, and in which no one else has any rights, carries the fee to the center of such way. We think the established rule in this state is that it does not, but that the fee is limited to the side line of the lane. *Bangor House* v. *Brown*, 33 Maine, 309. None of the reasons exist which are stated by the courts as the foundation of the rule that when a deed bounds the premises by a highway or a stream it conveys the fee to the center. *Johnson* v. *Anderson*, 18 Maine, 76. The reasons why the rule appli-

cable to a grant bounding the premises by a highway does not apply to a way like the one involved in this case are well and clearly stated by Shepley, C. J., in *Bangor House* v. *Brown*, *supra*, and it is unnecessary to repeat them here.

In Massachusetts the court has held that the rule applicable to a boundary by a highway extends to private ways. *Fisher* v. *Smith*, 9 Gray, 441. But the opinion is a *per curiam* opinion of a divided court, and no reason is given for extending the rule to private ways; and we must assume that the words "private ways" are used by the court in that case as embracing only ways over the land of the grantor in which third parties have a legal right of passage, as the way involved in that case was of that character. When the owner of the fee uses his land as a passage way for any purpose connected with his buildings, or the management of his farm, and no other person has any right of way in such passage way, it is not a way in the legal signification of the word.

If, however, *Fisher* v. *Smith* must be held to be in conflict with *Bangor House* v. *Brown*, we prefer to adhere to the rule established by our own court. This conclusion disposes of the defendant's requests for instruction upon this point.

We now come to the question, what is the true construction of the deed from Isaac Hilton to Andrew Hilton upon the point under consideration? The first call is from a bound specified, by courses and distances, "to the road leading from the highway to said Andrew's house." If this call stood alone, as we have seen, the line would terminate at the south side of the lane. But the next call is "then, in said way, northwest twenty and a half poles to a fence near said Andrew's shed;" so that while the first call does not extend into the way at all, the next call starts in the way. It is admitted by the learned counsel for the defendant that the words "to the way" are terms of exclusion, and, unless by construction the line can be held to terminate in the center of the lane, are inconsistent with the next call, which starts "in the way," and that an ambiguity arises as to the point where the line terminates in the way. This being so, it becomes a question of fact for the jury to determine whether the bound is at the south line of the way, or in the way; and if in the way, at what point in it;

and the courses and distances, which are stated with precision, become material, and the jury should consider them, as well as the other calls in the deed bearing upon the question, in determining where the line is located at that point upon the face of the earth; especially as the location of the way at the time of the conveyance is in controversy.

From the point thus established, the line, by the second call, must be run in the lane, northwest, twenty and one-half rods, to the fence near the shed as located at the time of the conveyance; and by the next call from that point by the course and distance named to the white oak tree; and the location of the fence near the shed being in controversy, the course and distance from that tree to the point where the line strikes the fence become material.

The instruction of the presiding judge was substantially in accordance with this view of the question, and we think was correct.

The construction put upon the deed from Trask to the plaintiff by the judge is in accordance with the rule we have declared; but if not in all respects correct, the further instruction given to the jury, that Trask had no greater title than Andrew Hilton took by his deed, and could convey no greater title to the plaintiff, removed all ground of exception on the part of the defendant.

The next ground of exception is the refusal to give the requested instructions numbered six and seven, as to the effect of the acts of the parties in running and marking the lines just before making the deed in 1822, and to the instruction given on that point.

Neither of the requests is sound as a legal proposition, and could not have been properly given. The sixth request is, in effect, that, if before the deed was made the parties went upon the land and run and marked the lines, and the deed was made intended to embrace the same land, "and the locating and marking and the description in the deed do not agree, the locating will control." This request was based upon the evidence introduced by the defendant, tending to show that at the end of the line run from the highway in the lane northwest twenty and a half rods, a

stake was driven by the parties in the center of the lane; and, if the jury believed the evidence, would require them to substitute the stake for the "fence near the shed," clearly designated in the deed as the monument. And to illustrate the rule contended for by the defendant more clearly, if the parties to a conveyance, before making the deed, set up a stake as a corner, and in the deed a marked tree is designated as the corner, it would require the substitution, by parol evidence, of the stake for the tree clearly designated by the deed, though they may be rods apart. We do not understand that the rule goes to this extent.

It is only where there are two or more monuments upon the face of the earth, each of which answers to the call of the deed, that proof of the one erected by the parties will govern; or where the parties run a line as of a certain course and distance, and then make a deed calling for a line of the same course and distance, intending it as the line run, or where the deed conveys a part of a lot by a line which shall embrace a certain quantity, and the parties have run and marked the line as embracing the quantity called for, and in cases similar in principle, that the running and marking of the line will be conclusive, although it may be found in fact to be of a different course and length, or embrace more land, than the deed calls for. The clear and unambiguous calls of a deed cannot be set aside and different ones substituted in their place by parol proof of the acts of the parties, either before or after the deed is made. *Emery* v. *Fowler*, 38 Maine, 175. *Webster* v. *Emery*, 42 Maine, 204. *Madden* v. *Tucker*, 46 Maine, 367. *Knowles* v. *Toothaker*, 58 Maine, 172.

The seventh request is even more objectionable, as it does not embrace the element that the description in the deed was intended to embrace the land included within the lines run and marked by the parties.

We think the charge of the judge on this point was full, clear and correct, and stated the rule as strongly in favor of the defendant as he was entitled to have it.

The next exception is to the charge of the judge on the question whether the defendant was estopped to deny the location of the line as claimed by the plaintiff, by reason of his acts and

silence in regard to its location prior to the taking of her deed by the plaintiff.

The counsel for the defendant admit that the rule given to the jury by the judge is correct as a general proposition, and the only ground of exception pointed out is that the instruction did not require the jury to find that, at the time of the declarations and acts of the defendant relied on by the plaintiff, the defendant knew where the true dividing line was. Without examining the law upon the question involved, it is sufficient to say that the defendant was a witness and did not claim that he did not know, at the time, where the line in fact was; but on the contrary, he testified that it was pointed out to him, and that he then claimed it to be where he now claims it. There was no question raised between the parties as to his knowledge of the location of the line, but the contention between them was whether it was pointed out to the plaintiff, or her husband who acted for her, to be where she, or the defendant, now claims it to be. The judge was not required to instruct the jury as to the law upon a question not in contention between the parties.

Another ground of exception is the charge of the judge on the question of the effect of a notice or claim made to the plaintiff's husband, as to the location of the line, before she took her deed. It was conceded that the plaintiff, her husband and the defendant were present on the premises the day before the deed was made, and the evidence tended to show that the plaintiff's husband acted for her during the survey of the lines. The evidence was conflicting as to whether a claim was then made to the husband that the line was where the defendant now claims it to be. But if such claim was made to him, the evidence tended to prove that it was not communicated to the plaintiff, and that she was ignorant of it. The judge instructed the jury, in substance, that, if the plaintiff's husband was there acting for her as her agent, by her authority, in running and fixing the lines, and a claim was made to him by the defendant, it would be the same as if made to her, unless the defendant "still knew that that notice was not given to the plaintiff herself, and he still permitted her to go on and complete the purchase without making his title known to her. That

is to say, if he . . knew . . that the agent was not acting faithfully, was permitting her to pay for land which she was not to take; if he knew that, and knew that she was personally relying upon it, it would not excuse him for not making known to her his title." We think this was a correct statement of the rule of law applicable to the case.

The defendant also excepts to the charge on the rule of damages. The clauses of the charge complained of are as follows: "If he went on there with good reason to feel that he had title, acting honestly, although he would be liable for actual damages, he would not be liable for punitive damages. But if he went on there and committed the trespass willfully, wantonly, or maliciously, you would be entitled to add to the actual damages just such amount as, in your sound discretion and good judgment, taking all the circumstances of the case, all the effects necessarily connected with the act, he ought to pay, and she ought to receive, as a punishment for his wrong doing." Again, "so that, if he went on there in this way, with a vindictive disposition, for the purpose of doing her harm wantonly, without regard to her rights, in a reckless manner, then she would be entitled to recover, as I said before, just that amount, in addition to actual damages, which in your sound discretion and good judgment you think, under all the circumstances of the case, he ought to pay as a punishment for his wrong doing."

It is claimed that this instruction was, in effect, directing the jury that they must give punitive damages if they found the trespass willful, wanton, or malicious; when the true rule is that the jury may, in their discretion, if they think proper in such case, award punitive damages.

We think the language used could not have been so understood by the jury. It must be presumed that the jury understood the words used in their common and popular meaning, and not in their strict legal sense. The common definition of the verb entitle, when used in such connection, is "to give a right or claim to."

In the first clause the words "be entitled" were used in the same sense as the words, "have a right," and thus read, the jury

were told that they had a right to add to the actual damages just such amount as, in their sound discretion and good judgment, under all the circumstances, the defendant ought to pay and the plaintiff ought to receive. This is certainly unobjectionable.

Giving the same meaning to the word "entitled" in the second clause the jury were told that, if they found the facts as stated by the judge the plaintiff had a right to recover just that amount in addition to actual damages which in their sound discretion and good judgment, they thought under all the circumstances of the case the defendant ought to pay as a punishment for his wrong doing. This, certainly, was not a direction to the jury that they must, as matter of law, give the plaintiff some amount as punitive damages, but taking the language together the whole matter of punitive damages was submitted to their sound discretion and good judgment.

It was unobjectionable to say to the jury that if they found the trespass willful, wanton, or malicious, the plaintiff had a right to recover, or receive such sum as punitive damages as they, in the exercise of a sound discretion, might see fit to award her. It is difficult to perceive what legal right a jury has to award to a plaintiff damages which he has no right to recover. The plaintiff's right to recover is dependent upon the discretion of the jury, and taking the charge on this question as a whole, that is its obvious meaning.

We see no cause to disturb the verdict on the ground that it is against the evidence, or that the damages are excessive.

Exceptions and motion overruled.

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

JOHN S. CUSHING *vs.* EDWARD A. FIELD.

Somerset. Opinion June 5, 1879.

Promissory note. Indorsement. Negotiability.

A note payable to order, on the face of which there is the following indorsement: "This note is subject to a contract made Nov. 13, 1874," is not negotiable; the assignee takes it subject to all the equities between the original parties.

An immaterial alteration will not avoid a contract.

ASSUMPSIT on note of following tenor:

"Skowhegan, Me., October 1, 1874. One year after date I promise to pay to the order of C. B. Mahan, four hundred and eighty-seven dollars, at the Granite National Bank, Augusta, Maine. Value received. (Signed) Edward A. Field."

There was an indorsement across the extreme end of the note, thus: "This note is subject to a contract made November 13, 1874." It was claimed by the defense that this indorsement, after it was made and the note had been delivered, was fraudulently altered so as to read: "This note is subject of contract," &c.

Plea, the general issue, with brief statement as follows: That the note, and defendant's signature thereto, were obtained by fraud and fraudulent representations and without consideration; of all which, the plaintiff had notice and knowledge, and that he was not a *bona fide* holder of the note. Other facts in the opinion. The verdict was for the plaintiff for $76.79; and the jury found specially that the indorsement aforementioned was changed by one Thompson, Mahan's agent, to whom the note with the indorsement on it was delivered by the defendant, by writing "of" over the word "to" after the note was signed.

The plaintiff moved to set aside the verdict and the special findings because they are against the evidence and instructions of the presiding justice, and because the damages are too small, and not in accordance with the instructions of the court or the evidence in the case, and also alleged exceptions.

The defendant, likewise, moved "the court now here, that judgment be entered for said defendant, notwithstanding the verdict

aforesaid, because the note declared upon in the writ, and the indorsement thereon, having been spread upon the records of this case and making a part thereof, and the jury having returned a general verdict for the plaintiff, and a special verdict finding that the writing indorsed on the back of said note when signed by the defendant, and delivered by him to one Ward S. Thompson, was as follows: "This note is subject to contract, dated Nov. 13, 1874;" and that said Thompson fraudulently altered the same so as to read, "This note is subject of contract, dated Nov. 13, 1874;" which said general and special verdict are also spread upon, and made part of, the record of this case; the said defendant therefore moves that judgment be entered for him, upon the whole record, notwithstanding said general verdict."

The defendant requested the court to instruct the jury that the indorsement on the back of the note of the words, "This note is subject of contract dated Nov. 13, 1874," made the note subject to, and dependent upon, the conditions and stipulations of that contract, and destroys the negotiability of the note, and this plaintiff cannot maintain an action on it.

That the plaintiff can in no event recover more than the amount due under the contract.

That if the jury should be satisfied from inspection of the writing and from all the evidence in the case that the original indorsement upon the note was, "This note is subject to contract of Nov. 13, 1874," such a note would be subject to the terms and conditions of said contract; that the negotiability of the note would thereby be destroyed, and the plaintiff could not maintain this action. That if they should be satisfied from such inspection and evidence that said indorsement was fraudulently altered by Ward S. Thompson, to whom said note was delivered by the defendant, by writing the word "of" over, and in place of, the word "to," thereby altering the legal effect and validity of such indorsement, such fraudulent alteration would render the note void, and the plaintiff could not recover on it.

The court declined to give the instructions requested, or any of them; and instructed the jury to disregard the writing upon the back of the note, in making up their general verdict.

But the question of such alteration by said Thompson, as matter of fact, was submitted by the court to the jury, and they returned a special verdict that the original indorsement was, "This note is subject to contract of Nov. 13, 1874," and was fraudulently altered by said Thompson so as to read, "This note is subject of contract of Nov. 13, 1874."

Baker & Folsom, for the plaintiff.

D. D. Stewart, for the defendant, cited 2 Pars. Bills and Notes, 534, 536, 539, 541, 542-545, 562. *Davlin* v. *Hill*, 11 Maine, 434. *Benedict* v. *Cowden*, 49 N. Y. 396. *Stocking* v. *Fairchild*, 5 Pick. 181. *Jones* v. *Fales*, 4 Mass. 352. *Hobart* v. *Dodge*, 10 Maine, 159. *Makepiece* v. *Harvard Coll.*, 10 Pick. 392. *Barnard* v. *Cushing*, 4 Met. 231, 232, 233. *Shaw* v. *Meth. Epis. Soc.*, 8 Met. 226. *Bank* v. *Blanchard*, 7 Allen, 33.

Fraudulent alteration by Mahan's agent, after the defendant signed the note, rendered it absolutely void. 2 Pars. on Bills and Notes, 571, 582. 2 Daniels Neg. Insts., § 1397. *Meyer* v. *Huneke*, 55 N. Y. 412. *Benedict* v. *Cowden*, *supra*. *Wait* v. *Pomeroy*, 20 Mich. 425. *Johnson* v. *Heagan*, 23 Maine, 329. 4 Amer. Rep. 375.

Upon the whole record, the defendant's motion should prevail, and judgment should be entered for him, *non obstante veredicto*. *Knell* v. *Williams*, 10 East. 431. 2 Pars. Bills and Notes, 562.

APPLETON C. J. This is an action on a promissory note of the following tenor:

"Skowhegan Maine, October, 1874. One year after date, I promise to pay to the order of C. B. Mahan, four hundred and eighty-seven dollars, at the Granite National Bank, Augusta, Maine. Value received. Edward A. Field."

The note was indorsed "C. B. Mahan, agent of the Granite Agricultural Works, Lebanon, N. H."

There was also an indorsement across the extreme edge of the note thus:

"This note is subject of a contract made November 13, 1874."

The note, though having a different date is shown to have been

executed on November 13, 1874, when the following contract was signed:

"Office of the Granite Agricultural Works, Proprietors of the Granite Mower and Reaper, Manufacturers and Dealers in Agricultural Implements, Iron and Wood-working Machinery.

Lebanon, N. H., Nov. 13, 1874.

Edward A. Field

Bought of Granite Agricultural Works,

1	No. 6 Mower and Reaper, 5 feet cut,		$140.00
1	No. 0 " " " 4 " 9 "		75.00
2	No. 1 " " " 4 " 6	75	150.00
1	No. 2 " " " 4		75.00
4	No. 1 Side Hill Plows,	11.75	47.00
			487.00

Received by note due Oct. 1st, 1875, payable at Granite National Bank.

"We hereby agree with the said Field that if he should not be able to sell all the above goods before July 30, 1875, and shall notify us of such fact by mail, or otherwise, at that time, we will then send a general agent to assist him in the sale of the same. If then neither our agent nor the said Field can succeed in selling all the above goods before August 1, 1875, then we will take them off his hands and pay him the same prices at which they are now billed to him, with all money paid out for railroad freight charges on same from our factory. We hereby reserve the right to send an agent to assist said Field at any time when we deem it necessary, in order to secure the sale of said goods, and will account to the said Field for all goods so disposed of by us. It is also further agreed that if the said Field shall succeed in selling all the said goods, either alone or with our aid before August 15, 1875, then the said Field shall pay his obligation given this day for the same, in good faith, and the same as if this agreement had not been given at all.

"The above goods shall be well housed and properly cared for at all times.

"All the above goods are warranted from flaws or other defects in manufacturing. Granite Agricultural Works, C. B. Mahan, Agent.

"I hereby accept the terms of the above agreement, and will accept the goods named above in good faith, and do the best I can

soon as sent, to sell the same and pay for them as above specified. Edward A. Field."

The Granite Agricultural Works were burned and a mowing machine valued at seventy-five dollars was the only article in the bill of goods, which the defendant ever received, and it was for this that the verdict was rendered.

The note, the memorandum upon it, and the contract referred to are to be construed together as part of one and the same transaction. *Davlin* v. *Hill*, 11 Maine, 434. *Johnson* v. *Heagan*, 23 Maine, 329. *Stocking* v. *Fairchild*, 5 Pick. 181. *Barnard* v. *Cushing*, 4 Met. 230.

The note in suit is not negotiable. In *Jones* v. *Fales*, 4 Mass. 245, a note was given in the usual form on which, at the bottom, was written [Foreign Bills] and these words were held to destroy its negotiability. In *Amer. Ex. Bank* v. *Blanchard*, 7 Allen, 333, the words "subject to the policy" were held to incorporate the policy into the contract for the payment of money and to make the latter dependent on the contingency that no claim would arise on the policy against the company before the expiration of the time when the promise would mature. As the promise was conditional and not absolute, the note was held not to be negotiable. In *Benedict* v. *Cowden*, 49 N. Y. 396, the facts were somewhat similar to those of the case at bar. The defendant gave his note at the bottom of which were these words, "The above note to be paid from the profits of machines when sold." This memorandum was held to be a substantive part of the note and that it qualified it the same as if it had been inserted in the body of the instrument, and consequently that the note was not negotiable. The assignee takes it subject to all the equities between the orginal parties.

It is claimed that the words on the note have been altered and that the indorsement across the end of the note was originally thus, "This note is subject of a contract made Nov. 13, 1874." The alteration relied on consists in changing "to" as it is claimed it was originally written to "of." It is difficult to imagine what motive anybody would have to make such a change. If made, it does not alter the relation of the parties. Whichever word is

used, the note is subject to the contract. The idea that such an alteration was fraudulently made is simply preposterous. The probability is much greater that it was written "of" and then "of" changed to "to," for the purpose of making the intention, if possible, more clear. But either way, nobody could be harmed.

But it is well settled that an immaterial alteration will not avoid a contract. In *Aldous* v. *Cornwell*, 3 (L. R.) Q. B. 573, it was held that the second resolution in Pigot's case, (11 Rep. at fol. 27 *a*) that "if the obligee himself alters the deed . . although it is in words not material, yet the deed is void," was not to be regarded as law. "No authority was cited," remarks Lush, J., "nor are we able to find any, in which the doctrine has been acted upon, and an instrument held to be avoided by an immaterial alteration." In *Langdon* v. *Paul*, 20 Vt. 217, where the plaintiff offered a sealed instrument in which he acknowledged he had "signed" certain notes, and the words "and executed" were interlined, it was held that the interlineation was immaterial. Whenever, by the alteration of a promissory note, neither the rights nor interests, duties nor obligations of either of the parties are in any manner changed, the alteration is immaterial. *Derby* v. *Thrall*, 44 Vt. 413. *Arnold* v. *Jones*, 2 R. I. 345. *Ames* v. *Colburn*, 11 Gray, 390. *Cole* v. *Hills*, 44 N. H. 227.

Defendant's exceptions sustained.
Plaintiff's motions and exceptions overruled.

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

WILLIAM C. CROSBY vs. ERASTUS REDMAN & another.

Penobscot. Opinion June 7, 1879.

Lien. Statute of frauds.

The plaintiff, in writing, permitted certain persons to cut and remove from his lands certain timber and bark, expressly retaining full and complete ownership and control of the same until the sum due for the stumpage, and any paper which may be given for it, should be paid. The stumpage not being paid according to the tenor of the permit, a negotiable note was given therefor, and a receipt given by the general owner wherein is expressly retained "his lien on the lumber as expressed in the permit:" *Held*, that the note did not discharge the lien.

Nor did the transaction constitute a bargain or delivery of personal property within the provisions of R. S., c. 111, § 5.

ON FACTS found by a referee, with agreement that the law court may order such judgment as may be proper upon the facts thus found.

TROVER for certain logs and lumber manufactured therefrom. Writ dated October 18, 1877. The facts fully appear in the opinion.

W. C. Crosby, pro se.

W. H. McCrillis & J. B. Redman, for the defendants, contended that the permit was an agreement by which the plaintiff sold, and Penny & Davis bought, personal property. The trees were a part of the realty, but, when severed from the land, vested in Penny & Davis.

The plaintiff had no seller's lien for the price. Penny & Davis bestowed their labor upon the chattels and changed the property of the plaintiff from trees into logs and bark, and therefore plaintiff had no seller's lien for the price. *Douglass* v. *Shumnay*, 13 Gray, 502. Notably, *Sillsbury* v. *McCoon*, 3 Coms. 380.

The plaintiff had, however, retained, by express stipulation in the permit, ownership of the lumber, until the stumpage (price) was paid, and until any note given for the price was paid.

That what the plaintiff in this receipt, etc., to Penny & Davis calls " my lien " appears, on reference to the permit, to be plaintiff's ownership of the lumber.

This ownership of the lumber is the plaintiff's title, upon which he claims that the defendants converted his lumber to their use.

The plaintiff cannot in face of the written agreement or permit, the receipt and settlement, and the note, deny that he bargained and sold the lumber, and took a note for it, with an agreement that the lumber should remain his property until the note was paid. Neither the transaction, nor the facts as reported by the referee, admit of any other interpretation.

The agreement that the lumber was to remain the property of the plaintiff until the note was paid was not made and signed as a part of the note, nor was the note recorded like mortgages of personal property, and hence by the statute of frauds, R. S., c. 111, § 5, the agreement that the property should remain plaintiff's until the note was paid, was void.

Therefore the plaintiff had no property in the lumber at the time of the alleged conversion by the defendants. *Boynton* v. *Libbey*, 62 Maine, 254.

APPLETON, C. J. On March 24, 1876, the plaintiff gave a permit to Joseph Penny, 2nd, and D. W. Davis "to cut and remove hemlock bark and logs, and spruce timber suitable for logs," from his land, reserving and retaining "full and complete ownership and control of all lumber which shall be cut and removed, . . wherever and however it may be situated, until all matters and things appertaining to or connected with this license shall be settled and adjusted, and the sum or sums due, or to become due, for the stumpage shall be fully paid, and any paper which may be given for it paid," etc.

The stumpage not being paid according to the tenor of the permit, a note was given for the amount due. At the same time the plaintiff gave the following receipt:

"Bangor, June 1, 1877.

Messrs. Penny & Davis to W. C. Crosby,	Dr.
"Stumpage of 921 spruce logs, 85,115 ft., cut by A. K. Hellier, on land in Clifton, under permit to you, $2.75 per M.,	$234.07
"Stumpage 27 pine logs, 3,400 ft., cut under permit to A. K. Hellier and Jos. Penny, 2nd,	10.20
	$244.27
"Interest for three months and grace,	3.79
	$248.06

"Settled by note of A. K. Hellier, with Joseph Penny, 2nd, and D. W. Davis sureties, payable in three months, at bank in Bangor, I retaining my lien on lumber as provided in permit. W. C. Crosby."

The note given for stumpage was not paid at maturity, and the question presented for determination is whether the plaintiff by taking it has discharged his lien on the lumber cut.

It has been settled in Massachusetts by a uniform series of decisions from *Thacher* v. *Dinsmore*, 5 Mass. 299, to *Lord* v. *Bigelow*, 124 Mass. 185, that a negotiable note, given to a creditor for the amount of a pre-existing contract, is *prima facie* to be deemed a payment or satisfaction of the debt. This presumption, however, may be rebutted and controlled by evidence that such was not the intention of the parties. In many of the states the taking of a promissory note is not to be regarded as payment, unless by special agreement to that effect. *Clark* v. *Draper*, 19 N. H. 423. In this state we have uniformly adhered to the rule adopted in Massachusetts. The acceptance of negotiable paper for a debt, and giving a receipt in discharge thereof, are an extinguishment of the original liability, unless it appears that the parties did not so intend. *Milliken* v. *Whitehouse*, 49 Maine, 527. *Ward* v. *Bourne*, 56 Maine, 161. *Paine* v. *Dwinel*, 53 Maine, 52.

The evidence is conclusive that the plaintiff did not take the note in suit in absolute payment of his stumpage. By the terms of the permit the lien for stumpage was to remain until any paper given for it should be paid. The receipt, too, which was given for the note unmistakably shows by the most express language that the plaintiff intended to retain his lien "as provided in permit." In such case the lien remains in full force, the notes being only payment conditionally. As remarked by Peters, J., in *Prentiss* v. *Garland*, 67 Maine, 345, "the notes were received to be a discharge of the lien when paid. If the notes had been paid, the stumpage would have been paid. Whenever the notes are paid the lien is gone." So here the lien continues in accordance with the terms of the permit as security for the note equally as for the stumpage before it was given.

Here is no bargain nor delivery of personal property within R. S., c. 111, § 5. There is only an agreement to discharge a lien upon certain property upon a condition thereafter to be performed. The principal value of the logs arose from the labor of the permittees. The right to cut and remove on certain conditions had been acquired from the owner of the real estate. There has been no subsequent sale. The note was not given for the purchase of logs, for none were then purchased. It was given to discharge a lien which the plaintiff had a right to impose, but it was given on condition, and the condition not having been performed, the original lien remains in full force.

Judgment for plaintiff.

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

E. PHILLIPS BLAKE, administrator, *vs.* MAINE CENTRAL RAILROAD COMPANY.

Cumberland. Opinion June 7, 1879.

Master and servant. Negligence. Liability. Demurrer. Declaration. Presumption.

It is settled law that a master is not liable to a servant for an injury resulting from the negligence of a fellow servant in the same general employment.

When there is one general object, in attaining which a servant is exposed to risk, if he is injured by the negligence of another servant while engaged in furthering the same object, he is not entitled to sue the master; and it does not matter that they were not employed in the same kind of work.

Nor is this rule altered by the fact that the servant guilty of such negligence is a servant of superior authority, whose lawful directions the other is bound to obey.

The master is liable for negligence in the selection of his servants, but he does not warrant their competency. To recover for an injury caused by the incompetency of a fellow servant, it must be shown that such incompetency was known, or should have been known to the master, if he had been in the exercise of ordinary diligence.

The negligence of the master in not selecting competent servants, being the basis of his liability, must be distinctly set forth in the declaration.

Proper qualifications, once possessed, may be presumed to continue, and the master may rely on that presumption until notice of a change.

On general demurrer to the declaration, errors, which might be fatal in a special demurrer, will be disregarded.

ON DEMURRER.

Writ dated October 5, 1876, and contained two counts, to each of which a separate general demurrer was filed and joined; but from the view taken by the court the first count only is stated; the material parts of which are as follows:

"And the defendants then and there employed the said deceased Silas H. Potter, in the capacity of a section man, to take charge of their said railroad track between said Waterville and West Waterville, and to keep the same in repair and suitable for the running of trains thereon, and the defendants provided said Potter with a hand-car to go over said portion of the track, which the defendants required the said Potter to go over at proper times and in a proper manner, and it was the duty of the defendants, in running trains over said railroad, to have due regard for the pres-

ervation of the life and limb of said Potter while he was in the discharge of his said duties; and while the said Potter, at said Waterville, on the eleventh day of December, A. D. 1875, and in the discharge of his duties as said section man in the employ of the defendants, was riding on a hand-car propelled by himself and others over said section of defendants' track, for the purpose of caring for the same, the defendants, although well knowing their duty and obligations, did, on said last named day, at said Waterville, negligently, carelessly, recklessly, willfully and wantonly, and in total disregard of law and of the safety of said Potter and others, lawfully upon said hand-car, by their engineer, Charles W. Low, and conductor Harding M. Dunlap, agents and servants of the defendants, employed by defendants in their business and entrusted by defendants with the care and control of one of their locomotive engines, then and there propelled by steam, and then and there attached to and drawing a paymaster's car from said Waterville through said West Waterville upon and over said section of said railway of defendants at said Waterville, then and there, without any notice or warning to said Potter, and without the actual knowledge of said Potter, and without any fault on the part of said Potter, dispatch and send with great velocity and violence over said railway track (upon that portion thereof which defendants had assigned to the care of said Potter, and upon which the said Potter was then and there lawfully moving upon his hand-car, and in the same direction which said hand-car was going, said locomotive engine, and car attached thereto, against and upon the hand-car upon which said Potter was lawfully riding as aforesaid), at about the hour of seven o'clock and fifteen minutes in the forenoon, then and there instantly crushing a hole in the skull of said Potter, and then and there inflicting upon him mortal and fatal wounds and injuries, whereof the said Potter thereafterwards, to wit: at said Waterville, at about the hour of nine o'clock in the forenoon of the last named day, died; and the plaintiff avers that said Potter was then and there in the exercise of due care and diligence, and that said injury, suffering and loss of life were the direct result of the negligence, carelessness and recklessness of the defendants, and of their gross carelessness and

negligence in appointing unsuitable employees to manage the running of said locomotive engine and car—and without the fault of the said Potter, or any other person on said hand-car at the said time with him."

It was agreed by the parties that the case should be submitted to the law court to determine the sufficiency of the declaration, reserving to each the right of amendment given by statute in cases in which demurrers are filed at the return term.

E. F. Pillsbury & J. H. Potter, *E. F. Webb*, for the plaintiff, contended that this case was not within the rule that one servant of a corporation cannot recover for an injury caused by the negligence of a fellow servant. The employees here were not in the same service, nor of the same grade. The conduct of defendants, as set out in the writ and admitted by the pleadings, is *prima facie* evidence of his negligence, and the declaration charges enough to hold him. *Gilman* v. *Eastern R. R. Co.*, 13 Allen, 433. *Phil. & Read. R. R. Co.*, v. *Derby*, 14 How. 483. *Fifield* v. *N. R. R. Co.*, 42 N. H. 225. *Railroad* v. *Lockwood*, 17 Wall. 357, 384. *Steamboat* v. *King*, 16 How. 469. *Hilton* v. *Middlesex*, 107 Mass. 108. *Doss* v. *Wisconsin*, *K. & T. R. R. Co.*, 59 Mo. 27.

J. H. Drummond & J. O. Winship, for the defendant corporation, contended, *inter alia*, that plaintiff's claim that this case is not within the general rule governing liability of servant for negligence of fellow servant, is groundless; the different kind of service is of no consequence, and so settled in *Lawler* v. *Androscoggin R. R. Co.*, 62 Maine, 466.

As to liability of defendants and in support of the demurrer, the following authorities were cited: *Gilman* v. *Eastern R. R. Co.*, 13 Allen, 433, 10 Allen, 233. *C. & O. Canal Co.* v. *Portland*, 56 Maine, 77. Wood Master and Serv't, § 416, and cases there cited. *Id.*, §§ 417–420. *Caldwell* v. *Brown*, 53 Penn. St. 453. *Weger* v. *Railroad*, *Id.* 460. *Davis* v. *D. & M. R. R Co.*, 20 Mich. 105, (4 Am. 361). *Harper* v. *Ind. R. R. Co.*, 47 Mo. 357. *Moss* v. *Pacif. R. R. Co.*, 49 *Id.* 167, (8 Am. 126). *Carle* v. *B. & P. R. R. Co.*, 43 Maine, 260. *Beaulieu* v. *Port-*

land Co., 48 Maine, 291. *Dow* v. *Kansas R. R. Co.*, 5 Am. 401. *Union Pacif.* v. *Mulliken*, 5 Am. 406. *Same* v. *Young*, 5 *Id.* 419. *Chapman* v. *Erie*, 7 Am. 357. 55 N. Y. 579. *Connor* v. *Railroad*, 8 *Id.* 357. *Proctor* v. *Railroad*, 9 Mo. 440. *Hardy* v. *Carolina R. R. Co.*, 14 *Id.* 309.

APPLETON, C. J. It has been settled by an almost unbroken series of decisions that a master is not liable to a servant for an injury resulting from the negligence of a fellow servant in the same general employment. The servant undertakes between himself and his master to run all the ordinary risks of the service, including that of the negligence of his fellow servants. *Beaulieu* v. *Portland Co.*, 48 Maine, 295. *Lawler* v. *Androscoggin R. R. Co.*, 62 Maine, 467. *Warner* v. *Erie Railway Co.*, 39 N. Y. 469. *Zeigler* v. *Day*, 123 Mass. 152.

When there is one general object, in attaining which a servant is exposed to risk, if he is injured by the negligence of another servant whilst engaged in furthering the same object, he is not entitled to sue the master; and it does not matter that they were not engaged in the same kind of work. *Charles* v. *Taylor*, 3 (L. R.) C. P. Div. 492. *Lovill* v. *Hawk*, 1 (L. R.) C. P. Div. 161. *Tunney* v. *Midland Railway Co.*, 1 (L. R.) C. P. Div. 296. *Seaver* v. *Boston & Maine R. R. Co.* 14 Gray, 467.

Nor is the rule that a master is not liable to a servant for the negligence of a fellow servant in their common employment altered by the fact that the servant guilty of such negligence is a servant of superior authority, whose lawful directions the other is bound to obey. *Fultham* v. *England*, 2 (L. R.) Q. B. 33. "A fellow servant I take to be any one who serves and is controlled by the same master," observes Dalrimple, J., in *McAndrew* v. *Burn*, 39 N. J. 115.

The master is liable for negligence in the selection of his servants, but he does not warrant their competency. To recover for an injury caused by the incompetency of a fellow servant, it must be shown that such incompetency was known, or should have been known to the master if he had been in the exercise of ordinary diligence. *Lawler* v. *Androscoggin R. R. Co.*, 62

Maine, 467. The master is not liable if he use ordinary care and prudence in the selection of competent workmen and materials. *Cotton* v. *Edwards*, 123 Mass. 484. *Cummings* v. *Grand Trunk Railway Co.*, 4 Cliff. (C. C. U. S.)

The negligence of the master in not selecting competent servants is the basis of his liability, and it must be distinctly set forth in the declaration. The master is under obligation to use due care and diligence in the selection and employment of his agents and servants, and for want of such care is responsible to all other servants for any damages that may thence arise. *Harper* v. *Ind. & St. Louis R. R. Co.*, 47 Mo. 56. *Moss* v. *Pacif. R. R. Co.*, 49 Mo. 127. The responsibility is not merely for the negligence of his servants, but for his own. While the duty of a master to his servant requires the exercise of great care in the employment of fellow servants, and the institution of due inquiry to ascertain their character and qualifications, when suitable and competent persons have been employed, the same degree of diligence is not required. Good character and proper qualifications once possessed may be presumed to continue, and the master may rely on that presumption until notice of a change. *Chapman* v. *Erie Company*, 55 N. Y. 579.

The declaration in the writ sets forth that the plaintiff's intestate was in the employ of the defendant corporation; that while so in their employ, and in the exercise of due care and diligence, he was severely injured, underwent great suffering and ultimately lost his life by reason of the careless and reckless acts of certain servants of the defendants employed in and about their business, and intrusted by them "with the care and conduct of one of their locomotive engines then and there propelled by steam," to which a car was attached, etc., "and that said injury, suffering and loss of life were the direct result of the negligence, carelessness and recklessness of the defendants, and of their gross carelessness and negligence in appointing unsuitable employees to manage the running of said locomotive engine and car," etc.

The demurrer to the declaration is general. Errors, which might be deemed fatal on a special demurrer, will be disregarded when the demurrer is general. The allegation that the injury,

suffering and loss of life of the plaintiff's intestate was the direct result of the negligence, carelessness and recklessness of the defendants, and their carelessness and negligence in appointing unsuitable employees by whom the engine was negligently managed, would seem to be a sufficient averment that the negligence of the defendants in not selecting competent servants was the cause of all the grievances for which remuneration is sought in this suit. As the demurrer admits all the facts set forth in the declaration, we think a good cause of action is disclosed in the first count. It becomes unnecessary, therefore, to particularly discuss the second count in the plaintiff's writ.

First count in the writ adjudged good.

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

CATHARINE HOAR, administratrix, *vs.* MAINE CENTRAL RAILROAD COMPANY.

Cumberland. Opinion June 7, 1879.

Common Carrier. Passengers. Hand-car. Foreman of section.

To entitle an administratrix to recover for an injury to her intestate, caused by being negligently run over by defendants' train, while he was riding between stations on a hand-car at the invitation of the foreman of a section, it must appear that the company was a common carrier of passengers by hand-cars.

No person becomes a passenger except by the consent, express or implied, of the carrier.

A foreman of a section acts without the scope of his authority by accepting a person for transportation on his hand-car.

ON REPORT.

CASE. The declaration is as follows:

"In a plea of the case, for that on the eleventh day of December, A. D. 1875, the defendants were the owners and operated a railroad known as the Maine Central Railroad, passing through the towns of Waterville and West Waterville, in the county of Kennebec, and were common carriers of passengers and persons

between said Waterville and West Waterville, and were then and there bound and required by law to carry and transport all passengers and other persons lawfully in and upon its said railroad carefully and safely, and with due regard for the preservation of their lives and limbs; and were required to employ careful, faithful and suitable persons for servants and employees, to run and manage their trains, locomotive engines and cars, and were bound to run and manage the same carefully and with due regard to the limbs of those legally in their cars.

"Yet the defendants, well knowing their duty and obligations, did, on said day last named, at said Waterville, through and by their foreman of a section, their agent and servant, Silas H. Potter, then and there employed in their business, and then and there entrusted by defendants with the care and control of one of its hand-cars, which was run on said day from said Waterville to West Waterville, upon and over said railroad, by said Potter and others, invite, request and authorize said deceased, John Hoar, then and there alive and in good health (and until a short time previous thereto having been for many years employed by defendants as section man), to ride with him, the said Potter, upon said hand-car from said Waterville to West Waterville, over and upon said railroad of defendants, which invitation and request said deceased then and there accepted, and in pursuance thereof got upon said hand-car with said Potter and one Jere Murphy, and then and there proceeded to ride from said Waterville to West Waterville over said railroad, all which was then and there well known to said defendants and to their servants, officers and agents.

"And the plaintiff avers that the defendants did then and there negligently, carelessly, wantonly, and in total disregard of law and of the safety of said Hoar and of their passengers and others lawfully traveling in and upon its cars, over and upon its road, at said Waterville, and of their lives and limbs, by other of defendants' servants and agents then and there entrusted by defendants with the control and management of a locomotive engine of the defendants, then and there propelled by steam, and attached to and drawing a paymaster's car, and those having control of said locomo-

tive engine and paymaster's car, then and there being employed by defendants in their business upon said railway, without any notice to said Hoar or to any person on said hand-car, and without the actual knowledge of said Hoar, dispatch and send with great violence and velocity on said railway, and over the same track upon which said hand-car was then and there lawfully passing, with the said Hoar and others then and there lawfully thereon, said locomotive engine being then and there attached to said paymaster's car, against and upon said hand-car upon which said Hoar was lawfully riding, and without warning or notice to said Hoar, then and there instantly (to wit: at about the hour of seven o'clock and twenty minutes A. M., on the 11th day of December, A. D. 1875,) fracturing the skull of said Hoar, and then and there inflicting upon him mortal and fatal wounds and injuries, whereof said Hoar thereafterwards, to wit: on the same day at about the hour of one o'clock P. M., after suffering great pain and torture and agony during said period of time, died.

"And the plaintiff avers that the said defendants did not employ careful, faithful and suitable persons for servants and employees to run and manage their locomotive engine, car and train, but put the same in charge of negligent, careless and heedless persons and employees, and said deceased was then and there in the exercise of due care and diligence, said injury, suffering and loss of life being the direct result of the negligence, carelessness and recklessness of defendants, and without the fault of said Hoar or of any other persons on said hand-car.

"Also for that the defendant corporation, before and at the time of committing the grievances hereinafter named, to wit: on the eleventh day of December, A. D. 1875, were the owners and operated a railroad running from Bangor to Portland, Maine, through the towns of Waterville and West Waterville, in the county of Kennebec; that the said John Hoar, then in full life, at the special instance, request and invitation of said defendants, got upon a hand-car of said defendants to ride from said Waterville to West Waterville, over and upon the defendants' said road, and the defendants then and there so received the said Hoar, to carry him from said Waterville to West Waterville, and then and

there it became the duty of the defendants to provide safe and sufficient transportation to said Hoar, between said Waterville and West Waterville, and to employ safe, careful and suitable employees to manage their locomotive engine, car and train with care, and with due regard for the life and limb of said Hoar and others lawfully on defendants' cars and railway, and to run their locomotive engines, cars and trains in a careful and safe manner. Yet the said defendant corporation, not regarding their duty in that behalf, did not provide safe and sufficient transportation from said Waterville to West Waterville for said Hoar, and did not employ safe, careful and suitable employees to manage their locomotive engines, cars and trains with care, and with due regard for the life and limb of said Hoar and others lawfully on defendants' cars and railway, and did not then and there run their locomotive engine, car and train in a careful manner, but on the contrary, the said defendant corporation employed such careless and heedless employees and servants to manage their said locomotive engine, car and train, and did manage and control them with such recklessness and negligence, that said locomotive engine, car and train were drawn with great speed and violence upon and against the car upon which the said Hoar was lawfully riding, as aforesaid, on said eleventh day of December, A. D. 1875, at a few minutes past seven o'clock in the forenoon, and without any notice to said Hoar, then and there wounding, bruising and crushing the said Hoar, by reason of which injuries the said Hoar thereafterwards, at about one o'clock of the same day, died, during which time the said Hoar underwent great pain of body and mind; and the plaintiff avers that the injuries so received by said Hoar were in consequence of the great negligence and carelessness of the defendant corporation as aforesaid, and without the fault of the said Hoar.

"Also for that the said defendants, on the eleventh day of December, A. D. 1875, were the owners and operators of a railroad extending from Bangor to Portland, in the state of Maine, and running through the towns of Waterville and West Waterville; and were bound by law to have due regard for the life and limb of such persons as were lawfully on their railroad and in

their cars, and were required to employ careful and suitable persons to run and manage their engines, cars and trains, and the said John Hoar, deceased, was then and there at said Waterville, lawfully and properly riding in a railway vehicle provided for that purpose by the defendants, their servants and agents, over and upon said defendants' railroad between said Waterville and West Waterville, and at the request of the defendants, their servants and agents.

"Yet the said defendants, well knowing their duty and legal obligations toward said Hoar, and all persons lawfully being or riding upon its cars or other vehicles, did not provide careful and suitable persons to run and manage their cars, engines and trains, but did on said eleventh day of December, A. D. 1875, at said Waterville, wantonly, willfully, unlawfully and with gross negligence, kill and slay said John Hoar (then in full life but since deceased), by inflicting then and there upon the body of said Hoar a mortal and fatal wound with a locomotive engine of the defendants, then and there propelled by steam, upon said railroad, which locomotive engine of the defendants the defendants propelled, hurled, projected and discharged over said railroad with great velocity and violence, directly against and upon the vehicle above named, upon which the said John Hoar was lawfully riding, then and there fractured the skull of the said Hoar, and then and there inflicting frightful, excruciating and intolerable agony, anguish, distress, pain and misery upon him, so that, after enduring the same for the space of about five hours, he died on said eleventh day of December, A. D. 1875, at said Waterville, and the plaintiff avers that said Hoar came to his death then and there as aforesaid, solely by the gross negligence and culpable carelessness of the defendants, as aforesaid, and while in the exercise of due care and diligence, and without any negligence or want of care on his part."

At the first term the defendants filed a separate demurrer to each count in the declaration, which was joined, both parties reserving the right of amendment. Thereupon the parties agreed to submit the case to the law court for their determination of the sufficiency of each count.

E. F. Webb, for the plaintiff, in addition to the cases cited in *Blake* v. *M. C. R. R. Co.*, cited *Steamboat New World* v. *King*, 6 How. 469. *Wilton* v. *Middlesex R. R. Co.*, 107 Mass. 108. *Doss* v. *Wis. & Kans. & Tex. R. R. Co.*, 59 Mo. 27. *Ramsden* v. *Boston & Albany R. R. Co.*, 104 Mass. 117.

J. H. Drummond, for the defendants.

APPLETON, C. J. The material and substantive allegations in the several counts in the plaintiff's writ are that the defendants are common carriers of passengers between Waterville and West Waterville; that as such carriers they are bound to carry all passengers and persons lawfully on their road carefully and safely over the same; that the plaintiff's intestate, being invited by one Potter, a foreman of a section in their employ and entrusted by them with the care and control of one of their hand-cars, to ride with him on said hand-car from Waterville to West Waterville, accepted the invitation; that the plaintiff's intestate while riding was run over by one of the defendants' engines to which a paymaster's car was attached and injured so that he died, and that this was through the negligence of the defendants and their servants, the deceased being in the exercise of due care.

To each count of the declaration the defendants filed a general demurrer.

I. The liability of a railroad company differs as to their duty to their servants and to passengers. They are liable to servants for injuries resulting from want of due care in the selection of fellow servants, but if duly selected, they do not guaranty against their negligence. *Blake* v. *M. C. R. R. Co.*, *ante*. Not so as to passengers, to whom they are responsible for injuries arising from their negligence or incapacity, irrespective of the question of more or less care in their selection. It is obvious that there is no defect in the declaration so far as it relates to the negligence of the defendants, if they are to be deemed common carriers by hand-cars.

II. The plaintiff's intestate was to be carried gratuitously. But that does not place him in a different position, so far as relates to his right to protection from neglect, from a pay passenger—if

he is to be regarded as a passenger to be carried by the defendants. *Phil. & Read. R. R. Co.* v. *Derby*, 14 How. (U. S.) 468. *Wilton* v. *Middlesex R. R. Co.*, 107 Mass. 108. Whar. Neg., § 355.

III. The plaintiff places her right to recover upon a neglect by the defendants of their duties to the intestate as common carriers. To impose upon the defendants the duties and responsibilities of common carriers, they must be shown to be such. The grave and important question, then, is whether the defendants, though common carriers of passengers along their road and in their cars for that purpose, are common carriers of passengers by their hand-cars used by their section men. Were the defendants chartered as common carriers save by their cars for passengers? Have they by their acts or conduct held out to the public, or authorized their agents to hold out to the public, that they were common carriers by their hand-cars? If they have not been chartered, and have not in any way held themselves out, as common carriers by hand-cars, then the duties and obligations resting upon them as carriers have not arisen.

If the defendants were common carriers in relation to the plaintiff's intestate, they would be bound to carry all who should apply. Were, then, the defendants bound to carry on their hand-cars any one asking to be so conveyed? Assuredly not.

In *Graham* v. *Toronto, Grey & Bruce Railway Co.*, 23 Up. Can. (C. P.) 514, the defendants agreed, with a contractor for the construction of their railway, to furnish a construction train for ballasting and laying the track for a portion of their road then under construction; the defendants to provide the conductor, engineer and fireman; the contractor furnishing the brakemen. On October 31, 1872, after work was over for the day and the train was returning to Owen Sound, where the plaintiff, one of the contractor's workmen, lived, the plaintiff, with the permission of the conductor but without the authority of the defendants, got on. Through the negligence of the person in charge of the train an accident happened, and the plaintiff was injured. "The fact," remarks Hagarty, C. J., "that the defendants' engine driver or conductor allowed him to get on the platform, does not alter my view of the case.

"I cannot distinguish it from the case of a cart sent by its owner under his servant's care to haul bricks or lumber for a house he is building. A workman, either with the driver's assent or without any objections from him, gets upon the cart. It breaks down, or by careless driving runs against another vehicle, or a lamp post, and the workman is injured. I cannot understand by what process of reasoning the owner can in such case be held to incur any liability to the person injured. Nor, in my opinion, would the fact that the owner was aware that the driver of his cart often let a friend or person doing work at his house drive in his cart, make any difference. . . It could never be, I think, in the reasonable expectation of these defendants that they were incurring any liability as carriers of passengers, or that they should provide against contingencies that might affect them in that character."

A similar question arose in *Sheerman* v. *Toronto, Grey & Bruce Railway Co.*, 34 Up. Can. (Q. B.) 451, where one of the workmen was being carried, without reward, on a gravel train, and was injured so that he died, it was held that the deceased was not lawfully on the cars with the consent of the defendants, and a nonsuit was directed. "The workmen," observes Wilson, J., "were not lawfully on the cars. They were not passengers being carried by the defendants. They were acting on their own risk, not at the risk of the defendants, and however unfortunate the disaster may have been, it is only right the legal responsibility should fall on those who ought to bear it, and not upon those upon whom it does not rest." In this case "it appeared that it was not necessary the defendants should carry the men to and from their work, and that they never agreed to do more than to provide cars for carrying ballasting and materials for track laying."

The defendants not being common carriers, so far as relates to their liability to the plaintiff's intestate, the declaration not disclosing facts which show such liability, must be adjudged bad. *Eaton* v. *Delaware, L. & W. R. R. Co.*, 57 N. Y. 383. *Union Pacif. R. R. Co.* v. *Nichols*, 8 Kan. 505. In *Dunn* v. *Grand Trunk R. R. Co.*, 58 Maine, 187, the plaintiff was riding in a

saloon car atttached to a freight train, and paid the customary fare for conveyance in a passenger car.

IV. A master is bound by the acts of his servant in the course of his employment, but not by those obviously and utterly outside of the scope of such employment. If not common carriers, a section foreman with his hand-car has no right to impose upon the defendants the onerous responsibilities arising from that relation. He has no right to accept passengers for transportation and bind the defendants for their safe carriage, and every man may safely be presumed to know thus much.

If the risk is much greater by this mode of conveyance, the plaintiff's intestate by adopting it assumed the extra risks arising therefrom, and must be held to abide the unfortunate consequences.

No one becomes a passenger except by the consent, express or implied, of the carrier. There is no allegation of express consent by the defendants, nor of anything from which consent can be implied that the plaintiff's intestate should be carried at their risk by this unusual mode of conveyance.

Declaration bad.

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

RALPH C. JOHNSON & others, executors, *vs.* PHILO HERSEY & others, and GEORGE G. PIERCE & others, trustees.

Waldo. Opinion June 9, 1879.

Partnership. Trustee process. Trust.

Where one partner, without the knowledge or consent of his copartner, pays his own note to a private creditor out of the funds of the insolvent firm, such creditor knowing that the money belonged to the firm, the funds so received will be regarded as held by the private creditor in trust for the benefit of the firm, and may be attached in his hands upon a trustee process instituted against the firm by one of its creditors.

ON REPORT.

ASSUMPSIT on a promissory note of the following tenor:

"For value received we promise to pay R. C. Johnson or order two thousand dollars one year from date, with interest semi-annually at six per cent as it accrues. (Signed) Hersey & Woodward, prin. H. H. Johnson, surety. Belfast, Dec. 7, 1869."

Writ dated March 15, 1878, and was served same day on Belfast National Bank, trustee.

The facts sufficiently appear in the opinion.

The question of the liability of the trustee was submitted to the law court upon so much of the disclosure, allegations and testimony as is legally admissible, and judgment to be rendered in accordance with the law.

W. H. Fogler, for the plaintiffs.

J. Williamson, for the trustee, among other things, said:

I. The bank cannot be charged under general provisions of R. S., c. 86, because ordinary trustee process will not lie unless the trustee owes the principal defendant money, or is otherwise liable to be sued by him. *Skowhegan Bank* v. *Farrar*, 46 Maine, 293.

II. And no suit could be here brought by the principal defendant against the bank. *Farley* v. *Lovell*, 103 Mass. 387. *Homer* v. *Wood*, 11 Cush. 62. *Tay* v. *Ladd*, 15 Gray, 296. *Jones* v. *Yates*, 9 B. & C. 532. *Wallace* v. *Kelsall*, 9 M. & W. 274. *Gordon* v. *Ellis*, 7 M. & Sel. 607.

III. Nor could Hersey, one of the principal defendants, sue alone. *Wells* v. *Mitchell*, 1 Ire. Law. 484.

IV. Nor can the bank be charged under the special provisions of R. S., c. 86, § 63; for there was no actual fraud on the creditors of the firm. No fraud in law is to be inferred from the simple fact of taking payment from firm funds. *Wallace* v. *Kelsall*, 7 M. & W. 272. No constructive fraud. The bank must have had knowledge of the design of the principal. *Blodgett* v. Chaplin, 48 Maine, 322.

V. The bank had a right to receive payment made to it on account of Woodward's debt. *Ridley* v. *Taylor*, 13 East. 175.

VI. Hersey had means of knowing that the transaction had taken place. All the circumstances show a precedent authority or subsequent ratification on the part of Hersey. Direct evidence is not required. *Sweetsir* v. *French*, 2 Cush. 309. *Ex parte Berbonus*, 8 Ves. Jr. 540. *Kendall* v. *Wood*, (L. R.) 6 Ex. 243. *Smith* v. *Hill*, 45 Vt. 90. *Swan* v. *Stedman*, 4 Met. 848. *Butler* v. *Stocking*, 8 N. Y. 408. *Carter* v. *Beaman*, 6 Jones (Law), 44.

VII. It falls within the powers of a partner to pay his private debt by setting it off against the debt due his firm. *Ex parte Kirby*, Buck's R. on Banks, § 511. *Henderson* v. *Weld*, 2 Camp. N. P. R. 561. And he may make an executory contract to this effect. *Perry* v. *Butt*, 14 Ga. 699. *Greeley* v. *Wyeth*, 10 N. H. 15. *Hills* v. *Coe*, 4 McCord (Law), 136. *Tay* v. *Ladd*, 15 Gray, 296.

He can equally well pay it in money of the firm. A partner has the power of disposing of the assets of the firm beyond a mere agency. Pars. Part. (3 ed.) 170, 171.

This is not the attempt to bind all the partners by an executory contract made by one partner, but an executed payment of money. *Dob* v. *Halsey*, 16 Johns. 34. It is not the case of a partner trying to fix a contract upon a partner, but of a partner trying to impeach a payment by a fellow partner. *Homer* v. *Wood*, 11 Cush. 62.

VIII. *Rogers* v. *Batchelor*, 12 Pet. 221, is criticised at great length in *Locke* v. *Lewis*, 124 Mass. 1. *Caldwell* v. *Scott*, 54

N. H. 414, is decided on the weight of New Hampshire authorities.

Counsel also cited *Ex parte Yonge*, 3 Ves. & B. 36. Colly. Part. (5 Am ed.), § 182. *Anthony* v. *Wheaton*, 7 R. I. 490. *Carter* v. *Beaman*, 6 Jones (Law), 44. *Duncan* v. *Loundes*, 3 Camp. 478. *Halls* v. *Kirkpatrick*, 4 McCord, 136.

PETERS, J. The bank (alleged trustee) held a note against Woodward, one of the firm of Hersey & Woodward. The firm was insolvent. Without the knowledge or consent of his partner, Woodward drew drafts upon the copartnership funds, and passed them to the bank in payment of his individual note. The bank knew that it was a misapplication of the funds of the firm, as the papers were, *per se*, a perfect notice of the fact. A creditor of the firm has sued the partners upon a firm debt, and trusteed the bank for the sums thus paid on Woodward's private note. Can the attachment be sustained? We think it can.

One side of the question is, that the creditors can have no legal remedy because the partnership has none; that one partner has the power to transfer the partnership property without the consent of the copartners; that by his act the title passes out of the firm and vests in the transferee, when no fraud is intended, and can be reached by creditors or partners only in equity; that there can be no legal remedy.

The other side of the question is, that the transfer of partnership property by one partner, without the consent of his copartners, to pay a private debt of his own, is a fraud upon his copartners, unless the firm has enough to pay all its debts and liabilities; that, if the title in any way passes to the transferee, he holds it in trust for the benefit of the partners and not for himself; and that partnership creditors can avail themselves of this right of the partnership, in an action at law, by an attachment of the property. We hold this position to be the just and correct one.

Judge Story declares that the private creditor can have no better title to the funds than the partner himself had, and pronounces a creditor's acceptance of them as an illegal conversion of the funds of the firm. *Rogers* v. *Batchelor*, 12 Pet. 221. *Hoxie* v.

Carr, 1 Sumn. (C.C.) 181. *Kelly* v. *Greenleaf*, 3 Story, 93. He denominates the partners as having a lien upon the property for firm debts, and creditors of the firm as having a *quasi* lien thereon. Story Part. § 360. Lord Eldon called the partner's right an equity amounting to something like lien. *Ex parte Williams*, 11 Ves. 5. Chief Justice Gibson describes the right thus: "The principle which enables partners to pledge to each other the joint effects as a fund for the payment of the joint debts has introduced a preference in favor of joint creditors." *Doner* v. *Stauffer*, 1 Penn. 198. Chancellor Kent says: "Creditors have no lien upon the partnership effects for their debts. Their equity is the equity of the partners operating to the payment of the partnership debts." 3 Kent Com. 65. It is commonly said in the cases that the preference of the creditors is "worked out" through the equity of the partners. The lien is waived if all the partners assent to or join in the sale of partnership goods to pay the debt of one partner. Kent Com. *supra*. Chancellor Kent has been supposed to favor the theory of a creditor's lien more strongly than some other jurists have, and the New York court, in a comparatively late case (*Menagh* v. *Whitwell*, 52 N. Y. 165), say: "The better opinion is, at this time, in accord with the views of Chancellor Kent, that the partnership debts have in equity an inherent priority of claim to be discharged from the joint property."

The principle seems to amount to this, that the partners hold the lien for themselves and creditors. It is theirs for the benefit of their creditors. They can not benefit themselves thereby, excepting as they confer benefit upon their creditors. It is principally through proceedings for the benefit of creditors that the lien is ever maintained and upheld. The lien or equity of the partners, until waived by the partners, holds the property in a condition where it can be taken by creditors. As soon as an attachment of it is made, the lien of the partners by operation of law, so to speak, becomes transferred to the creditor, putting it beyond the further control of the firm.

What need of a resort to equity in such a matter as this? The legal remedy is more expeditious and efficacious, simple and satis-

factory. You may go into equity, but why be compelled to, when a proper result can be "worked out" in a more direct and cheaper way. No other creditor complains, requiring a distribution of the fund. The objection is, that it is assuming equity powers in a court of law. But a good deal of equitable remedy in partnership matters has already been imported into the law. In this respect the law in this state has been advancing, as late cases will show. *Hacker* v. *Johnson*, 66 Maine, 21. *Parker* v. *Wright*, *Id.* 393. Joint creditors have the primary claim upon the joint fund, in the distribution of the assets of partners, when in bankruptcy or insolvency. 3 Kent Com. 64. So in cases of general assignments for the benefit of creditors. *Wilson* v. *Robertson*, 21 N. Y. 587. *Merrill* v. *Wilson*, 29 Maine, 58. *Howe* v. *Lawrence*, 9 Cush. 553.

It is rather strange that a question of such practical interest and importance as this is should not have been discussed in any reported case in this state. There is not much authority upon the question to be found elsewhere. The case of *Caldwell* v. *Scott*, 54 N. H. 414, is, however, in point, and coincides with our view. *Arnold* v. *Brown*, 24 Pick. 89, indirectly decides the question, we think, the same way. *Locke* v. *Lewis*, by implication, admits the principle. (124 Mass. 1). Other cases are more or less to the same effect. *Williams* v. *Brimhall*, 13 Gray, 462. *Tay* v. *Ladd*, 15 Gray, 296. *Commercial Bank* v. *Wilkins*, 9 Maine, 28. *Yale* v. *Yale*, 13 Conn. 185. *Wells* v. *March*, 30 N. Y. 344. *French* v. *Lovejoy*, 12 N. H. 458. *Homer* v. *Wood*, 11 Cush. 62. In the case last cited it was held that partners could not jointly sue to recover a debt which one of the partners had released in payment of his own individual indebtedness. The decision is upon the ground that one of the plaintiffs was equally with the defendant guilty of the fraud.

In the case at bar no such difficulty about the joinder of parties is encountered. We also avoid the question whether it makes a difference that the private creditor does not know that he is receiving partnership funds. Upon this point the authorities disagree. *Locke* v. *Lewis*, *supra*. *Rogers* v. *Batchelor*, *supra*. *Ferson* v. *Monroe*, 21 N. H. 221. *Geery* v. *Cockroft*, 33 Sup.

Ct. (N. Y.) 146, and cases cited. Another question has been mooted, not arising here, and that is whether an action may be sustained in the name of one partner alone where the copartner and another person have jointly committed a fraud upon the partnership. It has been decided that it cannot be. *Wells* v. *Mitchell*, 1 Ire. (L. R.) 484. *Miller* v. *Price*, 20 Wis. 117. And, under some circumstances, that it can. *Calkins* v. *Smith*, 48 N. Y. 614.

No other points raised can change the result.

Trustees charged for $500.

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

GEORGE W. LARRABEE, in equity, *vs.* SEWARD P. GRANT.

Cumberland. Opinion June 19, 1879.

Chancery. Practice. Verdict.

In a court of chancery, a verdict can only be set aside by the chancellor. The common law judge has no such power. Under our system, the law court, and not a single judge, has the power of a chancellor. Decisions in equity, except in minor matters arising under the rules, are to be made by the law court.

A judge, sitting at law to try issues in a case in equity, may send up his minutes of the evidence and certify his opinion of the correctness and justice of the verdict, but his opinion will not be conclusive.

A new trial may be granted in a court in equity when it would not be in a court of law; and *vice versa*.

In equity, a finding is not set aside for misrulings of the judge, nor for the improper reception or rejection of evidence, if upon the whole facts and circumstances the verdict is satisfactory; nor will the court abide by a verdict, though legally sustainable, unless it be satisfactory.

The general rule in chancery is, that, inasmuch as the responsibility of the decision upon the whole case rests upon the court, the findings by a jury must be such as shall satisfy the conscience of the court to found a decree upon, or they will set it aside.

There must be, however, some weighty or material reason why the verdict does not satisfy the court. The objection should not be arbitrary or capricious.

ON REPORT.

BILL IN EQUITY, which in substance alleges that in March, 1866,

in pursuance of a previous agreement between the parties, the defendant, at the request of the complainant, purchased of one Wilson a lot of land and buildings thereon for $950, paying $400 down (which was furnished by the complainant) and gave his note for $550, secured by a mortgage on the premises; that the same was done for the benefit of the complainant and as a loan to him; that the defendant then agreed to convey the premises to the complainant whenever he should pay the same and interest; that it was agreed that the defendant should hold the premises as security for said loan; that the complainant entered into possession thereof, paid the taxes thereon, and has held the same without molestation, and has paid all of said loan except $200; that in November, 1876, the defendant ordered the complainant to leave the premises; and that the complainant has tendered the amount due.

Defendant filed his answer, denying the trust, among other things, which need not be reported. The complainant filed his replication, and requested certain issues of fact to be framed and tried by the jury.

At the April term, 1877, the following issues were framed and tried, the jury finding for the complainant in each:

I. Was it or was it not agreed by and between the complainant and defendant, that upon the application by the complainant to the defendant, he (the defendant) should purchase the premises described in the complainant's bill of the owner thereof (one Christopher Wilson), for the benefit of the complainant, as his agent, and in trust for him, as alleged in his bill of complaint?

II. Did or did not the complainant advance the sum of three hundred dollars cash, and one hundred, also, by a horse, to the defendant, as and for part payment for said premises, and as the first and advance payment therefor, as alleged in said bill of complaint?

III. Did or did not the defendant pay the balance of the consideration for said premises, to wit: the sum of five hundred and fifty dollars, by giving his promissory note or notes therefor, and as a loan to the complainant, and take a deed of said premises to himself, to hold as security for such loan, as alleged in said bill of complaint?

IV. Did or did not the said Grant agree with the complainant to convey to him said premises, upon the payment of said balance (of $550) by the complainant to said defendant, with interest thereon, as alleged in said bill of complaint?

V. Did or did not said Larrabee pay to the said Grant, from March 13, 1866, to March 13, 1867, the sum of one hundred and fifty dollars, and interest thereon, in payment of one of the notes given by said Grant to Christopher Wilson, as in part payment of the balance of the consideration to be paid said Wilson for said premises, as alleged in the plaintiff's bill of complaint?

VI. Did or did not the plaintiff pay to said Grant, from March 13, 1867, to June 1, 1872, the further sum of three hundred and forty-six dollars and eighteen cents, or any other sum, and, if any other, what sum as in part payment of said loan and interest thereon, as the plaintiff hath alleged in said bill of complaint?

VII. Did or did not the defendant purchase the so called Sawyer lots for the benefit of the plaintiff, to be accounted for in the adjustment of the transaction involved in plaintiff's bill of complant?

Thereupon the defendant moved to set aside the findings as being against law and the weight of evidence. The motion was heard and overruled by the presiding justice.

A motion was also filed to set aside the findings upon newly discovered evidence reported.

N. & H. B. Cleaves, for the complainant.

Clarence Hale, for the defendant.

PETERS, J. Certain issues of fact, arising under the pleadings in this bill in equity, were framed for and presented to a jury, the decision of all of which was in favor of the complainant. The evidence is sent to us, on a report of the presiding justice, upon a motion of the respondent for a new trial. Newly discovered evidence is also presented upon an additional motion to set aside the verdict. A motion to the same effect was first made to the justice presiding and overruled.

The complainant makes the point that the action of the single judge was final on the respondent. *Averill* v. *Rooney*, 59 Maine,

580, decides that such would be the case in an action at law. We think it otherwise in the case of a bill in equity. The justice who presided at the trial of the issues submitted was sitting in a court of law, and the trial was there had upon legal principles and rules of evidence. The common law judge has no power to set the verdict aside. In a court of chancery that must be done by the chancellor. Under our system, the whole court, and not a single judge, has the power of a chancellor. Decisions in equity, except in minor matters, arising under the rules, are to be made by the whole court. A new trial may be granted in a court in equity when it would not be in a court at law, and *vice versa*. The one court proceeds on somewhat different grounds from the other, or may do so. For instance: In equity, a finding is not set aside for misrulings by the judge, nor for the improper reception or rejection of testimony, if the chancellor (here the full court) decides upon the whole facts and circumstances that the verdict is satisfactory, nor will the chancellor abide by the verdict, though legally sustainable, unless it is satisfactory. A judge sitting at law may send his minutes of the evidence to us, and certify his opinion of the correctness and justice of the verdict, and, under our system of the judges sitting upon both the law and equity side of the court, it would probably be a rare occurrence that his advice would not be followed, but in chancery practice it would not be conclusive. We do not understand that the learned judge who tried these issues intended by his action to express his satisfaction or dissatisfaction of the verdict rendered, but that his denial of the motion submitted to him merely expressed an unwillingness upon his part to indicate an opinion one way or the other, in view of the necessity that required the case to go before the judges in full court.

The motion seeks to set aside the findings of the jury, because against evidence and the weight of evidence. That the verdict is contrary to the weight of evidence, may be sufficient to set it aside. The point in the case at bar is in respect to how nicely the evidence should be balanced and weighed in order to determine whether the verdict be contrary to the weight of evidence or not. Undoubtedly a court in equity can exercise more discretion-

ary power in such a case than a court at law can. At law, a court does not set aside a verdict as being merely against the weight of evidence, unless it is so clearly so that the jury must be presumed to have been actuated by some improper influence, or by bias and prejudice, or to have committed some evident mistake. It is not enough to disturb the verdict that the court would have arrived at a different conclusion. But the general rule in equity is everywhere declared to be, that the findings by a jury must be such as shall satisfy the conscience of the court to found a decree upon, or they shall be set aside. No doubt there should be some material or weighty reason why the verdict does not satisfy the court. The objection to it should not be arbitrary merely and capricious. The conscience of the court should be satisfied unless such reason exists. The judgment in *Clark* v. *First Cong. Society, in Keene*, 45 N. H. 331, is a discussion of the merits of this question, as well as a learned review of the cases touching it, and the New Hampshire court concludes that, under their system, the rules as to new trials should be essentially the same in equity as at law. This view finds some support in a few other cases in this country. But the cases abound in the books which decide that a more liberal discretion is exercised in granting new trials by courts in chancery than by courts at law. The reason of the distinction, as commonly given, is well stated in *Patterson* v. *Ackerson*, 1 Edw. Ch. R. 102, where it is said: "This arises from the consideration that, after all, the responsibility of the decision rests upon the judge in equity; the issue being ancillary to his decision for the purpose of informing his conscience as to doubtful facts; and therefore his conscience must be satisfied before he can proceed to base a decree upon the finding of a jury." It is palpable, we think, that the reservation to the court of a larger discretion in cases in equity than in cases at law is necessary, in view of the nature of the questions that fall within the equitable jurisdiction. The rules and principles indicated herein are more fully, but substantially in the same way, stated in Daniell's Ch. Pr. & Pl., under the head of Feigned Issues; and in Barbour's Ch. Pr., Book 2, c. 3, as well as by text writers generally, and concurred in by many cases, a few of which are

referred to. *Warden of St. Pauls* v. *Morris*, 9 Ves. 155. *Goodyear* v. *Rubber Co.*, 2 Cliff. 365. *Basey* v. *Gallagher*, 20 Wall. 680. *Garsed* v. *Beale*, 92 U. S. 684. *Johnson* v. *Harmon*, 94 U. S. 378. *Apthorp* v. *Comstock*, 2 Paige, 482.

The respondent contends that the verdict should be entirely disregarded by the court and the case be decided without the aid of a jury upon the bill, answer and proof. It appears from what has already been said, and it is established by the authorities above and below cited, that the court has the power to do so. The verdict advises but does not control the opinion of the court of chancery. It is a matter of evidence, designed to aid the chancellor, but he is not concluded by it. It is, however, the general (not universal) rule to either accept the verdict as binding or set it aside. It would be an extreme case to authorize a contrary proceeding. This court has the power, in an action of law, to set aside as many verdicts as may be rendered, when unsupported by the evidence, and certainly the power lies in the court, sitting in equity, to take to itself as a last resort the control and final decision of a case in equity where the furtherance of justice and the rights of parties plainly demand it, notwithstanding the result reached may amount to an overruling of the findings in the same case by a jury. More especially is this so, since, under our statutory provision allowing a jury trial in cases generally, many questions may be submitted to a jury which could be as well or better appreciated and determined by the court. For constitutional reasons, the Massachusetts court is debarred from the exercise of such a power, (*Franklin* v. *Green*, 2 Allen, 519,) and a few other states for one or another reason concur in the same view. But the great current of authority is the other way. Professor Greenleaf declares the rule thus: "According to the doctrine of equity, the facts are found by the chancellor, and, of course, all the subordinate means of ascertaining them, and verdicts among the rest, are used only for his information, and are not imperatively to govern and control his judgment." 3 Greenl. Ev., §§ 261, 337. We do not, however, fully concur with the learned author that this right of the chancellor may be regarded as taken away in a state where the statute law allows a jury trial in cases of equity as a matter of

right. *Id.*, § 262. While for such reason the power might be more sparingly and cautiously used, we are impressed with the belief that extreme cases would be more likely to arise, under the operation of the law, requiring such a discretionary power on the part of the court to be exercised. Story Eq. Jur., § 1479. *Silsby* v. *Foote*, 20 How. 385. See authorities cited *supra*.

The same rule that applies to findings of fact by a jury was observed when the chancellor in the English practice called upon the law judges for their opinion upon a question of law. The chancellor might regard or disregard the opinion according as he was convinced by it or not. In the case of *Howard* v. *Duke of Norfolk*, 3 Chan. Cas. 28, Lord Nottingham said: "As to the learned judges that assisted me at the hearing, the decree is mine, and the oath that the decree is made upon is mine; theirs is but learned advice and opinion. . . It is my decree; I must be saved by my own faith, and must not decree against my own conscience and reason." Much interesting matter touching this relation of chancellor with the common law judges and courts is found in Ram's Leg. Judg. (Townshend ed.) 371.

Upon the whole case, including the newly discovered evidence, after careful examination and consideration, we do not feel clear that the verdict should stand, and would be better satisfied to have the issues again submitted to a jury. We see no occasion to state the grounds of objection to the verdict in detail. We think the points of dispute may be seen and appreciated better at a second trial than they were before. The evidence will be more full and complete.

New trial granted.

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

JAMES WRIGHT *vs.* OREN ANDREWS & another.

Somerset. Opinion June 25, 1879.

Indorsers. Notice. Liability.

Sureties on a promissory note made in Massachusetts, and while the statute there was in force, approved June 30, 1874, are entitled to notice of non-payment thereof, when, and only when, indorsers would be.

Having been fully secured by a pledge of money for their liability on the note, and money having been appropriated to the payment thereof, and the sureties authorized to use it for that purpose, they were not entitled to notice of non-payment.

ASSUMPSIT by the plaintiff as indorsee against the defendants, as makers of a promissory note, of which the following is a copy:

"$800.00. Lawrence, Mass., Aug. 28, 1877. Thirty days after date I promise to pay to the order of Ellen E. McIntire eight hundred dollars, payable at ———, value received. Rufus Andrews."

Indorsed in blank "O. Andrews & Co.," on one end of the note. On the other end "Ellen E. McIntire." $200.00 was indorsed on the note under date of August 28, 1877.

The writ is dated October 8, 1877, and contains a money count.

The action was originally brought against Rufus Andrews, Oren Andrews and Sumner Andrews, all of whom live in Lawrence, Mass., and property of the two latter was attached in this state. Subsequently the plaintiff discontinued as to Rufus Andrews. The plaintiff, in 1877 and 1878, resided in Skowhegan, in this county.

After the testimony was out the case was withdrawn from the jury by consent and submitted to the presiding judge, with right to except. The following facts were either admitted or found by him to exist: At the time of the making of the above mentioned note the original parties to it all lived in Lawrence, Mass., and have ever since continued to reside there. The note was made there. The present defendants were, and now are, a partnership doing business as grocers there. Said note, before being passed to the payee, was signed by Rufus Andrews and indorsed "O. Andrews & Co." by Sumner Andrews, and was then delivered to

the payee. No question was made as to the liability of the partnership, if either partner was liable on the note. The consideration thereof was the sale and transfer by the payee to Rufus Andrews of the furniture, etc., of a boarding-house previously owned by her. The defendants were to become the sureties for their brother, Rufus Andrews, for the purchase money for which the note was given, and the name of the firm was indorsed accordingly. It was admitted that there was a valid consideration for the note.

It was proved that a few days before the note fell due it was brought by the payee to Skowhegan and indorsed and delivered by her to her father, the plaintiff, he paying her nothing for it. The two hundred dollars indorsed under date of August 28, 1877, was so indorsed at that time in pursuance of an agreement between the payee and these defendants, and covered the amount of a bill which they had against the payee for groceries, and they gave her a receipt therefor in full, for groceries furnished to date, and one of the defendants testified that they had no claim against her except for groceries. The defense relied on was that no demand for payment was made upon Rufus Andrews on the last day of grace, nor any seasonable notice given to the defendants. Defendants clained that such demand and notice was required by a statute of Massachusetts (c. 104 of the laws of 1874), which they put in evidence, as follows: "Be it enacted, etc., as follows: All persons becoming parties to promissory notes payable on time by a signature in blank on the back thereof, shall be entitled to notice of the non-payment thereof the same as indorsers. Approved June 30, 1874." In the absence of any further evidence the presiding judge found that said statute was an existing law in Massachusetts at the time of these transactions.

He also found that no proper demand was made upon Rufus Andrews on the last day of grace, nor was any seasonable notice of non-payment, sufficient to charge an indorser entitled to notice, given. But he found, upon testimony offered in the case, that at the time the defendants indorsed the note, as sureties for their brother, in the manner before stated, they were fully secured for all liability that they then assumed as such sureties.

The following facts appeared: When the signature of the firm was placed on the back of the note by Sumner Andrews, he received from Rufus Andrews, as security for the firm's indorsement, a bank book showing a deposit in a savings bank, in the name of Rufus Andrews' wife, of a sum exceeding $600. No proof was offered of any written transfer of the book or its contents, but Sumner Andrews received it without objection as security. On October 1, 1877, Rufus Andrews sent his wife to get the money, to pay the note, which was on that day presented to him by John H. McIntire, husband of the payee, who received it from the plaintiff for collection. John H. McIntire had requested payment of the note from Rufus Andrews, on Saturday, September 29, 1877, but without presenting the note, and did not then have it, but received it Monday, October 1. On Saturday Rufus Andrews had replied to McIntire's request for payment, that the note should be paid on Monday. When McIntire first called with the note, on Monday, Rufus said his wife had not had time to go and get the money. But later in the day she went, and Oren Andrews, one of the defendants, went with her, and got money of hers out of the bank, to be appropriated in payment of the note, and carried it to Rufus Andrews, who was confined to his house by sickness, and at the same time caused Rufus to be summoned as trustee of Ellen E. McIntire, in a suit brought by Oren Andrews & Co., upon a claim that she was liable to them for groceries furnished her brother, Marshall Wright, and originally charged to him, to the amount of $250. They claimed that she was a copartner of her brother, and their suit was subsequently entered in court and finally nonsuited.

The defendants proposed to McIntire that if he would allow $150 on the note, on account of this claim, the balance of the note should be paid, but he refused to do this.

After the trustee process had been served, and Rufus Andrews had notified McIntire that he could not pay the note for that reason, the money before mentioned was placed in the defendants' safe, and under their control, and they used it in the business of the firm or have it now.

The judge further found that if this money was the money of

the wife, and not that of Rufus Andrews deposited in her name, she assented to its being appropriated to the payment of the note, or such disposition as the husband might make of it to secure such payment, or to secure his brothers for their liability on the note.

While the case was in progress before the jury, Ellen E. McIntire, a witness for the plaintiff, was asked the following question by the plaintiff: "Did you know of his (Rufus Andrews) having any visible means except the boarding-house that he bought of you, and the bank book?" This was objected to by the defendants' counsel, but the objection was overruled and the witness answered as follows:

"The understanding was, it was all he had. He said he had so much in the Essex bank."

Plaintiff then asked the following question: "How much did he say he had on his bank book?" This was excluded and not answered.

The presiding judge, in considering the case, held that the first question (which was answered) was immaterial and based no conclusion upon the answer.

The defendants appeared personally at the trial and testified in the case, denying that any bank book or other security was given them as security for signing the note, as stated by plaintiff's witnesses. And Rufus Andrews, called as a witness by them, testified that he did not say anything about a bank book to his brother at the time he signed the note—that he had no recollection of it—that he hadn't any bank book at that time, and never had any. But the presiding judge found the facts as hereinbefore stated.

Upon all the facts proved, as above stated, the presiding judge was of the opinion that the plaintiff was entitled to recover, and that the want of a demand and notice sufficient to charge an indorser, would not prevent his recovery, and he so ruled, and ordered judgment for the plaintiff for six hundred dollars and interest from the time the note fell due. The defendants alleged exceptions.

James Wright, pro se.

D. D. Stewart, for the defendant, cited Laws of Mass., 1874, c.

404. *Akers* v. *Demond*, 103 Mass. 323. *Stickney* v. *Jordan*, 58 Maine, 107. *Cline* v. *Baker*, 99 Mass. 255. *Portland & Ken. R. R. Co.* v. *Bartlett*, 12 Gray, 244. *Allen* v. *Brown*, 124 Mass. 78, note. *Gibson* v. *Machine Co.*, 124 Mass. 546.

The law in Massachusetts is settled that taking security by an indorser is no waiver of demand and notice. *Creamer* v. *Perry*, 17 Pick. 332. *Haskell* v. *Boardman*, 8 Allen, 38. 1 Par. N. & B. 571–5.

The claim about the pledge of money, its appropriation, and authority to sureties to use it, was after defendants were legally discharged from their liability, and was a matter with which plaintiff had nothing to do; the whole matter is *res inter alios*. *Ray* v. *Smith*, 17 Wall. 411. 2 Dan. Neg. Ins. § 1129. *Haskell* v. *Boardman*, *supra*. *Andrews* v. *Boyd*, 3 Met. 339. 1 Par. N. & B. 572, and cases cited. *Moses* v. *Ela*, 43 N. H. 557, 560. Story Prom. Not., § 278.

DANFORTH J. The note in suit in this case, is evidence of a contract made in Massachusetts by parties residing there, and so far as appears to be performed there. Hence it must be construed in accordance with the laws of that commonwealth. The defendants signed the note upon the back in blank.

The case finds that at the time the note was executed and delivered there was in force in Massachusetts a statute of the following tenor: "All persons becoming parties to promissory notes payable on time by a signature in blank on the back thereof, shall be entitled to notice of the non-payment thereof the same as indorsers." It will be noticed that this statute does not require a demand of the maker, but simply a notice of non-payment; which as the case finds was not seasonably given.

It is suggested in the argument that under the statute a notice to a party whose signature is upon the back of the note in blank is in all cases required and that therefore its omission in this case is fatal to the maintenance of the action. It is true that no exceptions in express terms are made in the statute. But the notice required is such and only such as indorsers would be entitled to. If then the facts are such as would excuse notice to an indorser,

the same facts must necessarily excuse notice to a promisor signing as these defendants did. The necessity of notice to an indorser depends upon the contract, which may be express or implied, so notice to a surety "the same as an indorser" must in a like manner depend upon such contract as may be made by the parties or inferred from the facts. It cannot be required in the latter case, if under the same circumstances it would not be in the former.

The main question then involved in this case is whether upon the facts found by the justice presiding the defendants were entitled to notice of the non-payment of the note.

Whatever conflict there may be in the decisions of different courts in regard to the necessity of notice to an indorser who has security for his liability as such, there appears to be none, when the property pledged for such indemnity is appropriated to, and the indorser is authorized by the contract to use it for the payment of the note. In such case it is very clear that notice may be dispensed with. By such appropriation there is a trust reposed in the indorser, and by his acceptance of it an implied promise on his part that such trust shall be faithfully performed. In a certain sense the indorser becomes original promisor and assumes the place of the maker of the note. He therefore suffers no injury from the fact that he is not notified of the omission of an act which fidelity to the principal, as well as to the payee, required him to perform. Story Prom. Notes, § 281. Red. & Big. Lead. Cas. 467. *Haskell* v. *Boardman*, 8 Allen, 38, 41. *Ray* v. *Smith*, 17 Wall. 411, 416.

In this case the presiding justice found that at the time the defendants indorsed the note as sureties "they were fully secured for all liability assumed by them as such." This security appears to have been a bank book showing a deposit in a savings bank, in the name of the maker's wife. Subsequently as the case finds, one of the defendants went with the wife and got the money out of the bank, "to be appropriated in payment of the note." This appears to have been done with the consent of both husband and wife. Hence whatever may have been the effect of the original security the subsequent appropriation brings the plaintiff's case within the principles of undisputed law. That this took place after

the maturity of the note is not material, for it was not only a waiver of any release which might have accrued to the surety, but was a confirmation of the original pledge, and the appropriation after the maturity can be no less effectual but rather more so than if made before. The implied promise would rather be strengthened, for the inference is that both maker and surety at that time looked to that fund as the sole means of paying the note. Nor does the fact that the surety paid the money to the maker of the note for a purpose of his own, change the result; for when that purpose failed of its accomplishment, the money was returned and now remains with the defendants, as we may well infer, to carry out the original design. Whether the money belongs to the husband or wife there seems to be no reason why the defendants should withhold it from the payment of the note to which it was appropriated with the consent of both, and which consent so far as appears has never been withdrawn.

Exceptions overruled.

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

GEORGE F. STEVENS, in equity, *vs.* ELLA C. STEVENS.

Somerset. Opinion June 25, 1879.

Trust. Presumption. Burden of proof. Husband and wife.

In equity, generally, when land is conveyed to one person on the payment of the consideration by another, a resulting trust will be presumed in favor of him who pays the consideration.

Aliter, when the purchase is made by a husband and the conveyance is to the wife. In such case the presumption is that it was intended for the benefit of the wife.

When a husband pays the consideration of a conveyance of land to his wife from a third person, the burden of proof is upon the husband to overcome the presumption and establish the trust.

BILL IN EQUITY, heard on bill, answer and proof.

The bill alleges in substance that on April 7, 1868, he conveyed by quitclaim deed certain land to his mother (Hannah Stevens); that being about to travel, he took a note for $500 and a mort-

gage of the premises from his mother running to his wife (respondent) to hold in trust for him until his return; that his wife was then in Massachusetts, paid no part of the consideration and knew nothing of the transaction until he sent the note and mortgage to her there; that his wife has abandoned him, and refuses to assign the note and mortgage to him, although requested so to do, but on the contrary has brought an action at law to foreclose the mortgage.

The bill prays for an injunction and for an assignment of note and mortgage.

The answer alleges that the mortgage was a gift to her from her husband which she accepted as her own property; that he separated from her, and has never since furnished her with the necessaries of life; that while he was absent, she was sick and unable to support herself, and for the purpose of obtaining means of support, she assigned the note and mortgage to Richard Ball and now owes him $200 for money thus loaned; but received a re-assignment before suit brought.

E. W & F. E. McFadden, for the complainant.

S. S. Brown. for the defendant.

DANFORTH, J. It is undoubtedly a well established principle in equity that in ordinary cases when land is conveyed to one person on the payment of the consideration by another, a resulting trust will be presumed in favor of him who pays the consideration.

When, however, the purchase is made by a husband and the conveyance is to the wife, this principle does not apply, but the presumption is, that it was intended for the benefit of the wife. 2 Story's Eq. Jur., § 1204. *Whitten* v. *Whitten*, 3 Cush. 197. *Spring* v. *Hight*, 22 Maine, 408.

Hence, in this case the burden of proof rests upon the plaintiff not only to overcome this presumption, but to establish the trust relied upon in his bill. An examination of the testimony, assuming its admissibility, shows a preponderance in favor of the presumption.

Bill dismissed with costs.

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

CHARLES GIFFORD *vs.* CHARLES H. CLARK & others.

Kennebec. Opinion June 25, 1879.

Rules of court. Motions. Affidavit. Verdict. Misconduct of jurors.

A motion to set aside a verdict for alleged misconduct of jurors, when the facts are in dispute, should be verified when presented, by affidavit, in order to entitle it to be considered or reported under the rules of the supreme judicial court, and the superior court of Kennebec county.

To support a motion of this description, it is not a universal rule that the production of a report of the evidence given at the trial is essential, or that the affidavit of the party or his attorney would not be regarded as sufficient proof that the facts were material to the issue tried.

ON MOTION to set aside verdict.

This action which was for breach of warranty in the sale of a horse, was tried by a jury at the February term, 1879, of the superior court for Kennebec county, and a verdict found for the defendants. Thence the action was continued to the next April term on plaintiff's motion for a new trial, because of the alleged misconduct of jurors. The motion sets out the following causes alleged by the plaintiff:

"Because, he says, that he has been informed since the trial in this case, during the trial and while the case was pending, sundry members of the panel, before whom the case was being tried, to wit: Hosea Blaisdell, Levi Perkins, Joseph Douglass and Frank B. Lowell, went to the stable of Hiram Reed, in Augusta, and there examined the mare, whose soundness was in controversy in the case, and then and there examined the size and condition of her off hind leg and thigh and the bunch thereon, in the absence of the plaintiff or his attorney, and without his knowledge or assent, and without the order of the court in that behalf; and the size and condition of said leg and thigh of said mare, and the bunch thereon, were material facts in controversy between the parties, there being conflicting testimony in regard to the same as will appear by a full report of the same. And the plaintiff further says that he expects to prove the facts herein stated by Alfred M. Reed, of Augusta. Charles Gifford. By L. Clay and H. Farrington, his Atty's."

The motion was not verified by the affidavit of the plaintiff or his attorneys, nor was there any report of the evidence; but the testimony of Hosea Blaisdell, Levi Parker, John Morrill, Joseph Douglass and F. B. Lowell (who were five of the jurors who tried the case), and Alfred M. Reed, who kept a stable where the horse remained during the trial, accompanied the motion.

The facts sufficiently appear in the opinion.

L. Clay & H. Farrington, for the plaintiff, cited *Dennett* v. *Dow*, 17 Maine, 20, and note. *Winslow* v. *Morrill*, 68 Maine, 362. *Bowler* v. *Washington*, 62 Maine, 302.

J. Baker, for the defendants.

Barrows, J. Much waste of time may be prevented by adhering to the useful rules of procedure, both in the supreme judicial court and the superior court for the county of Kennebec, which require that all motions based upon facts not appearing of record, or in the papers on file in the case, and not agreed on and stated in writing duly signed, shall be verified by affidavit.

A defeated party hardly ever attributes the loss of his case to what is usually the real cause, its own demerits; but this is no reason why he should be permitted to waste time and make expense in the investigation of the numerous idle rumors which almost always accompany a law suit, mere creatures of the imagination, the fruit of the unwholesome suspicions of the parties or their sympathizing friends, or of the idle babble of partially informed bystanders. The information must come in such shape that the moving party can properly verify it in the manner required by the rule before it can be deemed worthy of attention. If there were no other reason why the motion for a new trial should be overruled, this defect would be sufficient.

But the case when examined is a good illustration of the utility of the rule. A comparison of the testimony of the single witness called in support of the motion and that of the five jurors called by the defendants, shows that the only important facts that can be regarded as established are that the plaintiff, who makes this motion, drove the horse in question to Augusta at the time of the trial and put him up in a stable where two or three of the jurors

kept their horses, and others frequently passed; that he himself during the progress of the trial called the attention of one of the jurors and other persons present to the animal and the bunch on her leg; that no other juror made any particular examination of the animal or the bunch; that none of the jurors went there for the purpose of examining her, and that what they casually saw had no influence upon their verdict.

For obvious reasons, the examination made by one of the jury at the instance of the plaintiff and in his presence, whether the plaintiff acted wilfully or ignorantly, is no ground for sustaining his motion; and the testimony, as a whole, establishes nothing approaching to misconduct on the part of any other juror. It is not strange that the plaintiff did not under the circumstances verify his motion by affidavit.

The case exhibits nothing like the misconduct of a juror with the prevailing party, as in *Heffron* v. *Gallupe*, 55 Maine, 563; or the examination of the subject matter of the controversy by jurors in company with the son of the prevailing party, where the jurors testified that their examination influenced their verdict, as in *Bradbury* v. *Cony*, 62 Maine, 223; or the deliberate going in search of evidence out of court by jurors, who acted upon the results of their examination themselves and communicated them to their fellows, as in *Bowler* v. *Washington*, 62 Maine, 302, and *Winslow* v. *Morrill*, 68 Maine, 362.

Where neither the jurors nor the prevailing party or their agents or friends have been guilty of any misconduct, it is not likely to tend to the advancement of justice to grant new trials at the instance of obstinate litigants on account of the accidental knowledge of some one or more of the jurors respecting some matter of fact involved in the issue, when it does not appear that that knowledge affected the result, or prevented the jury from deciding according to the law and the evidence.

A motion of this description should be verified when it is presented, by the affidavit of the party or his attorney, that he has good cause to believe, and does believe, that the facts are as alleged in the motion; that the same occurred without fault or collusion on his part, and that the information has come to his

knowledge since the close of the trial. The moving party here, while he in substance alleges most of this in his motion and gives the name of his witness, fails to append the proper affidavit. The judge in the court below might well have refused to spend time in taking the testimony until the motion was properly verified in accordance with the rule.

The plaintiff in his motion alleges that the size and condition of the mare's leg and the bunch thereon were material facts in controversy between the parties, and that there was conflicting testimony relating thereto, "as will appear by a full report of the same." The report is not forthcoming. The defendants objected that there ought to be no hearing of the motion without such report, contending that, if presented, it would show that these matters were unimportant, and that the case turned upon another point. We cannot lay it down as a universal rule that the production of such report is essential to the maintenance of a motion of this sort, or that the affidavit of the party or his attorney would not be regarded as sufficient proof that the facts were material to the issue tried. But it is obvious that such a report of the testimony may often have a strong bearing upon the motion, and give point and force to the testimony adduced to support or defeat it which that testimony might not otherwise possess.

Motion overruled.

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

WILLIAM F. ABBOTT *vs.* THOMAS McALOON.

Penobscot. Opinion June 25, 1879.

Evidence. Order. Signature,—authenticity of.

Upon the question whether an order for goods received by mail by the plaintiff, purporting to be signed by the defendant, was or not either signed or authorized by the defendant, the testimony of the plaintiff, that the defendant previously informed him that he would send an order, and that a postcript to the order alluded to a matter known only to the plaintiff and the defendant, affords sufficient *prima facie* evidence to establish the fact that it was the authorized order of the defendant.

ON EXCEPTIONS.

ASSUMPSIT on account annexed, one item of which was for one thousand cigars, sent to the defendant by the plaintiff in answer to the following order or letter:

"Bangor, Me., April 11th. W. F. Abbott, Sir: Please send me an assortment of cigars for a new place. I want about four hundred good nice ones, and six hundred of good cigars, that I can sell for ten cents each. I should prefer two different brands of the six hundred—three hundred of each, making one thousand in the whole. Thomas McAloon. P. S. I have not received that $105.00 according to agreement. Send by Monday's express, sure."

Writ dated June 26, 1876. Plea, the general issue.

At the trial the defendant objected to the introduction of the order or letter directed to plaintiff, bearing defendant's name, ordering one thousand cigars of plaintiff, it being admitted that said signature was not in the hand-writing of the defendant. The fact whether or not the defendant authorized it to be written was left to the jury, to be inferred or not, from circumstances.

The jury were instructed not to consider the letters unless they were satisfied from the evidence that the letter was authorized to be written and sent by the defendant.

Other facts in the opinion. The verdict was for the plaintiff for $391.69, including the charge for the cigars, and the defendant alleged exceptions.

P. G. White & J. W. Donigan, for the plaintiff.

S. F. Humphrey & F. H. Appleton, for the defendant.

PETERS, J. The plaintiff, in Saco, received by mail a written order for cigars, purporting to be signed by the defendant in Bangor. The question arose whether the order was either signed or authorized by the defendant. The plaintiff testified that a postscript on the order alluded to a matter known to no person but the defendant and himself, and that previous to the reception of the order the defendant promised him he would send him an order.

The question now is, whether that testimony was enough to authorize the submitting the paper to the jury, for them to consider, provided they first found, as a matter of fact, the paper to have been the authorized order of the defendant. We think it was *prima facie* sufficient. Proof of hand-writing is one mode of showing that papers are genuine or authorized. It may also be done by admission and conduct in various ways. Men may communicate by means of signs and cipher as well as by using words in their ordinary signification. There are cases holding that, if A mails a letter to B and receives an answer by mail purporting to come from B, the fact that such an answer is so received makes a *prima facie* case in favor of the genuineness of the answer. That principle governs this case. Whar. Ev., § 1328. *Chaffee* v. *Taylor*, 3 Allen, 598. *Tozier* v. *Crafts*, 123 Mass. 480.

Exceptions overruled.

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

BENJAMIN N. THOMS & another *vs.* JAMES B. DINGLEY & another.

Penobscot. Opinion June 23, 1879.

Sale. Personal property. Warranty. Damages,—measure of.

The common doctrine applicable to all cases is, that the damages recoverable shall be the natural and proximate consequence of the act complained of. Within this general definition other rules exist,—rules within a rule.

The ordinary measure of damages applying to warranty of personal property is the difference between the actual value of the articles sold and their value if they had been such as warranted. Additional damages, however, are sometimes recoverable, if specially declared for, and such as may reasonably be supposed to have been contemplated by both parties when the contract was made as a probable result of a breach of it.

The defendants, manufacturers and vendors of carriage springs, sold to the plaintiffs several sets of springs to be used by them in the construction of carriages, warranting them to be of the best of steel: *Held,* that the parties must be supposed to have intended a warranty that the articles were fit and suitable for the particular purpose for which they were ordered and sold, and that the defendants were liable to the plaintiffs for the necessary expenses of taking out of the carriages, in which they were placed, some of the springs, which proved defective, and inserting others in place of them; such damages, though special or consequential, not being regarded as uncertain, speculative or remote.

ON EXCEPTIONS.

ASSUMPSIT on contract of warranty of six sets of carriage springs sold by defendants to plaintiffs, January 30, 1872, at the price of $43, and used by plaintiffs in the construction of six carriages.

Plaintiffs claimed special damages in one count of the writ.

Plea, general issue.

At the trial, plaintiffs introduced testimony tending to show that in January, 1872, they were, and for a long time before had been, in the business of manufacturing carriages in Bangor, and that their business was known to the defendants; that in the early part of said month they ordered to be made and sent to them by the defendants, manufacturers of carriage springs in Gardiner, six sets of carriage springs of certain dimensions, to be made of the best of steel; that said springs were ordered by plaintiffs for use in the construction of carriages, and that defendants knew that said springs were ordered and intended by plaintiffs for such use;

that springs of the dimensions ordered were sent by defendants to plaintiffs, and were warranted by defendants to be of the best of steel; that said springs were used by plaintiffs, as of the best of steel, in the construction of new and valuable carriages, which plaintiffs sold to various parties, warranting the same to be good and serviceable; that the steel in said springs was not of the best, but of a very poor quality, and unfit for a carriage spring; that, in consequence of the defective quality of their steel, the springs in five of the six carriages so constructed broke very soon after their sale, and that plaintiffs were subjected to an expense of sixty dollars for work, necessary in taking out, repairing and replacing said broken springs at different times, and claimed to recover the same.

Upon the question of damages, the presiding judge gave the jury the following instructions:

"The measure of damages is the difference between the springs as they were and as they should have been. I know of no other rule. If the price was the fair one, the usual price, why then the limit of damages could not exceed the price, because they could not be more than worthless. If they were to be repaired, and the repairs made them as good as new, then the cost of repair in that particular case, not exceeding the price at which they could have been purchased, would be the damage, if, being repaired, they were as good as new. If they were worthless, five of them, the measure of damages would be the value of them, the price paid, with interest from the date of the writ up to the present time."

Verdict for plaintiffs for nineteen dollars; and the plaintiffs alleged exceptions.

J. Varney, for the plaintiffs.

L. Clay, for the defendants, contended that the instruction upon the question of damages was correct, and cited *Moulton* v. *Scruton*, 39 Maine, 287. Story Con. 344, § 552. Sedg. Dam. (5 ed.) 655–658. *Stiles* v. *White*, 11 Met. 356. *Wright* v. *Roach*, 57 Maine, 600.

Neglect to give particular instructions not requested is not

ground for exception. *Gardner* v. *Gooch*, 48 Maine, 487. *Darby* v. *Hayford*, 56 Maine, 246. *Willey* v. *Belfast*, 61 Maine, 569.

PETERS, J. The defendants, manufacturers and vendors of carriage springs, sold to the plaintiffs, carriage builders, six carriage springs, knowing that the plaintiffs were to use them in the construction of carriages, and warranted them as made of the best of steel. They turned out to be of poor material, and unfit for the purpose for which they were intended and used. In this action on the warranty, the plaintiffs claim to recover, having declared therefor specially, the expenses to them of taking out of the carriages into which they were placed some of the defective springs and fitting new ones in place of them.

The common doctrine applicable to all cases is, that the damages shall be the natural and proximate consequence of the act complained of. They are general damages when the necessary and natural consequence. If they are the natural but not the necessary consequence of the act complained of, then they are special damages, and must be specially set forth in the declaration. *Furlong* v. *Polleys*, 30 Maine, 491, and cases there cited. This is an ancient and very general doctrine. The difficulty is to determine when cases fall within and when without the definition. That must often be settled by other rules of a more definite character. There must be rules within the rule. In the growth and advancement of the law, rules have been adopted to meet the necessity.

Ordinarily, the measure of damages applying to warranty of personal property is the difference between the actual value of the articles sold and what they would have been worth if as warranted. *Wright* v. *Roach*, 57 Maine, 600. But this is not an invariable standard. It is not always adequate to produce just results. There are cases where more extended damages are recoverable for special or consequential or exceptional losses.

The rule that embraces cases of special damages is the one formulated in the case of *Hadley* v. *Baxendale*, 9 Exch. 353. Alderson, B., there said: "Where two parties have made a con-

tract which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract, should be either such as may fairly and reasonably be considered as arising naturally, that is, according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and were thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from the breach of the contract under those special circumstances so known and communicated." More could profitably be quoted from the case, if space permitted.

The principles laid down in *Hadley* v. *Baxendale* have been applied in many cases, and in the main been approved by many courts. In *Griffin* v. *Colver*, 16 N. Y. 489, in discussing the English case, Selden, J., observes that "the damages must be certain, both in their nature and in respect to the cause from which they proceed." In our own state any rule giving uncertain and speculative damages has been uniformly rejected. Damages have not been allowed which consisted of profits expected to arise out of collateral or independent contracts, nor for losses accidentally occasioned or supposed to be occasioned in one's business or affairs. *Bridges* v. *Stickney*, 38 Maine, 361. *Frye* v. *Railroad*, 67 Maine, 414. For this reason, the court, in *Freeman* v. *Morey*, 41 Maine, 588, (a case in contract and not of tort) refused to allow for the loss of the use of a mill in process of construction, for which defendant neglected to furnish such mill-irons as he had contracted to deliver. Whether the plaintiff in that case would have finished his mill and profitably used or rented it was regarded as a matter of uncertainty. It was undoubtedly the belief of the court that such a liability was not within the intention of the parties when the contract was entered into, and that the consideration for such a risk would have been inadequate.

The New York cases, following the lead of *Hadley* v. *Baxen-*

dale, have a tendency to require that in contracts the damages shall be such as arise naturally in the usual course of things, and at the same time be such as must have been contemplated by the parties. Our own cases seem to affirm the same thing. Mr. Sedgwick (Damages, 6 ed., p. 81,) thinks there may be cases of damages contemplated by the parties that would not be regarded as arising naturally. But that could seldom, if ever, occur. Parties could hardly be supposed to contemplate damages that could not naturally arise, without making some express provision in relation to them. And what would appear at one standpoint as indirect or remote damages, may appear differently in the light of all the circumstances attending the contract when it is made. However that may be, and whether accepted in its wider or narrower limits, we think the case at bar easily falls within the rule.

Upon the principle laid down in *Hadley* v. *Baxendale*, it is in many cases, and we think correctly, held that where manufactured articles are ordered for a special purpose known to the seller, there is an implied warranty that they are reasonably fit and suitable for the purpose for which they are ordered, and the vendee may recover for the breach of warranty such damages as may be reasonably supposed to have been in the minds of the parties in respect to it. *French* v. *Vining*, 102 Mass. 132. *Bradley* v. *Rea*, 14 Allen, 20. *Howard* v. *Emerson*, 110 Mass. 320. Field Dam., § 277. Sedg. Dam. (6 ed.) 353, note. Par. Con., Title, Warranty. So in the present case, the warranty that the articles were of sound steel must, under the circumstances, bear the construction that the parties intended a warranty that they were suitable and fit for the particular use for which they were ordered and sold. The defendants knew, or assumed to know, of what quality of material the articles were constructed, and by their warranty relieved the plaintiffs from the necessity of personal inspection and risk.

The case of *Miller* v. *Mariner's Church*, 7 Maine, 51, is, in this respect, to the same effect as *Hadley* v. *Baxendale*, although decided a quarter of a century before the latter case. There the question was, what damages were recoverable for the failure to deliver some stones at the date contracted to be delivered, the

contractee purchasing them to use in the construction of a building in process of erection. The general rule was given to the jury, that the damages would be no more than the contractee had or would have sustained by proceeding with due diligence, upon the failure of the contractor to perform his contract, to furnish himself with the same materials elsewhere. But the contractee was permitted to recover damages for the necessary delay, as well as for the additional price occasioned by the default of the other party, the delay involving the loss of labor, if not the loss of rents. Other cases in this state present somewhat similar decisions. *True* v. *Telegraph Co.*, 60 Maine, 9. *Bartlett* v. *Telegraph Co.*, 62 Maine, 209. *Grindle* v. *Express Co.*, 67 Maine, 317. See Massachusetts cases. *Bartlett* v. *Blanchard*, 13 Gray, 429. *Derry* v. *Flitner*, 118 Mass. 131.

Special damages are to be cautiously admitted. They cannot always be rejected. In this case, we think it not unreasonable to allow the actual cost of replacing the carriage springs, if the facts are as the plaintiffs assert them to be. Although such damages are special or consequential, they are not liable to the objection of being uncertain or speculative or remote. They are such as were contemplated by the parties.

Exceptions sustained.

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

JOHN F. BICKFORD *vs.* THOMAS FLANNERY.

Aroostook. Opinion June 27, 1879.

Scire facias. Judgment. Trustee. Record.

In *scire facias* against a trustee, upon plea of *nul tiel record*, and that the judgment set forth in the writ is not sufficiently definite and certain to impose any liability on the trustee, the production of a record of the original suit showing an omission of any *ad damnum* in the writ, and inconsistent in itself, in that it appears therein that the trustee was charged on his disclosure for the amount of the note declared on in the original suit less his costs, and that "it is therefore considered by the court that the plaintiff recover from the defendants and said trustee" a certain sum as debt or damage, and another and additional sum as costs, followed by an execution against the debtors and against their goods, effects and credits in the hands of the trustee for the amount of the costs as well as the debt, on which execution the demand on the trustee was made, is not sufficient to justify an order of judgment for the plaintiff in *scire facias*.

ON EXCEPTIONS.

Scire facias. Writ dated September 2, 1876, and declares as follows:

I. "Whereas, John F. Bickford, of Maysville, in said county, by the consideration of our justice of our supreme judicial court held at Houlton, in and for the county of Aroostook, aforesaid, on the last Tuesday of February, 1876, recovered judgment for the sum of $53.70 damages, and costs of suit taxed at $14.45, in the hands and possession of Thomas Flannery, of Fort Fairfield, in said county as agent and trustee of William Flannery and Isaac Flannery, of said Fort Fairfield; whereas said John F. Bickford afterward, at said Houlton, on the 24th day of March, 1876, purchased out of the office of our clerk of said courts our writ of execution upon that judgment, in due form of law, returnable into the clerk's office aforesaid in three months from the date thereof, directed to the sheriff of our said county, commanding him to serve, execute, and return the same according to the precept thereof; and whereas the said writ of execution was afterward, at said Houlton, to wit: at Fort Fairfield aforesaid, on the 5th day of April, 1876, delivered to one Bradford Cummings, then and ever since sheriff of said county, who

thereafterward, on the said 5th day of April, 1876, required the said Thomas Flannery to discover, expose, and subject the goods, effects, and credits of the said William Flannery and Isaac Flannery in his hands, to be taken on execution for the satisfaction of the said judgment, which the said Thomas Flannery then and there refused to do, whereupon the said Cummings made return upon the said execution into the clerk's office of our said court, as follows: 'Aroostook, ss. July 1, 1876. By virtue of this execution, on the 5th day of April 1876, I demanded of Thomas Flannery, the within named trustee, to pay over and deliver to me any goods, effects, or credits, belonging to the within named William Flannery and Isaac Flannery, in the hands and possession of the said Thomas Flannery—which the said Thomas Flannery then and there neglected and refused to do, and still neglects and refuses to do. And having held this execution all the time since April 5th, 1876, I return the same in no part satisfied. Fees, $1.45. Bradford Cummings, sheriff,'—as by the writ of execution and the said officer's return thereon, now on file with our said clerk, appears; and the same judgment remains wholly unsatisfied and not reversed or annulled, as the said Bickford hath suggested, by means of all which the said Bickford is in danger of losing all benefit from said judgment so recovered as aforesaid; and whereas the said Bickford hath supplicated us to provide remedy for him in this behalf. Willing therefore, that justice be done to all our citizens, we command you to attach the goods and estate of the said Thomas Flannery to the value of $100, and summon the said Thomas Flannery (if he may be found in your precinct) to appear before the justice of our supreme judicial court next to be holden at Houlton, within and for the county of Aroostook aforesaid, on the third Tuesday of September, 1878, then and there to answer to said John F. Bickford, and show cause if any he have, why judgment should not be entered up against him for the said sums and for fifteen cents for the writ of execution aforesaid, and $1.45 for said Cummings' fees on said execution, as of his own proper goods and estate, and execution be thereupon awarded accordingly.

II. "Whereas, John F. Bickford, of Maysville, in said county,

by the consideration of our justice of our supreme judicial court held at Houlton, in and for the county of Aroostook aforesaid, on the last Tuesday of February, 1876, recovered judgment for the sum of $53.70, in the hands and possession of Thomas Flannery, of Fort Fairfield in said county, as agent and trustee of William Flannery and Isaac Flannery, of Fort Fairfield; and whereas said Bickford afterward, at said Houlton, on the 24th day of March, 1876, purchased," etc., . . "then and there to answer to said Bickford, and show cause, if any he have, why judgment should not be entered up against him for the amount due upon the note declared upon in action in favor of said Bickford, against William and Isaac Flannery, and Thomas Flannery and Phebe Flannery, trustees, in which action judgment was rendered at the February term of said court, in 1876, as aforesaid, and for fifteen cents for said writ of execution, and $1.45 for said Cummings' fees on said execution as of his own property, goods and estate, and execution be thereupon awarded accordingly. And plaintiff avers that the amount due on said note at time of rendition of said judgment was $53.70."

Plea, the general issue, and "that the judgment set forth in the plaintiff's writ is not sufficiently definite and certain to render the defendant liable, so as to entitle the plaintiff to maintain his said action thereon against the defendant as he has declared against him." Also brief statement setting out that the execution described in the plaintiff's writ was not seasonably returned to the office of the clerk of the courts.

The plaintiff offered the record charging the defendant, and which is as follows:

"*John F. Bickford* vs. *Wm. Flannery and Isaac Flannery & trustees* (Thomas Flannery and Phebe Flannery).

"In a plea of the case; for that the defendants, at said Fort Fairfield, on the 9th day of January, 1875, by their promissory note of that day, by them signed, for value received promised the plaintiff to pay him or bearer the sum of $50, with interest, one year from date. Yet the defendants, though requested, have not paid the same, to the damage of the plaintiff (as he says) of $——.

"This action was entered at the present term of this court

(Feb'y term, 1876), when the trustees appeared, and Nicholas Fessenden was appointed to take their disclosure, and the trustee, Thomas Flannery, was charged for the amount due on the note, less his costs. And it was proved that personal notice had been given the defendants, and the defendants were defaulted.

"It is therefore considered by the court that the plaintiff recover from the defendants and said trustee, Thomas Flannery, $53.70 debt or damage, and $14.45 costs. Execution issued March 24th, 1876."

"$50.00. Fort Fairfield, June 9, 1875. For value received we promise to pay, jointly and severly promised to pay, to J. F. Bickford or bair forty dollars, with six per cent intress, one year from date. William Flannery. Isaac Flannery."

The plaintiff also offered the execution which was issued on said judgment, and the officer's return thereon, to wit:

"State of Maine, Aroostook, ss. To the sheriffs of our counties, their deputies and constables of the towns and plantations in said counties. Greeting. Whereas, John F. Bickford, of Maysville, by the consideration of our justices of our supreme judicial court, held at Houlton, in and for our county of Aroostook, on the 22d day of March, 1876, recovered judgment against Wm. Flannery and Isaac Flannery, of Fort Fairfield, for $53.70 debt or damage, and $14.45 costs of suit; and whereas, by the consideration of the same court, execution was likewise awarded for the same sums of $62.21 against the goods, effects and credits of said debtor in the hands and possession of Thomas Flannery, trustee of said debtor, as appears of record, whereof execution remains to be done: We command you, therefore, that of the goods, chattels, or lands of said debtor, in his own hands and possession, and in the hands and possession of said trustee, jointly and severally, you cause to be paid and satisfied unto said creditor, at the value thereof in money, the said sums, being $68.15 in the whole, with interest from said time of judgment, and fifteen cents more for this writ, and thereof also to satisfy yourself for your own fees.

"And for want of goods, chattels or lands of said debtor, in his own hand or in possession of said trustee, to be by them shown unto you, or found in your precinct, to the acceptance of said

creditor to satisfy the sums aforesaid, we command you to take the body of said debtor and commit him unto any of our jails in said counties, and therein detain in your custody until he shall pay the full sums aforesaid, with your fees, or be discharged by said creditor, or otherwise by order of law.

"Hereof fail not. . . Witness, John Appleton, Esq., at Houlton, the 24th day of March, 1876. Ransom Norton, clerk."

"Aroostook, ss, July 1, 1876. By virtue of this execution, on the 5th day of April, 1876, I demanded of Thomas Flannery, the within named trustee, to pay over and deliver to me any goods, effects or credits belonging to the within named Wm. Flannery and Isaac Flannery, in the hands and possession of the said Thomas Flannery—which the said Thomas Flannery then and there neglected and refused to do, and still neglects and refuses to do. And having held this execution since April 5, 1876, I return the same no part satisfied. Fees, $1.45. Bradford Cummings, sheriff."

The defendant offered the writ in the action of *Bickford* v. *Flannery*, and said Thomas Flannery and Phebe Flannery, trustees, with the note declared upon in that suit.

Upon the foregoing evidence the defendant moved for a nonsuit, but the presiding justice overruled the motion and ordered judgment for the plaintiff. The defendant alleged exceptions.

J. B. Trafton, for the plaintiff.

L. R. King, for the defendant.

BARROWS, J. The respondent was duly summoned as the trustee of William and Isaac Flannery in the plaintiff's suit against them, and made his disclosure in that suit and was adjudged trustee. The principal defendants had personal notice and were defaulted. Execution was issued and placed in the hands of an officer, who, within thirty days after the judgment, demanded of the respondent the goods, effects or credits of the principal defendants in his hands, and the respondent refused to pay over or deliver the same, and the officer, after holding the execution until a few days beyond its expiration, returned it in no

part satisfied, and the plaintiff sued out this writ of *scire facias* returnable at the next term of court.

Respondent pleads that there is no such record as the plaintiff has set out in his writ, and that the judgment set forth in the plaintiff's writ is not sufficiently definite and certain to render him liable, and adds, by way of brief statement, a denial that the execution was seasonably returned to the clerk's office. He does not claim that he did not have goods, effects or credits of the principal defendants in the original suit in his hands, but relies upon certain alleged defects and errors in the records and proceedings in that suit. His technical defense, in order to prevail, must be technically made out. He presents the badly written and badly spelled note on which that judgment was rendered and claims that we should find what the presiding justice apparently declined to do, that it was misdescribed in the original writ,—that it was for forty instead of fifty dollars, and dated June 9 instead of January 9, and so not due when the original action was brought, and cannot be the foundation of a valid judgment. How much of the apparent discrepancy is due to bad penmanship, careless copying, careless printing and proof reading, and general remissness and want of proper attention to the making up of the case, we need not trouble ourselves to inquire; for it has often been decided that "the notes or other proof used as evidence in ascertaining damages constitute no part of the record and cannot be regarded in case error should be brought to reverse the judgment in which they were offered." *Buckfield Branch R. R. Co.* v. *Benson*, 43 Maine, 374. *Came* v. *Brigham*, 39 Maine, 38. *Storer* v. *White*, 7 Mass. 448. *Peirce* v. *Adams*, 8 Mass. 383. See, also, *Paul* v. *Hussey*, 35 Maine, 97. *Starbird* v. *Eaton*, 42 Maine, 569.

The respondent cannot be heard to impeach and contradict the record in this way. His plea is that there is no such record.

It seems, also, that the fact that the return of *nulla bona* on the execution is made after the return day of the execution does not affect the liability of the trustee on *scire facias*. *Woods* v. *Cooke*, 61 Maine, 215.

But the defendant objects further that the judgment is invalid

by reason of not being sufficiently definite and certain. The record is of a declaration upon a promissory note dated January 9, 1875, payable to plaintiff or bearer, for fifty dollars, with interest, in one year from date. The judgment was at the February term, 1878, for fifty-three dollars and seventy cents debt or damage, and the respondent was charged as trustee upon his disclosure "for the amount due on the note less his costs." The declaration exhibits no claim but the note. The respondent bases his argument that the trustee was charged for an uncertain and indefinite sum upon his previous claim that the note was for forty dollars, dated June 9, 1875. But the amount due from the principal defendants in that suit to the plaintiff was a matter to be definitely settled then and there, and was determined by the judgment to be fifty-three dollars seventy cents.

The general rule is that nothing can be pleaded in bar of the *scire facias* which might have been pleaded in the original suit; (*Smith* v. *Eaton*, 36 Maine, 303), and though there is an exception recognized in *Cota* v. *Ross*, 66 Maine, 161, and cases there cited, which allows the trustee upon *scire facias* to object that the judgment in the original suit is void for want of jurisdiction obtained by legal service upon the principal defendant, such matters as the amount due from the principal defendants to the plaintiff we must assume were correctly settled in the original suit. The defendants there knew whether they gave the plaintiff a note for fifty dollars dated January 9, 1875, and if they chose to be defaulted after being properly served with notice to appear, it is not for their trustee to controvert their admissions to that effect. That is certain which can be demonstrated; and the order charging the trustee is equivalent to an order that he stand charged for fifty-three dollars seventy cents, and be allowed his taxable costs to be deducted therefrom. The phraseology of the order might be improved. We do not commend it as a precedent. But its intent is sufficiently apparent, and it is a common mode of indicating that from the particular sum with which the trustee stands charged he may deduct, when called upon by the officer, the amount of his taxable costs, which, being fixed by law, it is presumed he knows. It would be well for the clerk to minute the

amount upon the margin of the execution. The adjudication, however, was in substantial compliance with R. S., c. 86, § 65.

Thus far it would seem that the trustee would have no difficulty in understanding and obeying the order of the court by reason of any indefiniteness of the terms in which he was charged; for the means of ascertaining the precise amount were before him; and if this were the only trouble with the record, defendant's objections could not be sustained.

But the record, after stating correctly the adjudication of the court with respect to the trustee, exhibits a supplementary judgment, inconsistent with the first, that "the plaintiff recover from the defendants and said trustee, Thomas Flannery, $53.70 debt or damage, and $14.45 costs;" and upon a judgment thus erroneously entered up, an execution was issued in which it is recited that "execution was likewise awarded for the same sums (erroneously aggregated at $62.21) against the goods, effects and credits of said debtor in the hands and possession of Thomas Flannery, trustee," etc., and the officer's precept calls finally for sixty-eight dollars and fifteen cents in the possession of the trustee in pursuance of this erroneous record. If a plaintiff desires to realize the fruits of his judgment he must see that it is made up at least with such an approximation to correctness that those who desire to understand and obey it should not be misled nor called on to pay more than is due. A certain amount of carelessness has been engendered, perhaps, by the facility with which our statutes of jeofails and amendments enable parties frequently to avoid what would seem to be the legitimate results of the want of diligent exactness. It is an unfortunate delusion of the times, a delusion doomed to end in disappointment, to suppose that we can dispense with faithful work and prudent care by legislation, or by common consent, without losing the advantages which they alone can yield.

We think a trustee might well suppose there was something wrong about a judgment thus inconsistent in itself, and that he is not chargeable out of his own goods and estate for failing to respond to its uncertain mandate. If it could be successfully argued that this was but a clerical error which might be amended,

no motion was ever made to amend it. The plaintiff commenced this proceeding claiming the additional sum to which he was not, in any view that could be taken, entitled.

Moreover, the record in the original suit shows that the non-payment of the note was "to the damage of the plaintiff (as he says) of $——."

In *McLellan* v. *Crofton*, 6 Maine, 307, it was said that the total omission or smallness of the *ad damnum* in a writ, though amendable if seasonably attended to, cannot properly be considered as merely a circumstantial error after the rendition of judgment.

Exceptions sustained.

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

INHABITANTS OF LINNEUS *vs.* INHABITANTS OF SIDNEY.

Aroostook. Opinion June 27, 1879.

Pauper Supplies,—need of, application for. Stat. 1873, *c.* 119.

A formal adjudication by the board of overseers of the poor that a pauper has fallen into distress and stands in need of relief is not necessary.

It is sufficient if one overseer furnishes the supplies upon his own view of what is necessary and proper, provided his act is subsequently assented to or ratified by a majority of the board.

Where all, or a majority, of the board of overseers join in a notice to the town where the pauper's settlement is, stating that he had fallen into distress and was in need of immediate relief, and that such relief had been furnished by the town, this affords competent evidence of such ratification, and, in the absence of proof to the contrary, is sufficient evidence of the fact. *Smithfield* v. *Waterville*, 64 Maine, 412, re-affirmed.

Testimony from the wife of the pauper that when "we got the supplies we were not able to get along; that the supplies were necessary; that my husband was sick and not able to labor," and nothing appearing to the contrary, is sufficient to justify the jury in finding that the supplies were actually applied for by the paupers themselves, or that they were received with a full knowledge that they were pauper supplies.

Whether such knowledge ought not to be presumed in the absence of all evidence to the contrary, *quære.*

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

ACTION FOR SUPPLIES furnished by the plaintiff town to Wesley G. Daggett, Elizabeth B. Daggett, his wife, and Florence, Katy, Luther, Ida, Charles, James, Alberta and Flora Daggett, their children, on June 16, 1876, and who were alleged to have fallen into distress within the unincorporated place called Oakland,—the oldest incorporated town adjoining being said town of Linneus.

Date of writ, August 16, 1877. Plea, the general issue.

It was admitted that the necessary notices were given in proper form and at due times, and replies made by defendant town in due time, and that Linneus is the oldest incorporated town adjoining Oakland.

The facts sufficiently appear in the opinion.

J. C. Madigan & J. P. Donworth, for the plaintiffs.

E. F. Pillsbury & J. B. Hutchinson, for the defendants, cited Stat. 1873, c. 119, and claimed,

I. That there was no evidence that these were pauper supplies, and furnished as required under this statute.

II. No evidence of an adjudication or ratification by the majority of the board of overseers of the poor of Linneus, that the pauper was destitute and in need of immediate relief. The following authorities were cited: *Smithfield* v. *Waterville*, 64 Maine, 412. *Boothbay* v. *Troy*, 48 Maine, 560. *Verona* v. *Pembroke*, 56 Maine, 14. *Windsor* v. *China*, 4 Maine, 298. *Fayette* v. *Livermore*, 62 Maine, 229.

WALTON, J. This is a pauper suit, and the jury having returned a verdict for the plaintiffs, the defendants move to have the verdict set aside upon the ground that upon two points the plaintiffs' evidence is not sufficient to justify the verdict.

I. It is claimed that there is no evidence of an adjudication by a majority of the overseers of the poor that the paupers had fallen into distress and stood in need of relief. We think there is. The law does not require a formal adjudication. It is sufficient if one overseer furnishes the supplies upon his own view of what is necessary and proper, if his act is subsequently assented to or ratified by a majority of the board. And if all,

or a majority of the overseers, join in a notice to the town where the pauper's settlement is, stating that he had fallen into distress and stood in need of immediate relief, and that such relief had been furnished by the town, this, we think, is competent evidence of a ratification, and, in the absence of proof to the contrary, sufficient evidence of the fact. *Smithfield* v. *Waterville*, 64 Maine, 412. That such a notice was given in this case, was admitted at the trial. There was no evidence to control the *prima facie* force of this fact. Under these circumstances we think the jury was justified in finding that the furnishing of the supplies was ratified by at least a majority of the board.

II. It is claimed that there is no evidence that the supplies were applied for by the paupers themselves, or by any person authorized by them so to do, or that they were received with knowledge that they were pauper supplies, as required by the act of 1873, c. 119. We think there is. We think the language used by Mrs. Daggett fairly implies that the supplies were applied for by her and her husband. She says: "When we got these supplies in Oakland we were not able to get along; the supplies were necessary; my husband was sick and not able to labor." Nothing appearing to the contrary, we think this was sufficient to justify the jury in finding that the supplies were actually applied for by the paupers themselves, or that they were received with a full knowledge that they were pauper supplies. In fact, we do not feel quite clear that such knowledge ought not to be presumed in the absence of all evidence to the contrary. Certainly very slight evidence of these facts ought to be held sufficient, where there is no evidence tending to prove the contrary. There is no evidence tending to prove the contrary in this case.

Motion overruled.
Judgment on the verdict.

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

CHARLES FOSS *vs.* JAMES F. NORRIS.

Piscataquis. Opinion June 27, 1879.

Contract. Consideration. Demand. Damages,—measure of.

A written contract to pay a specified sum of money, or redeliver, on demand, to an attaching officer specific articles of attachable property which he has taken on mesne process is a lawful contract; and a recital of the attachments in such contract is sufficient evidence of a legal consideration therefor.

After a legal demand, an action may be maintained on such contract so long as the attaching officer is under a liability to the creditor or debtor for the property attached, the extent of that liability being the measure of damages.

A legal demand is one properly made as to form, time and place, by a person lawfully authorized, before or after the rendition of judgment in the suits in which the property is attached, although the contract contains a stipulation for the redelivery of the property "within thirty days after judgment in such actions if no demand be made."

It is no valid objection to the demand that the sheriff's deputy calls upon the receiptor to redeliver the articles, or in default thereof to pay according to his alternative stipulation.

ON FACTS AGREED.

ASSUMPSIT on the following contract signed by the defendant:

"Piscataquis, ss. May 10, 1876. For value received, I promise to pay Charles Foss, or his order, eight hundred dollars on demand, or to redeliver the goods and chattels following: Two hundred, more or less, squares of slate, the same property which the said officer has taken by virtue of a writ dated April 19, 1876, in favor of James C. Bishop of Guilford, in the county of Piscataquis, and against Lewis E. Norris of Monson, in said county, also taken by virtue of a writ in favor of Harry Sweet of said Monson, county aforesaid, dated May 9, 1876. Also taken by virtue of a writ in favor of John Martin of Monson, Piscataquis county, dated May 9, 1876, and against Lewis E. Norris.

"The above attachments were made to secure a lien for labor done on said slate. The amounts on the several attachments are five hundred and sixty-five dollars, and I hereby agree safely to keep and on demand to redeliver all the goods and chattels above described to the said officer or his successor in office, at Abbot, in

said county, in like good order and condition, as the same are now in, free from expense to the above named officer or to the creditors aforesaid; and I further agree that if no demand be made, I will within thirty days from rendition of judgment in said actions redeliver all the above described property as aforesaid at the above named place, and further notify said officer of said delivery."

A legal demand was made on the defendant which was indorsed on the foregoing, as follows:

"Piscataquis, ss. October 19, 1877. By virtue of the within, I have this day demanded of the within named J. F. Norris, the slate named in this receipt, or in default thereof, its value in current money. Zenas B. Poole, deputy sheriff."

Charles Foss was sheriff of Piscataquis county on or before January 1, 1876, and ever since. Zenas B. Poole was deputy under said Foss on or before October 19, 1877, and ever since.

The property mentioned in the contract or receipt was attached by said Foss in the writs mentioned in said contract; judgment has been rendered on said actions and the officer is liable to the creditors for the value of the slates described in said contract.

The court by agreement were to render legal judgment.

J. F. Sprague, for the plaintiff.

C. A. Everett, for the defendant.

Barrows, J. The contract signed by the defendant contains a promise to pay the plaintiff eight hundred dollars, or to redeliver, on demand, to the plaintiff or to his successor in office, at Abbot, free of expense to the officer or attaching creditors, certain specified goods and chattels which appear by the recitals in the contract to have been attached by the plaintiff on certain writs against Lewis E. Norris.

The contract contains also a stipulation for such redelivery within thirty days after the rendition of judgment in the actions in which the attachments were made, if no demand should be made. The agreed statement signed by counsel shows that judgment has been rendered in these actions, and that the officer is

liable to the creditors for the value of the property attached and described in the contract, the amount of the attachments as stated in the contract being five hundred and sixty-five dollars.

It further appears in the agreed statement that "a legal demand was made on the defendant," a certificate of which was indorsed on the contract, indicating that on October 19, 1877, Zenas B. Poole, a deputy of the plaintiff, demanded of the defendant the property attached, "or in default thereof its value in current money."

The defendant objects to a recovery by plaintiff on the ground that it does not appear that judgments had been rendered in the actions in which the attachments were made at the time of this demand, or that they were rendered more than thirty days before the commencement of this action, or that plaintiff's deputy had any authority to make the demand.

The case seems to have been somewhat carelessly made up, but we think enough appears to show that the plaintiff is entitled to judgment. The contract was a lawful one. It purports on its face to be "for value received," and the recital of the attachments made therein is sufficient evidence of a legal consideration therefor. After a legal demand, made either before or after the rendition of judgment in the suits in which the property is attached, an action may be maintained thereon so long as the attaching officer is under a liability to creditor or debtor for the property attached. When such a demand is made, the liability of the defendant is fixed, and it is not necessary to show that the thirty days after judgment, within which he agreed to redeliver the property if no demand should be made, have elapsed before the commencement of the suit.

We cannot assent to the defendant's proposition that the "legal demand," which he has admitted means a demand which is legal in form only, or that the return of a demand made by the plaintiff's deputy on the contract shows that the demand was not a legal one.

A "legal demand" means a demand properly made as to form, time and place, by a person lawfully authorized, and may be made before or after judgment in the suits in which the property is

attached, and by an agent of the promisee duly authorized. The admission of a legal demand includes an admission that the demand was properly made at Abbot, at a suitable time and place by the duly authorized agent of the promisee, having the receipt in his possession to be discharged if the contract was performed.

Nor will any reasonable or proper construction of this statement of facts admit the hypothesis that the defendant responded to the demand and performed his contract. It is no valid objection to the demand that the plaintiff's deputy called upon the defendant to redeliver the goods, or in default thereof to pay according to his alternative agreement. He does not appear to have done either.

The extent of the liability of the officer to the parties in the original suit or suits is the measure of damages. Commonly in these cases the liability to the attaching creditor is the one chiefly to be regarded, because usually the debtor whose property is attached procures the receiptor, and when he does this and the property is returned to the possession of the debtor upon the reception of such a receipt as this, the attachment is thereby dissolved and the contract alone remains for the security of the officer and the creditor. *Waterhouse* v. *Bird*, 37 Maine, 336. But cases might arise where the attaching officer might be under a liability to the debtor as well as the creditor, and the indemnity should be coextensive with the liability.

This case as it is presented, does not furnish the materials for an intelligent assessment of damages. We might surmise that the liability to the attaching creditors is the only one which needs to be regarded. But, this conceded, we have nothing from which the damages can be ascertained.

The amount of property which the officer is ordered to attach in the writs would rarely be the precise amount for which he would be responsible, and which would be needed to constitute a complete indemnity for him.

Defendant defaulted. To be heard in damages at nisi prius.

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

SARAH R. HUBBARD *vs.* INHABITANTS OF FAYETTE.

Kennebec. Opinion July 1, 1879.

Highway,—defect, and nature of. Injury,—claim for. Notice. Waiver. Stat. 1876, *c.* 97.

The plaintiff's husband gave to the selectmen of the defendant town, within sixty days after her injury, the following notice: "Fayette, March 10, 1877. To the selectmen of Fayette, Gentlemen: I hereby notify you that my wife, Sarah R. Hubbard of Fayette, sustained an injury of a broken shoulder on account of a defect in the highway in Fayette on the 30th of January last near the southwest end of the Davenport road, so called. I hereby enter a claim against said town of Fayette for said injury for the sum of $200. John Hubbard, per B:" *Held*, that even if the husband was authorized to act for his wife, yet the notice was not sufficient.

I. It was not a notice by the plaintiff, or in her behalf, and presented no claim in her behalf.

II. It does not specify the nature of the defect.

Held, further, that an answer by the selectmen addressed to John Hubbard, denying any liability of the town to him, was not a waiver of a want of notice by the plaintiff, nor of the defects in the notice given.

ON REPORT.

ACTION OF CASE for an injury received on the highway in Fayette, January 30, 1877. To prove notice of her injury to the defendants, plaintiff produced a paper dated February 16, 1877, signed by her husband, John Hubbard, also a paper dated March 10, 1877, signed by said John Hubbard; also answer of the selectmen of defendant town dated April 13, 1877. It was admitted that said notices were delivered to the defendants within sixty days of the time the injury was received. For the purpose of enabling the parties to have the question of the sufficiency of the notices settled by the court without the expense of bringing their witnesses, the presiding judge ruled that said notices were not sufficient to entitle the plaintiff to maintain her action, and the parties agree that the case be reported for a decision of the law court. If the notices are sufficient on proof that plaintiff's husband was authorized to act for her, the action is to stand for trial, otherwise the plaintiff is to be nonsuit.

The notices and answer aforenamed are as follows:

"Fayette Feb. 16, 1877. I, John Hubbard, claim damages of

the town of Fayette for injuries which my wife received January 30th, in consequence of a defect in the highway near the mouth of the Davenport road so called. John Hubbard."

"Fayette, March 10, 1877. To the selectmen of Fayette, Me. Gentlemen: I hereby notify you that my wife, Sarah R. Hubbard of Fayette, sustained an injury of a broken shoulder on account of a defect in the highway in said Fayette, on the 30th day of January last near the southwest end of the Davenport road so called.

"I hereby enter a claim against said town of Fayette for said injury for the sum of two hundred dollars ($200.00). John Hubbard, per B."

"Fayette, April 13, 1877. John Hubbard, Esq. Dear Sir :— We have considered your case for damage against the town on account of the accident to your wife on the highway, and have decided that the town is not liable for damages sustained.

"By reference to chapter 97 of the acts passed in 1876, you will see that the town must have reasonable notice of the defect or want of repair in the road before the accident happened, or the claimant cannot recover.

"You will find by reference to chapter 206 of the acts of 1877, that a reasonable notice by saying that the municipal officers of the town must have twenty-four hours actual notice of the defect or want of repair, which we did not have.

"We can prove that on the morning of January 30th, there was no defect in the road at the place where you allege the accident to have taken place. Yours with respect. A. G. Underwood, E. Russell, W. G. Watson, Selectmen of Fayette."

E. F. Pillsbury & J. H. Potter, for the plaintiff, contended:

I. The notice is required for the benefit of the town and is not to be strictly construed. The object of the notice is that the town may have opportunity to seasonably investigate the cause of the injury and the claim for damages before lapse of time and change of circumstances may render proof of the facts less attainable; and further that the town may have opportunity to settle without suit if they see fit. *Blackington* v. *Rockland*, 66

Maine, 332. *Sawyer* v. *Naples*, 66 Maine, 453. As to sufficiency of notice and its requirements, see opinion of Peters, J., in *Blackington* v. *Rockland*, *supra*, 334.

II. The defendants by their acts have waived the insufficiency of the notice if any existed, for in their negotiation with plaintiff (see their reply) they do not allude to any defect in the notice, but put their refusal to pay on other and distinct grounds. They are therefore estopped to set up or rely upon any defect or insufficiency in the notice. And having thus waived, the law assumes the notices to be correct, and will not listen to the defendants when they seek to show the contrary. *Blake* v. *Ex. Mut. Ins. Co.*, 12 Gray, 265. *Vas* v. *Robinson*, 9 Johns 192. *Etna F. Ins. Co.* v. *Tyler*, 16 Wend. 401. *Clark* v. *New England F. Ins. Co.*, 6 Cush. 342. *York* v. *Penobscot*, 2 Maine, 1.

III. John Hubbard was the duly authorized agent of plaintiff, and all that he did he did as such. The notice of March 10 was not his notice, given by him as such, but was the notice of another person, viz: his wife, given by her, through her huusband, acting as her agent. *Reed* v. *Belfast*, 20 Maine, 247. *State* v. *Hewitt*, 31 Maine, 400. *Harwood* v. *Lowell*, 4 Cush. 310.

O. D. Baker, with *J. Baker*, for the defendants.

LIBBEY, J. To entitle the plaintiff to recover against the town it is incumbent on her, by act 1876, c. 97, to prove that she notified the municipal officers of the town, or some of them, within sixty days after receiving the injury, by letter or otherwise in writing, setting forth her claim for damages, and specifying the nature of her injuries and the nature and location of the defect which caused them.

She introduced in evidence two notices given to the selectmen of the defendant town, one dated February 16, 1877, the other dated March 10, 1877. It is unnecessary to notice the first as it is fatally defective in several respects, and the plaintiff's counsel do not rely upon it. The second reads as follows:

"Fayette, March 10, 1877. To the selectmen of Fayette, Me. Gentlemen: I hereby notifiy you that my wife Sarah R. Hub-

bard, of Fayette, sustained an injury of a broken shoulder on account of a defect in the highway in said Fayette, on the 30th day of January last, near the southwest end of the Davenport road, so called. I hereby enter a claim against said town of Fayette for the sum of two hundred dollars. John Hubbard, per B."

On April 13, 1877, the selectmen of the town sent a reply addressed to John Hubbard, in which they say "We have considered your case for damages against the town on account of the accident to your wife on the highway and have decided that the town is not liable for the damages sustained;" and they deny that there was any defect in the way at the place where the accident is alleged to have occurred.

The question presented by the report is, whether the notice is sufficient on proof that the plaintiff's husband was authorized to act for her. We think it is not.

I. It does not purport to come from the plaintiff or to be given in her behalf. It does not set forth her claim for damages; but it sets forth the claim of John Hubbard for damages by reason of the injury to his wife. There is nothing in it giving the municipal officers any notice that the plaintiff made any claim against the town on account of her injuries. Proof that her husband was authorized to act for her does not aid the notice; because by it he does not purport to act for her and sets forth no claim in her behalf.

II. It does not specify the nature of the defect. In this respect it is general. The statement is "by reason of a defect in the highway." It should have been sufficiently specific to call the attention of the municipal officers to the particular defect complained of.

But it is claimed that the reply of the selectmen is a waiver of the want of notice by the plaintiff, or of the insufficiency of the one given. If the selectmen, being public officers, can legally waive the statute requirement in this respect, in behalf of their town, which we do not intend to decide, we think it clear that they did not do it in this case. A reply denying any liability of the town to John Hubbard for the claim made against it by him, cannot be held to be a waiver of notice by the plaintiff of her claim

for which she brings this suit. *Veazie* v. *Rockland*, 68 Maine, 511.

Plaintiff nonsuit.

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

SARAH BOND *vs.* BRADFORD CUMMINGS.

Aroostook. Opinion July 3, 1879.

Lex loci. Married woman.

By the law of New Brunswick, a married woman living with her husband and having no separate maintenance, cannot acquire title to personal property by purchase from him.

The validity of a contract is to be determined by the law of the place where it is made.

Where a married woman living with her husband in New Brunswick and having no separate maintenance, purchased a horse of her husband, and subsequently moved into this state with the property, the horse is attachable here as the property of the husband.

ON REPORT.

TRESPASS for a mare.

The facts are stated in the opinion.

The case was by agreement taken from the jury and reported to the law court. If, upon the evidence in the case, the action can be maintained it is to come back for trial to a jury; otherwise the plaintiff is to be nonsuited.

Powers & Powers, for the plaintiff.

J. C. Madigan & J. P. Donworth, for the defendant.

LIBBEY, J. This is trespass against the defendant, as sheriff of Aroostook county, for a mare. The defendant justifies the taking by his deputy by virtue of an attachment of the mare as the property of John Bond, the plaintiff's husband, on a writ in favor of R. S. Starrett against him.

The plaintiff claims title to the mare by virtue of a purchase from her husband while living with him, and having no separate

support, in the province of New Brunswick, from which province they moved into this state about the time of the attachment. No purchase is claimed to have been made in this state.

By the law of New Brunswick a married woman, living with her husband and having no separate maintenance, cannot acquire title to property by purchase from him. The validity of the contract under which the plaintiff claims title must be determined by the law of that province.

"Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made." *Scudder* v. *Union National Bank*, 91 U. S. 406. Story Conf. of Law, §§ 242, 243.

Bringing the mare into this state gave the plaintiff no title which she did not acquire by virtue of the purchase from her husband, by the law of New Brunswick; and the mare was legally attachable here as the property of the plaintiff's husband.

Plaintiff nonsuit.

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

JOHN F. SMITH *vs.* THOMAS TARBOX.

York. Opinion July 2, 1879.

Evidence. Declarations.

In trespass against an officer for attaching a store of goods claimed by the plaintiff, on writs against the plaintiff's brother, the defendant denied the plaintiff's title, contending that, with intent to defraud the brother's creditors, the plaintiff and brother arranged to give the plaintiff the nominal title while in fact the brother was the real owner; and to prove it the defendant offered in evidence the declarations of the brother, made while conducting the business and in the absence of the plaintiff, tending to show that he was not clerk but principal, and that the plaintiff's name was only used to protect the goods against the brother's creditors: *Held*, inadmissible to prove the corrupt agreement.

ON MOTION AND EXCEPTIONS.

TRESPASS against the sheriff of this county for the alleged misfeasance of his deputy, in entering store No. 83, Marble Block, Biddeford, and taking goods therefrom, in June, 1877.

The defendant pleaded the general issue, with a brief statement of justification under legal writs against one George T. Smith, commanding the deputy to attach the goods in question as the property of George T. Smith, brother of the plaintiff, and their subsequent sale on execution in due course of law, alleging that the goods were the property of George T. Smith and not the plaintiff's, and that the plaintiff's claim was the result of a fraudulent arrangement between the plaintiff and his brother George to cover the property of George in fraud of his creditors.

The plaintiff offered evidence tending to show that he bought the goods of one Staples, hired the store of him and employed George to carry on the business in the store as his clerk and cutter.

The defendant claimed that the purchase was in fact made with the funds and on the credit of George, and the latter was in reality carrying on the business for his own benefit and on his own account and not as the servant of the plaintiff. In support of this claim the defendant called B. F. Chadbourne as a witness by whom he offered to show that, subsequent to the plaintiff's alleged purchase of

Staples and while George was apparently carrying on the business in the store and in possession of the goods, George told the witness that he (George) was in trade under his brother's (plaintiff's) name; that he was ashamed to do business thus as it hurt his credit; and that it was done for the sole purpose of protecting him against his creditors to whom he was indebted as one of the late firm of Cobb & Smith, and that he made many promises between March 8, 1877, and the date of the attachment to pay his debt to Chadbourne & Kendall, based on his assertion of his ownership of the goods attached. The presiding justice excluded the testimony and the defendant alleged exceptions, and moved to set aside the verdict as being against law and evidence.

John M. Goodwin & W. F. Lunt, for the plaintiff.

Alden J. Blethen, for the defendant, contended that the declarations of George T. Smith were admissible as coming from one in possession; and cited Bump Fraud. Convey., under head of "Declarations in Possession." *Blake* v. *White*, 13 N. H. 267. They were *res gestae*. *Pomeroy* v. *Bailey*, 43 N. H. 126.

Counsel also cited Bump Fraud. Convey. 265.

SYMONDS, J. This is an action against the sheriff for the alleged trespass of his deputy in entering a shop at Biddeford and attaching, on writs against George T. Smith, the plaintiff's brother, certain goods therein claimed by the plaintiff.

The defense denies the plaintiff's title to the property and alleges that, with intent to defraud the creditors of George T. Smith, the plaintiff and he made an arrangement to give the plaintiff the nominal title to the goods attached, while in fact George T. Smith was the owner of them and the proprietor of the business carried on in the shop.

During the trial, the defendant in support of the theory that the goods were the property, not of the plaintiff but of his brother, offered to prove certain declarations of George T. Smith, made while he was conducting the business, tending to show that he was not a clerk but the principal, and that his brother's name was used only as a protection to him against the claims of preexisting creditors.

These declarations of George T. Smith, made in the absence of the plaintiff, were excluded by the court, and to this ruling the defendant excepts.

It is evident from an examination of the exceptions and report of evidence that the statements of the plaintiff's brother were offered for the purpose of proving the corrupt agreement alleged. There was nothing else in dispute which they tended to establish.

Upon this question of collusion between the plaintiff and his brother, of the existence of the alleged conspiracy or fraudulent agreement between them, we think the declarations of George T. Smith were not admissible against the plaintiff, under any of the exceptions to the rule excluding hearsay testimony. Although they were made while he was in possession of the stock and engaged in managing the business, still they were only competent evidence against himself and those between whom and himself some privity of interest or estate or some collusion was first shown. They were not admissible against the plaintiff to prove the fact of such privity of interest nor to prove such collusion.

The sole purpose which the admission of the testimony in this case could have served would have been in its tendency to prove that the plaintiff was a party to the fraudulent agreement alleged. The result would have been to affect the plaintiff upon this preliminary question, of the existence of such common fraudulent design, by the statements of another, made out of court and not in the plaintiff's presence.

The authority cited from 13 N. H. 267, has some tendency to support the claim of the defendant in regard to the admissibility of the evidence we are considering. But upon examination we are satisfied that the ground on which the learned court in that case deemed the evidence admissible was that the relation of vendor and vendee existed between the plaintiff and his brother, James L. Blake, whose declarations were received. Such sale being alleged to be fraudulent as to both parties to it, the declarations of each became material. This is not true of the present case. The plaintiff does not claim title through his brother, George T. Smith; and to receive in evidence the declarations of the latter would be to go one step farther than the court go in

Blake v. *White*, and to overstep a wise and necessary limit to the introduction of testimony before the jury. It is not that in particular instances the admission of evidence like this might not serve the ends of justice, but that in its general operation, the rule excluding it will produce better results.

Whatever doubts may remain upon the case, we are of the opinion that, the rulings on matters of law having been correct, there is no such manifest error as will justify us in disturbing the verdict.

Motion and exceptions overruled.
Judgment on the verdict.

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

VIRGIN, J., did not sit.

PARKER P. BURLEIGH, in equity, *vs.* RUSSELL H. WHITE, administrator, & others.

Aroostook. Opinion July 8, 1879.

Equity,—practice. Partnership. Lien.

It is not an objection to the report of a master in chancery that he acted under a general mandate only, the master having performed the services that were intended to be required of him and no more.

A partner in the purchase and permitting of lands, who by agreement puts his personal services against the furnishing of capital by his copartner, has the right to charge against the partnership any sums necessarily expended by him for the personal services of others in and upon the common property.

In a bill in equity brought by an equitable owner against the heirs of a co-owner for the title of real estate and its earnings accruing before the death of their ancestor, the court will, under a prayer for general relief, entertain jurisdiction of all matters growing out of the property during the pendency of the suit between the parties thereto.

If one owner has converted to his own use more than his proportion of the proceeds from the joint estate, the court, in making a final settlement between the parties, will decree to the other owner a lien for such excess upon the estate left, with suitable provisions to make the lien effectual.

ON REPORT.

BILL IN EQUITY. The material allegations of the bill and

answer will be found in 64 Maine, 23. When the case was before the court as reported above, the bill was sustained and the estate declared subject to the resulting trust claimed. The opinion then ordered a master to be appointed to ascertain the true condition of the mutual demands between the parties. Accordingly a master was appointed, and on the coming in of his report, the case, by agreement of the parties, was made law on the report, the court to award such final or other decree as they adjudged proper, the report to be open to either party the same as if exceptions had been filed.

The report was as follows :

"That objection was seasonably taken by the counsel for the defendants to any proceedings before me, because no decretal order defining the duties of the master was presented, which objection I overruled. The defendants also seasonably objected to the introduction of any evidence concerning moneys received by William H. Burrill or Russell H. White, as administrators of the estate of James White, deceased. This objection was also overruled by me.

"That I find the true condition of the mutual demands between the parties to be as stated on pages six to twenty, inclusive, of the schedule hereunto annexed and forming part of this report; and that the balance due the complainant on the first day of March, A. D. 1878, inclusive of interest computed on each item of said demands, to that date, was $8,731.44. In reaching this conclusion, I have allowed the charge of the complainant for scaling, surveying, examining lands, &c., as per paper hereto annexed, marked 'A' amounting with interest as aforesaid to $1,151.46. But if this court shall determine that under the agreement set forth in the complainant's bill, said charges last named are not allowable, then one-half of the amount is to be deducted from said balance, leaving due the sum of $8,155.71, as by page twenty-one of said schedule.

"That I find the true condition of the mutual demands between the complainant and said James White, at the time of the decease of said White, December 24, A. D. 1870, inclusive of interest computed as aforesaid, to be stated as on paper 'B'

hereto annexed and forming part of this report, and that the balance due the complainant at that date, was $1,931,21. But if one-half of the amount of the charges for scaling, &c., as per paper marked 'A' before referred to are not allowable, then I find a balance of $1,355.48, due the complainant from said James White, at the time of his decease as aforesaid.

"And I further find and report that on the tenth day of August, A. D. 1871, by their deed of quitclaim of that date, duly executed and recorded, Annette W. White, and Camilla A. White, two of the defendants, for a consideration of three thousand dollars conveyed to Russell H. White, co-defendant, 'all of' their 'right, title and interest in and to all real estate in the state of Maine, formerly owned by James White, late of Belfast, now deceased,' and that on the twenty-fifth day of August, A. D. 1871, by their deed of quitclaim of that date, duly executed and recorded, Eugene L. White, and Willis T. White also co-defendants, conveyed to said Russell H., 'all' their 'right, title and interest in and to all the real estate belonging to James White, deceased, late of Belfast.' The nominal consideration in said deed last named, was one dollar, but it appeared by testimony introduced by the defendants, that the real consideration paid was three thousand dollars. It also appeared that prior to receiving said conveyances, said Russell H. caused an examination to be made at the registry of deeds, in Aroostook county, concerning the title to the lands of which the said James White was seized at the time of his death, and found the same unincumbered. To the introduction of said deed, and to evidence concerning the same, said complainant made seasonable objection, which objection I overruled.

"I find that at the date of said conveyances to said Russell H., viz: on the twenty-fifth day of August, A. D. 1871, the true condition of the mutual demands between the parties to be as stated on paper marked 'C' hereto annexed and forming a part of this report, and that the balance then due the complainant, inclusive of interest to the first day of March, A. D. 1878, was $2,050.16. But if the charges for scaling, etc., as per paper marked 'A' are not allowable, then I find a balance due the complainant of $1,474.43.

"And I further find and report that from the date of the appointment of said Russell H. White, as administrator of the estate of said James White, viz: on the tenth day of December, A. D. 1872, to March 1, 1878, inclusive of interest to the said last named date, he the said Russell H., received on account of the lands in question, the sum of $7,532.21, and disbursed the sum of $1,329.89, as per paper marked 'D' hereto annexed and forming part of this report. In addition to said amount of disbursements, he paid certain notes given by said James White to Theophilus Cushing, for the lands in Littleton, amounting, with interest to said last named date, to $9,396.52, as per paper 'D' before referred to. As there was no evidence that said notes were secured by a mortgage on said lands, I have regarded the amount of the same as cash payments made by said James White, at their respective dates in the general statement of mutual demands herein first made.

"And I further find and report that up to the date of said conveyances to said Russell H. White, viz: on the twenty-fifth day of August, A. D. 1871, said William H. Burrill, administrator of the estate of said James White, received on account of said lands the sum of $679.01, and disbursed the sum of $277.49; and that the amount received by him during the whole period of his administration was $8,928.46, and that the amount disbursed was $1,890.56. These several amounts, which include interest computed to March 1, 1878, appear by paper marked 'E' hereto annexed and forming a part of this report.

"And I further find and report that the balance due from the complainant to said James White, on private or separate accounts, with interest computed to March 1, 1878, is $3,794.76, as per page nineteen of the schedule aforesaid. I find that all the accounts between the parties relative to Linneus lands, have been adjusted, and that on the 27th day of October, A. D. 1870, a balance of $3,683.86, was then admitted by the complainant to be due on old notes to said White.

"And I further find and report that a certain paper marked 'A' introduced by the complainant, admitted to be in the handwriting of said James White, had no probative weight with me

except as sustained by other evidence; and that I found no items therein sustained by force of said paper alone.

"And I further find and report that neither the complainant, nor said Russell H. White, in his individual capacity or as administrator of the estate of said James White, or for services claimed to have been rendered by said James White, have proved any claim for personal services in relation to said lands, except so far as embraced in said paper 'A' hereto annexed.

"And I further report that by agreement of counsel this report made by me as master is to be entered at *nisi prius*, as 'law on report,' and it is to go to the full court, and is to be open to either party the same as if they had filed exceptions thereto."

A. W. Paine, for the complainant.

J. Baker, for the defendants.

I. The master had no jurisdiction because the cause was not committed to him by any decretal order defining his duties and powers. Adams Eq. 375, 379, 384. *Simmons* v. *Jacobs*, 52 Maine, 147.

II. The complainant is not entitled to recover in this suit on any accounts that accrued after the death of White. The decision must be within the scope of the allegations and in accordance therewith. The allegations and the scope of the bill are confined to transactions that took place prior to the death of White, or existing at the time of his death. Money in his hands and due from him at the time of his death, and notes and demands due to him at that time arising from sales of lands or the stumpage, only can be included in the final judgment.

The question of title is *res adjudicata*. The present inquiry relates solely to accounts and choses in action which vest in the administrator and not in these heirs. A large part of the balance found due from White was not derived from any notes or contracts that accrued prior to his decease. The sum of $1,931.21 only is the maximum recoverable.

From that sum should be deducted the amount charged by the plaintiff for "scaling, surveying and examining the lands." That was included in his agreement, and he was to do it without com-

pensation. But he was in the legislature and land agent during a large part of the time when these services were rendered, and so he could not render them himself in person as he agreed to do, but employed others to render them for him, and not for the joint operation; and of course he has no more right to charge for them than if he had rendered them himself. It was his duty and part of his agreement to furnish these services without charge, without compensation, and in set off and consideration of the advancements and hazards of White. He might render them *per se* or *per alium* as he pleased, but not at the cost of White in either case. The $1,931.21 should therefore be reduced to $1,355.45, as the largest sum the plaintiff can recover, with interest from March 1, 1878.

III. But if the court should overrule this position, then we contend that the balance of accounts must be struck at the time Russell H. White took his deeds from four of the six heirs of the estate, August 10 and August 25, 1871. These deeds were both recorded prior to the commencement of this suit. The purchases were made in good faith, for a valuable consideration of $3,000 to each heir, and made by said White after searching the records and finding no incumbrance on the property, and without any knowledge or belief on his part of any secret trust.

If it is said that this title is not valid against this secret trust, we claim that it is, and must be held so until it is judicially settled in a proper process and with an appropriate issue. White is unquestionably entitled to have that question litigated and a deliberate and binding decision made upon it. This he has not had, and cannot have in this bill, because it is not directly in issue by the pleadings, but only collaterally; and no decision that could be made on that question under this bill and the pleadings would prevent White from litigating it again.

PETERS, J. We think the objection to the master's acting in the case is not well taken. He had a general mandate only, but did not exceed the power that would have been committed to him had his duties been prescribed by the court with more particularity or detail. No inconvenience has arisen from it. His

examinations and report fully cover all the grounds that either side rests its questions upon.

We can have no doubt that the complainant should be allowed for such money as he paid out for tracing lines, scaling lumber and the like. It is not his own services that he asks pay for, but to have the sums refunded to him which he has paid out. The evidence before the master is not before us. The presumption is that this account was properly examined and allowed. We think the allegations in the bill in relation to the services of the complainant as joint owner or copartner, referred to what he was to do in respect to the property himself. It does not follow that no outside services were necessary.

Another question presented is, whether the auditor should state the accounts as far as items are concerned which have accrued from the property since the death of White, the original holder of the title to the lands. In other words, shall the land and all matters and accounts be settled up to this time, or only up to the death of White? The bill was originally against the administrator and heirs of James White, and now stands by amendment against his heirs, one of whom is the administrator and, subject to the complainant's claim, the sole owner of the property. The whole accounts are one subject matter, the pursuit of one inquiry, and relate to the same estate. No difficulty can arise from making in this proceeding a final settlement. On the contrary, it must be a positive benefit to both sides. Time, labor and money will be saved thereby. Two suits should never be required where all matters can be adjusted in one. The original claim only is thereby disposed of, with such matters as have arisen out of the same *pendente lite*. The gist of the bill is virtually against the property and the fruits of the property. A supplemental bill is never necessary where the original bill can accomplish a just result. Having the bill in our hands, under the prayer for general relief, all necessary relief can be afforded. This is in accordance with the general rules laid down by all authors on the subject of equity. *Nelson* v. *Bridges*, 2 Beav. 239, Story Eq. Jur., § 794, and note. If this were not so, a part of the subject matter of the suit could be abstracted and carried away while the

plaintiff's claim is being resisted and delayed by the defendant, without adequate remedy for it.

The rights of all the parties can be preserved by the form of the decree. All the respondents but one are now virtually out of the controversy, but should not recover costs, as they are but nominal parties and have been subjected to no expenses in the litigation. Their assignee has been the only active defendant.

The bill is sustained with costs. The complainant is declared to be the owner of an undivided half of the lands remaining unsold, and of one-half of all sums of money, in any form, due or to be due, for lands, or stumpages therefrom, sold and not accounted for in the report of the auditor; and entitled to receive a conveyance of such shares from Russell H. White in any capacity or right in which he is the holder of the same. The complainant is to have a lien upon the other half of such lands and sums of money for the sum of eight thousand and seven hundred and thirty-one dollars and forty-four cents, and interest thereon from March 1, 1878, and for the costs of this suit. The principal respondent and his predecessor in title having taken and converted to their use a portion of the common estate, it is equitable, and in accordance with the principle regulating copartnerships and co-ownerships, that the complainant should be remunerated therefor from the same property. Therefore the master already appointed shall appraise and set off to the complainant such undivided portion of the half of the lands and claims last named as will be equal in value to the sum and interest and costs aforenamed; land to be first taken in preference to the choses in action; a suitable conveyance and transfer of the appraised property to be made by the respondent, Russell H. White, to the complainant, unless an amount equivalent to the amount of the appraisal shall be paid to the complainant, or be secured to him, by the respondent, upon such terms as a single judge may settle when the master's report again comes in. A decree in accordance with these terms and conditions to be entered as a final determination of all matters under this bill in dispute between the parties. *Sampson* v. *Alexander*, 66 Maine, 182.

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

STEPHEN S. WILLIAMS *vs.* SOLON WHITE.

Sagadahoc. Opinion July 18, 1879.

Consignment. Contract.

The defendant agreed to take the plaintiff's hay to B, sell it and pay him the net proceeds; on arriving in B, the defendant, in his own name, consigned his whole cargo, comprising several lots of other owners with the plaintiff's, to commission merchants, who, from time to time, sold portions of it and made remittances to the defendant on account of sales of cargo, but failed before the whole was disposed of: *Held*, that, if the defendant had a right to consign the plaintiff's hay, he should have done it separately and required separate accounts of its sale.

To charge the plaintiff with a portion of the loss on the cargo, he must show that the proceeds of sale of the plaintiff's hay were not paid by the remittances from the consignees to the defendant.

ON REPORT.

ASSUMPSIT to recover balance due for 8 177-200 tons of hay, $75.75 having been already paid.

The facts sufficiently appear in the opinion. The court to render such judgment as may be fit upon the law and fact.

J. W. Spaulding & F. J. Buker, for the plaintiff.

W. T. Hall, for the defendant.

LIBBEY, J. The defendant was engaged in the business of buying and shipping hay to Boston for sale, and in November, 1877, he agreed to take the plaintiff's hay, send it to Boston and sell it, and pay the plaintiff the proceeds of sale, less freight and charges. He took it and consigned it with the rest of the cargo, made up of several lots, a part of which was his and a part belonged to others, to commission merchants, in his own name, for sale. The cargo was sold, from time to time, by the consignees, and an account thereof was rendered by them under date of January 25, 1878, by which it appears that the net amount of sales of the cargo was $1,612.78. Prior to rendering the account the consignees had remitted to the defendant at different times about $1,000 on account of sales of the cargo. In February following the consignees failed; and after that the defendant

received $100 for hay sold after the failure, and a dividend of twelve and a half per cent on the balance. He claims that the plaintiff is chargeable with his *pro rata* share of the whole loss on the cargo. We think not.

If the defendant had a right under his agreement with the plaintiff to consign the plaintiff's hay to commission merchants for sale, which would depend upon the usage in that business, about which there is no evidence, it was his duty to consign it separately, and require a separate account of its sale, as it might be of a different quality from the rest of the cargo, or might be sold on a different state of the market, and bring a different price. He had no right to intermingle it with the rest of the cargo, to be sold in his own name, rendering no separate account of its sale. To charge the plaintiff with a portion of the loss, it is incumbent on him to show that the proceeds of sale of the plaintiff's hay were not paid by the remittances. In the absence of any express appropriation of payment by the parties, the law would appropriate the remittance in payment of proceeds of sales previously made; and if the plaintiff's hay had been sold before the remittance, and the sum remitted was sufficient in amount, the defendant must be regarded as having received the proceeds of sale of that hay, and liable for the full amount. By the account of sales rendered by the consignees, it does not appear when any portion of the cargo was sold. The defendant offers no other evidence in regard to it. Moreover, there was a portion of the hay unsold when the consignees suspended, which was afterwards sold for $100, and the whole amount was received by the defendant. It does not appear whose hay it was. If it was the plaintiff's, he is entitled to the proceeds.

We think the defendant fails to show any ground on which the plaintiff is chargeable with a portion of the loss; and that he is liable for the net proceeds of the sales of the plaintiff's hay, which appear to be $121.71. The plaintiff has received $75.75, leaving $45.96 due him.

Defendant defaulted for $45.96, *and interest from the date of the writ.*

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

JOHN WEBBER *vs.* WILLIAM DORAN, & SOMERSET COUNTY, trustee.

Somerset. Opinion July 18, 1879.

Trustee. Contingent liability.

To charge an alleged trustee by reason of any money due from him to the principal defendant, it must appear that, when the writ was served upon the trustee, the money was due absolutely and not contingently.

Thus, where the principal defendant agreed to put into the basement of a court house furnaces which should heat the building to the satisfaction of the county commissioners, at a specified price, payable when completed, and thereupon put in two furnaces which had not been accepted when the writ was served upon the county; and within a reasonable time thereafterward the furnaces were rejected as insufficient, and a new contract was made for adding another for a specific sum together with the original sum and interest: *Held*, that the trustee be discharged.

ON EXCEPTIONS.

ASSUMPSIT.

The only question raised by the exceptions was upon the ruling of the presiding justice whereby he discharged the trustee upon the disclosure.

J. Wright, for the plaintiff, cited Par. Con. 539. *Emery* v. *Davis*, 17 Maine, 252. 16 Maine, 17. 9 Pick. 441. 7 Cush. 485. *Dwinel* v. *Stone*, 30 Maine, 384. *Smith* v. *Cahoon*, 37 Maine, 281. Hill. Sales, 274, 275.

The trustee should be charged. See *Balkham* v. *Lowe*, 20 Maine, 369. *Lane* v. *Nowell*, 15 Maine, 86. *Hooper* v. *Day*, 19 Maine, 56. *Cutter* v. *Perkins*, 47 Maine, 557. *Davis* v. *Davis*, 49 Maine, 282. *Bryant* v. *Erskine*, 50 Maine, 296. *Wither* v. *Munroe*, 19 Maine, 42. *Ware* v. *Gowen*, 65 Maine, 534. *Ricker* v. *Fairbanks*, 40 Maine, 43.

Walton & Walton, for trustee.

LIBBEY, J. The writ was served on the trustee February 14, 1879. On January 3, 1878, the county of Somerset, the alleged trustee, by its commissioners, made a contract with Doran, the principal defendant, by which he agreed to put into the basement

of the court house two or more furnaces of the kind called Doran's Eagle Furnace, to heat the court room and the offices in it sufficiently and to the satisfaction of the county commissioners, and warrant the perfect working of the same, together with all the apparatus and appurtenances connected therewith, in all states and conditions of the weather, and to furnish all the materials therefor, of the best quality, to be completed by January 25, 1878. And in case the furnaces did not work perfectly and to the satisfaction of the commissioners, he was to take them and the apparatus out and restore the building to the same condition that it was in when he commenced putting them in.

And the county was to pay said Doran therefor, when the agreement on his part should be performed to the satisfaction of the commissioners, the sum of $325, towards which sum he was to take the stoves then in the court room for $40.

By the disclosure it appears that Doran put in two furnaces in the last of January or first of February, 1878, and they were used in the building up to the service of the writ. After March, 1878, the county commissioners were requested by Doran, from time to time, to determine whether the furnaces were of sufficient capacity and worked to their satisfaction, but they declined then to accept them, on the ground that they had not had sufficient opportunity to test their capacity and working in all conditions of the weather, and in all uses of the building, but the refusal to accept was not final. To this Doran does not appear to have objected. This state of things continued up to the time of the service of the writ.

At the March term, 1879, the commissioners finally determined that the two furnaces were not of sufficient capacity to heat the building as required by the contract, and rejected them; whereupon a new contract was made by which Doran was to put in another furnace of his largest size, for which, and the two he had before put in, he was to have $360, and interest on $285 from the time the two furnaces were set up.

Upon these facts we think the trustee was properly discharged. At the time of the service of the writ the liability of the trustee was contingent. R. S., c. 86, § 55, clause 4. *Dwinell* v. *Stone*, 30 Maine, 384. *Bryant* v. *Erskine*, 50 Maine, 296.

It was not to become fixed till the commissioners determined that the furnaces were of sufficient capacity and worked satisfactorily; or at least till they unreasonably refused to determine, and Doran had in fact complied with the terms of the contract on his part. *Chapman* v. *Lowell*, 4 Cush. 378. *Brown* v. *Foster*, 113 Mass. 136.

It does not appear that any complaint was made by Doran that the delay was unreasonable. On the contrary, he acquiesced in the action of the commissioners, and it was finally demonstrated that the two furnaces were not of sufficient capacity to heat the building as the contract required, and a new contract was made by which another was to be put in. True, the action of the commissioners with Doran after the service of the writ cannot affect the rights of the plaintiff, but the fact that the two furnaces were found not to be of sufficient heating capacity, tends to show that the delay of the commissioners was not unreasonable, or, if it was, that the principal defendant had not performed the contract on his part.

Exceptions overruled.

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

KNOWLTON PLATFORM AND CAR COUPLING COMPANY *vs.* FULLER G. COOK.

Knox. Opinion July 18, 1879.

Assignment. Indenture. Construction. Evidence.

K, a patentee for a certain improvement in car couplings, and having in view certain other improvements therein; and having invented certain improvements in car platforms and draw bars, and having in contemplation certain other improvements therein, entered into an indenture with the defendant, S and R, by which the defendant, S and R were each to pay one-third of all expenses incurred in securing before and thereafter letters patent on the inventions, or contemplated inventions, and in introducing the inventions into actual use; and whenever any part of the patents were sold to any persons other than the defendant, S and R, for actual use, then the expenses of sale and further introduction to be paid by all the parties *pro rata*. K also agreed to devote his time and inventive powers to perfecting all the patents, and, as soon as letters were obtained, to assign to the defendant, S and R an undivided one-sixth thereof to each. Subsequently K assigned a portion of his half to certain others, who with all others interested organized themselves into the plaintiff corporation under R. S., c. 48, §§ 18–20, for the purpose of manufacturing and selling the patented articles and licenses to make and use the same, all of the parties becoming stockholders therein. Thereafter, K assigned to the plaintiff company all his title and interest in his two patents for improvement in car couplings, therein agreeing to assign to the plaintiffs all future improvements by him made in the premises, and that the full benefit of the indenture first named should accrue to and become the property of the plaintiffs. Thereafterwards, the defendant, S and R assigned to the plaintiffs all their title and interest in the same patents, with an agreement that the full benefit of the indenture first named should accrue to and become the property of the plaintiffs. In an action by the plaintiffs to recover one-third of the expenses mentioned in the indenture between K and the defendant, S and R: *Held*, that K's assignment to the plaintiffs did not include his claim for such expenses incurred before the assignment; and that K's assignment and the assignment of the defendant, S and R extinguished the indenture.

Parol evidence as to the understanding of the parties as to the effect of a written assignment of an indenture is inadmissible.

ON REPORT.

ASSUMPSIT to recover balance of certain items of expenses enumerated in a certain indenture between C. H. Knowlton of the one party, and the defendant, J. D. Spear and J. E. Robinson, of the other, amounting to $110.13, less $43.42.

The plaintiffs claimed to recover by virtue of the indenture named and the assignments of Knowlton to the plaintiffs, and of the defendant, Spear and Robinson to the plaintiffs.

The indenture and assignments sufficiently appear in the opinion.

The plaintiffs offered evidence tending to prove that it was the understanding, at the formation of the plaintiff corporation, that the defendant, Spear and Robinson were to continue liable for expenses as before the organization, and that the plaintiffs were in fact to be subrogated to, or to succeed to the rights of Knowlton under the indenture; also evidence to prove a reference by plaintiffs and defendant, a year or so after the incorporation of plaintiffs, of the question as to whether there had then been such a sale, under agreement "A," as to determine the liability of the defendant thereunder, as showing the construction placed upon the several agreements by these parties; also evidence to prove that, subsequent to agreement "A," the stock or interest originally owned by or derived from C. H. Knowlton has never been assessed by the company for any expenses or liabilities, and that all the other stock has been, and that this was in pursuance of the original understanding at the making of agreement for incorporation.

Defendant objected to all parol evidence, because the several contracts and all the transactions between the parties are in writing, and cannot be enlarged, varied, controlled or explained by such evidence.

It was admitted for the purposes of this action that C. H. Knowlton has performed all that was obligatory upon him under the indenture, and that several patents have been taken out and assigned by him to the company since its formation; and that J. P. Cilley, John Carr, Herbert C. Havener, Alonzo Snow and John C. Knowlton purchased the interest they owned at incorporation from C. H. Knowlton prior to the incorporation.

The action was marked law on report, with the stipulation that, if the parol testimony offered was admissible, or if the action was maintainable without it, the action was to stand for trial; otherwise plaintiffs to become nonsuited.

C. E. Littlefield, for the plaintiff, cited *Dwinel* v. *Barnard*, 32 Maine, 116. *Leffingwell* v. *Elliott*, 8 Pick. 455. *Holland* v. *Craft*, 3 Gray, 162. *Longley* v. *Longley*, 23 Maine, 39. *Haven* v. *Brown*, 7 Maine, 421. *Folsom* v. *Merch. M. Ins. Co.*, 38 Maine, 414. *Emery* v. *Webster*, 42 Maine, 204. *Bradford* v. *McCrary*, 45 Maine, 9. *Covel* v. *Hart*, 56 Maine, 518.

On the admissibility of evidence. 1 Greenl. Ev., §§ 289, note 2; 287, note 1. *Haven* v. *Brown*, *supra*. *Hatch* v. *Kimball*, 16 Maine, 146. *Fickett* v. *Swift*, 41 Maine, 65. *Courtenay* v. *Fuller*, 65 Maine, 156.

T. P. Pierce, for the defendant.

LIBBEY, J. Prior to January 3, 1873, Charles H. Knowlton had procured letters patent from the United States for improvement in car couplings, and had in view certain other improvements in car couplings; and had invented certain improvements in car platforms and car bars, and had in contemplation certain other improvements relating to said subjects; and on that day he entered into an indenture with the defendant, J. D. Spear and J. E. Robinson, by which the defendant, Spear and Robinson, on their part, agreed to pay, in equal shares of one-third each, all the expenses incurred in securing said letters patent, or that might thereafter be incurred in obtaining from the patent office letters patent on said inventions, or contemplated inventions, including models, drawings, fees and all reasonable expenses; also all expenses of making patterns, sample specimens, and introducing said inventions, or any of them, into actual use and trial; but whenever any of said patents or contemplated patents, or any part of them, should be sold to any person or persons other than said defendant, Spear and Robinson, for actual use, then from that time the expenses of sale and of further introduction should be paid by all of said parties in proportion to the share owned by each.

And said Knowlton on his part agreed to devote his time and inventive powers to improving and perfecting each and all of said patents and contemplated patents, and as soon as any other patent should be obtained from the United States on said subjects

he agreed to assign to said defendant, Spear and Robinson one undivided sixth part thereof to each.

Prior to October 14, 1874, said Knowlton had sold and assigned a portion of his half of said patents to Alonzo Snow, J. C. Knowlton, H. C. Havener, J. P. Cilley and John Carr, and on that day all the parties interested in said patents and inventions, by an agreement in writing of that date, associated themselves together for the purpose of organizing themselves as a corporation, by virtue of R. S., c. 48, §§ 18–20, "for the purpose of manufacturing and selling platforms, car couplings and connecting gear of cars, and letters patent; and to sell rights and licenses to make and use the couplings and inventions of Charles H. Knowlton." And on December 1, 1874, their incorporation for said purposes, under the name of the "Knowlton Platform and Car Coupling Company," with a capital stock of $50,000, all paid in, was perfected, all of said parties becoming stockholders therein.

On December 19, 1874, said Knowlton, in consideration of $7,500, sold and assigned to said company all his title and interest in his two letters patent for improvements in car couplings, one issued November 26, 1872, the other issued April 1, 1873. In the assignment said Knowlton agreed that whatever improvements might thereafter be made by him in car couplings and connecting gear, whether patented or not, should be assigned to and become the property of said company, and that the full benefit of the agreement made by and between himself and the defendant, Spear and Robinson, dated January 3, 1873, should accrue to and become the property of the company.

On February 8, 1875, the defendant, Spear and Robinson, in consideration of $25,000, sold and assigned to said company all their title and interest in said patents, with an agreement similar in terms to that in said Knowlton's assignment, transferring to the company all benefit of the said indenture of January 3, 1873.

The plaintiffs claim to recover of the defendant one-third of certain expenses specified in said agreement of January 3, 1873, incurred by said Knowlton prior to his assignment to them, and also one-third of such expenses incurred by them since said assignments.

Their claim to recover for the expenses incurred by Knowlton is based on the ground that the agreement in his assignment of his patents is an assignment to the plaintiffs of his right of action for said expenses against the defendant under said agreement of January 3, 1873.

We think that agreement, construed in the light of the subject matter to which it relates and the surrounding circumstances, is not an assignment by Knowlton to the plaintiffs of an existing right of action for expenses previously incurred; but that it was the intention of the parties that the plaintiffs should take all benefit of the agreement of January 3, 1873, in the future only. If it was the intention of the parties to assign all existing rights of action for expenses previously incurred, we should expect them to use apter terms than those used to express that purpose, and to make some stipulation requiring the plaintiffs to do what Knowlton was required to do on his part by that agreement.

The plaintiffs' claim to recover one-third of the expenses incurred by them since the said assignments is based on the ground that the defendant's liability still continued, under said agreement of January 3, 1873, after said assignments. We think by a fair construction of the contracts this ground is untenable.

By that agreement Knowlton and the defendant, Spear and Robinson entered into mutual stipulations by which each party was to do certain things in regard to the patent then issued, and to any patent or patents that might be thereafter issued, to said Knowlton. By the new arrangement all the parties interested in said patents and inventions were to be, and were, incorporated for the purpose of owning and managing those patents and the business growing out of them, and both parties to the agreement of January 3, 1873, were to convey and assign, and did assign, to the plaintiffs all their interests in said patents, including all benefit to either party under said agreement.

By the assignment to the plaintiffs of that indenture by both parties thereto it became extinguished, and ceased to be an existing contract. There were no longer two parties to it. It had become merged in one. If there can be any doubt as to the legal effect of the contracts entered into between the parties, the

construction which we have given them is supported by the consideration that by the indenture of January 3, 1873, Knowlton was to devote his time and inventive powers to improving and perfecting his patent and contemplated patents, and when a new patent was procured, the defendant was entitled to an assignment of one-sixth of it; but by said Knowlton's agreement with the plaintiffs, he was to assign to them all such new patents and inventions, and did procure and assign several to them. If the defendant's liability still continued under that indenture, he would be entitled to one-sixth of the new patents procured and assigned to the plaintiffs, but by his assignment to them of his interest in the indenture he ceased to have any right to a share of such patents. Moreover the plaintiffs, by their acts after said assignments, seem to have put upon them the same construction which we have given them, for by their votes from time to time, they assessed the expenses which they incurred upon their stockholders.

The parol evidence offered is not admissible, as it would contradict the written contracts between the parties, and control their legal effect.

Plaintiffs nonsuit.

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

JOSHUA BLENN *vs.* H. HARRISON LYFORD.

Somerset. Opinion July 21, 1879.

Accommodation note. Evidence.

In an action by the indorsee against the maker of a dishonored promissory note, received by the plaintiff after maturity, it is competent for the defendant to show that it was an accommodation note, and that it was paid by the party for whose accommodation it was given.

When an accommodation note has been paid, at or after its maturity, by the party whose duty it was to pay it, its negotiability ceases.

The indorsee of such a note, when overdue and after such payment, cannot recover the same against the maker, though he may have paid value for it.

ON REPORT.

ASSUMPSIT by indorsee against the maker of a promissory note.

After the note was read in evidence, the defendant offered the receipt following, signed by M. E. Rice, the payee, which was excluded: "Received of H. H. Lyford two notes of hand, dated in December last, for three hundred dollars each, one payable in six months from date, the other seven months from date. These notes are for my benefit, except for his note due me April 15, 1872, for $225. The balance of the two above named $300 notes I am to pay."

Joseph H. Richardson, called by the defendant, testified in substance that he bought the note in suit of M. E. Rice in the fore part of April, 1872; that it had about four months to run; that it then had on the back the words, "Holden without demand or notice, M. E. Rice," now erased; that he kept it two or three months after it became due. On being asked whether M. E. Rice then paid it and took it up, the answer, on objection of the plaintiff, was excluded.

Various other questions to similar purport, and other testimony tending to show equitable defenses, was excluded on objection.

By consent of parties, the case was withdrawn from the jury and reported to the law court. If the foregoing rulings were wrong, and if the evidence excluded was admissible and would constitute a valid defense against this plaintiff, the case is to stand for trial; if inadmissible, or insufficient to constitute such defense,

a default is to be entered for the amount of the note, with interest since due.

The remaining material facts sufficiently appear in the opinion.

D. D. Stewart, for the plaintiff, contended that plaintiff is the proper holder of the note, which is commercial paper. None of these letters and writings are admissible to affect him, he being no party to them, and no proof being offered that he had any notice or knowledge of them before he purchased the note. *Brown* v. *Spofford*, 95 U. S. 478. *Collins* v. *Gilbert*, 94 *Id.* 754. *Bank* v. *Crow*, 60 N. Y. 85, 87. *Wait* v. *Chandler*, 63 Maine, 257. *Malbon* v. *Southard*, 36 Maine, 148.

For the same reason the other evidence offered was inadmissible to affect the plaintiff, and constituted no defense.

Even if a note is accommodation paper, and overdue when taken, and the party taking it knows it is accommodation paper, that affords no defense. Red. & Big. L. Cas. Prom. Notes, 264, and cases cited. *Thompson* v. *Shepherd*, 12 Met. 311.

Here there is neither proof nor pretense that the plaintiff had any knowledge when he purchased the note that it was accommodation paper. He took it before it was due, for full value, and is entitled to recover. *Collins* v. *Gilbert*, *supra*. *Farrell* v. *Lovett*, 68 Maine, 326.

Josiah Crosby, for the defendant.

APPLETON, C. J. This is an action of assumpsit on the following note:

"St. Albans, Me., Dec. 2, 1871. Seven months from date, value received, I promise to pay M. E. Rice, or order, three hundred dollars, at any bank in Bangor. H. H. Lyford."

The note was indorsed in blank "M. E. Rice." The following words were also on the back of the note, erased with ink but legible: "Holden without demand or notice. M. E. Rice."

Granting the presumption that the plaintiff is a *bona fide* holder for value of the note before maturity, that presumption may be overcome by proof.

It appears from the testimony that the note was indorsed to

one Richardson, for value, in the April following its date; that it was not paid at maturity, and that about three months after its dishonor he delivered it to Rice, the payee.

The plaintiff then received the note in suit, when overdue. The note remaining unpaid after maturity was dishonored, and it was the duty of the indorsee to make inquiries concerning it. If he takes it, though he gave a full consideration for it, he does so on the credit of the indorser. He holds the note subject to all equities with which it may be incumbered.

As the plaintiff is the indorsee of a dishonored note, it was competent for the defendant to show that it was an accommodation note, and that it had been paid by the party for whose accommodation it was given.

That the note was for the accommodation of the payee is abundantly shown by his receipt of the date of February 22, 1872, as well as by the testimony offered and excluded.

The note being for the accommodation of Rice, it was his duty to pay it. The note being found after dishonor in the hands of the one bound to pay it, the presumption is that he paid it. 2 Par. N. & B. 220. It was competent to show that in fact he paid it, but the answer to an inquiry whether the note was paid by Rice was excluded. This was erroneous.

Assuming the note to have been paid by Rice, it was the same as if paid by the maker. It was paid by the party whose duty it was to pay it. The purpose for which it was given has been accomplished. The negotiability of a note ceases after its payment by the party who should rightfully pay it. "Now it cannot be denied," says Denman, C. J., in *Lazarus* v. *Cowie*, 43 E. C. L. 819, "that if a bill be paid when due by the person ultimately liable on it, it has done its work, and is no longer a negotiable instrument. . . But the drawer of an accommodation bill is in the same situation as the acceptor of a bill for value; he is the person ultimately liable, and his payment discharges the bill altogether."

Rice, when he took up the note in suit, had no right of action against the maker, and could not transfer to the plaintiff any better right after maturity than he had. Edwd. B &. N. 564.* *Fish* v. *French*, 15 Gray, 520. *Tucker* v. *Smith*, 4 Maine, 415.

In the cases cited by the plaintiff there are most important differences from the one under consideration. In *Bank* v. *Crow*, 60 N. Y. 85, the plaintiffs were the indorsees of the note for value and before maturity, and were consequently to be protected. In *Thompson* v. *Shepherd*, 12 Met. 311, it was held that the indorsee of a note, who receives it for value from the second indorser, after it has been dishonored by the maker, can recover thereon against the maker, although he knew when he received it that as between the maker and first indorser it was an accommodation note. But this is upon the principle affirmed by the court in *Woodman* v. *Churchill*, 52 Maine, 58, that where the first indorsee of a promissory note acquires a right of action against the maker, by being a *bona fide* purchaser, without notice and before maturity, he can transfer a good title as well after as before the note becomes due.

Exceptions sustained.
Action to stand for trial.

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

In re HERBERT L. DAMON, appellant from DECREE OF JUDGE OF INSOLVENCY.

Androscoggin. Opinion July 23, 1879.

Insolvent act. Constitutional law.

The constitution of the United States does not prohibit the enactment of an insolvent law by a state.

The insolvent act of this state, having been enacted while the federal bankrupt law was in force, went into full operation upon repeal of the bankrupt law, and not before.

The provision of Stat. 1878, c. 74, § 15, authorizing the sequestration of the estate of an insolvent without previous notice to him, is not unconstitutional for that cause.

ON EXCEPTIONS.

On December 9, 1878, the judge of the court of insolvency, on application of the creditors of the appellant, issued a warrant for taking possession of the appellant's estate in accordance with the provisions of Stat. 1878, c. 74, §§ 14, 15. The warrant was made returnable December 24, 1878, and ordered the appellant to then appear.

On return day Damon appeared before the court of insolvency, resisted the prayer of the application, and filed a motion alleging, in substance, that he was adjudged an insolvent on December 9, 1878, on the petition of his creditors and without any notice to himself, contrary to the law of the land; that the statute under which he was so adjudged is unconstitutional and void, for that when said statute was enacted, to wit: February 21, 1878, the federal bankrupt law was in force and so continued until September 1, 1878; that the state statute did not take effect upon its passage, or at the expiration of thirty days after the recess of the legislature which enacted it, by reason of the federal bankrupt law; and that the state statute never became of effect. The prayer of the motion was for a dismissal of the proceedings against him.

The judge of the court of insolvency overruled the motion; and Damon appealed to the supreme judicial court.

The presiding justice of the appellate court ruled, as matter of

law, that the decree appealed from be affirmed. Thereupon the appellant alleged exceptions.

Hutchinson, Savage & Hale, for the appellant, cited 1 Kent Com. 387. *Houston* v. *Moore*, 5 Wheat. 21. R. S., c. 1, § 3. Const. Maine, Art. I, §§ 1, 9. U. S. Const. 7 Amend. 14 Amend. *Barron* v. *Mayor Baltimore*, 7 Pet. 243. *Porter* v. *Taylor*, 4 Hill, 140. Mass. Stat. different.

Frye, Cotton & White, contra.

APPLETON, C. J. The insolvent law of this state, c. 74 of the acts of 1878, was enacted while the bankrupt law of the United States was in full operation. The proceedings in the case before us are under the insolvent law of this State, and were commenced since the repeal of the bankrupt law.

I. It is objected that the statute of this state is unconstitutional and void because enacted while the bankrupt act of the United States was in full force.

It is provided by section eight of the first article of the constitution of the United States that "congress shall have power . . to establish . . uniform laws on the subject of bankruptcies throughout the United States." Here is no prohibition against the passage of bankrupt or insolvent laws by the states. As long as the national government abstains from legislation on this subject the states may act. "It is sufficient to say," observes Marshall, C. J., in *Sturgis* v. *Crowninshield*, 4 Wheat. 122, "that until the power to pass uniform laws on the subject of bankruptcies be exercised by Congress, the states are not forbidden to pass a bankrupt law, provided it contain no principle which violates the tenth section of the first article of the constitution of the United States." The right of the states to pass insolvent or bankrupt laws, and that the power given to the United States is not exclusive, has been repeatedly affirmed. *Boyle* v. *Zacharie*, 6 Pet. 348. *Cook* v. *Moffat*, 5 How. 310. *Baldwin* v. *Hale*, 1 Wall. 223.

If there is a state law on the subject, the subsequent passage of a bankrupt law by congress neither repeals nor annuls it. It only

suspends its operation so far as the law of the State may be in conflict with the act of congress. As was said by Bartol, C. J., in *Lavender* v. *Gosnell*, 43 Md. 153, "the act of congress suspends the state law but does not repeal it. Proceedings commenced under the state law prior to the passage of the bankrupt act may be carried on to their final termination in accordance with the provisions of the state law." *Judd* v. *Ives*, 4 Met. 401. *Chamberlain* v. *Perkins*, 51 N. H. 337.

A voluntary assignment by a debtor for the benefit of his creditors, under the insolvent law of the state, is *prima facie* an act of bankruptcy within the thirty-fifth section of the bankrupt act of 1867, but such an assignment, no proceedings in bankruptcy having been instituted, remains valid, unless such proceedings are instituted within six months thereafter. *Maltbie* v. *Hotchkiss*, 38 Conn. 80. The insolvent law of this state is not wholly superseded by the bankrupt act of the United States, but when they come in conflict, the latter must prevail. Hawkins' Appeal, 34 Conn. 549. Gerry's Appeal, 43 Conn. 289. In Iowa it was held that the state insolvent law was not nullified, superseded or suspended by the bankruptcy law, and that jurisdiction might be exercised under the former until proceedings have been commenced under the act of Congress. *Reed* v. *Taylor*, 32 Iowa, 209. But it is not required to go to the length of the case last referred to.

While the bankrupt law is in full force, it has, or may have, jurisdiction of cases within its provisions. "Upon the repeal of that law," observes Dewey, J., in *Atkins* v. *Spear*, 8 Met. 491, "the insolvent law of Massachusetts was revived, and with its revival all the limitations and restrictions upon the right to a discharge revived, although the acts occurred during its suspension." The bankrupt law merely suspending the state insolvent laws, upon its repeal they at once revive and need not be re-enacted. *Lavender* v. *Gosnell*, *supra*. "If the right of the states to pass a bankrupt law is not taken away by the mere grant of the power to congress," observes Marshall, C. J,, in *Sturgis* v. *Crowninshield*, *supra*, "it cannot be extinguished; it can only be suspended by the enactment of a general bankrupt law. The repeal

of that law cannot, it is true, confer the power on the states; but it removes a disability to its exercise, which was created by the act of congress."

It follows from these decisions that a state insolvent law is not unconstitutional, and that it is neither repealed, annulled nor rendered void by the passage of the bankrupt law, for proceedings commenced under its provisions may be completed, notwithstanding the existence of a bankrupt law enacted after their commencement, and because the moment the act of congress is repealed the state law at once revives. It is evident, therefore, that the state law has vitality notwithstanding and during the existence of the paramount law of the United States, for if it was void by the act of congress it could not revive.

We now come to the question whether the state can pass an insolvent or bankrupt law during the existence of an act of congress on the subject. In other words, whether the act under discussion is in force. Its validity is unquestioned unless absolutely void in its inception.

No constitutional provision has been violated, for the passage of such a law is not merely not prohibited, but it is impliedly sanctioned by the clause giving congress power over the subject matter of bankruptcies. The legislature may pass a law to take effect instantly, or at a future day, or on the happening of a future event. If the statute had said that it was to take effect upon and after the repeal of the bankrupt law of congress, there could have been no doubt as to its validity. But such is the precise effect of the law without the insertion of any such provision. The act of congress is the paramount law on the subject when called into action. The law of the state is subordinate to it. The efficient action of the state law is suspended for the time being precisely as in the cases already considered, when a national bankrupt law was passed subsequently to a state law on the same subject. The state may pass a law which is subordinate to the paramount authority of national legislation, and is only subordinate to that, but which, when that ceases to have force by reason of its repeal, has at once the vigor of law. Whether the law of the state is existent and superseded by the subsequent legislation of

congress, or is inoperative by reason of precedent congressional action, can make no difference. In either case the efficiency of the state law is alike suspended and in abeyance while the act of congress is in force, and when that is repealed the law of the state at once and instantly becomes operative, and action may be had under its provisions.

II. It is urged that the law was invalid because it did not go into complete operation after its passage. But that is not requisite to its validity. It does go into partial operation on its passage. It was a law valid in all respects and to be obeyed, except so far as it was in conflict with the statute of the United States. When that conflict ceased, the law went into full operation. It was a law, to go into full effect when it ceased to be in conflict with the act of congress, and whether that was inserted in the act, or left as the legal result from the relation of the state and national government to each other, can make no difference.

III. It is claimed that the act is in violation of the state constitution because, as the appellant's counsel allege, it provides by section fifteen that the debtor may be adjudged a bankrupt, and his property, without notice to him in the first instance, may be sequestered.

This is not a new question. It was raised in Massachusetts under provisions similar to those of the act under consideration, in *Kimball* v. *Morris*, 2 Met. 579. "The object of authorizing the preliminary proceedings seems to have been to provide in the first place for a sequestration of the property of the debtor, upon an *ex parte* application of a creditor, and in this respect does not differ from proceedings by writ of injunction, issued for the purpose of preserving the property in its present state." A similar question arose in relation to the power of bank commissioners to restrain banking corporations from acting, by injunction issued before any hearing, in *Com.* v. *Farmers & Mechanics' Bank*, 19 Pick. 542, and the constitutionality of the statute giving such power was affirmed. Indeed, the statute gives no more power than was conferred by the bankrupt law of the United States. Rev. Stat. U. S., § 5024. It authorizes the sequestration of the property of the debtor on certain conditions by warrant duly

issued by the judge of insolvency. By the law of the state any creditor, of his own mere motion, may seize by attachment, without prior notice, all the attachable property of his debtor, or he may, after taking the prescribed oath, arrest his person. Much more, then, may he sequestrate the attachable property of his debtor under the sanction of a warrant issued by a magistrate upon application upon oath. *O'Neil* v. *Glover*, 5 *Gray*, 144.

Exceptions overruled.

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

SARAH P. ROBINSON *vs.* WILLIAM W. EDWARDS.

Kennebec. Opinion July 21, 1879.

Evidence. Practice.

In trespass against an officer for seizing and selling the plaintiff's goods on an execution against another person, the officer's return on the execution is not admissible evidence for the defendant to prove the amount and value of the goods taken.

In such action, mortgages of the same property by the execution debtor to other parties are not admissible.

A point not taken at the trial is not open on a bill of exceptions.

ON MOTION AND EXCEPTIONS.

TRESPASS for taking and carrying away a stock of boots, shoes and leather, of the alleged value of $534.53, claimed by the plaintiff. Date of writ, September 13, 1876. The defendant justified as a deputy sheriff under a writ in favor of the *Waterville Bank* v. *Isaac Robinson & another*, from whom the plaintiff acquired her title.

The officer's return on the execution issued upon the judgment in the action above named was offered by the defendant to show the amount of the goods taken and their value as ascertained by the sheriff's sale on the execution, but was excluded. The defendant also offered a record of a foreclosure of a mortgage of the goods from Isaac Robinson & another to one Frye, made

April 25, 1876, which was objected to and excluded. Also mortgage from the same persons to Waterville Savings Bank, dated August 22, 1870, and assignment of the same to Baker & Baker July 6, 1877, and foreclosure by the assignees, which were excluded. Also record of a mortgage from the same parties to Waterville Savings Bank, May 21, 1873, and assignment to Baker & Baker July 6, 1877, and foreclosure of the same by the assignees, which were excluded.

The verdict was for the plaintiff for $543.62. The defendant seasonably filed a motion to set the verdict aside as against law and evidence and the weight of evidence, and alleged exceptions.

Baker & Baker, for the plaintiff.

F. A. Waldron, for the defendant, contended that partnership creditors have a priority over private creditors. Lind. Part. 877. 9 Maine, 28. 20 Maine, 91. 68 Maine, 78. 6 Mass. 242.

By uniting plaintiff's two claims she has lost all claim to compensation from the assets of the firm until the creditors of the firm have been paid in full. 2 Comst. 262. 52 Barb. 26. 4 Maine, 400. 5 Maine, 471. 23 Maine, 22. 34 Maine, 273. 40 Maine, 528. 63 Maine, 318.

Mortgaging partnership property by Isaac Robinson to secure his private debt was outside the partnership business, a fraud upon creditors of the firm as well as the other partner, and void as to both. Lind. Part. 223. Gow Part. 58. Story Part. 190–210, and notes. Bayley Bills (4 ed.) 47. 3 Kent Com. 42. 1 East, 49. 13 East, 175. 2 Esp. R. 524, 731. 2 Caines, 246. 2 Johns. 300. 4 Johns. 251. 16 Johns. 34. 19 Johns. 154. 11 Wend. 75. 1 Wend. 529. 3 Pick. 5. 5 Pick. 412. 7 Pick. 542. 10 Pick. 147. 12 Peters, 229. 10 Paige, 170. 5 Mason, 176. 4 Maine, 84. 31 Maine, 454. 50 Maine, 442. 58 Maine, 415. 67 Maine, 499.

The mortgage was given with intent to defraud, hinder and delay creditors, and was received by this plaintiff for the purpose of aiding and assisting therein. 7 Maine, 252. 14 Maine, 104. 44 Maine, 11. 4 Cush. 446. 7 Met. 520.

If this formed any part of her motive in taking the mortgage, it is void as to creditors. 44 Maine, 11.

There was a secret trust to enable mortgagors to settle with their creditors, which renders the mortgage void. 23 Maine, 221. 11 N. H. 460. 20 Johns. 5.

Plaintiff gave no answer to notice of attaching officer, as required by the revised statutes. R. S., c. 81, § 43.

The return of the officer on execution in original suit should have been received to show amount of goods taken, and also as the best evidence of their value which it was possible to obtain.

The intent to defraud, hinder and delay the creditors of Isaac Robinson & Co. on the part of the plaintiff was a material issue on the trial of the case. The foreclosure of the mortgage from Ann C. Robinson and Isaac Robinson to Frye, and the assignments of savings bank mortgages to Baker & Baker and foreclosure of the same, being similar transactions, and, under the peculiar circumstances of the case, tending to show fraud, should have been admitted. 4 Maine, 172, 306. 12 Maine, 515. 17 Maine, 341. 32 Maine, 55. 48 Maine, 322. 113 Mass. 384. 11 Cush. 213.

They were ruled out as too remote in point of time, but no rule has ever been established in regard to time. The question in this case is, "did the evidence offered tend to prove the intent of the party?" Defendant claims that it did, and hence should have been admitted. 3 Greenl. Ev., § 15. Ros. Crim. Ev. (3 Am. ed.) 99. 11 Cush. 213.

Fraud is a conclusion to be deduced not merely from events but from their relation to each other. To separate them is to deprive them of their legitimate effect. 23 How. 187. 8 Wheat. 173. 24 Conn. 94. 13 N. H. 270.

APPLETON, C. J. This is an action of trespass for taking and carrying away a stock of boots and shoes belonging to the plaintiff. The defendant justifies as a deputy sheriff having a writ in favor of the *Waterville Bank* v. *Robinson & another*, from whom the plaintiff acquired her title.

The jury by their verdict have established the plaintiff's title to the property in dispute.

Exceptions are filed to rulings of the justice presiding at *nisi prius.*

I. The returns of the officer on the execution in the original action were offered in evidence by the defendant to show the amount of goods and their value, as ascertained by the sheriff's sale on the execution, but they were ruled out.

This ruling was correct. The execution would show the amount of the goods returned thereon, but it would not show that more goods had not been taken.

The plaintiff, at all events, was entitled to recover the fair market value of the property at the time and place of its taking. What that was could not be shown by an officer's return of the price which articles seized brought at a forced sale on execution at public auction months after the original attachment.

II. The mortgages offered in evidence, from Ann C. Robinson and Isaac Robinson to the Waterville Savings Bank, and their assignment to Baker & Baker, were matters *inter alios*, and they should not in any way injuriously affect the plaintiff's rights. They were properly excluded.

III. The evidence is fully reported upon the motion for a new trial. The points raised in argument were not presented at *nisi prius*, or, if they were, no exceptions have been taken to the rulings of the justice presiding in relation thereto. *Goodnow* v. *Hill*, 125 Mass. 587. In either case the defendant has no cause of complaint. He should have raised the questions now presented, and if he did, and the rulings were unsatisfactory, he should have excepted thereto.

There was contradictory evidence. The integrity of the plaintiff's claim was impeached. The decision of her title was submitted to a jury under instructions to which no exceptions have been taken, and with rulings, so far as disclosed, which are unexceptionable.

Exceptions and motion overruled.

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

STEPHEN W. TOWNSEND, administrator, *vs.* WILLIAM H. LIBBEY.

Kennebec. Opinion July 22, 1879.

Officer,—liability of. Trustee,—default of.

When an officer, ordered to attach real estate, neglects to do so, and it is conveyed by the debtor before judgment on the action, he is liable for official neglect, although the execution was not placed in the hands of an officer within thirty days from the rendition of judgment.

If, in such case, there was real estate of the debtor remaining on which a levy might have been, but was not made, the value of such real estate should be allowed in reduction of damages.

The judgment against a trustee on default only makes out a *prima facie* case of indebtedness, which may be disproved on *scire facias*.

ON REPORT from the superior court of the county of Kennebec.

CASE against the sheriff of the county of Kennebec, to recover damages for an alleged neglect of one of his deputies to attach real estate as directed in a writ in behalf of the plaintiff against one Benjamin Haines as principal defendant, and the city of Gardiner as his trustee.

The material facts sufficiently appear in the opinion.

The law court, by agreement of parties, were to render judgment upon the facts and law applicable thereto.

H. S. Webster, for the plaintiff.

L. Clay, for the defendant, cited *Todd* v. *Darling*, 11 Maine, 34. *Crockett* v. *Ross*, 5 Maine, 443, 445. *Boynton* v. *Flye*, 12 Maine, 17. *Pearson* v. *Tincker*, 36 Maine, 384–388. *Abbott* v. *Jacobs*, 49 Maine, 319.

APPLETON, C. J. This is an action against the sheriff of Kennebec county, to recover damages for an alleged neglect of one of his deputies to attach real estate.

The plaintiff sued out a writ of attachment, dated October 1, 1877, against Benjamin Haines, and the city of Gardiner as his trustee. The writ was served by the deputy to whom it was delivered by serving the trustee with a copy and reading the same to the principal defendant. The action was entered at the next March term at which it was returnable, and judgment by default

was rendered against the principal and trustee, and an execution was issued thereon April 2, 1878.

The deputy to whom the writ was delivered for service was ordered to attach real estate, which he failed to do. The damages for this neglect the plaintiff seeks to recover in this action.

At the time of the attachment the defendant was the owner of real estate, the principal part of which he conveyed away shortly after the date of the plaintiff's writ and before the recovery of judgment.

The evidence conclusively shows official neglect on the part of the deputy. The officer was liable if judgment was rendered for the plaintiff, and at the time of its rendition, and while it was in force, there was no real or other estate upon which a levy could be made.

It is urged in defense that the plaintiff should not recover, because the execution was not placed in the hands of an officer within thirty days after the rendition of judgment. But if this debtor had conveyed away all his property so that there was none on which a levy could be made, the delivery of the execution into the hands of an officer would have been an idle and useless ceremony. *Abbott* v. *Jacobs*, 49 Maine, 319.

If there had been no intervening conveyance or attachment of the debtor's property, it is obvious that the plaintiff would not have been harmed by the officer's neglect to return an attachment. So far as there was real estate upon which a levy could have been made, it was the duty of the plaintiff to levy on the same. So far as there was real estate, it was the neglect of the plaintiff that he did not levy on it, and for this neglect the defendant and his deputy should not suffer. An allowance of seventy-five dollars in reduction of damages should be made for the value of the real estate remaining in the debtor's hands, which might have been seized on execution had it been seasonably delivered to the officer.

The plaintiff obtained judgment against the trustee by default. This makes out a *prima facie* case of indebtedness. The judgment is for the goods of the debtor in the hands of the trustee. But this judgment is not conclusive between the parties. It is not final. On *scire facias*, the trustee may disclose further, and

a judgment in that suit on disclosure or by default would be binding on him. R. S., c. 86, §§ 65–71. No deduction should be made for the supposed funds in the hands of the trustee, for the evidence shows that there were not any which could have been secured in case of a seasonable demand on the execution.

Defendant defaulted. Judgment for the original judgment against Haines, less $75.00.

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

DANIEL M. DUNHAM *vs.* BOSTON & MAINE RAILROAD COMPANY.

Penobscot. Opinion July 21, 1879.

Common carrier. Forwarder.

When a railroad company receives goods from a connecting road to be transported to the owners, it is bound to forward them forthwith; and they cannot justify their detention on the ground that, by their regulations, goods so received are not to be forwarded until the receipt of a bill of back charges, and that no such bill accompanied the goods.

ON REPORT.

CASE for damages for the detention and non-delivery, and the not forwarding, within a proper and reasonable time, of a car of mowing machines and parts of mowing machines, whereby the plaintiff was unable to fill his contract for and sell forty-five machines, and to use the parts in repairing other machines.

Plea, general issue.

The following facts were agreed:

In the summer of 1876, a car containing mowing machines and parts of mowing machines was shipped from Little Falls, N. Y., to the plaintiff, directed to Bangor, Maine.

After coming over various connecting railroads, in the ordinary course of transportation, the car arrived in Boston over the Fitchburg railroad, July 1, 1876; and on that day (which was Saturday), and probably in the afternoon, it was placed by the latter

company on the track of the defendant company in Charlestown, Mass., at usual place of transfer between the roads, and what is called a memorandum bill was left at the crossing man's house near by. No notice was given of the same by the servants of the Fitchburg company to the servants of defendant company, and it is not customary to give such notice, each company taking cars which they find upon their track.

On July 3, 1876, the servants of defendant company took said car into their possession, and got the memorandum bill where it had been left. The regular way-bill of the freight in said car was, by mistake on the part of some servant of the Fitchburg company, delivered on said July 3 at the freight office of the Eastern railroad company, in Boston, and was not delivered to defendant company until July 11, 1876, when it was delivered at their general freight office in Boston.

Said car was taken by defendant company, on said July 3, over the line of their road to Portland, Maine, reaching there on the morning of July 4. It remained in Portland on the track of defendant company until July 12, 1876, and was not meanwhile offered to the Maine Central railroad company, the next connecting carrier. On July 12, 1876, the car was delivered to said Maine Central company by defendant company, and on July 13 was brought through to Bangor, the place of its ultimate destination.

It was also admitted that, by due course of transportation, the car would have arrived July 5, but did not in fact arrive until July 14, when, as plaintiff contended, the term of sales for that season had passed and the goods not worth more than forty per cent of their market price when ordered.

In defense it was admitted that C. L. Hartwell, now, and in July, 1876, the general freight agent of said Fitchburg company, would testify that:

"The usual and customary method of transacting business between connecting lines of railroad, when freight is transported over such connecting lines, is this: When the freight has been carried over one road, the yardman, so called, at the terminus of that road delivers the car containing the freight to the yardman

of the next connecting road, at the same time giving him a memorandum bill, so called, which bill shows the name of the person to whom the freight is directed, the place of its ultimate destination, and sometimes a specification of what the freight is, but which does not show the amount of charges upon the freight for carriage up to that point. It is also usual, upon the same day with the delivery of the freight and the memorandum bill, for the delivering road to make out at their freight office a regular way-bill of the freight, which regular way-bill shows, in addition to everything shown by the memorandum bill, the amount of the charges of the delivering road upon the freight, which charges include their charge for carriage over their own line and whatever charges they have paid or become responsible for for transportation over other roads over which the freight may have come, and deliver this way-bill at the freight office of the receiving road.

"According to the custom of doing business between connecting roads, whenever one road receives freight from another connecting road, they become responsible to the road from which they receive the freight for all charges they have for their own carriage and for back charges, whether paid by them or which they in their turn have become responsible for; and the last road, which carries the freight to place of ultimate destination, retains the freight until they have collected all these charges.

"In some cases the regular way-bill is not delivered on the same day with the freight, and in such cases the custom of the Fitchburg railroad company, of which I am, and in July, 1876, was, the general freight agent, is to receive the freight with the memorandum bill, and send it forward at once, and afterwards, as soon as received, sending on the regular way-bill. Such, too, has been the habit of the Boston & Maine railroad company in doing business with our road. There are, however, some roads which refuse to receive freight at all without the regular way-bills showing charges.

"In all cases, upon the receipt of freight, the company receiving it becomes responsible for all charges for previous transportation over connecting lines to the company from which they have received the freight."

It is also admitted that W. J. C. Kenney, now, and in July, 1876, the general freight agent of the defendant company, would testify exactly the same as Mr. Hartwell, both in relation to the general custom of doing business between connecting roads, and as to the particular custom of the Boston & Maine and Fitchburg companies, in cases where regular way-bill showing charges is not delivered on the same day with the freight.

It is also admitted that Payson Tucker, now, and in July, 1876, the superintendent of the Maine Central railroad company, would testify as follows:

"The established rule of the Maine Central railroad company is, not to receive goods from connecting lines to be forwarded unless such goods are accompanied by a regular way-bill, or memorandum, giving name of consignee, destination and charges due. This rule was in full force and effect during the year 1876, and was adopted in accordance with orders from the Superintendent's office."

If asked by plaintiff's counsel, Mr. Tucker would also say that, if perishable goods were offered to his company without the regular way-bill accompanying, he thinks he should direct their being received and forwarded, if thereto particularly requested by the connecting road, and upon being fully protected from all liability resulting therefrom by the road offering the goods; but would also add that such cases did not often occur, and he did not remember any such actual case.

It is also admitted that Robert A. McClutchy, now, and in July, 1876, the freight agent of the defendant company, in Portland, would testify that, as such agent of the defendant company in Portland, the place of connection of the two roads, the regulations of the Maine Central railroad company, testified to by superintendent Tucker, had been communicated to him; that the business between the two companies was done in accordance therewith; and that in every case where he, in behalf of the defendant company, had offered freight to the Maine Central company without accompanying way-bill showing charges, the freight had been uniformly refused, and that in several cases he did so offer freight and have it refused.

It is also admitted that Charles M. Chase, of Reading, Mass., would testify that, in July, 1876, he was in the employ of the defendant company, in Boston, as yard clerk in the freight department. His duties as such clerk were to receive memoranda accompanying freight received by defendant company from connecting roads in Boston, to go to the freight office for the way-bills of the freight, and from the memoranda and way-bills to make out new memoranda to accompany the freight over the line of the defendant company. The memoranda made by him were known as conductors' memoranda, and were to be passed in by conductors with the way-bills of freight at the freight office of the company, at the end of their route.

He remembers a car load of mowing machines received from the Fitchburg railroad company, in Boston, directed to D. M. Dunham, Bangor, Maine. He thinks the memorandum received by him with the car was dated July 1, 1876, and was received by him this same day the car was delivered to defendant company, viz: July 3, 1876. He knows the car was forwarded to Portland over defendants' road on the same day it was received; there was a delay in the delivering of the way-bill of this car load of machines, and he distinctly remembers of going during this delay to Mr. Saville, then the freight agent of the Fitchburg company, in Boston; he had before going at least twice reported the non-delivery of this way-bill at defendant company's freight office, to Charles E. Merritt, that he might write to the Fitchburg officials for it. When he personally went to Mr. Saville for it, Saville told him that the bill had not yet got round. He remembers this transaction from having looked into the car, noticing the character of the freight, and thinking it had better go forward at once. He personally attended to its being attached to that day's train, and spoke to the conductor of the train about it. He also remembers it from the unusual delay in the delivery of the way-bill, and from the matter being investigated soon after, when it was fresh.

The memoranda sent by him with freight contain the name of place on defendants' road from which the freight starts, the place thereon where it is to leave the road, the name of consignee,

place of final destination, number of car, and description of its contents.

It is also admitted that Charles E. Merritt, of Boston, would testify that, in July, 1876, he was employed in the general freight office of the defendant company, in Boston; that, in the course of said employment, in said July, 1876, between the time when a car load of mowing machines directed to D. M. Dunham, Bangor, Maine, was received by defendant company, from Fitchburg company, and the time when the way-bill of said freight was received by defendant company, he wrote two letters to the freight officials of the Fitchburg company, and sent them in the ordinary course of such business by messenger, inquiring about said way-bill, and requesting its delivery; that he has no personal knowledge of the delivery of the car, except as it was reported to him by the man in the yard at the time; that he remembers sending these letters on account of the delivery of the way-bill, and because the matter was brought to his attention upon its investigation not long afterwards, when it was fresh.

It was agreed that all the foregoing testimony, which it was admitted would be given by the various persons aforesaid, should be regarded as if actually given upon the stand, and that it may be used by either party in the case as proof actually taken on the stand, subject only to such legal objection as might be made to its admissibility if actually offered on the stand, such objections to be made by either party at the trial or in the argument of their case, without prejudice on account of such objection not having been earlier made and herein noted.

The case was then withdrawn from the jury and continued on report, with the stipulation that, if the full court shall decide that the defendants had a legal right to detain the car in question until the Fitchburg railroad company had delivered the expense account of back charges, then a nonsuit is to be entered; otherwise, the case to be sent back for the jury to settle the facts, under such rules of law as may be laid down by the law court.

H. L. Mitchell, for the plaintiff.

Wilson & Woodard, for the defendants, cited *Watts* v. *Bailey*,

49 N. Y. 464. *St. John* v. *Van Santvoord*, 6 Hill, 157. *Farmers & Mechanics Bank* v. *Champlain Trans. Co.*, 23 Vt. 186. *Williams* v. *Gilman*, 3 Maine, 276. 1 Greenl. Ev., §§ 292, 294. 2 Redf. Railw. (5 ed.), § 184. *Judson* v. *Western R. Corp.* 4 Allen, 520, 526. *Briggs* v. *Boston & L. R. R. Co.*, 6 Allen, 246. Story Bail., § 532. *Bowler* v. *E. & N. A. Railway Co.*, 67 Maine, 395. *Stevens* v. *Boston & Worc. R. R. Co.*, 8 Gray, 262, 266.

APPLETON, C. J. The defendants, on July 1, 1876, received from the Fitchburg railroad company certain goods consigned to the plaintiff at Bangor, with a memorandum stating from whom received and to whom and where to be delivered, but the Fitchburg company neglected or omitted from carelessness to furnish the defendant with the amount of precedent freight earned.

The defendants received the goods, and on the third or fourth of July carried them to Portland, where they remained until July 12, when, having received a bill of all previous freight earned, they delivered the goods to the Maine Central railroad, which corporation took them to their place of destination and delivered them to the consignee.

The plaintiff, in consequence of the delay in transportation, lost the sale of his goods, and brings this action to obtain compensation for such loss.

The acceptance by the defendants of the goods at Portland was complete when the goods by their consent came into their hands. *Pratt* v. *Railway Co.*, 95 U. S. (S. C.) 43.

The defendants receiving the goods and taking them to Portland, in so doing were common carriers and liable as such.

But as the goods were to be delivered at a point beyond their line, and as they knew where and to whom they were to be delivered, they were thus to be regarded as forwarders, and it became their duty to forward the goods without unnecessary delay. *Plantation No.* 4. v. *Hall*, 61 Maine, 517. *Rawson* v. *Holland*, 59 N. Y. 611. *Burroughs* v. *N. & W. R. R. Co.*, 100 Mass. 26.

The defendants manifestly neglected their duty as forwarders.

For so doing they rely upon an established rule of the Maine Central railroad company, which is not "to receive goods from connecting lines to be forwarded unless such goods are accompanied by a regular way-bill or memorandum giving name of consignee, destination and charges due."

But this rule, if proved, cannot avail, because they did in fact receive the goods and carry them part way, and thus receiving them and transporting them they were bound to forward.

While the defendants claim all the rights of common carriers they must discharge all the duties of such carriers. Railroads may make arrangements for mutual accommodation. They may have the merit of convenience, but they have not the force of law. They are not obligatory on the public.

It is claimed that they are to be excused because the antecedent charges for freight had not been delivered and they could not collect the freight earned. But that is no excuse. Because the Fitchburg railroad company neglected to furnish the amount of freight, so that they were unable to state the amount of precedent freight and collect it, is no excuse for not forwarding the goods in their possession.

But they would not be responsible for its collection if the negligence of the Fitchburg railroad company prevented their having the necessary information to enable them to make such collection. They should not suffer for the negligence of others for whose acts they are not responsible. They could forward the goods with their own bill for freight earned by them.

But the defendants having received and carried the goods were bound to deliver them to the next railroad. In *Reynolds* v. *B. & A. R. R. Co.*, 121 Mass. 291, the defendants refused to receive the goods because there was no freight bill and expense voucher. In the present case the defendants did receive and transport over their line, but neglected to forward. They cannot deny that they had the custody of the goods as carriers; that they were responsible as such carriers over their road; that when the goods reached its terminus their liability as carriers had terminated and a new duty as forwarders had arisen, which they neglected to discharge.

But the defendants are not justified in the delay in this case by

the evidence upon which reliance is placed. Hartwell, the general freight agent of the Fitchburg railroad, and Kenney, the general freight agent of the defendant company, agree that in cases where the regular way-bill is not delivered on the same day as the freight, the custom of both railroads "is to receive the freight with the memorandum and send it forward at once, and afterwards, as soon as received, sending on the regular way-bill." Neither witness states that the road receiving the freight with the memorandum is to retain it till the way-bill is received, or that the freight received is subject to the further order of the road delivering it until the way-bill is forwarded. If it were so, the road receiving the freight might be compelled to hold it against the will of the owner until the road delivering the freight should see fit to deliver the way-bill. This would make the subsequent carriage of goods depend upon the action of the railroad delivering, and their carriage might be delayed indefinitely.

What the defendant corporation should have done, and what it did not do, was to deliver the freight with their own charges only, and the memorandum stating the place where and the person to whom the freight was to be forwarded, to the next line of railroad over which the goods were to be transported. If the Fitchburg railroad should not forward their freight bill in a reasonable time, so that the defendants could collect the freight, they would not be responsible for it. The loss would be the result of negligence on the part of the Fitchburg railroad, which that corporation could not and should not impose on these defendants.

But it has been urged that the Maine Central railroad company would not have received the goods without a way-bill giving the charges due. They were not tendered for transportation, therefore it cannot be known that they would not have carried them to their place of destination.

But why should not the Maine Central railroad have taken and carried the goods? It seems from the testimony of their freight agent they were accustomed to forward freight though the regular way-bill showing charges was not delivered on the same day with the freight.

Again, it was the duty of the Maine Central railroad as common carriers to receive and transport the freight. The defendants had the goods to forward, and it was nothing to the Maine Central railroad that the Fitchburg railroad, or some preceding railroad on the route, had neglected their duty. The Maine Central would not be liable for precedent freight earned, of which they had no notice. Indeed, they might assume that, if no charges were made known to them, it was because none whatever existed. They would have no right to refuse goods tendered for carriage.

Where goods are delivered to a railroad company by a connecting railroad company to be transported to the owners, and the same are received by said company for the purpose, it becomes its duty to send them off immediately; and it cannot justify the detention of the goods on the ground that, by its regulations, goods received from a connecting road are not to be forwarded until the receipt of a bill of back charges, and that no such bill accompanied the goods. *Michaels* v. *N. Y. Cent. R. R. Co.*, 30 N. Y. 564. This case determines the precise question under consideration.

In the case of transporting goods over several railroads constituting a connecting line, neither company is an agent of the owner; each exercises an independent employment as a contractor with the owner and is responsible for its own negligence, and it cannot make the owner responsible for the negligence of a connecting road. *Sherman* v. *Hudson R. R. Co.*, 64 N. Y. 255.

Here the defendants' only excuse is the negligence of another railroad, and that, too, when they had all the information needed for the discharge of their own duty. The convenience of the public must have precedence. It is not just that goods consigned should be lost or diminished in value at the cost of the consignee, thereby to exonerate a railroad company from the consequences of its own negligence, still less to exonerate another railroad from the consequences of its negligence. The defendants should have discharged their known duty, whether the Fitchburg company did theirs or not. They should have tendered the goods received with the memorandum to the Maine Central railroad company for

transportation, and then they would have fulfilled the legal obligation resting upon them. If the Maine Central railroad had refused to receive and transport, it would then remain to be seen by what right they could refuse goods tendered for transportation so long as they claim to be common carriers.

The measure of damages is the difference in the value of the articles (which should have been forwarded) at the time and place when and where they ought to have been delivered and when they were actually delivered. *Ward* v. *N. Y. Cen. R. R. Co.*, 47 N. Y. 329.

Defendants defaulted.

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

INHABITANTS OF NORRIDGEWOCK *vs.* INHABITANTS OF MADISON.

Somerset. Opinion July 21, 1879.

Payments made, after notice and without denial of liability, by one town to another, do not estop the town paying to deny the settlement of the pauper therein.

Such payments are evidentiary of the town's liability, the effect of which is for the jury.

The decision of commissioners appointed under R. S., c. 3, § 43, to ascertain and determine the dividing line between towns, is conclusive upon them.

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

ASSUMPSIT for supplies furnished to John G. Young and family, and Marshall F. Young and family, claimed to be paupers of defendant town. The only question presented to be determined by the jury was a question of the paupers' settlement. There was no pretense that the paupers' settlement was in Norridgewock. The verdict was for the defendants.

The plaintiffs introduced evidence that the paupers had been furnished at previous times and occasions by the overseers of Norridgewock, who had furnished these paupers with necessary supplies, and had given to the overseers of Madison the notice required by statute, and that no denial was ever made by the overseers of

Madison until the accruing of the bill on which this suit was brought, but the overseers of Madison had always paid such bills. The plaintiffs' counsel claimed that such payment in such cases was equivalent to a judgment, and conclusive upon the defendants upon the question of settlement in this case, and asked the judge so to rule, but he refused so to rule, and did rule that it was only evidence to be considered by the jury.

The plaintiffs claimed that the town of Madison having exercised jurisdiction of that territory set to Cornville by line run by commissioners, under R. S., c. 3, § 43, from its incorporation in 1804 to the running of that line in 1876, a residence on that tract on March 21, 1821, was a residence in Madison, and that the running of said line was no evidence that such line was the true line. The court ruled as hereinafter recited.

The only evidence relative to the residence of the father of the paupers on that territory was from Enoch Hayden, who testified that he was born February 24, 1807, and that when he was fourteen, sure, in December, 1821, or January, 1822, he helped remove paupers' mother and two or three children from Corinna to witness' father's house in Cornville, and the father did not accompany them, but had left Corinna before, and he thought was then building the house on the tract above named.

It is admitted that there was, upon the east end of the square lot, a log house in which Samuel S. Young, or Samuel Young, 2nd, once lived, which by this line now comes within the line of Cornville, and which by the line as once occupied was in Madison.

The judge charged the jury as follows: "Something was said in regard to a town line; that at one time it was considered that a certain house, where it was alleged this man Young resided, was within the town of Madison, and that afterwards the citizens of the town took the legitimate course for establishing a line, and brought that house in the town of Cornville instead of Madison. I instruct you that the record evidence, which has been put in here, of the ascertainment of that line, is binding upon all parties and is the legitimate town line in this case; so if you find that material, you may consider that line as established at the place where the record says it is."

There was no evidence that the paupers ever acquired a residence in their own right, and the only evidence of any residence, in any way acquired, was evidence tending to show a residence of the paupers' father in Madison, on March 21, 1821, put in by the plaintiffs. There was such evidence introduced. To the rulings applicable to the above no exceptions are taken. The plaintiffs introduced evidence that, in July and August, 1840, the father of the paupers and family, including the paupers, fell into distress, and were relieved by the town of Madison as paupers and from time to time, up to the date of the accruing of the amount in suit, the town of Madison assisted the various members of the father's family, including these paupers, as paupers, supporting them sometimes in Madison, sometimes paying for supplies furnished by one other town to a very large amount. There was no evidence whatever as to residence introduced by defendants. There was no evidence whatever to show that the paupers' father was not born in Madison, and had lived in Madison up to the time that Enoch Hayden testified to moving the family from Corinna to Cornville, in December, 1821, or January, 1822.

The court instructed the jury, as to the payment for medical services in 1840 by the selectmen of Madison, as follows:

"They say probably those medical services were paid for by the overseers of Madison under a misapprehension of the real facts; that they did not go down to the bottom of the investigation at the time and ascertain really where the settlement of Young was; but that they made such an investigation as they did, and they were paying away somebody else's money than their own, to wit: the town's, and they made a mistake. There is the explanation.

"Then the town of Norridgewock go further and put in the deposition of Mr. Lindsey, which you will have with you, and which you have heard read, that Madison has paid sundry bills for the support of these Youngs from 1872 to 1877, some of them pretty large. And they have put in other evidence to the same purport, that Madison has, during a series of years, different years since 1840, paid bills of that character and to quite a large amount; and they urge upon you the argument that they would not have done it unless they had sufficiently investigated to

become convinced that it was their duty, under the law, to do it.

"Individuals, you probably would not expect to be paying money voluntarily, without suit, to a party to whom they owed nothing. If you should have a case come before you and it should be proved that Mr. A. had, for a long series of years, been paying money upon a claim which somebody else had made against him, and he had kept paying, paying year after year, voluntarily, perhaps you would expect that there would be pretty strong ground for believing that he owed or else he would not have done so. We are selfish, we do not pay away our money in that way against our own interests, as a rule, unless we find there is some well founded claim in law or equity; and when we find something of that kind, it is pretty strong evidence that, whatever the party defendant may say now, having had time to look the ground over, there was a pretty well grounded claim, or else he would not have spent so much money in trying to pay it. You have heard the argument on the other side; that there was a certain supposition in relation to the settlement of Mr. Young, and that the successive boards of overseers, one after the other, when a bill came up from some other town for the support or relief of the Youngs, they looked back on the books and found that one set of overseers, away back in 1840, had paid bills of that character, and there had been sundry bills paid since, in different years, and that would rather dull their endeavor to investigate, and they would pay without investigating any further, pinning all their faith upon what they found among the records of the town.

"I instruct you, as matter of law, that this testimony that Madison has paid, so frequently, bills for the relief of these Youngs when they have been presented by other towns, is not conclusive; that it does not bind the town necessarily, so that I can rule as matter of law that they would be estopped to deny it, as I could rule they would be estopped to deny the settlement if they had not returned the answer; but that this is evidence submitted to you as tending to prove that the settlement was really in Madison during all those years, and that it is for you to weigh that testimony, together with all the rest of the testimony in the case bearing upon the question of settlement, and then say, have the

plaintiffs by a preponderance of the testimony in the case satisfied you that the settlement of those Youngs was really in Madison. That is just the legitimate scope and bearing of that testimony. They are facts put in for you to weigh and give them such weight as you, in your wisdom, shall consider they are entitled to, after having heard the arguments on both sides."

The verdict was for the defendants; and the plaintiffs alleged exceptions.

J. H. Webster, for the plaintiffs, cited *Jay* v. *Carthage*, 53 Maine, 128. Mass. Stat. 1793, c. 59. Stat. 1821, c. 122. R. S. c. 24, §§ 27, 28. *Leicester* v. *Rehoboth*, 4 Mass. 180. *Harpswell* v. *Phipsburg*, 29 Maine, 313. *Weld* v. *Farmington*, 68 Maine, 301–306. *Marshpee* v. *Edgartown*, 23 Pick. 156. *Ellsworth* v. *Houlton*, 48 Maine, 416, 423. *Dewey* v. *Field*, 4 Met. 381. *Hearne* v. *Rogers*, 9 B. & C. 577. *Cummings v. Webster*, 43 Maine, 192–194. *Lisbon* v. *Bowdoin*, 53 Maine, 324. *Haines* v. *Ham*, 39 Maine, 268. *State* v. *Jackson*, *Id.* 291. *Propr's Ken. Purch* v. *Laboree*, 2 Maine, 275. *Coffin* v. *Rich*, 45 Maine, 507. *Hughes* v. *Farrar*, 45 Maine, 72.

Walton & Walton, for the defendants:

APPLETON, C. J. This is an action to recover for supplies to certain paupers alleged to have their settlement in the defendant town.

The repeated payments by the defendants to the plaintiffs for supplies furnished the paupers, after notice to them and without denial of their liability, are claimed to be an estoppel upon them in this action. The more numerous the payments, the greater the probability that the pauper has his settlement in the town so paying. But such payments do not constitute an estoppel. They are important evidence, the force of which, with the other circumstances of the case, is to be determined by the jury. *Ellsworth* v. *Houlton*, 48 Maine, 417. *Weld* v. *Farmington*, 68 Maine, 301. The instructions on this branch of the case are in accordance with the previous decisions.

The settlement of the paupers, as claimed by the plaintiffs, was

derived from the father by virtue of his residence in the defendant town.

The decision of commissioners appointed under R. S., c. 3, § 43, in ascertaining and determining the line between Madison and Cornville, was received in evidence to show that the place where the pauper was said to have his residence was not within the limits of the defendant town. In their report they "ascertain and determine" the line between those towns in part only, there being no dispute between the towns as to the rest of the line. There was, therefore, obviously, no occasion for running an undisputed line. The statute makes the line so ascertained and determined "the true dividing line between such towns," and the presiding justice so declared the law.

The defendants, having repeatedly paid the plaintiffs bills incurred by them for the support of the paupers whose settlement is in controversy, were oppressed with the heavy burden of explaining why such payments were made. There was contradictory evidence upon the controverted questions of fact. The plaintiffs had the advantage of the closing argument, and their learned counsel would not fail to avail himself of all the benefits to be derived therefrom. We do not think there is such a preponderance of evidence in favor of the plaintiffs as requires our interference.

Motion and exceptions overruled.

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

HARRIET L. STEVENS *vs.* ROLLINGSFORD SAVINGS BANK.

Cumberland. Opinion July 28, 1879.

Dower,—demand for. Corporation.

When a foreign corporation is seized of real estate situated in this state, and has a tenant thereon, the demand of dower may be made, under the provisions of R. S., c. 103, § 17, upon the tenant in possession.

ON EXCEPTIONS.

ACTION OF DOWER. The premises were owned by the defendant bank, a corporation in New Hampshire, having no place of business, office or agent in Maine.

The demandant offered in evidence a written demand of dower, duly and seasonably served upon the tenant in possession of the demanded premises under the defendants. The defendants seasonably objected to its admission, claiming that, as the action is against a corporation, the demand should have been made upon some officer of the corporation, and not upon the tenant in possession; but the presiding justice admitted the evidence. Thereupon the defendant alleged exceptions.

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

C. P. Mattocks, for the defendants, contended that the demand should have been made upon some officer of the defendant bank by virtue of R. S., c. 103, § 18. If "person" in R. S., c. 103, § 17, may mean corporation, then § 18 is unnecessary. The statute is not limited to domestic corporations.

Counsel cited *Luce* v. *Stubbs*, 35 Maine, 92. *Merrill* v. *Shattuck*, 55 Maine, 370. *Hunt* v. *Hotchkiss*, 64 Maine, 241.

APPLETON, C. J. This is an action of dower.

The defendant bank is a corporation in New Hampshire, having no place of business, office or agent in this state.

A written demand of dower was duly and seasonably made upon the tenant in possession of the premises demanded.

The demand was properly made of the tenant. By R. S., c. 103, § 17, the dowress "must demand her dower of the person who is at the time seized of the freehold, if in the state, otherwise, of the tenant in possession."

The word person includes a corporation. R. S., c. 1, § 13.

The demand, then, is to be made of the person or corporation seized of the freehold, if in the state, otherwise, of the tenant in possession. Here the owner of the freehold is not in the state, and the demand may be made on the tenant. It matters not whether the person seized of the freehold be a person or a corporation, if not in the state.

If the corporation is in the state, the demand is to be made in accordance with section eighteen. But if out of the state, the demand may be made on the tenant, as was done in this case.

This section in no way conflicts with section seventeen. It only prescribes the demand to be made when a corporation in this state is seized of the land in which dower is claimed.

Exceptions overruled.

WALTON, VIRGIN, PETERS, LIBBEY and SYMONDS, JJ., concurred.

JOSIAH H. GARDNER *vs.* BOSTON & MAINE RAILROAD COMPANY.

York. Opinion July 28, 1879.

Corporation. Contract. Engineer,—authority of.

The engineer of a railroad has no power, by virtue of his position, to bind the corporation by his contracts. Special authority therefor must be shown.

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

ASSUMPSIT by plaintiff for work by himself and oxen on the defendants' railroad.

Plea, the general issue, with brief statement that all the work which the plaintiff did for said road was done by virtue of a contract between the defendant railroad and one W. G. Patch, and that defendants have paid said Patch therefor, and that the plaintiff's contract was with said Patch, and not with the defendants.

The material facts are stated in the opinion. The verdict was for the plaintiff.

B. F. Hamilton & I. T. Drew, for the plaintiff.

G. C. Yeaton, for the defendant corporation, cited Brice's *Ultra Vires*, c. 5, and particularly Prop. 216. *Thayer* v. *Vt. Cent. R. R. Co.*, 24 Vt. 440–447. *Powrie* v. *Kan. Pac. R. R. Co.*, 1 Col. 529. *Homersham* v. *Wolv. Water Co.*, 6 Exch. 137. *Sharpe* v. *San Paulo R. R. Co.*, (8 L. R.) Ch. App. 597. Spon's Dic. Engin., Tit. Rail. Engineering. Toml. Cyclo. Useful Arts. Enclyc. Brit. Knight's Cyclo. Arts & Sci.

APPLETON, C. J. This is an action of assumpsit for work claimed to have been done for the defendant corporation in 1872.

The defense is that one Patch was contractor to do certain work for the defendants, and that he employed the plaintiff to do the work in question and has paid him the amount due. But whether he has paid him or not is immaterial, so far as these defendants are concerned, if the work was done by the plaintiff while employed by Patch and in the performance of his contract.

The plaintiff claims that he was employed by one Bacon, an engineer in the service of the defendants. There is no evidence to show that Bacon was specially authorized to hire men. It would be an unusual proceeding if he were so authorized. As an engineer, without special authority, he would have no power to bind the defendants. He would be no more than an employee of the corporation. The engineer ordinarily cannot employ others to do the work which contractors have agreed to do and make the corporation liable for its payment.

The evidence fails to show any liability on the part of the defendants.

Motion sustained.
New trial granted.

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

CHARLES H. GILMAN *vs.* INHABITANTS OF PATTEN.

Penobscot. Opinion January 7, 1879.*

Demand,—evidence of. Receipt. Interest. Stat. 1868, *c.* 225, *construed. Statute of limitations.*

A demand for his divisional share of money to be divided under Stat. 1868, c. 225, may be inferred from the fact that the soldier was at the office of the town treasurer to receive his dividend and gave his receipt therefor.

The receipt so given is open to explanation and to the correction of mistakes.

A soldier is entitled to interest on his share of the amount to be divided, after demand on the treasurer.

The amount paid to the town for "recruiting and other expenses" cannot be deducted from the amount received by the town under c. 225, and thereby diminish the share of the soldier.

Three years men, enlisting prior to July, 1862, are entitled to their share of the money received by the town under the reimbursement statute.

By Stat. 1868, c. 225, § 6, the amount received by the towns to be divided was to be paid out "to the soldiers who enlisted, or were drafted, and went any time during the war, or, if deceased, to their legal representatives."

Those enlisting under Stat. 1864, c. 227, are precluded by the terms of their enlistment, from claiming any additional bounty.

Riggs v. Lee, 61 Maine, 499, distinguished.

ON REPORT.

ASSUMPSIT to recover the sum which plaintiff says is now due him from defendant town, as his share of the funds paid by the state to defendant, under the equalization act of 1868, c. 225. Writ dated June 30, 1876.

The parties agreed that the town of Patten, on March 5, 1870, received from the state, under said act, $4,300 in bonds, and $75 in currency; the town having previously passed the vote in reference to the disposition of said funds, mentioned in section six of said act, and having seasonably furnished the copy of said vote therein called for.

That on March 28, 1870, at its annual meeting, under a sufficient article in the warrant therefor, the defendant town passed the following votes, viz:

I. "That the selectmen be authorized to divide the money

---

*The papers in this case came into the hands of reporter since the issuing of Vol. 69. REP.

belonging to the soldiers according to their best skill and judgment, and in an equitable manner."

II. "That the money belonging to the soldiers in the treasury be divided on or before the first day of July, A. D. 1870."

That in June, 1870, the selectmen divided said $4,375, first deducting therefrom, as sums to which the town was entitled, by way of the reimbursement to the town, contemplated and provided for in said act, $1,420, the amount which the town had actually paid out as bounties during the war. Also the sum of $466.80 paid out by the town, and called, "recruiting and other war expenses," but not bounty money.

That the interest which had accrued on the bonds received by the town from the state, from their issue till their division by the town, was not included in the amount divided by the town, but was retained by the town in addition to the sums above named retained for purposes of reimbursement.

That the town of Patten had furnished on its own quotas but twenty-five men during the war who had no town bounty, all of whom were three years men.

That the plaintiff was one of the twenty-five so furnished; had received $100 state bounty; was drafted August 14, 1863, and was discharged July 16, 1865.

That so much of said money thus received by the town from the state as was divided as surplus, was made in the division into seventy-one shares and distributed in the following manner: To twenty-four three-years men, who enlisted prior to July, 1862, and not credited to any town, each one share; to nineteen three-years men who were on the town quota and had received town bounty, each one share; to twenty-five three-years men on the town quota who had received no town bounty, each one share; to three nine-months men on the town quota who had received town bounties, each one-fourth of a share.

That, according to said basis, the whole shares, sixty-eight in number, were each $36.33; and the one-fourth shares, three in number, were each $9.08.

That the sum of $36.33 thus assigned by the selectmen as plaintiff's share, was, on July 9, 1870, received by plaintiff from the

treasurer of defendant town, and that plaintiff thereupon gave to said treasurer a receipt, duly signed in form, as follows, viz :

" Patten, July 9, 1870. Received of the town of Patten, by hand of James S. Mitchell, treasurer, thirty-six dollars and thirty-three cents, being my share of moneys received from the state under the act for the equalization of the municipal war debt, and in full discharge and satisfaction for my claim against the town."

That in addition to whatever of demand may be inferred from what took place when plaintiff took money and gave receipt July 9, 1870, a demand was made in March, 1875. At the hearing at *nisi prius*, certain testimony was introduced by each party upon the question as to the circumstances under which the receipt was given.

The case is reported to the full court, with the understanding and agreement between the parties, that, if, upon the admissions of the parties, with so much of the annexed testimony as is legally admissible, plaintiff may maintain his action, there shall be judgment for plaintiff.

If, upon the same conditions, the plaintiff cannot maintain his action, then judgment shall be for defendants, excepting that, if, in the latter case, in the judgment of the court, the action is not maintainable on account of plaintiff's receipt given to the town treasurer, the action shall stand for trial upon the principles which the full court may apply to the other branches of the case.

The remaining facts appear in the opinion.

W. H. McCrillis & J. Varney, for the plaintiff.

Wilson & Woodard, for the defendants.

If plaintiff's original claim was legal, it has been satisfied, as evidenced by his receipt of July 9, 1870, unless impeached on the ground of fraud. R. S., c. 82, § 38. *Bisbee* v. *Ham*, 47 Maine, 543. *Percival* v. *Hichborn*, 56 Maine, 575.

The Stat. 1868 was blind. The plaintiff had the means of knowing all that the selectmen knew, and ratified the equitable division.

The fund was not a trust fund, but had all the elements of an ordinary legal claim of an individual against a town.

The cause of action accrued when the funds came from the state treasury to the town treasury, March 5, 1870. And the statute of limitations began to run when the plaintiff might have brought his action. 2 Chit. Con. (11 Am. ed.) 1228. *Hall* v. *Marston*, 17 Mass. 575. *Floyd* v. *Day*, 3 Mass. 403. *Coffin* v. *Coffin*, 7 Maine, 298. *Williams Coll.* v. *Balch*, 9 Maine, 74. *Stetson* v. *Harvey*, 31 Maine, 353. *Lewis* v. *Sawyer*, 44 Maine, 332. *Calais* v. *Whidden*, 64 Maine, 249.

The vote of the town of March 28, 1870, was more than six years before action brought; and if not, it does not recognize the claim of any particular soldier as a valid subsisting debt. *Page* v. *Frankfort*, 9 Maine, 115. *Harvey* v. *Tobey*, 15 Pick. 99. The votes merely refer the question of division to the selectmen for examination, as in *Fiske* v. *Needham*, 11 Mass. 452.

The plaintiff's right became vested by the vote prior to receipt of the money.

The schedule was a mere certificate of the acts of one official to another, and is not an acknowledgment or promise in writing. It was a history of their prior doings for his information. *Wellman* v. *Southard*, 30 Maine, 425. *Porter* v. *Hill*, 4 Maine, 41. *Deshon* v. *Eaton*, 4 Maine, 413. *Brown* v. *Edes*, 37 Maine, 313.

The payment was not enough to take the case out of the statute of limitations. 3 Par. Con. (5 ed.) 75, 76. *White* v. *Jordan*, 27 Maine, 370.

Counsel also cited *Riggs* v. *Lee*, 61 Maine, 499. *Canwell* v. *Canton*, 63 Maine, 304.

APPLETON, C. J. The plaintiff was drafted August 14, 1863, into the service of the United States, on the quota of the defendant town, and was discharged therefrom August 14, 1865, having received no town bounty.

The defendants, on March 5, 1870, received from the state treasurer $4,300 in bonds and $75 in currency, under the act of 1868, c. 227, the town having passed votes, "1st. That the selectmen be authorized to divide the money belonging to the soldiers according to their best skill and judgment and in an equitable manner."

"2d, That the money belonging to the soldiers in the treasury be divided on or before the first day of July, A. D. 1870."

The selectmen allowed the plaintiff $36.33, for which he gave the following receipt:

"Patten, July 9, 1870. Received of the town of Patten, by hand of James S. Mitchell, thirty-six dollars and thirty-three cents, being my share of moneys received from the state under the act for the equalization of the municipal war debt, and in full discharge and satisfaction for my claim against the town. Charles H. Gilman."

The writ in this case is dated June 30, 1876. The plaintiff seeks to recover a further sum in addition to that for which he gave his receipt. To this claim, and to the amount claimed, the defendants interpose various answers.

I. Reliance is placed on the statute of limitations. But that affords no bar.

On July 9, 1870, the plaintiff was at the treasurer's office to receive his dividend of the surplus to be divided. That he demanded it is necessarily inferrable from the receipt, for we cannot suppose the treasurer would pay without being asked.

Further, a special demand was made in March for the balance claimed.

II. It is claimed that the receipt given is an answer to the plaintiff's claim.

Had there been evidence that the receipt was given on condition that it was to be in full satisfaction, and, if not so accepted, it was not to be paid, it would have been a grave question whether the plaintiff could recover. But there is no evidence that such was the fact. The plaintiff says he did not know how much was due; that, supposing this to be the true amount, he signed the receipt, not intending to discount anything to the town.

A receipt is always open to explanation. If the plaintiff, without fault, has received less than his due, he is entitled to recover whatever may be remaining due.

III. The money received was for the reimbursement of the town in accordance with the provisions of the act. The accruing interest belonged to them. The soldier can only claim interest after default of the town.

IV. In the division of the money received, after deducting $1,420 for bounty money paid, the town made a further deduction of $466.80 for "recruiting and other expenses."

But the last mentioned sum was "not actually paid out" as bounty, and therefore was not within the act of 1868, c. 228, to be deducted. It remains, therefore, the proper subject of division.

V. It is objected that twenty-four three years men who enlisted prior to July, 1862, and are not credited to any town, are not within the statute and are not entitled to any portion of the surplus.

But those who enlisted prior to July 1, 1862, without any bounty, are as much entitled to remuneration as those who subsequently enlisted in consideration of a bounty, greater or smaller, as the case may be, or those who, declining to enlist, were drafted into the national service against their wills. Assuredly no discrimination can equitably be made adverse to those who, without compulsion or expectation of bounty, enlisted at the first call made on their patriotism.

The statute of 1868, c. 225, sanctions no such unjust inequality.

The basis of reimbursement is fixed by section one, which provides that "each city, town and plantation shall receive and be reimbursed from the state one hundred dollars for every man furnished for the military service of the United States towards its quota for the term of three years, under the call of the president of July 2, 1862, and all subsequent calls, and in the same proportion for every man so furnished and accepted for any shorter period, in manner as is hereinafter provided." In determining the amount to be reimbursed to the town regard is to be had to the town quota.

But the money in the town treasury, what is to be done with it? This is determined by section six, which provides that the amount received, "or the surplus of the same above the amount actually paid out to the soldiers who enlisted or were drafted and went any time during the war, or, if deceased, to their legal representatives." The division of the money, it will be seen, is not based on the quota of the town. It is to be appropriated to those "who enlisted or were drafted and went any time during the

war." If there is any class of soldiers who especially deserve reward for their meritorious services, it is those who volunteered prior to the call of July, 2, 1862. They are within the express language of the act, and most emphatically within its equity.

The counsel for the plaintiff rely on case of *Riggs* v. *Lee*, 61 Maine, 499, as adverse to the views here advanced. But the question now under consideration was there neither raised, discussed, considered nor decided. There was no claim for soldiers who served prior to the date of July 2, 1862. The soldiers claiming their distributive share of the surplus were soldiers on the town's quota, and the decision is that those who served without receiving a bounty were entitled to recover their share of the surplus referred to in section six. It in no way negatives the equal or greater equities of the volunteers who went to the war prior to July 2, 1862.

The plaintiff, then, has no right to any portion of the surplus belonging to "twenty-four three years men, who enlisted prior to July 2, 1862."

VI. The money received under section one is at the rate of $100 for every three years man furnished and accepted, and in the same proportion for every man furnished and accepted for a shorter period. By section six towns furnishing no bounty, or less than $100, are entitled to the certificate provided by section three after they have voted to appropriate the "sum to which they would be entitled, or the surplus of the same above the sum paid out, to the soldiers who enlisted or were drafted and went any time during the war, or, if deceased, to their legal representatives." But how was this to be appropriated? So as to equalize bounties among them, or to increase the existing inequalities? We think so as to equalize, as far as may be, the town bounties. If A has enlisted for three years and has received a town bounty of $50, he is not to come in for a share of the surplus until all those who have received no town bounty shall have received, regard being had to the length of enlistment, to the same extent, and then, all being on an equality, the balance is to be divided in proportion to the length of time served. It is, however, to be borne in mind that those who enlisted under the act of 1864, c.

227, are precluded by the terms of their enlistment from claiming any additional bounty. *Canwell* v. *Canton*, 63 Maine, 304.

Defendants defaulted, and to be heard in damages.

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

SAMUEL P. GRAVES, in equity, *vs.* JOHN F. BLONDELL & others.

Sagadahoc. Opinion September 5, 1879.

Equity. Pleading. Fradulent conveyance. Estoppel.

In equity, the defendant may plead in bar to the whole bill or to a part only; and in the latter case he must answer to the remainder.

A debtor's conveyance of all his property to secure the future maintenance of himself and wife is fraudulent as against existing creditors, and voidable by them.

The court will not hold such a conveyance fraudulent in part and good in part by reason of the fact that a small part of the consideration was the payment of some of the grantor's debts.

To estop the plaintiff from setting up the fraud for the reason that he assented to the conveyance, the defendant must allege and prove, not only that the plaintiff, knowing the purpose for which the deed was to be given, assented to it, but that such assent induced the defendant to take it.

BILL IN EQUITY, heard on plea in bar, answer and proof.

CASE stated in the opinion.

W. Gilbert, for the plaintiff.

G. Barron & W. Thompson, for the defendants.

LIBBEY, J. This case comes before this court on bill, plea in bar, answer and proof. The plaintiff, in his bill, alleges that, on June 17, 1876, Andrew J. Graves was seized in fee and possessed of a certain farm, situated in Topsham, and on that day conveyed it to the defendants, John F. Blondell and Roxana E. Blondell, his wife, and that they still hold the same by virtue of that conveyance; that he is informed and believes that the only consideration given for said conveyance was the undertaking of said Blon-

dell and wife to maintain said Andrew J. Graves and his wife during their lives.

That, on said June 17, 1876, he was a creditor of said Andrew J. Graves, having a debt against him for services before that time rendered and for money laid out and expended, and on September 30, 1876, he commenced an action against said Andrew for said debt in the supreme judicial court for Sagadahoc county, and attached his real estate therein; and at the August term of said court, 1877, he recovered judgment in said action for the sum of $487.50 damages, and costs of suit taxed at $60.73; and execution was duly issued thereon September 24, 1877, and on October 1, 1877, he caused the same to be duly levied on said farm, excepting the dwelling house.

He further alleges that, at the time of said conveyance, to the best of his knowledge and belief, said Andrew had no other property liable to attachment, and in any wise available for the payment of his said debt, and that the parties to said conveyance had full knowledge of his debt, and that said Andrew had no money other than said estate with which to pay it, and that said conveyance was fraudulent as against him.

The prayer is that said Blondell and wife be required to release and convey to plaintiff the premises levied on.

The defendants, Blondell and wife, filed a plea in bar of the plaintiff's right to maintain his bill. The plea sets out, substantially, three grounds of defense.

I. It denies that the plaintiff was a creditor of said Andrew at the time of the conveyance, although it does not deny the rendition of the judgment as alleged in the bill.

II. It denies any fraud in the conveyance.

III. It avers that before the conveyance was made the plaintiff had knowledge of their intention to take it, and said to Mrs. Blondell, in the presence of her husband, "You are welcome to all there is there if you and Fred will go and take care of the old folks," and to Mr. Blondell, at the same time, "Fred, if you go there, don't be such a —— fool as I have been. You get a deed of it before you go." It does not aver that the defendants were induced thereby to take the conveyance. There are various other

matters set forth in the plea, but they all bear upon the points above stated.

To this plea exception was taken by the complainant on the ground that it did not specifically answer all the allegations of the bill. No exception was taken to the sufficiency of the plea in other respects. The exception was presented to one of the justices of the court, and overruled. This ruling was correct. In equity the defendant may plead to the whole bill or to a part only. If to the whole bill, no answer need be made. If to a part only, he must answer to the rest.

The facts pleaded in this case, if well pleaded, are a bar to the bill, admitting all the allegations to be true. In such case it is not necessary that the plea should notice, and specifically admit or deny, all the allegations of the bill. For the purpose of deciding the validity of the plea, the bill, so far as not contradicted by the plea, is admitted to be true. Story Eq. Pl., § 694.

The plea appears to be open to the charge of duplicity. Story Eq. Pl., § 654. But it becomes unnecessary to determine its sufficiency, as the defendants, Blondell and wife, after filing it on motion therefor, had leave to file and did file an answer which presents the same grounds of defense.

In their answer they admit that said Andrew J. Graves was the owner of the farm; that they took the conveyance thereof from him as alleged in the bill, and that the consideration therefor was a bond given by them to him for the maintenance of himself and wife during their lives, and the payment of a note given by him to one Jaques on which there were about $90 then due. They also say that Blondell was to pay the taxes then due on the farm, and discharge a debt which he had against said Andrew for about $40, although not mentioned in the bond.

They admit that, before and at the time they took the conveyance, they knew that the plaintiff and his family had lived on the premises with said Andrew, and had performed services there; but allege that, before that time, they had been informed and believed that said Andrew had conveyed to the plaintiff a house lot, and that, at the time the conveyance was made, said Andrew informed said John F., who was acting for his wife as well as

himself, that he was not indebted to the plaintiff; that the plaintiff had received payment from time to time for his services, and that the house lot was conveyed to him and accepted as a full payment for the balance due him on account of his services.

They allege that, previous to the acceptance of the conveyance, they had a conversation with the plaintiff relative to their intent to take it, and that the plaintiff then said to Mrs. Blondell, in the presence of her husband, "You are welcome to all there is there if you and Fred will go and take care of the old folks, and I will never claim a —— cent;" and immediately afterwards, addressing himself to Mr. Blondell, whom he called Fred, the plaintiff said: "Fred, if you go there, don't be such a —— fool as I have been. You get a deed of it before you go." There is no allegation that the defendants were induced to take the conveyances by these assurances.

They allege some facts tending to show that the plaintiff was not a creditor, but they do not deny it; nor do they deny the recovery of the judgment, and the levy on the farm as alleged in the bill.

They deny all intent to defraud the plaintiff, and say that before they accepted the conveyance they made due and sufficient inquiry to ascertain whether it would be hurtful to the creditors of the grantor, and relying on "all the information hereinbefore mentioned and believing the same, and without any notice from the plaintiff that he was or claimed to be a creditor of said Andrew, . . though he well knew the intent of these defendants to take the conveyance in season to notify and warn them, . . these defendants did accept the deed as aforesaid, and did give security for the maintenance of the grantors as aforesaid."

There is no denial in the answer of the allegation in the bill, that, at the time of the conveyance, said Andrew had no property except the estate conveyed to the defendants which could be taken for the payment of the plaintiff's debt.

Upon the pleadings these facts appear to be beyond controversy. On June 17, 1876, Andrew J. Graves was indebted to the plaintiff in the sum of $487.50, and on that day he conveyed his farm, all his attachable property, to the defendants, the principal

consideration therefor being security for the future maintenance of the grantor and his wife. The plaintiff brought an action against said Andrew, recovered judgment, execution was issued thereon, and levy made on the premises in controversy as alleged in the bill.

If the case stopped here, there would be no doubt that the plaintiff is entitled to the decree prayed for. The conveyance by Andrew J. Graves of all his property to secure the future maintenance of himself and wife was fraudulent as against existing creditors, and voidable by them. *Welcome* v. *Batchelder*, 23 Maine, 85. *Rollins* v. *Mowers*, 25 Maine, 192. *Hapgood* v. *Fisher*, 34 Maine, 407. *Sidensparker* v. *Sidensparker*, 52 Maine, 481. *Smith* v. *Smith*, 11 N. H. 460.

The fact that a small part of the consideration was payment of some of the grantor's debts does not change the result. The court will not hold the conveyance fraudulent in part and good in part. *Sidensparker* v. *Sidensparker*, *supra*.

But the defendants say that the plaintiff is estopped from impeaching the conveyance on the ground of fraud, because they say that, knowing their intention to enter into the contract, he assented to it, and thereby induced them to take the conveyance.

To make out a defense on this ground it is necessary for the defendants to allege in their answer, and prove, not only that the plaintiff, knowing the purpose for which the deed was to be given, assented to it, but that such assent induced them to take it. We have seen, by an examination of the answer, that there is no direct allegation that the declarations of the plaintiff induced them to take the conveyance; and on examination of the evidence there appears an entire absence of such proof. Mrs. Blondell testifies that her father proposed to her that they should go and take care of himself and wife and have a deed of the farm, about ten days before they moved (six days before the conveyance); that before that time she had heard the plaintiff say nothing in regard to the matter; that her father asked her if she would come up and take what they had and take care of them. She asked him if there was no one else to go. He said her mother did not want any one but her. She told him if there was no one

else to go she would go rather than her mother should suffer. She remembered no other conversation with him about it till after the deed was given. She further testifies that, after that and before the deed was given, she told her husband of her father's proposal, and asked him if he would go, and he said he would not. She told him she should go whether he went or not. Then he said he would go. She was asked by her counsel for what reason she consented to take the deed and go to her father's to live, and answered, that it was to take care of her father and mother.

Blondell testifies, on this point, that his wife first proposed the taking of the deed to him a very few days before it was given. He didn't want to go there. After they had considerable conversation she said she should go. He then said if she went he supposed he should go. And in answer to a question put by his counsel, he said he took the deed because his wife wanted to go there and take care of her mother.

We think therefore, that, if the declarations which the defendants allege the plaintiff made were proved, the defendants cannot invoke the doctrine of estoppel.

But the plaintiff denies that he ever made the alleged declarations to the defendants, or in any way assented to their taking the conveyance. Upon this point the burden of proof is upon the defendants. The parties testified directly against each other. The plaintiff states the purpose for which he sought the interview, and details, particularly, what was said between the parties. The weight to be given to the testimony of the defendants is weakened by the discrepancies between the allegations in their plea and answer, sworn to by them, and their testimony in the case. It is only necessary to notice one, which is prominent. In their answer they allege that Andrew J. Graves told Mr. Blondell, before the deed was accepted, that the plaintiff had been paid from time to time for his services, and that the deed of the house lot was made to and accepted by him in full payment and discharge of the balance due him. In their testimony, Mrs. Blondell does not state that anything of the kind was communicated to her; and Mr. Blondell expressly says nothing was said to him by said Andrew in regard to the matter.

Upon a careful consideration of all the evidence we are not satisfied that the alleged declarations were made by the plaintiff to the defendants before they took the conveyance.

Bill sustained. Decree as prayed for. Costs for plaintiff.

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

STATE *vs.* MARK THOMPSON.

Penobscot. Opinion September 5, 1879.

Statute,—construction of.

Statute 1876, c. 67, "to prevent the destruction of certain fish in the upper waters of the Penobscot river," is not repealed by the Stat. 1878, c. 75, § 28.

ON EXCEPTIONS.

The case is stated in the opinion.

Jasper Hutchings, county attorney, for the state.

A. Sanborn, for the defendant, contended that the statute on which the complaint is founded was repealed by statute 1878, c. 75, § 28, and cited *Pingree* v. *Snell*, 42 Maine, 53. *Ellis* v. *Page*, 1 Pick. 43.

APPLETON, C. J. This is a complaint under R. S., c. 131, § 8, for an attempt on the part of the defendant to violate the provisions of c. 67 of the acts of 1876, being an act "to prevent the destruction of certain fish in the upper waters of the Penobscot river."

It is provided by c. 67 that "there shall be, between the first day of April and the fifteenth day of July of each year, a weekly close time of four days, from sunrise on Sunday to sunrise on Thursday of each week, during which no salmon, shad, alewives or bass shall be taken or destroyed from or in the waters of the Penobscot river or its branches above the railroad bridge between Bangor and Brewer, but between said Thursday and Sunday at

sunrise, as aforesaid, it shall be lawful to take any of said fish in said waters above said bridge, any law to the contrary notwithstanding." This act relates only to a portion of the year. It contains no prohibition as to any other time.

The defense rests on the alleged repeal of c. 67 by the act of 1878, c. 75, by the twenty-eighth section of which "all acts and parts of acts inconsistent with this act are hereby repealed."

The question occurs whether there is any inconsistency between these different enactments. By the act of 1878, c. 75, § 10, it is provided that "there shall be a close time for salmon from the fifteenth day of July of each year to the first day of April following, during which no salmon shall be taken or killed in any manner, under a penalty of not more than fifty nor less than ten dollars, and further penalty of ten dollars for each salmon so taken."

But there is not the slightest inconsistency between the act of 1876 and that of 1878. By the act of 1876, c. 67, certain days are specified on which fish may be caught between the first day of April and the fifteenth of July of each year, but there is no enactment relating to the rest of the year. For aught that appears there was unlimited license of fishing the rest of the year. To remedy this the act of 1878, c. 75, was passed, prohibiting the taking or killing of salmon from the fifteenth of July of each year to the first day of April following. The omission of the act of 1876, is supplied by the enactment of 1878. The whole year is embraced in both acts.

Exceptions overruled.

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

STATE *vs.* WILLIAM COTTLE & another.

Penobscot. Opinion September 5, 1879.

Complaint.

A complaint alleging that the defendant "did on the 8th of May, 1878, with force and arms, wilfully and maliciously violate the laws of the state of Maine, by dragging, hauling or drifting a net for the purpose of catching salmon in the Penobscot river between the Bucksport R. R. Bridge and the water works dam, said 8th day of May being one of the days set apart by law for a close time," does not set out any offense under Stat. 1876, c. 67, or R. S., c. 131, § 8.

ON EXCEPTIONS.

COMPLAINT against William Cottle and Mark Thompson, made to the municipal court for the city of Bangor, wherein it is alleged by one of the fish wardens that the defendants "did, on the 8th day of May, A. D. 1878, with force and arms, wilfully and maliciously violate the laws of the state of Maine, by dragging, hauling or drifting a net for the purpose of catching salmon in the Penobscot river, between the Bucksport R. R. Bridge, and the water works dam, said 8th day of May being one of the days set apart by law for a close time, all of which is against the peace," etc.

The case came up by appeal. In the supreme judicial court the defendants demurred to the complaint, whereupon the complaint was adjudged good and the demurrer overruled; and the defendant alleged exceptions.

Jasper Hutchings, county attorney, for the state, contended that the complaint was under R. S., c. 131, § 8, for an attempt to violate Stat. 1876, § 67, and cited, 2 Arch. Cr. Pr. & Plead. 30. Wheat. Cr. L., § 2698. 2 Greenl. Ev., § 5. R. S., c. 1, § 4, rule 26. *State* v. *McAllister*, 24 Maine, 139.

A. Sanborn, for the defendants.

APPLETON, C. J. This complaint is claimed to be under R. S., c. 131, § 8, which provides for the punishment of an attempt accompanied with an overt act to commit any criminal offense

when the attempted commission of such offense either fails or is prevented.

By Stat. of 1876, c. 67, it is provided that "there shall be, between the first day of April and the fifteenth day of July of each year, a weekly close time of four days, from sunrise on Sunday to sunrise on Thursday of each week, during which no salmon, shad, alewives or bass shall be taken or destroyed from or in the waters of the Penobscot river or its branches above the railroad bridge between Bangor and Brewer," etc., under certain penalties specified in the act.

The complaint alleges that the defendants did, on the 8th of May, 1878, "wilfully and maliciously violate the laws of the state of Maine, by dragging, hauling or drifting a net for the purpose of catching salmon in the Penobscot river between Bucksport R. R. bridge and the waterworks dam, said 8th day of May being one of the days set apart for close time, all of which is against the peace of said state and contrary to the form of the statute in such cases made and provided."

Here, obviously, is no statement of an offense under c. 67 which has been carried into effect. The allegation is of an attempt, if of anything. But the complaint fails to specify any "criminal offense" about to be committed, for the attempt to commit which the person guilty of such attempt would be amenable to punishment. It alleges neither the failure nor the prevention of the criminal offense attempted to be committed. For aught that is alleged, the catching of salmon might have been ever so successful.

The complaint neither alleged an offense committed, nor the attempt to commit one, with the certainty that is required in criminal procedure.

The statute of 1876, c. 67, provides certain close days when salmon may not be taken in the waters of the Penobscot river and its branches "above the railroad bridge between Bangor and Brewer." In the complaint is the allegation of a purpose of catching salmon "in the Penobscot river, between the Bucksport R. R. bridge and the Water Works dam." But there is no allegation where the Water Works dam is. So far as it appears from

the complaint, it may be above or below the Bucksport R. R. bridge. If below, then no offense was committed.

Exceptions sustained.
Complaint bad.

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

STATE *vs.* CALVIN E. KNOWLTON.

Waldo. Opinion September 10, 1879.

Complaint. Misnomer.

The description of the place to be searched by a search and seizure process is sufficient when the complaint alleges that intoxicating liquors are left and deposited "in a certain wagon on the fair grounds on the easterly side of Union Hall in Searsport," etc.

A misnomer is only pleadable in abatement.

ON EXCEPTIONS.

CASE stated in the opinion.

G. E. Johnson, county attorney, for the state.

W. H. Fogler, for the defendant, contended that:

I. The "premises" or "place" to be searched are not "described and specifically designated," as required by art. 1, § 5, of the constitution of this state, and by R. S., c. 27, § 35.

"A certain wagon on the fair ground," neither "describes nor specifically designates" any "place" or "premises." The wagon is not described in any manner. There might be a hundred wagons on the fair ground.

The complaint and warrant are therefore defective and should be quashed. *State* v. *Robinson*, 33 Maine, 570. *Jones* v. *Fletcher*, 41 Maine, 254. *State* v. *Grames*, 68 Maine, 418.

2. The respondent is not sufficiently designated in the complaint. His christian name is not given. "C" is not a name. If his name was unknown it should have been so alleged in the complaint. So loose a method of pleading should not be encouraged.

This is not a case of misnomer of which advantage can only be taken by plea in abatement; but a case in which the name of the person accused is not set forth, and demurrer, or motion in arrest of judgment, is the proper remedy.

APPLETON, C. J. This is a search and seizure process to which the defendant filed a general demurrer, to the overruling of which exceptions have been filed.

The ground relied upon is that the place to be searched is not specifically designated.

The allegation in the complaint is that intoxicating liquors are kept and deposited "in a certain wagon on the fair ground on the easterly side of Union Hall, in Searsport," etc.

A place is described. It is so clearly described that the wagon on the fair ground on the easterly side of Union Hall was found with the liquors therein intended to be sold in this state in violation of law, together with the defendant so intending to sell them. The description was such as enabled the officer to bring the offender before the court, and when there he admitted by his demurrer every material allegation in the complaint. *Com.* v. *Intoxicating Liquors*, 107 Mass. 386–392.

A misnomer of a defendant is only pleadable in abatement. It cannot be taken advantage of in arrest of judgment. 1 Chit. Pl. (14 Am. ed.) 451. Where defendants are sued by their sirnames alone, the omission can only be taken advantage of by plea in abatement. *Seeley* v. *Boon*, Cox (N. J.) 138. A misnomer is waived by a failure to plead it or by a default. *Bank* v. *Jaggers*, 31 Md. 38. The objection that the accused is wrongly named is too late after arraignment. *Wilcox* v. *State*, 31 Tex, 586.

Exceptions overruled.

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

EDWIN S. STEVENS *vs.* ORRIN S. HASKELL and another, Executors.

Waldo. Opinion September 10, 1879.

Evidence. Contract—construction of.

Parol evidence is inadmissible to vary or contradict a written agreement. Thus where the plaintiff leased his mill, house, stable and mill yard to the defendants' testator "to manufacture all lumber of various kinds that he wants to during the year 1874, all for the rent of seventy-five cents per thousand for the lumber, and the waste wood while manufacturing said lumber." *Held:* In an action to recover for the proceeds of waste wood arising from the testator's lumber taken from a lot near the plaintiff's mill and transported to and sawed at the testator's mill several miles distant from the plaintiff, that it was not competent for the plaintiff to prove that, when the lease was made, the parties understood that the testator's lot near the plaintiff's mill was to be stripped and all the lumber sawed at the plaintiff's.

ON REPORT.

Plaintiff relied upon a count for money had and received by Going Hathorn in his lifetime, late of Pittsfield, deceased, defendant's testator, to the amount of $400.00.

Plea, general issue and brief statement alleging no sufficient notice and demand upon the defendants as executors of Going Hathorn before suit brought, as required by statute; and also alleging a former recovery by plaintiff in a former suit brought by the plaintiff against said Hathorn in his lifetime and defended by the defendants as his executors after his death; and also alleging a former recovery by defendants in suit brought by said Hathorn in his lifetime against said Stevens and prosecuted by them after his death to final judgment. The plaintiff introduced the following notice and demand, viz: "To Orrin S. Haskell and Obed Foss executors of Going Hathron late of Pittsfield in the county of Somerset, deceased. You are hereby notified that I have a claim against the estate of said Hathorn for the sum of six hundred and sixty-two dollars and fifty cents for rent of mill for sawing seventy-five thousand feet of lumber at seventy-five cents per thousand feet, and for one hundred and sixty cords of waste wood from said lumber at two dollars and fifty cents per

cord, and for damage to mill and machinery, and to boarding house, one hundred and fifty dollars, the said claims having accrued before the decease of said Hathorn, I hereby demand of you payment of said claims as executors of said estate.

E. S. STEVENS."

Dated at Unity, July 30, 1877.

Admitted that the defendants are executors of the will of Going Hathorn, late of Pittsfield, and that the following contract put into the case by plaintiff was executed by the plaintiff and by the said Going Hathorn and Pushaw:

This memorandum of agreement made this 22d day of November A. D. 1873, by and between E. S. Stevens of Unity in the county of Waldo and Hathorn and Pushaw of Pittsfield in the county of Somerset,

Witnesseth—That said Stevens agrees to let his mill, situated on the Sawabascook stream, about two miles below Hermon Pond, known as Morris Mill, to said Hathorn and Pushaw, to manufacture all lumber of various kinds that they want to manufacture during the year 1874, commencing on the first day of March, and also the house and stable near said mill and the mill yard and landing belonging to said mill, all for the rent of seventy-five cents per thousand feet for said lumber, and the waste wood made while manufacturing said lumber. And said Stevens also agrees in consideration of said rent to remove the planer and stave machine from said mill and to clear out said mill and to put said mill and machinery, and track and car for running out lumber, and said mill yard, in good order for their business, previous to said first day of March, 1874.

Said Hathorn and Pushaw accepting the terms and conditions above written agree to run said mill to manufacture said lumber and to pay to said Stevens rent of seventy-five cents per thousand feet for said lumber manufactured by them, and also to let him have the waste wood made while manufacturing said lumber.

Plaintiff will prove (if admissible) that the mill rented by defendants' testator, was in Hampden, that Hathorn & Pushaw owned a lumber lot near the mill, upon which was estimated to be 200 M. feet of long lumber, and 400 cords of spool timber,

equal to 160 M. feet of lumber; that after making the contract and previous to cutting the timber Pushaw sold his interest to Hathorn; that it was the intention and understanding of the parties when the contract to rent the mill was made that the lot was to be stripped and all of the lumber sawed at plaintiff's mill; that about 200 M. of long lumber was sawed at plaintiff's mill; that Hathorn cut about 400 cords of spool wood from said lot, hauled it to the railroad, shipped it to Pittsfield and sawed it at his own mill; that there was about 160 cords of waste wood, from the 400 cords of timber sawed at Pittsfield, the waste wood being worth $2.50 per cord, which wood the said Hathorn sold and received the pay for, and still retains it.

The above admissions are made *pro forma*, and for the purpose of presenting the questions of law arising in the case to the law court; but they are not to prejudice the defendants or be used in case the court should direct the action to stand for trial.

The defendants introduced record of judgment recovered by plaintiff at the March term of this court, 1878, against the defendants as executors of said Going Hathorn, writ and record of judgment make part of the case. They also introduced record of judgment recovered by them as executors of said Hathorn, at the December term of the supreme judicial court, 1877, in Somerset county. Writ and record make part of the case. It was, however, admitted for the purposes of the present case, that the claims which the plaintiff makes in the present suit, as hereinbefore stated, were not presented by him in the defense of that suit as matter of recoupement or set off, or in reduction of damages.

By consent of parties the case was reported to the law court. If the action is maintainable, it is to stand for trial; otherwise judgment to be entered for defendants.

George E. Wallace, for the plaintiff, among other things said:

There is an ambiguity in the following clause in the contract, "to manufacture all lumber of various kinds that they want to manufacture during the year 1874." Parol testimony is admissible to show the circumstances and surroundings of the parties at

the time of making the contract. 1 Greenl. Ev., §§ 288, 297. 16 Conn. 196. *Sumner* v. *Williams*, 8 Mass. 214.

The true construction of the contract in the light of all the surroundings is that Hathorn & Pushaw were to pay Stevens seventy-five cents per M. and the waste wood made while manufacturing the lumber from the lot near Stevens' mill.

It would not be a reasonable construction to say they were to pay him rent for all lumber they might manufacture any where during the year 1874. Nor would it be a reasonable construction to say that it was optional with Hathorn & Pushaw to manufacture as small amount as they saw fit, considering the extensive repairs that were required of Stevens, and as shown by the judgment in the case.

The contract is to manufacture "lumber of various kinds," if the intention had been to manufacture long lumber only, they would have used the word "slabs" instead of the words "waste wood," as the term "waste wood" applies more especially to the refuse from short lumber, and "slabs" is applied to long lumber.

The waste wood became the property of the plaintiff the moment it was severed from the lumber.

The judgment in the action, *Stevens* v. *Hathorn et al.*, is not a bar to an action for the conversion of the wood.

The conversion was by Hathorn alone, this action is against Hathorn's estate, and the estate still holds the proceeds from the sale of the wood.

The statute requires notice before bringing an action, the object is to call the attention of the executor to the demand before an action is brought. Plaintiff could bring an action for money had and received or for trover.

D. D. Stewart, for the defendants.

APPLETON, C. J. This is an action of assumpsit upon a count for money had and received by Going Hathorn, defendant's testator, to the amount of $400 from the sale of the waste wood made from his timber sawed by him at his mill in Pittsfield.

On 22d November, 1873, the plaintiff leased to Hathorn & Pushaw his mill below Hermon Pond with the house, stable and

mill yard "to manufacture all lumber of various kinds that they want to manufacture during the year 1874, commencing on the first day of March . . all for the rent of seventy-five cents per thousand feet for said lumber and the waste wood while manufacturing said lumber," &c.

Pushaw sold out his interest to Hathorn, whose estate the defendants represent.

At the April term, 1875, in this county the plaintiff commenced an action on the above contract against Hathorn & Pushaw for rent due on which he recovered judgment. In that suit no claim was made for waste wood. Indeed, the plaintiff has had all the waste wood accruing from the lumber sawed at his mill under the contract of November 22d—before referred to.

The proceeds of waste wood sought to be recovered in this suit are from the sales of the waste wood arising from the testator's lumber sawed by him at his mills in Pittsfield, some twenty miles or more distant from the plaintiff's mill in Hampden.

The plaintiff offered to show that it was the intention and understanding of the parties when the contract to rent the mill was made that the testator's lot near the mill was to be stripped and all the lumber sawed at the plaintiff's mill.

But this is directly in contradiction of the written agreement of the parties. Hathorn & Pushaw were "to manufacture all lumber of the various kinds they want to manufacture, during the year 1874." No specific amount to be manufactured is fixed or determined. They were to manufacture what they wanted, not what they did not want to manufacture.

The parol evidence offered was entirely inadmissible. It materially varies the written contract deliberately entered into by the parties. *Doyle* v. *Dixon*, 12 Allen, 578. *Shaw* v. *Shaw*, 50 Maine, 95.

The rent is seventy-five cents per thousand for manufacturing said lumber "and the waste wood made while manufacturing said lumber." The waste wood is specially confined to that arising from the lumber manufactured at the plaintiff's mill. He can claim no other. It is absurd to suppose that either had reference to the waste wood of lumber manufactured elsewhere.

The lumber manufactured by defendant's testator at his mill in Pittsfield was his own. The waste wood from the lumber manufactured there was his. The plaintiff has no interest, nor claim to it, nor in the proceeds derived from its sale.

Besides, the plaintiff has recovered judgment in one action upon his contract in which he alleged that "the said Going Hathorn and George N. Pushaw their memorandum of agreement as aforesaid has not kept in any way, shape or manner, but hath broken the conditions thereof." It would seem by the authorities cited that the plaintiff could not split his cause of action and maintain two suits. But it is unnecessary to consider the question, as upon other facts proved or admitted the plaintiff has no cause of action whatever. *McCaffrey* v. *Carter*, 125 Mass. 330. *Clemence*, 119 Mass. 473.

Judgment for the defendants.

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

JOHN T. CLEMENT *vs.* NATHAN P. BENNETT.

Waldo. Opinion September 10, 1879.

Mortgage. Tenant. Forcible entry.

A deed and bond of defeasance, executed at the same time, and as part of the same transaction, constitute a mortgage.

A mortgagor is not a tenant within R. S., c. 94, concerning forcible entry and detainer.

ON REPORT.

The case is stated in the opinion.

G. E. Johnson & W. H. Fogler, for the plaintiff, contended that no appeal from the decision of the magistrate was taken, therefore the only question for trial here, (if any), under the pleadings, is that of title. All other issues were determined by the magistrate, and his determination was final. *Abbott* v. *Norton*, 53 Maine, 158. R. S., c. 94, § 6. *Copeland* v. *Bean*, 9 Maine, 19.

Plaintiff established his title by the introduction of his deed. Ib.

Defendant to prevail must show as good or better title in himself.

The bond is not evidence of title, therefore was improperly admitted; it being the only evidence introduced by defendant, his defense must fail.

Defendant's brief statement admits the existence of the relation of landlord and tenant, alleging: "In which bond an *agreement* is made that the possession may be retained," &c.; such an agreement creates such relation. *Marden* v. *Jordan*, 65 Maine, 9. *Dunning* v. *Finson*, 46 Maine, 546.

If the bond is admissible under the brief statement, plaintiff should be allowed to prove that the defendant has failed to fulfill the conditions therein named.

The question, whether or not the relation of mortgagor and mortgagee exists between the parties, cannot be raised here under the pleadings. If defendant had desired to raise that question here, he should have appealed from the decision of the magistrate. *Abbott* v. *Norton*, *supra*. *Copeland* v. *Bean*, 9 Maine, 19.

The facts and circumstances of the transactions will not sustain the theory of such relationship, if it could be raised here. Jones on Mort., §§ 264, 265, 335. *Bethlehem* v. *Annis*, 40 N. H. 36.

The bond and deed are separate and distinct transactions independent of each other.

There is no debt or obligation on the part of the defendant to be secured. Jones on Mort., § 268. *Haines* v. *Thompson*, 11 Am. Law Regr. N. S., 680.

If a mortgage, the title is in the plaintiff. *Blaney* v. *Bearce*, 2 Maine, 132. *Weeks* v. *Thomas*, 21 Maine, 476. 4 Kent's Com. 173, 9th ed.

J. A. Lamson, (*Thompson & Dunton* with him) for the defendant.

APPLETON, C. J. This is a process of forcible entry, and comes before this court on a plea of the general issue and a brief statement alleging title in the defendant.

The complainant put in a deed of warranty from the defendant to him, dated October 17, 1876, describing the premises in controversy.

The respondent offered a bond of the same date from the complainant to him, covering the same premises, in which he agreed to convey the same upon the performance of the terms and conditions specified therein.

The deed and bond of defeasance executed at the same time and as part of the same transaction, constitute a mortgage. The relation of the parties is that of mortgagor and mortgagee. R. S., c. 90, § 1.

The mortgagor is not a tenant within the act relating to forcible entry and detainer. c. 94, § 1. *Reed* v. *Elwell*, 46 Maine, 270. *Hastings* v. *Pratt*, 8 Cush. 121. "The case of mortgagor and mortgagee," observes Kent, J. in *Dunning* v. *Finson*, 46 Maine, 553, "rests upon the peculiar provisions of the statute as to the mode of entry, and the legislature did not probably contemplate that this process should apply ordinarily to such a case, under the provision in relation to disseizin or that in relation to tenants at will."

Judgment for the respondent.

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

SAMUEL WELD & another, executors, in equity, *vs.* GEORGE PUTNAM & others.

Cumberland. Opinion September 11, 1879.

Will—construction of. Residuary fund—life-estate in.

On the bequest of a life-estate in a residuary fund where no time is named in the will for the commencement of the interest, or the enjoyment of the use or income of such residue, the life legatee interest is to be computed from the time of the death of the testator.

A testatrix devised and bequeathed the residue of all her estate, real and personal in trust to trustees named "for the sole use and benefit of her sister" S. H. S., directed certain precautions to be observed for the safety of the principal and ordered that "the interest and income accruing from the same

and all other profits that may accrue from this trust" should be collected by the trustees and paid over every six months to the sister during her natural life. By the same item the trustees were authorized, on request of the sister, to sell the real estate, invest the proceeds and pay the interest accruing therefrom to the sister during her natural life: *Held* that S. H S. took the interest and income of the residue of the estate from the death of the testatrix.

BILL IN EQUITY brought under the statute to obtain a construction of the last will of Sophia J. Snow, late of Brunswick, in this county.

So much of the will as is essential to the decision appears in the opinion.

N. Webb, for the complainants, cited *Williamson* v. *Williamson*, 6 Paige, c. 298. *Cook* v. *Meaher*, 42 Barb. 533, S. C. 36 N. Y. 76. Hillyards Estate, 5 Watts & Serg, 30. *Augersteen* v. *Martin*, Turner & Russ, 234. *Hewett* v. *Morris*, Turner & Russ, 241. *Gibson* v. *Bott*, 7 Ves. Jr., 89. *Pollard* v. *Learned*, 102 Mass. 54. *Pollard* v. *Ballard*, 1 Allen, 490. *Pinkerton* v. *Sargent*, 112 Mass. 110, 113. *Lovering* v. *Minot*, 9 Cush. 151. *Lamb* v. *Lamb*, 11 Pick. 371. *Sargent* v. *Sargent*, 103 Mass. 297.

C. E. Clifford, for the defendants, cited Will. on Exec. (6 Am. ed.) 1423-4-5, and cases there cited.

APPLETON, C. J. This is a bill in equity brought under the provisions of R. S., c. 77, § 5, by the executors and trustees under the will of Sophia Joanna Snow to determine the construction of the same.

By the first item of the will certain enumerated articles of personal property are given and bequeathed to her beloved sister Salome Harding Snow.

The second item, the construction of which is to be determined, is in these words:

"2. I give and bequeath to Israel Whitney of Boston, Samuel Weld of Roxbury, and Graham Rogers of Boston, jointly in trust for the sole use and benefit of my beloved sister Salome Harding Snow, the residue of all my estate, both real and personal, of which I may die possessed—the same to be kept securely invested in

good stocks and mortgages, always first mortgages, and the interest and income accruing from the same and all other profits which may accrue from this trust to be collected by the said trustees and paid over to her, my said beloved sister, Salome Harding Snow, every six months during her natural life. My trustees on the request of my said beloved sister, Salome Harding Snow, are hereby fully authorized and empowered to sell my real estate, held by them in trust under this my will and to execute valid deeds for the conveyance thereof, free and discharged of all trusts. The money or sum accruing from said sale to be securely invested in good stock and mortgages, always first mortgages, and the interest accruing from said investment to be paid to her my beloved sister, Salome Harding Snow, during her natural life. And I also fully authorize my trustees, after the decease of my beloved sister, Salome Harding Snow, to sell and convey said real estate for the purpose of facilitating a distribution of said trust property in the manner hereinafter mentioned. After the decease of my beloved sister Salome Harding Snow, the following legacies to be paid in the order as they are numbered: No. 3 first, No. 4 second, and so on. Should there not be property enough to pay all these legacies, the first numbered are to be paid and the last numbered are to be left out," &c.

The question presented for our determination is this: Does Salome Harding Snow take the interest and income of the residue of said estate from the death of the testatrix?

The intention of the testatrix is unmistakable. The residue of all her estate, both real and personal, is devised in trust for the sole use and benefit of her beloved sister. The interest and income accruing from stocks and mortgages, and all other profits which may accrue from the trust are to be collected and paid over to this beloved sister, every six months during her natural life. In case of sales of real estate, the sum accruing therefrom is to be reinvested, and the interest accruing from such investment is to be paid to this sister during her natural life.

The will speaks from the death of the testatrix. The income and interest on the estate as then existing, at once accrues—and from that date. Nothing indicates an accumulation. Nothing

indicates that there is to be any postponement of the right of the sister to accruing income or interest. On the contrary, every six months during her natural life the income and interest is to be paid. Upon the death of the testatrix, separation of principal and interest takes place. The will disposes of each. The income and interest is to be paid to the sister. The principal, from which income and interest arise, is subject to the general provisions of the will upon the death of the sister.

"The result of the English cases appears to be," observes Walworth, Ch., in *Williamson* v. *Williams*, 6 Paige, 298, "and I have not been able to find any in this establishing a different principle, that on the bequest of a life estate in a residuary fund, and when no time is provided in the will for the commencement of the interest or the enjoyment of the use or income of such residue, the legatee for life is entitled to the interest or income of the clear residue, as afterwards ascertained to be computed from the time of the death of the testator." In *Lovering* v. *Minot*, 9 Cush. 151, it was held that under a will by which all the residue and remainder of the testator's estate is given to trustees, in trust, to pay over and distribute the income to and among his five children, one-fifth to each, during their respective lives with remainder of over, that such children are entitled to their respective portions of the income of such residue from the death of the testator. In *Cook* v. *Maker*, 36 N. Y. 15, it was decided that when a sum is left in trust with direction that the interest and income be applied to the use of a person, that such person is entitled to interest from the death of the testator. "The weight of authority," observes Davies, C. J., "now is in favor of allowing the payment of annuities or incomes to commence at the testator's death." To the same effect are the decisions in *Pollock* v. *Learned*, 102 Mass. 54, and *Sargent* v. *Sargent*, 103 Mass. 297. Every clause in the will negatives the idea that there was to be an accumulation of interest. *Hewitt* v. *Morris*, 1 Turner and Russell, 241.

The result is that in accordance with the plain intent of the testatrix, Salome Harding Snow takes the interest and income of the residue of the estate from the death of the testatrix.

The bill is sustained, and a master is to be appointed to deter-

mine all the reasonable costs and charges accruing in this case on both sides, which are made a charge upon the estate in the hands of the trustees.

WALTON, VIRGIN, PETERS and SYMONDS, JJ., concurred.
LIBBEY, J., did not sit.

In re OREN HAWKES, appellant from decree of Judge of Insolvency.

Cumberland. Opinion September 11, 1879.

Insolvency. Practice.

After a petition has been made and proceedings have commenced and are pending in the court of insolvency, a petitioning creditor cannot withdraw and have his name stricken out of the petition without leave of the court.

By leave of court creditors not originally petitioning may become parties to the proceedings already pending against an insolvent debtor.

ON EXCEPTIONS.

The facts appear in the opinion.

A. J. Blethen, for the appellant.

N. Webb & Thos. H. Haskell, for petitioning creditors.

APPLETON, C. J. This is an appeal from the decree of the judge of the court of insolvency. The questions raised by the decree are alone in issue. As in probate appeals, so in appeals from the court of insolvency, the appellant is restricted to such points as are specified in the reasons of appeal and those reasons should be set forth specifically.

The decree from which an appeal is taken presents three questions for adjudication.

1. Can a petitioning creditor after proceedings have been commenced and the cause is pending before the court of insolvency, withdraw as a party, and have his name stricken from the petition at his own will and pleasure, and against the wishes of his co-petitioners and thus defeat the very proceedings to which he became voluntarily a party?

The insolvent law is a remedial not a penal statute. Its object is not the punishment of the insolvent debtor. It is to provide for a just and equitable distribution of his estate among those to whom it of right belongs. It seeks to protect the honest creditor from being over-reached by the unscrupulous debtor and to relieve the honest debtor from the burden of liabilities he is unable to discharge.

The petition by creditors against an insolvent debtor to compel a submission of his estate to the court of insolvency is not a mere suit *inter partes*. "It rather partakes," observes Woodruff, J., *in re* the Boston, Hartford & Erie Railroad Company, 9 Blatchf. 101, "of the nature of a proceeding *in rem*, in which every creditor has a direct interest." It is to be observed that the general principles applicable to proceedings in bankruptcy are equally applicable to proceedings in insolvency so far as the several statutes on these subjects are similar or analagous.

After proceedings had been commenced and the court of insolvency had acquired jurisdiction, the firm of Rothwell, Martin & Co., one of the petitioning creditors, "refuse to proceed further in insolvency proceedings against said Hawkes," and move that their names be stricken from the petition.

This motion was denied.

If the motion had been granted, the number and claims of the petitioning creditors would have been reduced below the requirements of the statute. It would defeat the just rights of their associates. It would compel a resort to new proceedings, and confirm attachments which will now be defeated, and thus a more equitable distribution of the assets of an insolvent debtor will be presented.

The reasons given in the petition of Rothwell, Martin & Co. are that they were led to join the original petition "through a misunderstanding of the facts in the case, and that they do not believe it will be for the best interest of the creditors of Hawkes to have the petition granted," and therefore they pray to have their names stricken from the petition.

It is undoubtedly true that the court has authority to authorize a petitioner to withdraw, and that such authorization will be granted

for good cause, as that the signature of the petitioning creditor was obtained by misrepresentation. Here there is no misrepresentation found by the court, nor alleged by the petitioner. What the misunderstanding was and how it occurred, and what was for the best interest of the creditors were submitted to the decision of the judge of insolvency and his conclusion negatives the allegation of the petitioners. There is nothing before us to show any error of law or of fact. On the contrary his very clear and able opinion affords a full justification of his judgment in the premises.

In re Heffron, 6 Bissel, 156, a similar question arose and in delivering his opinion, Blodgett, J., says, "I am of opinion the request should be denied, and that none of the creditors, who have joined in the petition should be allowed to withdraw unless all do so. As the bankrupt law now stands I am satisfied it would be a mischievous practice to inaugurate to allow a quorum to be broken after they have united in good faith for the prosecution of proceedings. . . I do not intend to say that creditors who have been misled by false representations should be prevented from withdrawing by a discovery of the truth." To the same effect is the decision *in re* Sargent, 13 B. R., 144. Indeed, while a creditor who has proved his debt may be permitted to withdraw it, if it was made under mistake of law or fact, yet such withdrawal will not be granted if intervening rights will thereby be affected. *In re* Hubbard, 1 Law. M. 190.

2. It is objected that Nutter Brothers were permitted to join in the proceedings against the insolvent Hawkes. These proceedings are for the benefit of all his creditors. They are interested therein and have a right to intervene. *In re* Lacy, Downs & Co., 12 Blatchf. 323. *Foster* v. *Goulding*, 9 Gray, 50.

3. It is objected that the statute, under which these proceedings are had, is unconstitutional. But that is no longer an open question, its validity after full consideration having been affirmed *in re* Damon, 70 Maine, (Herbert L. Damon, appellant.)

Exceptions overruled.

WALTON, VIRGIN, PETERS, LIBBEY and SYMONDS, JJ., concurred.

STATE *vs.* LEWIS B. PETERSON.

Franklin. Opinion September 11, 1879.

Practice. Instruction—Misnomer.

A motion to set aside a verdict in a criminal case as being against evidence can only be heard at *nisi prius.*

In the trial of the defendant on an indictment for incest with his daughter Etta Peterson, where proof was offered that her name was Mary Etta Peterson, an instruction that if the defendant committed the crime with his daughter and she was commonly and generally known by the name of Etta Peterson, it was sufficient—was held correct.

In the trial of an indictment for incest with the defendant's daughter about whose real name there was conflicting testimony, a memorandum covering her photograph purporting to be signed by the daughter is not admissible in the absence of evidence that it was her hand writing.

ON EXCEPTIONS.

Indictment for incestuous fornication with defendant's daughter, Etta Peterson. The government introduced one Ebenezer Chandler, who showed his commission, as an ordained minister of the gospel, authorizing him to solemnize marriages, during the pleasure of the governor, issued by Governor Kent in 1841, and said commission was introduced in evidence. He was then (subject to objection) allowed to read his record of a marriage of Lewis B. Peterson and Mary J. Gammon, solemized May 6, 1860, in Franklin county by him, and said record was put in as evidence, said commission and record being in due form. He was then asked if he recognized the prisoner at the bar, and his answer was: "I should not know that I had ever seen him." There was no other evidence from said Chandler of identity of the defendant as being the party that said Chandler married. There was evidence tending to show that the mother of the defendant's daughter with whom the crime is alleged to have been committed, bore the name of Mary Jane Gammon before her marriage. There was evidence tending to show that said Lewis B. Peterson and Mary Jane Gammon lived together as husband and wife from the date of the marriage to the time of said Mary Jane's death, and that they had during that time two and only two children, one daughter and one son, and the defendant testifying in

his own behalf stated that the girl was his own daughter. The court submitted the question to the jury as a matter of fact, upon this evidence, whether the defendant was lawfully married to said Mary Jane Gammon. There was evidence that this daughter called Etta, was the daughter of said Mary Jane. The defendant introduced evidence to show that the real name of the girl (with whom the crime is alleged to have been committed) is "Mary Etta Peterson," but that she is commonly called "Etta Peterson." Defendant's counsel contended that if her name was in fact Mary Etta Peterson, the defendant could not be found guilty under this indictment, but the court instructed the jury, that "if the defendant committed the crime with his daughter, and she is commonly and generally known by the name of Etta Peterson, that is sufficient." Defendant offered a memorandum, written on a piece of paper attached to, and covering a photograph, in the year 1878, purporting to be signed by said girl, for the purpose of showing how she wrote her name, but it was excluded by the court. The verdict was guilty.

The defendant filed a motion that the verdict be set aside for the reason that one of the jurors was related to the defendant within the sixth degree, and the evidence was taken to establish that fact. The motion was overruled by the court. The motion was as follows: "And now after verdict against him the defendant comes and moves that the verdict be set aside for the following reasons, viz: before the trial commenced the jurors who tried the case were inquired of by the court if any one of them was related to the defendant within the 6th degree or the degree of 2d cousins, and particularly John B. Peterson, one of the jurors, was so inquired of, but denied all relationship between them. Since the rendition of said verdict the defendant has learned that he can prove that said juror was at the time of trial related to the defendant by consanguinity within the sixth degree, and can prove the fact by Charles Peterson, the father of said John M. Peterson, who is a brother to the grandfather of said Lewis B., and by said Lewis B." But no evidence was furnished the law court.

Defendant alleged exceptions.

Elias Field, county attorney, for the state.

H. L. Whitcomb, for the defendant.

APPLETON, C. J. There are no exceptions to any ruling of the presiding justice as to what would constitute a legal marriage. It is therefore to be presumed that the instructions on this subject were satisfactory.

Whether there was a marriage was a matter of fact to be determined by the jury. The evidence received was admissible. Whether it was sufficient to justify the verdict is not a question submitted to our determination. If the finding of the jury was erroneous, the question as to whether there should be a new trial or not is to be heard and decided at *nisi prius*.

The defendant is charged with incest with his daughter, who in the indictment is called Etta Peterson. It was claimed that her name was Mary Etta Peterson. The court instructed the jury that "if the defendant committed the crime with his daughter, and she is commonly and generally known by the name of Etta Peterson, that is sufficient." To this there can be no legal objection. The name is for the identification of the person and to distinguish one from another. It would be absurd to require the use of the name not commonly and generally in use in preference to the one commonly and generally used.

The memorandum on a piece of paper covering a photograph, purporting to be signed by the girl with whom the offense was committed, was offered to show how she wrote her name and rejected. It was manifestly inadmissible. It was not shown to be her handwriting. It was not offered to contradict any thing she had said and it was not admissible to contradict any thing testified to by any other witness—so far as the exceptions disclose.

The motion to set aside the verdict on account of the alleged relationship of one of the jurors was overruled by the justice presiding at the trial. What the fact was, does not appear. Nothing before us shows or tends to show his ruling erroneous.

Exceptions overruled.
Judgment on the verdict.

WALTON, VIRGIN, PETERS, LIBBEY and SYMONDS, JJ., concurred.

EASTMAN HATHORN, executor, *vs.* AUGUSTUS B. EATON.

Somerset. Opinion September 12, 1879.

Executor. Crops. Case and trespass.

The executor derives his title from the will and his interest vests at the instant of the testator's death.

The executor of a will may maintain trespass or trover for the goods of the testator taken after the latter's death, though they may never have been in the actual possession of the former.

The executor cannot recover for the crops growing at the time of the decease of the testator.

The distinction between case and trespass is abolished.

ON REPORT.

TRESPASS for conversion of property belonging to the plaintiff's testator.

The facts sufficiently appear in the opinion.

The court to draw such inferences as a jury might, and enter judgment in accordance with the law of the case. And if the plaintiff is entitled to recover, to assess the damages, or settle by their opinion the principles on which the same shall be assessed by the judge at *nisi prius*.

D. D. Stewart, for the plaintiff.

J. Baker, for the defendant, cited 1 Wat. Tres. § 522. *Miller* v. *Baker*, 1 Met. 27-31. *Gibbs* v. *Chase*, 10 Mass. 128. 1 Hill. Torts, 77. Wat. Tres. § 739. 1 Washb. R. Prop. c. II, § 5, c. V, § 3. *Kimball* v. *Sumner*, 62 Maine, 305. *Wright* v. *Williamson*, 67 Maine, 524. "The Amiable Nancy," 3 Wheat. 546. *Sinclair* v. *Tarbox*, 2 N. H., 135. *Betts* v. *Lee*, 5 Johns. 348.

APPLETON, C. J. The plaintiff brings this action as executor of the will of Timothy Eaton, late of Athens, in this county.

Timothy Eaton died June 28th, 1874. On June 8th, 1874, he made a will appointing the plaintiff sole executor and giving his farm and all his personal property to the defendant. Ten days later he executed a codicil revoking divers bequests to the defendant and making a new division of his property among his children.

70 Me 38

The will was admitted to probate in 1874, but the defendant appealed from the decree allowing the codicil to the supreme court of probate, where it was ultimately admitted to probate and the decree of the judge of probate duly affirmed.

While this litigation was pending the defendant entered upon the farm of the deceased, took possession of the same and the personal property thereon belonging to the estate of the deceased and such portions of the latter as he chose, sold the most valuable portions of the same and neither restoring nor offering to restore any portion of what remained on hand to the executors, but claiming the whole personal estate as his own. The plaintiff as executor entered upon the premises occupied by the defendant claiming to exercise control over the personal property, but the defendant utterly denied his right to meddle with the same and forcibly drove him away.

After the codicil had been duly established by a decree of this court, the plaintiff brought an action of trespass for the personal property belonging to the estate of which he was executor, which had been taken possession of by the defendant as before stated.

1. As the executor derives all his title from the will, his interest is completely vested at the instant of the testator's death, and he may therefore before probate perform almost any act belonging to his office. He may make an inventory and possess himself of the testator's effects; he may enter peaceably into the house of the heir and take securities for the debts due the deceased, or remove his goods. As executor he may maintain actions on his own possession, as trespass, detinue, or replevin, for goods or cattle of the testator taken after the testator's death. So he may maintain actions, as trespass or trover, for such of the effects as never came into his actual possession, taken and converted after the testator's decease. Toller on Executors, c. 2, § 4.

2. The evidence, unmistakably, shows a conversion of the personal property of the testator by the defendant. He claimed the whole as his. He used and sold it according to his own will and pleasure. That the plaintiff might have maintained the action of trover cannot be doubted.

But trespass is equally maintainable. By R. S., c. 82, § 12. "The

distinction between trespass and trespass on the case is abolished. A declaration in either form is good."

Either trespass or trover was proper under the facts disclosed. *Moulton* v. *Smith*, 32 Maine, 406. *Moulton* v. *Witherell*, 52 Maine, 239.

3. The executor cannot recover for the crops growing at the time of decease of the testator. They belong to his devisees. *Dennett* v. *Hopkinson*, 63 Maine, 351.

4. The schedule, furnished us of the articles claimed as having been converted by the defendant, indicates their value as estimated by the appraisers on the estate of Timothy Eaton. They acted under oath. No other so satisfactory evidence is furnished us. The plaintiff is entitled to recover fifteen hundred seventy-nine dollars and fifty-eight cents with interest from August, 1874.

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

ABEL HUNT *vs.* ENOCH H. TIBBETTS.

Penobscot. Opinion September 16, 1879.

Contract—construction of. Damages.

The plaintiff and defendant being copartners, the latter on January 24, 1876, sold his interest to the former taking his notes for four thousand dollars payable at various times through a period of more than three years, and transferred the good will of the business to the plaintiff and agreed not to engage in it himself at B. for the term of ten years from date. "This last agreement" (repeating it) "to be binding on me (defendant) only in case the four thousand dollars which is the consideration hereof, is paid according to said H's agreement to pay the same and at the time agreed upon." Nearly three years thereafter, the plaintiff having paid at maturity all his notes except two which had not matured, brought this action for the violation of the defendant's agreement not to engage in the business: *Held*, that the payment of the whole four thousand dollars was not a condition precedent to its maintenance.

Also *held*, that for breach of such a stipulation damages which have accrued prior to the date of the writ only are recoverable; and that subsequent breaches may be the subject of future action.

ON REPORT.

ASSUMPSIT for damages sustained under a written agreement signed by the defendant dated January 24, 1876.

Writ dated September 17, 1878. Plea, general issue.

In the plaintiff's writ, after setting out the contract, the allegations of breach are as follows: "but that the defendant unmindful of his agreement aforesaid to sell and transfer to said plaintiff his good-will in said business, and his obligations under said agreement, did from and ever since the execution of said agreement to this date injure and diminish the business of the place so sold by defendant to plaintiff by contriving maliciously, constantly, and by the circulation of falsehood and slander as to the plaintiff and his business, whereby plaintiff has been greatly injured in his said business.

And plaintiff further avers, that the defendant, unmindful of his agreement, made with said plaintiff, as aforesaid, not to engage in or become in any way interested in the retail coffin and casket business, in the city of Bangor, for the term of ten years from that date, has since been engaged and interested in the retail coffin and casket business in said Bangor, and is now so engaged and interested and that the business in which defendant is so interested is a very extensive one and has been and is now largely composed of trade and patronage which plaintiff was entitled to and would have enjoyed but for defendant's violation of his agreement aforesaid not to engage in said business.

By reason whereof plaintiff has been damaged in the loss of business, profits and credit in the sum of five thousand dollars."

The contract is as follows:

"I, Enoch H. Tibbetts, of Bangor, Penobscot county, Maine, in consideration of four thousand dollars, to me paid by Abel Hunt, of said Bangor, do hereby sell and transfer to said Hunt, all my right and interest in and to all the property and assets of the late firm of E. H. Tibbetts and Hunt, of whatever kind and description, excepting the debts due said copartnership to this date, said debts remaining the property of the parties composing said partnership. And I further hereby sell and transfer to said Hunt, all my good-will in said business as carried on by said copartnership before its dissolution; and further hereby agree that I will not

engage in or become in any way interested in the retail coffin and casket business, in the city of Bangor, for the term of ten years from this date. This last agreement, viz: not to engage in said business in said Bangor for ten years, to be binding on me only in case the four thousand dollars, which is the consideration hereof, is paid according to said Hunt's agreement to pay the same and at the time agreed upon for said payment.

[Signed.] E. H. TIBBETTS.

Bangor, January 24th, 1876."

And the court are asked to decide the following questions:

I. Can the plaintiff recover in the present action for damages sustained under the clause in the agreement that the defendant shall not enter into the same kind of business in Bangor for ten years?

II. If not, and the plaintiff prosecutes this suit for other damages, will the judgment in this case (favorable to either side) be a bar to another action for the kind of damages first named?

III. Any other points the court may see fit to notice in the elucidation of the case.

The plaintiff to have leave to become nonsuit or to go to trial, at his election, after the law has been determined.

Humphreys & Appleton, and *J. Varney*, for the plaintiff, cited *Hunlock* v. *Blacklowe*, 6 Petersd. Ab. 37. *Leonard* v. *Dyer*, 26 Conn. 172. *Clough* v. *Baker*, 48 N. H. 254. *Wallace* v. *Antrim Shov. Co.*, 44 N. H. 521. *Caldwell* v. *Blake*, 6 Gray, 402, *Cutter* v. *Powell*, 2 Smith's Lead Cas. 23, *et seq.* *Powers* v. *Ware*, 4 Pick. 106. *Pierce* v. *Woodard*, 6 Pick. 206.

Wilson & Woodard, for the defendant.

Where the language is clear and unambiguous, there is no room for construction, and nothing for construction to do. A court will not by construction defeat the express stipulations of a contract, 2 Pars. Cont. (5th ed.) 500, Ib. 494-5. *Parkhurst* v. *Smith*, Willes, 332. *Gibson* v. *Minot*, 1 H. Bl. 569, 614. *Parnell* v. *Mill*, 3 Mau. Gr. & S. 625, 638.

Counsel also cited *Sewall* v. *Wilkins*, 14 Maine, 168. *Winslow* v. *Copeland*, 15 Maine, 276. *Simpson* v. *Peace*, 53 Maine, 497.

Bouv. Law Dict. tit. "Divisible," Chit. Contr. (11 Am. ed.) 1172. *Willard* v. *Spring*, 16 Johns. 121. *Smith* v. *Jones*, 15 Johns. 229. *Badger* v. *Titcomb*, 15 Pick. 409.

The contract is entire, the consideration single and entire, 2 Pars. Contr., 519, and cases *in notes.*

BARROWS, J. On the 24th of January, 1876, the defendant, by an instrument in writing, in consideration of four thousand dollars in negotiable notes, given by plaintiff to him payable at various dates, the last of the series not being due when this action came up for trial, sold and transferred to the plaintiff all his right and interest in and to all the property and assets of the late firm of E. H. Tibbetts & Hunt, excepting debts due, but expressly including and transferring "all my (his) good-will in said business, as carried on by said copartnership before its dissolution," and stipulated that he would not engage in or become in any way interested in that sort of business in Bangor "for the term of ten years from this date."

"This last agreement, viz: not to engage in said business in said Bangor for ten years to be binding on me only in case the four thousand dollars, which is the consideration hereof, is paid according to said Hunt's agreement to pay the same and at the time agreed upon for said payment." The plaintiff declares in a writ dated September 17, 1878, in assumpsit setting out the instrument according to its legal purport and effect, averring performance on his own part, and that defendant has broken his agreement as to the sale and transfer of the good-will of the business, and his agreement "not to engage in or become in any way interested in the retail coffin and casket business in the city of Bangor, for the term of ten years," from the date of the transfer.

The allegations of breach are somewhat loose and defective as to time and circumstance, (see Lawes on pleading in assumpsit, Story's Ed. 1811, pp. 208, 211,) but amendable; and though perhaps sufficient to sustain an action after verdict, we think they should be amended so as to obviate the danger of surprise to the defendant for want of greater particularity in the declaration as to the subject of complaint.

The first and principal question presented by the report is

whether the plaintiff can recover in the present action for damages sustained under the clause in the agreement that the defendant shall not enter into the same kind of business in Bangor for ten years.

It is well said in a note to *Cutter* v. *Powell*, in 2 Smith's Leading Cases, 6th Am. ed., 22, that "few questions are of so frequent occurrence, or of so much practical importance and at the same time so difficult to solve as those in which the dispute is whether an action can be brought by one who has entered into a special contract, part of which remains unperformed."

The defendant here contends that the punctual payment of the whole of the four thousand dollars at the times agreed upon for said payment is a condition precedent to the maintenance of an action by the plaintiff for any breach of defendant's contract in this respect.

The report shows that the plaintiff had paid without default on the days when they matured all his notes but the last one which is not yet due, one of them having fallen due and been paid since the commencement of this action. Thus far no breach of the contract can be attributed to the plaintiff. Is the language of the contract such that his remedy for a breach by the defendant must necessarily be postponed until he has made all the payments which he is bound to make?

The language is that of the defendant and is to be construed most strictly against him and favorable to the plaintiff.

The defendant in the outset as a part of the consideration of the plaintiff's notes payable on time, promises that he will not engage in the business for ten years from the date of the contract.

It is obvious that two of the matters which courts have been wont to deem important in determining whether the stipulations of parties are independent, or whether performance by one party is a condition precedent to the maintenance of his action for a breach on the part of the other—to wit: the order of time in which performance is to take place, and the fact that on each side the promises go only to a part of the consideration and a breach may be compensated in damages or the injured party otherwise have a perfect remedy, concur in the present case to incline us to

regard their mutual promises as independent, and to hold that each party should have his proper remedy for a breach by the other.

The defendant transferred his interest in the property of the firm and the good-will of the business and was to begin to perform his agreement (not to engage in the same business at Bangor for ten years) immediately.

When the action was commenced he had received and enjoyed a large part of the sum which was the consideration of his agreement not to compete with the plaintiff for the ten years succeeding the sale.

But for the peculiar form of the stipulation we should have no hesitation in saying that under the rules laid down by Sergeant Lawes in his valuable treatise on pleading in assumpsit, edition before cited, pp. 115, 119, neither of these parties could have counted on a full performance by the other as a condition precedent, but both must be left to their respective and mutual remedies in case of partial non-performance.

See the learned note (4) of Sergeant Williams, 1 Williams' Saunders, 320, *et seq.* See also the principle as stated in the note to *Cutter* v. *Powell*, 2 Smith's Leading Cases, 26, thus: "if the plaintiff's covenants which form the consideration be dependent, yet if part of the consideration have been accepted and enjoyed by the defendant, and the plaintiff have no other remedy than on the covenant, and the defect on his part be compensable by damages, the plaintiff may recover without alleging performance of the residue."

Defendant's counsel base an argument of no little force upon the peculiar language of the contract as hereinbefore quoted, claiming that it is too direct and explicit to leave any room for construction.

Yet if it is repugnant to the manifest intention of the parties as expressed in the contract as a whole, it must give way.

The remark of Tindal, C. J., in *Stevens* v. *Cushing*, 3 N. C. 355, (32 E. C. L. R. 153,) is appropriate and sound.

In that case defendant's promise was alleged to be made "on the performance of the before mentioned terms and conditions on

the part of the plaintiff." The defendants pleaded non-performance in divers important particulars and plaintiff demurred. And the chief justice remarks: "The rule has been established by a long series of decisions in modern times that the question whether covenants are to be held dependent or independent of each other is to be determined by the intention and meaning of the parties as it appears on the instrument and by the application of common sense to each particular case; to which intention when once discovered, all technical forms of expression must give way." He does not overlook the fact that "the defendant's covenant is entered into with the plaintiff not simply in consideration of the plaintiff's covenants and agreements, but on the performance of the before mentioned terms and conditions on the part of the plaintiff." He admits that the argument as to the intention based on these words would undoubtedly be strong were the question *res integra;* but he cites *Boone* v. *Eyre*, 1 H. Black., 273, n, as the leading case on the subject, where the defendant covenanted to pay, "the plaintiff well and truly performing all and everything therein contained, on his part to be performed," yet full performance on the part of the plaintiff was not held to be a condition precedent. He says further that "the case of *Hunlocke* v. *Blacklowe*, 2 Wms.' Saunders, 156, is strong to show that courts of justice are more anxious to discover and to be governed by the intention of the parties than to follow the strict and technical forms of words used in the instrument." And he proceeds on the strength of the rule laid down by Lord Ellenborough, in *Richie* v. *Atkinson*, 10 East. 295, that "where the covenants go only to a part of the consideration, there a remedy lies on the covenant to recover damages for the breach of it, but it is not a condition precedent," to render judgment for the plaintiff, notwithstanding the significant words connected with the defendant's promise.

"Covenants and agreements," it is said in *Todd* v. *Summer*, 2 Grattan, 167, "are construed according to the intention of the parties and the good sense of the case. Though in form they may be dependent, yet to prevent injustice they may be treated as independent."

Cases abound both in England and America in which these rules are recognized as sound. *Kingston* v. *Preston*, recited in *Jones* v. *Buckley*, Douglas, 690. *Carpenter* v. *Cresswell*, 4 Bing., 409, (15 E. C. L. R., 22.) *Franklin* v. *Miller*, 4 Ad. & El., 599, (31 E. C. L. R., 148, 151.) *Foster* v. *Prudy*, 5 Met., 442, 444. *Knight* v. *N. E. Worsted Co.*, 2 Cush. 283, 286, and many other cases cited in the note to *Cutter* v. *Powell*, *ubi supra*.

What is the true import and effect of the language upon which the defendant here relies?

It is fair to presume that each party entered into the contract with a design to fulfill his own agreement and an expectation that the other would fulfill his. The clause in question was introduced by way of security to the defendant, for prompt fulfillment on the part of the plaintiff. An early breach of defendant's agreement not to set up a rivalship in business would tend to deprive the plaintiff of the power to fulfill at all. It would be a practical withdrawal, to a greater or less extent, from the conveyance, of the good-will of the partnership business which had been transferred.

We cannot accept the interpretation now put upon it by defendant's counsel that it meant that defendant's stipulation was not then binding on him, and whether it ever would be depended on a contingency not yet determined. If so the term during which the defendant was not to engage in the business would have been set to commence, not from that date, but from the expiration of the credit given to the plaintiff.

On the contrary the defendant at that time doubtless intended to give the plaintiff a fair chance to pay his notes unembarrassed by any competition with himself and also to provide against the plaintiff's claiming any further exemption from such competition in case he did not pay promptly as agreed. It is as if he had said to the plaintiff, "I transfer the good-will of the business to you and I will not engage in it here for ten years from this date provided you make your payments promptly at the time fixed; but if you fail to pay as agreed I will be no longer bound by that stipulation."

We think a construction which would permit the defendant, in violation of his promise to engage in the business, and thereby perhaps take from the plaintiff the means of fulfilling on his part is inadmissible. It could not have been the intention of the parties.

The plaintiff is entitled to the benefit of his punctual performance thus far. The defendant is bound up to the present time by his acceptance and enjoyment of a part of the consideration. His remedy for any possible future failure of the plaintiff's is complete not only by action but under the stipulation as we construe it. It would be unreasonable and unjust and inconsistent with the object of the provision itself and with the plain intention of the parties to suffer him to set it up to bar an action for his own breach of a substantial part of his agreement.

In a case like this damages are recoverable only up to the time of the commencement of the action. The defendant may have broken his contract only in a single transaction. He may have broken it for months or years. He may have ceased to break it at the commencement of this suit. He may cease to-morrow, and observe it faithfully for the remainder of the ten years. There is no basis upon which prospective damages can be assessed. Plaintiff can recover in this suit only for such damages as had accrued prior to the date of the writ. Subsequent breaches may be the subject of another action. Under the stipulation in the report,

Case to stand for trial.

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

PETER DUNN *vs.* CHARLES F. COLLINS and others.

Aroostook. Opinion September 19, 1879.

Consideration. Bond. Sureties.

The payment in part of a debt due is no consideration for a promise to delay the collection of the balance.

The execution creditor gave to his debtor a written receipt for twenty dollars "to be indorsed on his execution" and agreed therein to "discharge the execution provided the debtor shall pay the further sum of ninety dollars in sixty and thirty days from date." In an action on a poor debtor's bond, previously given by the debtor to procure his release from arrest on the execution; *Held*, that the stipulations were without consideration and afforded no defense to the sureties.

ON REPORT.

Debt, on a six months' bond given by the defendants to procure the release of Charles F. Collins—one of the defendants—from arrest on an execution issued on a judgment in favor of the plaintiff against Collins. The defendant was defaulted. The sureties defended upon the ground of their discharge by the plaintiff by virtue of the following receipt, dated,

"Houlton, September 27, 1877.

Received of C. F. Collins the sum of twenty ($20) dollars, to be endorsed on ex'on Peter Dunn *v.* said Collins, and it is hereby agreed that I will discharge said ex'on, provided said Collins shall pay the further sum of ninety ($90) dollars in sixty and thirty days from this date, one-half of said last named sum of ninety ($90) dollars to be paid in thirty days from date, and balance in sixty days from date. PETER DUNN."

The presiding justice ruled that the stipulations contained in the receipt did not release the sureties. Thereupon the case was reported to the law court with the agreement that if the ruling was correct the defendants to be defaulted.

Madigan & Donworth, for the plaintiff.

J. B. Hutchinson, for the defendants, cited *Leavitt* v. *Savage*, 16 Maine, 72. *Thomas* v. *Dow*, 33 Maine, 390. *Andrews* v. *Marrett*, 58 Maine, 539. *Chute* v. *Pattee*, 37 Maine, 103. *Lime Rock Bank* v. *Mallett*, 34 Maine, 550. S. C., 42 Maine,

355. *Mariner's Bank* v. *Abbott*, 28 Maine, 280. *Little* v. *Hobbs*, 34 Maine, 357. *Crosby* v. *Myatt*, 10 N. H., 318.

DANFORTH, J. This suit is upon a poor debtor's bond. The principal makes no defense. The sureties defend upon the ground of their discharge by the plaintiff, and to sustain this defense put in the paper dated September 27, 1877.

This paper may presumably refer to the execution upon which the debtor was arrested, but it does not either directly or indirectly refer to the bond given to discharge that arrest. Here is no waiver of any of the conditions in the bond, nor any promise of delay in regard to them; nothing whatever to prevent the creditor from pursuing such remedies as it may afford and within the time allowed by its terms. Nor does it in any way interfere with such rights and remedies as may accrue to the sureties from the contract into which they have entered. The paper may perhaps be collateral to the contract in the bond, but cannot have any effect upon it or upon the liability of the sureties under it. *Merrill* v. *Roulstone*, 14 Allen, 511. *The United States* v. *Hodge*, 6 Howard, 279.

But whatever may be the true construction of the paper as an agreement, it is without consideration, and therefore without binding force. It is first simply a receipt for twenty dollars to be endorsed on the execution. That was no more than a discharge of the debt then due to that amount. It does not purport to be a consideration for the agreement which follows, and if it did the result would be the same, for part payment of a subsisting debt already payable, is not a legal consideration for a promise of delay as to the balance. 2 Am. Lead. Cas., (3d ed.) 306-7. *Mathewson* v. *Strafford Bank*, 45 N. H., 104. The agreement is in effect simply a promise on the part of the plaintiff on conditions to be performed by the debtor in the future. There was no promise on the debtor's part to perform these conditions, and if there were, it would only be for the payment of a debt for which the creditor had something more than a mere promise, a judgment of the court and execution. The debtor waived no right to fulfill any of the conditions of the bond, nor did he

assume any burdens which did not rest upon him by virtue of the bond and judgment. *Leavitt* v. *Savage*, 16 Maine, 72.

Thus the ruling of the presiding justice was correct, and as provided in the report, the defendants must be defaulted.

Defendants defaulted.

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

EMELINE L. COOK *vs.* CHARLES WALKER.

Piscataquis. Opinion September 19, 1879.

Dower in land held in common. Demand. Bond for conveyance of land.

A widow is entitled to dower in land of which her husband was seized during coverture as tenant in common; her right comes exclusively from his interest as separate and distinct from that of the other tenant.

Demand must be made upon, and the action be against the tenant of the freehold of the interest in which dower is claimed, and not against the other tenant.

A bond, for the conveyance of land upon certain conditions unconnected with a deed, is merely a personal obligation, and conveys no interest in the land; and the obligee is not such a tenant, even though in possession, as will authorize him to set out dower therein.

ON FACTS AGREED.

Action to recover dower in certain land, one undivided half of which the demandant's husband was seized during their coverture.

It was agreed that the issue joined shall be sufficient for the raising and deciding of all questions of law which may arise in the case before full court. That the plaintiff was lawfully married to George Blake, July 20, 1869, and that plaintiff was divorced from him as alleged in the writ. George Blake was the owner in fee of both moieties of land described in writ for many years and up to December 4, 1868, at which time he conveyed one undivided half in common of the same, to defendant, Charles Walker, by warrantee deed, with usual covenants; said deed to Walker dated December 4, 1868, and duly recorded.

On the same 4th day of December, 1868, said George Blake

gave said Walker a bond for the conveyance of the other undivided half of the said real estate on condition to be performed in ten years. Said Blake has made no other conveyance of said land. The said Walker has occupied and carried on said land, being a farm, ever since said deed and bond to him, as is customary in the cultivation and management of farms, paying taxes thereon, said occupancy being by consent of said Blake, paying said Blake no rent nor promising to pay rent except so far as the payments on said bond may be regarded as rent. That plaintiff made a demand upon defendant for dower on the 11th day of December, 1877. No objection is made to the form of notice or the mode of its service. For the last four years next preceding this term, September, 1878, said Blake has resided openly and continually in said county of Piscataquis, including the time when said notice was given and writ made and served. For more than one-half of said four years this last passed, said Blake has lived with said defendant on said farm and land; said Blake was so residing with Walker when said demand was made on Walker. Said Blake is and has been the father-in-law of said Walker for about eighteen years. Since December 4, 1868, said Blake has not exercised any control upon the management of said farm. The plaintiff has never released her dower on said premises, nor barred herself thereof unless she did so by the paper, a copy of which marked "C" is hereto attached, which paper was executed by her and delivered to said Blake before her divorce from him. Since said divorce and before said demand upon Walker, plaintiff's name has been legally changed from Emeline L. Blake to Emeline L. Cook. Said Walker has never conveyed any of the estate as aforesaid conveyed to him by said Blake.

The parties to said action agreed to submit the same to the full court upon the foregoing statement of facts, and if the court are of opinion that the plaintiff is entitled to dower as claimed, then they are to give such direction as is proper, otherwise plaintiff to be nonsuited.

Josiah Crosby, for the plaintiff.

A. G. Lebroke, for the defendant.

DANFORTH, J. The plaintiff in her writ claims dower in one undivided half of a certain lot of land therein described. That the interest of one of the tenants in common in land so held is liable to dower is unquestioned. Such a tenancy does not affect the right to dower though it may so far control the assignment as to require it to be set out as an undivided interest in the whole lot. *Blossom* v. *Blossom*, 9 Allen, 254.

Though in a process issuing from the probate court under the provisions of R. S., c. 65, § 19, the husband's interest may first be set off, and then the dower assigned by metes and bounds, there is no such provision relating to actions for the recovery of dower. *French* v. *Lord*, 69 Maine, 537. Still whatever may be the final result as to the method of setting out the dower the plaintiff is entitled to her judgment therefor if she maintains her right.

This judgment must be such as to give her her interests in the estate of her former husband and not interfere with the rights of the co-tenant. For this purpose the interests of the different tenants are separate and distinct, as much so as if they owned in severalty. The widow obtains her title from her husband, and must therefore take her portion from his estate alone. In this respect the tenant owning the part in which the widow is not entitled to dower is under no legal obligation to surrender any portion of his share, nor has he any right to, or control over the other share. If upon demand he should set out dower in that part owned by the other tenant, it would not be binding upon him, nor would he be concluded by a judgment to which he was not a party. The tenant of the husband's interests can alone set out the dower, and therefore the demand must be upon, and the action be against him; and he must be the tenant of the freehold. R. S., c. 103, §§ 17, 21.

Applying these principles to the case at bar and the solution is not difficult.

It is alleged in the writ that the husband was, during the coverture and at the time of the decree of divorce, an owner of one undivided half of the real estate described; that at the time of the demand and at the date of the writ, the defendant was the tenant of the "freehold of said real estate." The statement of facts shows then, that the allegation as to the husband's title is true; but while

it shows that the defendant was at the time mentioned a tenant of the freehold of an undivided half of the estate, it shows also that it was not the same half of which the husband had been the owner during coverture, but in fact the other half. He derives his title to this half from the husband, but by a conveyance previous to the marriage. If therefore the undivided half in which dower is claimed is the same as that of which the defendant was the tenant of the freehold at the date of the writ, the action must fail for want of seizin in the husband while the marriage continued. If on the other hand dower is claimed in that half of which the husband was so seized, then the action must fail for the demand was made upon, and the action brought against the wrong person. The facts show that the husband remained the tenant of the freehold up to the date of the writ, so that the defendant had no such interest in that part as would enable him to represent the husband's interest in this suit.

But the case further finds that the defendant had at the time a bond from the husband conditioned for the conveyance of his half upon certain terms which do not appear to have been complied with; and this bond is apparently relied upon as conveying such an interest in that half as will authorize the maintenance of this action. This, however, cannot be. The bond conveys no interest whatever in the land, nor does it purport to convey any. It is a personal obligation, in no respect touching the realty. It is not a bond of defeasance so connected with a deed of conveyance as to constitute a mortgage either in law or in equity, but simply a personal obligation to convey upon the fulfillment of certain conditions. It does not even give the right of possession. *Shaw* v. *Wise*, 10 Maine, 113. *Bailey* v. *Myrick*, 50 Maine, 178. *Newhall* v. *Union M. F. Ins. Co.*, 52 Maine, 180.

The defendant, therefore, in no way represented the undivided half in which the plaintiff is entitled to dower at the time the action was commenced. He should perhaps have availed himself of this defense by a plea in abatement, but the necessity of that is waived by the agreed statement in which it is provided "that the issue joined shall be sufficient for the raising and deciding of all questions of law which may arise in the case before the full court,"

even if any pleading were necessary under an agreed statement presenting the full case.

Plaintiff nonsuit.

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

JOSIAH H. DAVIS *vs.* FRANCIS C. DUDLEY, and another.

PARKER D. SHAW *vs.* FRANCIS C. DUDLEY, appellant.

FRANCIS C. DUDLEY *vs.* PARKER D. SHAW, and others.

Aroostook. Opinion September 19, 1879.

Infant's deed—ratification of.

A minor's deed of land not appearing upon its face to be prejudicial to him, is not void but voidable.

To avoid it or ratify it, there must be some act on the part of the minor, after becoming of age, indicative of that intention.

Mere delay on the part of the minor is not sufficient evidence; but delay coupled with the neglect of the minor after becoming of age, and having knowledge that the other party is intending to, and does make valuable improvements, to make known his intention to avoid his deed in season to prevent such expenditure, is a sufficient ratification.

ON REPORT.

The three actions were reported for the law court to determine the title between the parties.

The first two actions are trespass *quare clausum.*

Davis and Shaw both claim title under deed from Francis C. Dudley to Parker D. Shaw, dated November 27, 1868, Shaw having subsequently conveyed a portion of the premises to Davis.

Francis C. Dudley was born April 17, 1848, and therefore was a minor at the date of his deed to Shaw.

April 22, 1878, nine years after attaining his majority, Dudley taking his brother with him as a witness, made an entry upon the premises described in that deed, for the purpose of asserting his claim and title to the land, and forbade Shaw and Davis from

doing any more work upon it. For making this entry the Dudleys are sued in the above actions of trespass.

After the testimony was all in the cases were continued on report with an agreement that the law court should "determine the title between the parties. If the actions of trespass are maintainable, the damages to be fixed at the sum named. If the writ of entry is maintainable, it is to stand for trial on the question of betterments."

L. R. King, for Shaw and Davis.

Powers & Powers, for Dudleys.

The entry was proper to disaffirm the deed. *Boody* v. *McKenney*, 23 Maine, 517. Some positive act was necessary for the purpose. *Boody* v. *McKenney*, *supra*, 1 Pars. Contr. 272. Met. Contr. 60, and cases. *Urban* v. *Ginnes*, 2 Grant (Pa.)

Chadbourne v. *Rackliff*, 30 Maine, 354. *Holmes* v. *Blogg & Taunt*, 39, 16 E. L. & E., Am. note, 558.

DANFORTH, J. The last named of these three cases, that of *Dudley* v. *Shaw*, is a real action. It is conceded that the title to the land described in the writ was originally in the plaintiff. The tenants claim under a deed from him. The execution of the deed is not denied, but the case finds that when it was given the grantor was a minor. The deed is dated November 27, 1868, and the plaintiff became of age April 17, following. On the 22d day of April, 1878, the plaintiff entered upon the land claiming to own it. After the sale and before this entry the tenants had built buildings thereon and made valuable improvements, the plaintiff living near by and making no claim to the land or objection to the improvements. The only question involved in the case is whether under these circumstances the deed is valid and binding upon the plaintiff.

Whatever differences of opinion may formerly have existed as to whether a minor's deed is void or only voidable, it must now be considered as well settled law that an instrument like this, where it does not appear upon its face to be prejudicial and which may be beneficial to the minor, is voidable at his election. *Robinson* v. *Weeks*, 56 Maine, 106.

As the deed is voidable at the election of the minor, it follows that until that election is in some way made manifest there is neither a ratification nor an avoidance. Without the one or the other the deed must still remain in force but as a defeasible instrument. This manifestation must be shown by some positive and clear act, intended for that purpose. What that act shall be, or what is sufficient for that purpose must necessarily depend upon the circumstances of each case. It therefore follows that mere delay within the time allowed by the statute of limitations, uncoupled with any acts expressive of an intent to confirm, would not be sufficient for that purpose; and this may now be considered as well settled law; though some decisions may be found holding that unless the deed is repudiated within a reasonable time, ratification will result. 3 Wash. R. Prop. (3d ed.) 226. *Boody* v. *McKenney*, 23 Maine, 523-4. *Jackson* v. *Carpenter*, 11 Johns. 539. *Tucker* v. *Moreland*, 10 Peters, 75–6.

While mere acquiescence for any length of time within the statute of limitations, is no proof of intention to ratify, when coupled with acts or even omissions when duty requires action, it may become not only pertinent, but satisfactory proof of such intention.

In *Boody* v. *McKenney*, Shepley, C. J., says: "The reason is, that by his silent acquiescence he occasions no injury to other persons, and secures no benefits or new rights to himself. There is nothing to urge him as a duty towards others to act speedily."

In *Tucker* v. *Moreland*, Story, J., says: "Mere acquiescence uncoupled with any acts demonstrative of any intent to confirm it would be insufficient for that purpose."

From these propositions the inference is inevitable that when delay is coupled with acts, indicating intention to confirm, or which do cause injury to others, or secure benefits to himself, or under such circumstances as impose a duty to act speedily, it becomes proof of confirmation more or less potent according to the accompanying acts and circumstances.

This is analagous to the doctrine applied to infant purchasers. If he retains the land after becoming of age receiving a benefit from it, he confirms the contract without further act. *Hubbard*

v. *Cummings*, 1 Maine, 11. *Dana* v. *Coombs*, 6 Id. 89. Without a further citation of authorities it seems to be established as a general rule that when an infant enters into a contract and after becoming of age receives a benefit from it or by virtue of it does an act which is an injury to the other party he thereby ratifies it.

In this case the land was sold late in the fall. The grantor became of age in the spring following. The inference is that nearly or quite all the improvements were made at a time when the duties and responsibilities of an adult rested upon the plantiff. The case further shows that his residence was such that he must have known the improvements the tenants were making, the purpose for which they were made, and that they were made relying upon the title derived from the deed now in question. Under such circumstances if the plaintiff intended to avoid his deed, common honesty required him to make known that intention in season to prevent so great an injury and would forbid his making profit by an omission to do so. This certainly is a case where there is something "to urge him as a duty toward others to act speedily." Surely he was required to act within a reasonable time and failing to do so he must now be considered as electing to abide by his deed. The tenants might fairly suppose that he so intended, as they were under no obligation to assume that he would act in violation of that rule of law which requires honesty in minors especially after minority has ceased. While then mere delay has no effect of itself, under the circumstances of this case, it became demonstrative proof of an intent to confirm, and certainly as unreasonable in its length and similar in effect as causing loss to the party bound, as well as profit to the party whose duty it was to act, as if the minor had been the purchaser of the land in possession, instead of the seller. In which case it is clear he would have been held as confirming the deed. *Boody* v. *McKeen*, *supra*, 1 Am. Lead. Cas., 258.

This would seem to be a case coming within the meaning of the language used by Barrows, J. in *Robinson* v. *Weeks*, where he says contracts which may be avoided by the minor include "all executed contracts of this sort where the other party can be placed substantially in *statu quo*." It is undoubtedly true that

the consideration received may not necessarily be returned for that may have been expended or squandered before the minor becomes of mature age. Nor will he be held responsible for his acts while under age. But in this case the acts or omissions were not those of a minor but such as he is responsible for, and from the consequences of which he cannot, or does not propose, to relieve the other party.

It is however claimed that sufficient relief and all that the tenants are entitled to, may be obtained under the statute providing that in certain cases a tenant may in a real action recover compensation for his improvements, and there is a provision in the report that if the action "is maintainable, it is to stand for hearing on the question of betterments." This leaves that question open to be contested by the plaintiff and it is not clear that he might not do so with success. Six years' adverse possession appears to be necessary to give the tenant a right to such a claim. *Moore* v. *Moore*, 61 Maine, 420. *Bent* v. *Weeks*, 46 Maine, 524. It is not easy to see how such a possession can be shown here. The tenants were in possession not as disseizors of the plaintiff, but by virtue of a title under him; defeasible it may be, but nevertheless a title by a deed valid until defeated within a proper time and under proper circumstances. R. S., c. 104, § 32.

The case of *Tolman* v. *Sparhawk*, 5 Met. 469, relied upon by the plaintiff, differs materially from this. In that the improvements were made upon a strip of land between the true line and a conventional one. The latter was established by an agreement of the parties and was afterwards shown to have been a mistaken one. Hence the tenant had no title to the land, and, although he was holding under an assent of the plaintiff, that assent was but oral and given under a mistake. Therefore the tenant was holding not only without title, but in opposition to the true title, and the plaintiff, as well as the tenant, being in ignorance of the true line no obligation rested upon him to inform the tenant of his mistake. Therefore it was properly decided in that case that there was no estoppel on the part of the plaintiff, and the betterment act would work that justice between the parties which the law contemplates.

But if we assume that the tenants are in this action entitled to a compensation for their improvements the principle remains the same. There is still an injury to them as well as a benefit to the plaintiff sufficient to distinguish this case from those which hold that mere delay is not a ratification of the deed. It surely is an injury to a party after having made for himself a home to be obliged, without fault on his part, to sell it upon compulsion at the election of one who is in fault, at a price fixed by other parties and after paying the costs of a suit to have that price determined, or be compelled under the same liability of costs to pay such sum for the land as the judgment of the same persons may dictate. It is too of some benefit to the plaintiff or may be so, that he can at his election take the improvements or sell his land at the price assessed.

Besides if the tenants are entitled to a compensation as a condition precedent to an avoidance of the deed, as would seem to be unquestioned and unquestionable, that compensation should be made or tendered before the commencement of the action. The plaintiff must be entitled to recover when he begins his suit or he must fail. He can recover, if at all, only on the ground that the deed has been made void, and in order to do this he must perform all things incumbent upon him to do for that purpose. In this case there has been neither a performance nor a tender of it.

If, under these circumstances, the plaintiff can recover, the protection, which the law furnished him as a shield, has in his hands become a sword, a reproach to which we think the law is not open, and there must be judgment for the defendant.

This result necessarily disposes of the other actions. As the entry of the defendants which is the alleged trespass in each, was unauthorized the actions are maintainable, and as provided in the report judgment must be entered for the plaintiff in each case.

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

GEORGE WOODWORTH *vs.* GEORGE GRENIER and trustees.

Piscataquis. Opinion October 1, 1879.

Trustee process. Assault and battery.

An action for assault and battery cannot be commenced by trustee process. The word "expect" in R. S. c. 86, § 1 is a misprint and should read "except."

ON EXCEPTIONS.

Trespass against the principal defendant for an assault and battery.

The presiding justice ruled that this kind of action could not be commenced by trustee process; and the plaintiff alleged exceptions.

D. L. Savage, for the plaintiff, on the construction of the statute argued as follows:

"All personal actions may be commenced by trustee process. R. S. c. 86, § 1 provides, 'That all personal actions *expect* those of detinue, replevin, actions on the case for malicious prosecution, for slander by writing or speaking and for assault and battery, may be commenced by trustee process. Mark the words 'all personal actions expect' &c. Expect means 'to wait for.' Then all other personal actions shall wait for those of detinue . . and assault and battery.

"The trustees were discharged because the statute was supposed to prohibit the bringing of such an action by trustee process. It is respectfully submitted that the statute does not bar this kind of action; but on the contrary gives precedence to actions of detinue . . assault and battery to all other personal actions."

A. G. Lebroke, for the defendant.

VIRGIN, J. R. S., c. 86, § 1, provides that "all personal actions, *expect* those of detinue, replevin, actions on the case for malicious prosecution, for slander by writing or speaking, and for assault and battery, may be commenced by trustee process," etc. The word "expect" is most manifestly a typographical error caused by an accidental transposition of three letters and it should be "except"

as in the original statute and in all the revisions. Stat. 1821, c. 61, § 1. R. S. 1841, c. 119, § 1. R. S. 1857, c. 86, § 1.

In the revisions of statutes, verbal changes may occur, when it is obvious that no change in the law was intended, *Hughes* v. *Farrar*, 45 Maine, 72. *French* v. *Co. Com.* 64 Maine, 583.

Moreover, "no statute ought to be construed in such a manner as to be against reason." Bac. Ab. Stat. I. 10.

And "such a construction ought to be put upon a statute as may best answer the intention which the makers had in view; *qui hæret in litera hæret in cortice.*" Bac. Ab. I. 5. So that "whenever the intention of the legislature can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction seem contrary to the letter of the statute." *People* v. *Utica Ins. Co.*, 15 Johns. 380-1. *Jackson* v. *Collins*, 3 Cow. 96, and cases.

Literally construed, the provision would be absurd. Even the ingenious interpretation and luminous explanation suggested by the astute counsel for the plaintiff do not save it from the sheerest nonsense.

The ruling was obviously correct.

Exceptions overruled.

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

JAMES H. GOODWIN *vs.* RUFUS GIBBS and another.

Cumberland. Opinion October 1, 1879.

Flowage—Complaint. Tenants in Common.

Respondents, severally owning water mills on a stream, and as tenants in common owning and jointly maintaining a dam across the same on their own land, to raise a sufficient head of water to work their mills, may properly be joined in a complaint for flowage by the dam.

But when the complaint does not allege that the respondents created and maintained water mills on the stream on land of their own, it is bad.

Complaint for flowage inserted in a writ of attachment entered at the October term A. D. 1878.

Whereupon at said term the respondents severally filed demurrers to said declaration and complaint which were joined by the plaintiff and complainant, overruled by the court, and said declaration and complaint adjudged good. The respondents alleged exceptions.

The facts are sufficiently stated in the opinion.

N. S. Littlefield, for the complainant, cited *Nelson* v. *Butterfield*, 21 Maine, 220. *Walcott Manu. Co.* v. *Upton*, 5 Pick. 292. *Bates* v. *Weymouth*, 8 Cush. 548. *Fish* v. *Framingham*, 12 Pick. 68. *Billings* v. *Gibbs*, 55 Maine, 238. *Hill* v. *Baker*, 28 Maine, 9. *Moore* v. *Shaw*, 47 Maine, 88. *Davis* v. *Bingham*, 29 Maine, 391. *Benson* v. *Soule*, 32 Maine, 39.

S. C. Strout, *H. W. Gage* and *B. T. Chase*, for the respondents.

The mill act, R. S., c. 92, § 1, provides that "any man may erect and maintain a water mill, and dams to raise water for working it, on his own land." It is only in a case contemplated by this section, that a complaint for flowage, like the one at bar, can be maintained. It must be a dam to raise water for working a "water mill," and both the dam and the water mill must be upon land owned by the same party. Consequently the complaint must allege all these necessary facts, as a basis for this process. This complaint alleges that the dam is on land owned by said Billings and Gibbs, but does not allege that the mills, or either of them, are on land owned by them. This is fatally defective. *Jones* v. *Skinner*, 61 Maine, 25, and cases cited.

In point of fact, the dam is a reservoir dam, at the outlet of a pond owned by both defendants, as tenants in common, to retain water for a large number of mill owners below and to float logs, but the defendants do not own jointly, any mill or other improvement upon the stream, but Mr. Gibbs does own the first privilege below the reservoir dam, on which he owns, in severalty, a saw mill, shingle mill and woolen factory, which are operated by means of another dam some distance below the one complained of, while the tannery of Mr. Billings, owned by him, in severalty, is about one-fourth of a mile lower down on the stream, with a dam of his own, while between the two are one or two

other privileges with dams, belonging to other parties and operating other mills; and below Billings' are several other factories with separate dams. All these have the benefit of the reservoir dam, and none of them cause flowage on complainant's land.

The allegation in the complaint is that Gibbs owns "a saw mill, shingle mill and woolen factory," and Billings "a tannery." This implies, as the fact is, a several ownership.

The statute does not apply to the case of one man maintaining a dam on his land to operate a mill on another man's land. Both mill and dam must be owned by the same party to fall within the statute, § 1. All the proceedings provided for in c. 92, are inconsistent with the theory of this complaint, that joint owners of a dam may be liable to this process, when they have no joint ownership of a mill operated by means of the dam.

Sec. 3 provides for a regulation of the time of flowing and height of water. For whose mill, in this case? One may require more water than the other, or to flow a longer time.

Sec. 9 provides that the commissioners shall determine how far the flowing is necessary, &c.

Secs. 12 and 13 forbid flowing when prohibited by the commissioners, and furnish a new remedy in certain cases.

Secs. 15 and 16 give an action against the owner of the mill for the yearly damages awarded, and give a lien on the mill and dam.

How can these provisions be worked out in a case like this? If these defendants are jointly liable for flowage, whose several mill is subject to lien, the one first benefited, or the next, or both? Can a joint award and judgment under this statute, be a separate lien on mills of defendants, held in severalty? Or if suit is brought for damages, shall both be liable *in solido?*

Suppose Billings' tannery should be burned, or discontinued, can he still remain liable for the whole yearly damages, because Gibbs has a mill and he and Billings own a dam?

These considerations show conclusively that this statute only applies where both dam and mill are owned in the same right and by the same parties.

It follows upon the facts and allegations in this case, that this

reservoir dam is not erected and maintained under the authority of chap. 92, but the rights of all parties are at common law, and this process cannot be maintained. *Crockett* v. *Millett*, 65 Maine, 191, is decisive of this case.

The complaint alleges that Billings maintains a "tannery." There is no allegation that it contains any machinery run by water. We submit that a tannery is not a "water mill," within the meaning of chap. 92, sec. 1. The term is used in the statute to indicate a class of mills, in which something is ground or manufactured by the use of machinery propelled by water. Such a definition does not include a mere tannery, where hides are prepared by hand for the vats and then left in the vats till saturated with bark liquor, and then dressed by hand. There is no allegation that even a bark mill is operated in this tannery. In this process water is used—but not to drive machinery. The mill acts go to the verge of constitutional authority, and are not to be extended by implication, this court has said in *Jordan* v. *Woodward*, 40 Maine, 324.

In *Dixon* v. *Eaton*, 68 Maine, 542, this court has held that a steam mill, and a dam to raise water for floating logs to it, is not within the mill act.

LIBBEY, J. This is a complaint for flowage under R. S., c. 92, and comes before this court on demurrer to the complaint. The complaint among other things alleges that the respondents "have heretofore erected and now maintain water mills on said stream of water, to wit: the said Rufus Gibbs a saw mill, shingle machine, and woolen factory; and said Horace Billings a tannery" and that said respondents "have heretofore erected and ever since such erection maintained a dam across said stream to raise water for the use of their said mills, and to propel the machinery in the same, and still maintain said dam which is on land owned by said Gibbs and Billings and of which they have control."

1. It is objected that the complaint does not allege that the respondent's mills are on their own land. We think this objection is well taken. The complaint alleges that the respondents severally maintain water mills on the stream, and that they jointly maintain a dam across the stream on their own land to raise a

sufficient head of water to operate their several mills, but there is no allegation that they, as tenants in common or in severalty own the land on which their mills stand. There should be such an allegation to bring the case within the statute. *Jones* v. *Skinner*, 61 Maine, 25. *Crocker* v. *Millett*, 65 Maine, 191.

2. It is further objected that inasmuch as the defendants are several owners of mills on the stream below the dam complained of, and own the dam and land on which it stands as tenants in common and jointly maintain it, the dam is not within the protection of the statute, and this remedy will not lie. It is claimed by the respondent's counsel that, to bring the case within the statute, all the tenants in common of the dam must own as tenants in common a mill operated by the water raised by the dam. It is admitted by the complainant's counsel that if this position is sound, it is fatal to the maintenance of the complaint, as the facts of the case will not admit of an amendment to obviate the objection. But after a careful consideration of the provisions of the statute, and the able argument of the respondent's counsel in support of this objection, we think it not tenable. Either of the respondents might erect and maintain the dam on his own land to raise a sufficient head of water to operate his mill; and no good reason is perceived why being owners of mills in severalty, they may not unite and erect and maintain a dam in common to raise sufficient water to operate them. They are the owners of the dam, and each owns a mill operated by the water raised by it. The statute does not in terms prevent mill owners from thus uniting in the maintenance of a dam. If it does not in terms clearly permit it, it is clearly within its spirit and object; otherwise the several owners of mills and privileges on opposite sides of a stream could not jointly erect and maintain a common dam across the stream for the use of the mills at each end of it, but to have the right to flow by paying damages, each must maintain a separate dam. This is believed to be in conflict with the custom in such cases, in this state, which, so far as we are aware, has not been brought in question. No case is cited by the respondent's counsel in support of their position, and so far as we are aware the question has not been presented to the court. It was involved

in *Nelson* v. *Butterfield*, 21 Maine, 220, but was not directly considered. It seems to have been conceded by counsel and the court that in a case like this a complaint for flowage would lie.

In *Norton* v. *Hodges*, 100 Mass. 241, the court intimates the opinion, that, when the dam is owned by one party, and by an arrangement with several mill-owners below, it is maintained to raise water for the use of their mills, all the parties to such arrangement may be joined in a complaint for flowage, but the point was not decided.

We are of opinion that the respondents are to be regarded as erecting and maintaining a water mill, and a dam to raise water for working it, within the true meaning of the statute.

Exceptions sustained.

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

JOHN W. HOBART *vs.* CHARLES PENNY.

Penobscot. Opinion October 9, 1869.

Promissory note. Maker, endorser and endorsee. Equities.

The endorsee in good faith of a promissory note for value before maturity, without notice of equities between the maker and payee, is not bound by them.

ON REPORT.

The court to enter such judgment as shall be in accordance with the law of the case.

The material facts appear in the opinion.

D. D. Stewart, for the plaintiff.

D. F. Davis, for the defendant.

APPLETON, C. J. This is an action of assumpsit upon a promissory note, dated February 4, 1876, for $287.50 payable to William H. Downs or order, in six months and interest and endorsed by said Downs waiving demand and notice.

The evidence shows that the plaintiff purchased the note in suit, and another of the same tenor on one year, and gave therefor two hundred dollars in cash and his own note for three hundred dollars on time. The plaintiff denies all knowledge of the consid eration of the note or that there was any fraud in its inception. His statements are not disproved. He is therefore, a *bona fide* purchaser for value, ignorant of any or all facts which might defeat a recovery in the hands of the original payee.

The defendant, when he gave the note, promised to pay the same, into whosoever hands it might fall. He notified the world it was given for value and the plaintiff relying on his signature has in good faith paid value for it and is entitled to recover. *Farrell* v. *Lovett*, 68 Maine, 326. *Abbott* v. *Rose*, 62 Maine, 194. *Kellogg* v. *Curtis*, 65 Maine, 59. *Kellogg* v. *Curtis*, 69 Maine, 212.

It is therefore unnecessary to examine the several grounds of defense upon which reliance is placed, inasmuch as they are not open to the defendant, if they are ever so valid as between the maker and payee.

Neither is the defendant entitled to any deduction. A purchaser of negotiable securities before their maturity, whatever may have been their original infirmity, can, unless he is personally charged with fraud in procuring them, recover against the maker the full amount of them, though he may have paid therefor less than their par value. *Cromwell* v. *County of Sac.*, 96 U. S. 51.

Judgment for the plaintiff.

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

ELIZA LUNT, by guardian, *vs.* JOSEPH STIMPSON.

Cumberland. Opinion October 10, 1879.

Practice.

The judge of the superior court rendered judgment for the defendant, whereupon the plaintiff alleged exceptions : *Held*, that the judge had no authority to reopen the case on its merits after receipt of the mandate of the supreme judicial court of "exceptions overruled."

ON EXCEPTIONS.

The facts appear in the opinion.

C. P. Mattocks, for the plaintiff.

Every court has power over its own records and proceedings to make them conform to its own sense of justice and truth, so long as they remain incomplete and until final judgment has been entered.

Lothrop v. *Page*, 26 Maine, 119. *Woodcock* v. *Parker*, 35 Maine, 138. *Lewis* v. *Ross*, 37 Maine, 230, and cases there cited. Sawtelle, pet'r, 6 Pick., 110. *West* v. *Jordan*, 62 Maine, 484.

The granting of a new trial by the court is a matter of discretion, the exercise of which by inferior tribunals the higher courts will not undertake to regulate, as that discretion is not governed by any fixed principles. *People* v. *Superior Court*, 5 Wend., 114. Tidd's Practice, 904 and 910, and cases there cited.

In the exercise of such discretion the proceedings of the court are not subject to be revised or corrected by writ of error, certiorari or appeal. *Houghton* v. *Slack*, 10 Vt., 520.

An application for a rehearing must usually state some reason which would constitute a good ground for a new trial at common law. *Hunter* v. *Marlboro*, 2 Wood. & M. 168.

There can be no contest in this case upon the point that the decision of Judge Bonney is the same that would be rendered in the supreme judicial court, upon review of this action.

The decisions of this court are sufficiently numerous to satisfy the counsel for defendant, that exceptions will not be sustained, unless the case shows affirmatively that the excepting party has

been aggrieved by the ruling complained of. *Boothbay* v. *Woodman*, 66 Maine, 387. *Decker* v. *Somerset Ins. Co.*, ib. 406. *Soule* v. *Winslow*, ib. 447.

The act establishing the superior court, c. 151, laws of 1868, provides, that said "Court is hereby clothed as fully as the supreme judicial court, with all the powers necessary for the performance of all duties."

In the case of *Mayberry* v. *Morse*, 39 Maine, 105, the court held that after the acceptance of the report of referees, the presiding justice has power to order a re-investigation of the case before the same referees, and the learned judge who drew the opinion makes use of the following language: "The same causes which would suffice for the ordering of a new trial, might ordinarily require a recommitment. When such is the case no reason is perceived why a party should be left to his petition for review, as the only effect of such a course would be to prolong litigation. If either party therefore after a report has been accepted, should for new reasons and on the ground of facts before unknown, move a recommitment, it is the duty of the presiding justice to hear any pertinent evidence relating thereto, which may be offered, and then to determine as in his judgment the legal rights of the party may require.

There is no rule of law which prevents his hearing the motion, receiving the evidence and adjudicating thereupon."

The plaintiff claims that this case shows abundant reasons why a re-hearing of this case is not only manifestly proper, but is really for the best interest of the parties, tending as it does to prevent further litigation and save expense, and at the same time to arrive at a just result of the controversy already prolonged far beyond the pecuniary means of either plaintiff or defendant.

Henry Orr, for the defendant.

VIRGIN, J. *Facts.* At the March term 1876, of the superior court, Cumberland Co., Jane A. Brown recovered a judgment, by default, against Eliza Lunt, this plaintiff; and the execution issued thereon was satisfied in part by a levy upon the real estate of the judgment debtor in the following April.

In the fall and winter next succeeding, a lot of wood was cut on the premises covered by the levy by the authority of the execution creditor and sold to Joseph Stimpson, this defendant.

At the November term 1876, of the probate court, Eliza Lunt was duly adjudged insane and Micaiah H. Bailey appointed her guardian.

On February 5, 1877, Eliza Lunt by her guardian, sued out of the superior court the writ in the action at bar to recover the value of the wood cut as before mentioned, which action was tried by the justice of that court without the intervention of a jury, at the October term thereof, 1877; when the judge gave judgment for this defendant, on the ground that the wood in controversy was cut after the levy upon the land covered by the levy by the authority of the levying creditor, and that Eliza Lunt had failed to redeem the premises, within the year allowed by the statute. To this decision exceptions were alleged, the case went to the law court to settle the law raised thereby, and the action stood continued on the docket of the superior court until the January term, 1879; when a certificate from the law court, "overruling the exceptions," having been received, the defendant moved for judgment.

But prior thereto, to wit: on January 15, 1877, a writ of error was sued out of the supreme judicial court, returnable to and entered at the following April term, in behalf of Eliza Lunt, to reverse the judgment of March, 1876, of Brown against her, on the ground that she was insane when the writ against her was served and had ever since continued so. At the January term, 1879, of the supreme judicial court judgment was rendered reversing the judgment of *Brown* v. *Lunt*, for the cause alleged. Whereupon, at the January term of the superior court, this plaintiff resisted the defendant's motion for judgment in the action at bar and filed a motion for a re-hearing of the action upon its merits alleging the judgment of reversal on the writ of error and claiming judgment for the plaintiff. The judge of the superior court granted the motion of the plaintiff by rehearing the case, found the defendant guilty and awarded judgment against him for the value of the wood; to all which the defendant excepted.

The question, therefore, is, had the judge of the superior court authority to reopen the case after receipt of the mandate of this court "overruling the exceptions."

This question must be decided in the negative. For as already seen, the facts were found by the justice. The facts found were such, as, by applying the law to them, to warrant his ordering a judgment for the defendant. Now one of the principal facts in issue and forming the basis of the judgment for the defendant was that the defendant derived a legal title to the wood through Brown whose title came by the levy. His finding of that fact was conclusive upon the parties. *Mosher* v. *Jewett*, 63 Maine, 84. But the plaintiff's motion asks the justice to revise that finding, even after the law court has in substance ordered a judgment thereon, and find that the defendant had no title to the wood. This he was not authorized to do. For if viewed as a motion in arrest of judgment, R. S., c. 82, § 26 forbade it; while if considered as a motion to set aside the finding because of newly discovered evidence—to wit: the reversal of the judgment which formed the basis of the levy—the justice of the superior court could not entertain it; for that kind of motion, under our practice, is heard only by this court.

There was nothing to be done with this action after the allowance of the exceptions at the October term 1877, except to continue it, until receipt of the certificate from this court; and when that was received judgment should have been entered in accordance therewith under the statute. For if this motion could be entertained and the case re-opened as to title and what might follow, so could any other and an action might be endless.

Although differing in its facts, we perceive no distinction in principle between this case and *Mitchell* v. *Smith*, 69 Maine, 66; and if the plaintiff would avail herself of the fact of reversal of the original judgment, the legal remedy is the only one.

Exceptions sustained.
Judgment for the defendant.

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

ARTHUR G. SAWYER *vs.* ALBERT GERRISH.

Penobscot. Opinion October 10, 1879.

Contract—lien on future offspring.

The plaintiff's mare was served by the defendant's stallion for the purpose of raising a colt, whereupon the plaintiff agreed in writing to pay the defendant twenty dollars twelve months after date if his mare proved with foal, "colt holden for payment." *Held*, that the written agreement created a contract-lien in the nature of a mortgage.

ON FACTS AGREED.

Replevin for a three-year-old colt, described in the writ.

In 1874 defendant owned a certain stallion kept for breeding purposes, called "Mohawk." Said stallion was duly registered, as required by public laws 1873, c. 135.

On the 24th day of August, A. D. 1874, Elisha Sawyer, plaintiff's intestate, took a mare which he then owned, to said stallion, and had her duly served, whereupon he gave to defendant his promissory note therefor, in words and figures as follows:

"$20.00. AUGUST 24, 1874.

12 months after date I promise to pay to the order of Albert Gerrish, or bearer, if my mare prove with foal, twenty dollars, value rec'd, use of horse Mohawk. Colt holden for payment. If mare is disposed of, considered with foal.

ELISHA SAWYER."

The following season said mare was duly delivered of a foal, the product of said service.

The note has never been paid, though often demanded.

In the fall of 1878, defendant took possession of said colt, the product as aforesaid of his horse and said mare, said colt being then three years old, claiming a lien upon it by virtue of the stipulation in the aforesaid note, which says, "Colt holden for payment," and claimed said right of possession until the note and expenses of keeping were paid.

Whereupon plaintiff, his said intestate having in the meantime deceased, without making tender of any amount, denied the defendant's right to hold said colt, and brought this action.

If the defendant's lien was valid, plaintiff to become nonsuit and judgment to be ordered for a return.

F. Hamblen, for the plaintiff.

C. A. Bailey, for the defendant.

VIRGIN, J. It would seem that if the defendant had sent his mare to the plaintiff for the purpose of raising a colt from the latter's stallion, the defendant would have had, at common law, a lien upon her for the use of his horse, so long as he retained possession of the mare. *Scarfe* v. *Morgan*, 4 Mees. & W. 270; and perhaps upon the foal since *partus sequitur ventrem*, 2 Black. Com. 390. *Allen* v. *Dinsmore*, 55 Maine, 113. But no such question is raised here.

Neither does the case present any question of common law lien upon the colt. The defendant on the contrary claims a contract-lien upon the colt alone, by virtue of the written contract between the parties entered into after the service rendered had been completed and the colt had a potential existence.

It is well settled that the owner of personal property having a potential existence may sell it. *Grantham* v. *Hawley*, Hob. 132, 2 Kent's Com. 468 and note g, 492 note 1, c. *Farrar* v. *Smith*, 64 Maine, 77. And within this principle, the owner of a mare may, during gestation, sell her future offspring, which will vest in the vendee when parturition takes place. *McCarty* v. *Blevins*, 5 Yerg. (Tenn.), 195.

Doubtless the plaintiff, by his written contract with the defendant, intended to give him a claim of some kind upon the foal for the service of the defendant's horse, "if the mare proved with foal," of which she "was delivered the following season," "the product of the service."

What was that intention as declared by the terms of the agreement? The agreement should receive such a construction *ut res valeat et non pereat*, provided that construction be a reasonable one.

The plaintiff owned the mare and the offspring in the absence of any sale. The defendant never owned either; but they were both the unincumbered property of the plaintiff's intestate except

so far as the title of the colt was affected by the written agreement of the parties thereto. No possession, even, was ever had of the colt, by the defendant, until he took it a short time before the colt was replevied in 1878, about the time it was three years old. The case is, therefore, unlike that class of cases in which the owner parted with the possession of certain personal property, on a contract for sale, but retained the title until the price agreed on was paid.

The real transaction was simply—the plaintiff's intestate gave his promissory note to the defendant in consideration of the "use of" the defendant's stallion, payable "twelve months after date" provided his mare proved with foal, and gave security on the foal, for payment. The condition of the promise has been fulfilled and we think the promise should be.

Our opinion is that the contract was in the nature of a mortgage; and the case not distinguishable in principle from *Oakes* v. *Moore*, 24 Maine, 214, 220. The result is

Plaintiff nonsuit.
Judgment for return.

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

M. N. COTTLE & another *vs.* JOSEPH CLEAVES.

Franklin. Opinion October 10, 1879.

Promissory note. Intoxicating liquor. Practice.

When in an action by an indorsee against the maker of a negotiable promissory note, the defendant has proved that the note was given for intoxicating liquor sold in violation of law, the plaintiff cannot recover until he shows that he was a holder for a valuable consideration without notice of the illegality of the contract.

ON EXCEPTIONS.

ASSUMPSIT on a promissory note for the payment of $88.75, dated at Boston, Mass., February 3, 1877, payable on time to William Smith or order, at the Sandy River National Bank, Farmington,

Maine, and indorsed by Smith to Maverick National Bank, Boston, and by that bank to the plaintiffs.

The note was duly protested.

The action was tried by the presiding justice, without a jury, who found that the note was given for intoxicating liquors sold by the payee to the defendant in this state without legal authority.

The plaintiff introduced no evidence and the presiding justice ordered judgment for the defendant and the plaintiff alleged exceptions.

H. L. Whitcomb, for the plaintiff.

J. H. Thompson, for the defendant.

VIRGIN, J. When a persons sells intoxicating liquor, in this state, in violation of the provisions of R. S., c. 27, § 22, and receives therefor the negotiable promissory note of the purchaser, the seller can maintain no action thereon in his own name against the will of the maker; for R. S., c. 27, § 50, provides that "no action shall be maintained upon a promissory note given for intoxicating liquor sold in violation of the provisions of this chapter," unless the plaintiff be a "holder for a valuable consideration and without notice of the illegality of the contract."

But the owner of a negotiable promissory note indorsed in blank may bring an action thereon in the name of any person who consents thereto. *Patten* v. *Moses*, 49 Maine, 255. *Demuth* v. *Cutler*, 50 Maine, 298. Therefore when the seller of intoxicating liquor takes the note of his purchaser, "it is presumed," says Parke, B., in *Bailey* v. *Bidwell*, 12 Mees. & W. 73, 76, "that he would dispose of it and place it in the hands of another person to sue upon it;" and for this reason, when an action is brought against the maker of a note by an indorsee, and at the trial the defendant proves that it was given for liquor sold in this state in violation of law, the plaintiff cannot recover, until it is made to appear that he is a "holder for a valuable consideration and without notice of the illegality of the contract." *Baxter* v. *Ellis*, 57 Maine, 178. *Field* v. *Tibbetts*, 57 Maine, 358. *Hapgood* v. *Needham*, 59 Maine, 442. *Swett* v. *Hooper*, 62 Maine, 54.

In the case at bar it was proved that the note was given for

liquor sold in violation of the statute, but there was no evidence that the plaintiff was a "holder for a valuable consideration," etc.

Exceptions overruled.

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

THOMAS N. EGERY & another in equity *vs.* LEVI JOHNSON & another.

Penobscot. Opinion October 10, 1879.

Fraudulent conveyance. Equity.

The plaintiffs' debtor conveyed all his property to another for an inadequate present consideration together with a written agreement to support and maintain the grantor during his life. In a bill in equity by prior creditors, *held*, that the conveyance could not be upheld as against them.

BILL IN EQUITY heard on bill, answers and proof. The material allegations are in the opinion.

The defendant Johnson's answer admitted the ownership of the premises at the time alleged in the bill, and alleged—

That during 1873 or 4, Nason Brothers were engaged in lumbering operations under a contract with the plaintiffs and on the latter's land, and prior thereto borrowed $6,100 of the defendant to carry on their business and gave their notes therefor; that on October 23, 1874, to enable Nason Brothers to complete their operations the defendant gave them his negotiable promissory note for $1,800 on one month; that Nason Brothers cut and ran down to their mill 1,800,000 lumber, nearly all of which was sawed and shipped to the plaintiffs in Bangor; that during the operation this defendant was assured by Nason Brothers that when plaintiffs disposed of the lumber his notes should be paid; that he had frequent conversations with plaintiffs in which they informed him that they were receiving and disposing of the lumber and would account for the proceeds; that they held the $1,800 note and had no doubt that the proceeds of the lumber would be sufficient to pay said note and that the defendant would receive all his pay from Nason

Brothers; that confiding in the above assurance, during season 1875 he was induced to build a house on the premises mentioned in the bill, at a cost of more than $1,000; that receiving nothing from Nason Brothers, he became indebted for materials and labor upon the house; that being seventy-two years old and unable to labor, he was obliged to sell the house and land to the other defendant who paid sufficient money to discharge his indebtedness for labor and materials, amounting to $250; and in addition thereto agreed to support this defendant during life, which agreement he had faithfully fulfilled to the present date; and that he had no intention to defraud any of his creditors.

That all his creditors were soon after paid by himself or the other defendant, and he believed that the complainants had been fully paid or had in their hands sufficient property or money to pay the note of $1,800.

The other defendant's answer was substantially the same—alleging *inter alia* that one of the plaintiffs on October 29, 1875, informed him that the lumber was in this plaintiff's hands, and whatever was left after paying their bills, would be held in trust for the benefit of the defendant, Johnson, and that he had no doubt that something would be left after all his bills and claims had been paid.

The plaintiffs put in evidence a judgment for $549.50 debt, recovered on the $1,800 note, and a levy of the execution on the premises in question.

Johnson testified that he supposed the $1,800 note was paid when he conveyed, and that was all the debt he owed except bills on the house which were all paid by Keen.

Albert A. Keen (defendant) testified in substance:

That he had no knowledge of Johnson's indebtment to the plaintiffs when he purchased the premises; that he paid all the bills on the house, amounting to $260; that he heard of the $1,800 note three or four weeks afterward; that the plaintiff Dennett told him that he had no doubt there would be lumber enough to pay them, and what was over he would hold for Johnson's account.

That Johnson conveyed to him mortgages on three other houses

and some box boards, that he would like to sell the property mortgaged for the amount due on the mortgages; that he had of Johnson a note against Brown & Smith for $500 which had not been paid, but was in suit.

Wilson & Woodard, for the plaintiff.

D. N. Mortland, for the defendants cited *Scudder* v. *Young*, 25 Maine, 153. 1 Story Eq. 344. 2 Black. Com. 443. 3 Washb. R. P. 321. Story Eq. Plead. 251, 252. *Dixfield* v. *Newton*, 41 Maine, 221. 1 Story Eq. 362, 363. *Salmon* v. *Bennett*, 1 Conn. 525. 1 Story Eq. 381. *Whitman* v. *Weston*, 30 Maine, 285. *Denney* v. *Gilman*, 26 Maine, 156. *Chapman* v. *Butler*, 22 Maine, 191. *Stone* v. *Bartlett*, 46 Maine, 438.

VIRGIN, J. The complainants allege that on, and for some time prior to October 29, 1875, they were creditors of the defendant Johnson who then owned certain real estate described and which he then conveyed, without adequate consideration, to his grandson, the other defendant, to defraud and hinder the complainants; that they recovered a judgment against the grantor and levied their execution upon the real estate so conveyed; and they pray that the defendants shall release all their apparent title to the land levied upon to the complainants.

Some objection is made to the form of the bill. What might have been the result had the defendants demurred, we need not now inquire.

Both defendants deny in their respective answers any intention to defraud or delay creditors, and expressly testify to the same. And we feel so uncertain of any fraudulent intent in fact, that were such intent absolutely essential to the maintenance of the bill we should dismiss it.

But the answers *inter alia* respectively allege in substance—That Johnson sold and conveyed to Keen the land in controversy together with the new house built thereon at a cost of one thousand dollars, for the sum of two hundred and sixty dollars and an agreement "to take Johnson to Keen's house and support and maintain him during the remainder of his life; which he had faithfully done to the present time." And if this conveyance left the debtor insolvent, it was fraud in law.

Creditors have an equitable interest in the property of their respective debtors—it being the foundation of trusting them—which the law will, under certain circumstances, enforce. But the interests of a *bona fide* purchaser of a debtor's property are superior, "for the obvious reason" says Selden, J. "that the latter has not, like a mere general creditor, trusted to the personal responsibility of the debtor, but has paid the consideration upon the faith of the debtor's actual title to the specific property transferred." *Seymour* v. *Wilson*, 19 N. Y. 417. Hence the rights of a *bona fide* grantee, who has paid a full valuable consideration, are protected, though the grantor may have been actuated by a fraudulent intention.

Still a grantee is not protected when he has not paid such a consideration, though he may have acted in good faith. The two must concur. The amount of consideration is not material when the grantor is solvent, (*Usher* v. *Hardtime*, 5 Maine, 471; *Hapgood* v. *Fisher*, 34 Maine, 407); but when insolvent, the kind and amount of consideration do become material even in the absence of actual intent to defraud. Thus an agreement to support an insolvent grantor may be a valuable consideration, but it is not sufficient to uphold a conveyance as against prior creditors (*Rollins* v. *Mooers*, 25 Maine, 192, 199), even if there were no actual intent to defraud. *Webster* v. *Withey*, 25 Maine, 326. Persons taking a conveyance from such a grantor for such a consideration must take care that the existing debts of the grantor are paid, (*Hapgood* v. *Fisher*, 34 Maine, 407); and it is immaterial that the consideration comprises a present sum of money paid in addition to the agreement for support, provided the money alone were palpably inadequate. *Sidensparker* v. *Sidensparker*, 52 Maine, 481.

That Keen received a conveyance and transfer of all Johnson's remaining property is evident. He not only received a deed of the land in question, but a transfer of two mortgages and a note. His counsel in his brief speaks of the land as "the last bit of property that he (Johnson) had held in his hands" etc.; and "that he (Keen) took a conveyance of his (Johnson's) property which was left," etc.

Thus we see that the defendants are guilty of a constructive or legal fraud, which though not originating in any actual evil design to perpetrate a positive fraud upon Johnson's creditors, yet is deemed reprehensible and is prohibited by the law since it is equally prejudicial to the creditor's interests. 1 Story's Eq. § 258.

We do not think the defendants' proposition in relation to estoppel is tenable. There is no evidence that the plaintiffs stood by and saw Johnson convey to Keen without objection.

Bill sustained.

Decree as prayed for.

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

ELENORA PARSONS *vs.* INHABITANTS OF MONMOUTH.

Androscoggin. Opinion October 10, 1879.

Towns—authority of. Town officers—authority of.

No officer of a town has authority to issue a promissory note in behalf of his town without express permission of the town in its corporate capacity.

Neither can towns borrow money and issue notes of a commercial character for the execution of their ordinary business, unless expressly or impliedly authorized by the statute.

Semble a town may be held for money had and received and in fact appropriated for its legitimate business.

ON REPORT.

Assumpsit on a promissory note of the following tenor: "Monmouth, June 4, 1875. For value received as treasurer of the town of Monmouth, I promise to pay Miss Elenora Parsons, or order, nine hundred and fifty dollars, in one year from date with interest. (Signed) William G. Brown, Treasurer."

On the back of the note were two indorsements of $57, each, being the interest for two years.

The writ also contained a count for money had and received with a specification of the note.

The plaintiff testified in substance that on June 4, 1875, she

called upon Oliver S. Edwards, chairman of the board of selectmen of Monmouth for the purpose of loaning the town some money; that she went with Mr. Edwards to the town treasurer (Brown) and loaned him $950 and received the note in suit therefor; that she subsequently received the interest as indorsed.

Oliver S. Edwards, chairman of the selectmen, confirmed the testimony of the plaintiff, and testified that the town was in want of money at the time; that Brown received the money in the office used as the town treasurer's office, and put it into the safe used by the town.

William G. Brown, testified in substance to the same and that —"as near as I can recollect I paid out the money for the benefit of the town;" that he could not tell to whom it was paid; that he and one Walker were in partnership in the manufacture of clothing for Boston parties; that he borrowed money of the town occasionally when he had it in the treasury; that he practiced that mode for several years; that he found a deficiency in his account as town treasurer in 1877 of $12,000; that he could not tell what became of that money, it was a mystery; that he could not swear that he did not borrow from the town treasury in June 1875, some of the identical money received of the plaintiff; that in his settlements with the selectmen he put in his note to cover the deficiency as treasurer; that he had been treasurer from 1864 to 1874, and that when he gave up the books there were thirty-four notes outstanding, unpaid, amounting to $16,000.

There was evidence of Brown's declarations that he kept the town's money and the partnership money in one common pocketbook and used the money out of it for all purposes.

The case was withdrawn from the jury and continued on report.

Pulsifer, Bolster & Hosley, for the plaintiff.

If a corporation has received money in advance on a contract void on account of want of authority to make it, and afterwards refuses to fulfill the contract, the party advancing the money may without demand, recover it back in an action for money had and received. *Dell* v. *Wareham*, 7 Met. 438. Corporations are bound by implied contracts within the scope of their powers. 2 Kent. Com. 291. *Canaan* v. *Derush*, 47 N. H. 212. *Lebanon*

v. *Heath*, 47 N. H. 353. *Adams* v. *Farnsworth*, 15 Gray, 423. *Shrewsbury* v. *Brown*, 25 Vt. 197. *Gassett* v. *Andover*, 25 Vt. 342. Angell & Ames Corp. § 237. *Argenti* v. *San Francisco*, 16 Cal. 255, 282.

Pillsbury & Potter, for the defendants.

VIRGIN, J. Whether the restrictive word "as" in the body of the note declared on makes it, so far as its form is concerned, the note of the town and not the individual note of the treasurer, we need not now inquire; for if we adopt that as the true construction, the plaintiff cannot recover under the special count on the note, for the fatal reason that no officer of the town has the authority to issue a note in behalf of the town without the express permission of the town in its corporate capacity; and the report fails to show any such action by the town. This is too well settled to require the citation of authorities.

Neither can towns borrow money and issue notes of a commercial character for the execution of their ordinary business, unless expressly or impliedly authorized by the statute. Towns are creatures of the statute and find their duties and powers there specified. The general financial officers of towns frequently draw orders upon the treasurers for the payment of some legitimate indebtedness of the town, but such instruments are mere vouchers for the treasurer's disbursements. And though frequently made negotiable in form and therefore have the quality of negotiability so far as to authorize the holder other than the payee to bring his action in his own name if occasion requires, still they are in nowise [commercial paper free from equitable defenses, in the hands of *bona fide* indorsees. *Willey* v. *Greenbush*, 30 Maine, 452. *Sturtevant* v. *Libbey*, 46 Maine, 457. *Emery* v. *Mariaville*, 56 Maine, 315. *Bessey* v. *Unity*, 65 Maine, 342. Any view counter to this in *Chamberlain* v. *Guilford*, 47 Maine, 135, is not sound. The "mischievous and alarming consequences" that towns may borrow money and issue therefor notes invested with the character of commercial paper are thoroughly exposed by Judge Dillon in an elaborate opinion recently announced in *Gause* v. *Clarksville*, in the U. S. Court for the E. Dist. of

Missouri, and reported in 18 Am. L. Reg'r, 497, and 19 A. L. Journal, 253. See also 1 Dan. Neg. Instr. § 420, 2 Do. §§ 1527 *et seq.* We have no occasion to discuss this subject further, since the plaintiff puts his main reliance upon his count for money had and received.

Nor need we consider the question whether a town may not be held upon the ground that it received the money and in fact appropriated it to and expended it for its legitimate expenses, as it seems to have been held in *Gause* v. *Clarksville*, *supra* and cases there cited, and in 1 Dillon Mun. Corp. §§ 384, 750 and notes, and the cases cited by the plaintiff. For the facts reported utterly fail to satisfy us that the money received by Brown from the plaintiff ever went for the benefit of the town; but from the testimony of Brown himself we feel confident that it went in part to make up what he calls the $12,000 "mystery," but which the statute denominates "embezzlement." He testifies that he frequently "borrowed money when I had it in the treasury" apparently unconscious of or indifferent to the fact that such a borrowing is styled and punishable as "larceny" by the statute. R. S. c. 120, § 7.

Taking all the testimony together with his we think it "points the probability" that the town never had a dollar of the plaintiff's money. And if we should decide otherwise, our only reason would be that which is sometimes assigned as the ground of some verdicts, to wit—the plaintiff is a woman and the defendant a town.

Neither does the testimony prove ratification. *Dickinson* v. *Conway*, 12 Allen, 487.

Judgment for the defendants.

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

GEORGE DE PROUX vs. CHARLES H. SARGENT.

Waldo. Opinion September 11, 1879.

Pleading. Joinder of counts in debt. Estoppel.

A count in debt by an indorsee against the maker of a negotiable promissory note, may be joined with a count in debt on a judgment.

The defendant recovered a judgment against the plaintiff for the sum of $9.01 debt. Three years afterwards he sued on the judgment and joined a count on a promissory note given by the plaintiff to a third person "or bearer" for one dollar and fifty cents with interest and recovered a judgment on both counts. In an action for false imprisonment; *Held*, that the execution issued on the latter judgment properly ran against the body of the judgment debtor.

Also held that the plaintiff was estopped by the latter judgment from showing that the judgment creditor procured the note in violation of the provisions of R. S., c. 122, § 12 as amended by Stat. 1878, c. 57.

ON REPORT.

WRIT dated December 10, 1878.

Declaration in a plea of the case, for that said Charles H. Sargent on the sixth day of August, A. D. 1875, the same being the first Tuesday of August, A. D. 1875, at Belfast aforesaid, at a term of the Belfast municipal court then and there held, recovered judgment against said De Proux for the sum of nine dollars and one cent debt or damage and costs of suit taxed at five dollars and eighty-nine cents in an action of assumpsit upon a promissory note; that upon said judgment no execution could be legally issued running against the body of the said De Proux. And the plaintiff avers that thereafterwards, to wit, on the first day of September, A. D. 1878, at Belfast aforesaid, the said Charles H. Sargent, maliciously intending to oppress and unjustly to imprison the said De Proux, procured of one Franklin A. Green, attorney of one G. L. Foss, a certain promissory note dated July 31, 1878, payable one day after date to G. L. Foss or bearer for the sum of one dollar and fifty cents and interest signed by said De Proux; that said Sargent procured said note as aforesaid for the express purpose of deriving the profit arising from its collection by a suit at law and of maliciously oppressing

and unjustly imprisoning the said De Proux upon an execution to be issued upon a judgment which he the said Sargent might recover against the said De Proux by joining the said note and judgment aforesaid in an action of debt against the said De Proux.

And the said De Proux further avers that thereafterwards, to wit, on the sixteenth day of September, A. D. 1878, the said Sargent, maliciously intending and contriving to oppress and unjustly to imprison the said De Proux as aforesaid, sued out of said Belfast municipal court a writ of attachment in an action of debt in due form of law against the said De Proux, returnable at a term of said Belfast municipal court to be held at Belfast aforesaid on the first Tuesday of October, A. D. 1878, in which said writ the said Sargent declared in words and figures, to wit:

In a plea of debt; for that the said plaintiff by the consideration of our Belfast municipal court, at a term of said court holden at Belfast in and for the county of Waldo, on the sixth day of August, A. D. 1878, recovered judgment against said George De Proux for the sum of nine dollars and one cent, debt or damages and five dollars and eighty-nine cents costs of the suit, as by the record thereof in the same court remaining appears; which judgment is in full force, and not reversed, annulled or satisfied; whereby an action hath accrued to the plaintiff to have and recover of the said George De Proux the aforesaid sums of nine dollars and one cent and five dollars and eighty-nine cents, amounting in the whole to fourteen dollars and ninety cents.

Also for that said George De Proux, at Belfast in said county, on the thirty-first day of July, A. D. 1878, made his promissory note payable to one G. L. Foss or bearer, and delivered the same to said G. L. Foss, and said G. L. Foss thereafterwards, to wit, on the same day, for a valuable consideration, delivered said note to the plaintiff, and the said George De Proux thereby for value received promised the plaintiff to pay him the sum of one dollar and fifty cents in one day after date with interest, and by reason of the non-payment thereof an action hath accrued to the plaintiff to have and recover the same from the said George De Proux.

Also for that the said George De Proux at Belfast in said county on the thirty-first day of July, 1878, by his promissory note of that date by him subscribed, for value received promised one G. L. Foss to pay him or bearer in one day after date the sum of one dollar and fifty cents with interest, and the said G. L. Foss thereafterwards, to wit, on the same day, for a valuable consideration, transferred and delivered said note to the plaintiff, by means whereof the said George D. Proux then and there became liable to pay the plaintiff the said sum according to the tenor and effect of said promissory note. Yet although the said sum of money has long since become due and payable the said George De Proux hath never paid the said sum, whereby an action hath accrued to the plaintiff to have and recover from the said George De Proux the aforesaid sum of one dollar and fifty cents.

That said writ was duly served upon said De Proux and entered in said court on said first Tuesday of October, 1878, and continued to the first Tuesday of November, 1878, to a term of said court then to be held. That on said first Tuesday of November, 1878, the said Sargent recovered judgment against said De Proux in said action for the sum of sixteen dollars and seventy-one cents debt or damage, the same being the amount of said first mentioned judgment and note and costs of suit taxed at five dollars and fifty-two cents.

And the said De Proux further avers that on the nineteenth day of November, 1878, the said Sargent still maliciously intending and contriving to oppress and unjustly to imprison the said De Proux caused a writ of execution to be issued out of the office of the recorder of said Belfast municipal court, upon the judgment aforesaid directed to the sheriff of said county of Waldo or either of his deputies or either of the constables of the city of Belfast, commanding them that of the goods, or chattels of the said De Proux within their precincts they cause to be paid and satisfied to the said Sargent at the value thereof in money, the aforesaid sums being twenty-two dollars and twenty-three cents in the whole, with interest from the day of the rendition of judgment with fifteen cents more for said writ, and thereof also to satisfy themselves for their own fees, and for want of such goods and chattels of the

said De Proux to be by him shown unto them or found within their precincts to the acceptance of said Sargent to satisfy the several sums aforesaid commanding them to take the body of the said De Proux and him commit unto the jail in Belfast in said county of Waldo and him detain in their custody in said jail until he should pay the sums above mentioned with their own fees or that he be discharged by the said Sargent or otherwise by order of law. That said execution thereafterwards, to wit, on the same day was placed in the hands of Frederick S. Walls, sheriff of said county of Waldo to execute. That said sheriff, to wit, on the third day of December, 1878, for want of goods or chattels of the said De Proux shown unto him or found in his precinct to the acceptance of said Sargent wherewith to satisfy said execution.

The said sheriff under the express instructions in writing of the said Sargent by his attorney arrested the said De Proux on said execution and detained him the said De Proux in his custody from said third day of December, 1878, until the ninth day of December, 1878, on which ninth day of December aforesaid the said De Proux was allowed to take the oath prescribed in the thirtieth section of the one hundred and thirteenth chapter of the Revised Statutes and was released from said arrest by order of law.

And the said De Proux further avers that said Sargent procured said note for the profit which might arise to him from its collection by a suit at law, in violation of the statute in such case made and provided; and that he the said Sargent was not at the time said suit was brought the lawful owner or holder of said note. Wherefore the said De Proux avers that at the time said action was brought at the time said judgment was recovered and at the time said execution was issued he was not indebted to the said Sargent in the sum of ten dollars exclusive of costs, and was not liable lawfully to be arrested upon execution issued upon any judgment which the said Sargent might lawfully recover against him.

Whereby and by means of said causeless and malicious arrest and detention of the said De Proux by the said Sargent upon said

writ of execution the said De Proux was unjustly compelled to expend great sums of money in obtaining his release from said arrest and suffered great pain and inconvenience both in body and mind and during that time his affairs and business were greatly and necessarily neglected, to the damage of said plaintiff, as he says, the sum of five hundred dollars.

If upon the facts stated in the declaration the action could be maintained, the action should stand for trial; otherwise plaintiff to be nonsuited.

W. P. Thompson & R. F. Dunton for the plaintiff, contended that the allegations brought the case within the provisions of R. S., c. 122, § 12, as amended by statute, 1878, c. 57. That the defendant having procured the note in violation of a penal statute had no title to it, and cited *Green* v. *Morse*, 5 Maine, 291. *Parsons* v. *Lloyd*, 3 Wils. 341. R. S., c. 82, § 12. *Kelley* v. *Morris*, 63 Maine, 57.

That admitting Sargent legally procured the note, he could not by joining the judgment and note in an action of debt recover a judgment on which the execution issuing would authorize the arrest of this plaintiff. R. S., c. 113, § 19. *Kelley* v. *Morris*, *supra*.

The legislature did not intend to authorize holders of small demands less than ten dollars to assign them to one of their number and by aggregating them recover a judgment that an execution thereon should run against the debtor's body.

R. W. Rogers, for the defendant, contended:

That the judgment of a court of competent jurisdiction upon a point directly in issue is conclusive between the parties and their privies until reversed, and cannot be impeached directly, indirectly or collaterally in another action between them.

Pease v. *Whitten*, 37 Maine, 117. *Thurston* v. *Spratt*, 52 Maine, 202. *Walker* v. *Chase*, 53 Maine, 258. *Sturtevant* v. *Randall*, 53 Maine, 149. *Linch* v. *Swanton*, 53 Maine, 100. *Page* v. *Estes*, 54 Maine, 379. *Sibley* v. *Rider*, 54 Maine, 463. *Jackson* v. *Lodge*, 8 Am. Law Reg. N. S. 697. Not even when the judgment is recovered by default. *Weeks* v. *Thomas*,

27 Maine, 465. *Woodman* v. *Smith*, 37 Maine, 21. *Hagar* v. *Springer*, 60 Maine, 436. Or by fraud, *Granger* v. *Clark*, 22 Maine, 128. *Davis* v. *Davis*, 67 Maine, 398, and cases cited.

VIRGIN, J. An action of debt lies for a sum certain, whether it has been rendered certain by a judgment, or by a special or simple contract between the parties. 2 Greenl. Ev. § 279. *Mc Vicker* v. *Beedy*, 31 Maine, 314, 318. *Norris* v. *School Dist.*, 12 Maine, 293 *Portland* v. *At. & St. L. R. R. Co.*, 66 Maine, 485, 487. Hence debt may be maintained not only by the payee (*Martin* v. *Root*, 17 Mass. 222; *Mandeville* v. *Ridle*, 1 Cranch, 290,) but by the indorsee against the maker of a promissory note. *Wilmarth* v. *Crawford*, 10 Wend. 340. *Raborg* v. *Peyton*, 2 Wheat. 385.

So a count in debt on a simple contract may be joined in the same declaration with a count in debt on a judgment. 1 Chit. Plead. (16th Am. ed.) 221-2. 2 Wm's. Saund. 117, note a. *Union Cotton Manuf'y* v. *Lobdell*, 13 Johns. 462. *Mc Vicker* v. *Beedy*, *supra*. *Exchange Bank* v. *Abell*, 63 Maine, 346.

Sargent had a right, therefore, to join a count in debt on his original judgment with one on De Proux' note payable to Goss or bearer, provided the alleged illegal procuring of the note by Sargent did not prejudice his case. His declaration was strictly legal in form.

The plaintiff alleges that, Sargent, on September 16, 1878, sued out an action of debt, "in due form of law," against him, returnable on the first Tuesday of October following, setting out the declaration in full—one count on the former judgment and two on the note; that the writ was duly served and returned, entered on the return day and continued to the first Tuesday of November following, when Sargent "recovered judgment in said action against" this plaintiff, "for the amount of said first mentioned judgment and note;" that on Nov. 19, execution was issued on the judgment, running against the body of this plaintiff, and directed to the sheriff; and that the sheriff, under the express instructions in writing of Sargent by his attorney, arrested De Proux on the execution and detained him in his custody until he took the poor debtor's oath—some five days.

There appears no irregularity in any of the proceedings. The writ and execution were in the usual form. The defendant through his attorney, simply resorted to the usual legal methods for collecting his demands against De Proux, his debtor, so far as any of the forms of law are concerned.

But the plaintiff alleges, in substance, that Sargent procured the note from Goss in violation of the provisions of R. S., c. 122, § 12, as amended by Stat. 1878, c. 57, and therefore that, "at the time the said judgment was recovered, he (De Proux) was not indebted to Sargent in the sum of ten dollars, exclusive of costs, and was not liable lawfully to be arrested on execution issued upon any judgment which said Sargent might lawfully recover against him."

There is no pretense that, if the note and original judgment could be lawfully joined, they would not show that De Proux was indebted to Sargent in the sum of ten dollars, exclusive of costs, but the argument seems to be (1) That Sargent never had any legal title to the note and hence should not have had judgment for the amount of both note and former judgment; and (2) That admitting his title to the note, the execution issued upon the judgment recovered on both the former judgment and note should not run against the body of the judgment debtor.

1. The difficulty with the first proposition is, the law will not allow this plaintiff to set it up or prove it; because if true and available, it was a matter of defense, and it should have been set up at the November term of the municipal court when the judgment was recovered. Perhaps it was, and the issue was found against De Proux. Of that we are not informed. But whether it was or not, the plaintiff is concluded by the judgment rendered against him by a court of competent jurisdiction—having jurisdiction of the parties and the subject matter. *Pratt* v. *Dow*, 56 Maine, 86. *Greene* v. *Greene*, 2 Gray, 364, and cases cited by the defendant.

2. When a plaintiff has several distinct causes of action, of the same nature, he is allowed to pursue them cumulatively in the same writ. Steph. Plead. (Tyler's ed.) 254. Bac. Ab. actions, C.; and if he do not, he can recover but one bill of cost, if he sues on them severally. R. S., c. 82, § 117. It follows, therefore,

that although neither one of them might be large enough to authorize the execution to run against the body, they might when aggregated.

The position of the plaintiff that "no increment of a small note or account acquired after the recovery of the former judgment could make a judgment of sufficient amount to arrest the debtor legally," is not tenable. *Kelley* v. *Morris*, 63 Maine, 57, sustains no such proposition.

Plaintiff nonsuit.

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

CATHERINE A. STINSON in equity *vs.* ELISHA PICKERING & another.

Hancock. Opinion September 11, 1879.

Guardian. Equity—practice in.

In a bill in equity against an infant defendant, her guardian by probate appointment cannot appear for his ward if his interests in the result of the suit be adverse to hers.

In such case a guardian *ad litem* must be appointed.

In a bill in equity against an infant defendant no admission made in the answer of the guardian *ad litem* can bind the infant; but the whole case as against the infant must be proved.

ON REPORT.

BILL IN EQUITY, against Elisha Pickering, guardian of Anna F. Pickering, a minor daughter of the other defendant, and Anna F. Pickering the minor.

The bill alleges in substance that on April 23, 1873, Elisha Pickering conveyed certain land described to Francis Worcester and that the wife of the grantor joined in the deed releasing her right of dower therein; that on July 24, 1876, he conveyed certain other land to John H. Stinson by a similar deed; that on September 27, 1875, he conveyed by a similar deed certain other land to the Stinson Granite Co.; that said lots have passed by sundry mesne conveyances to the complainant.

That said several grantees paid full consideration for their respective conveyances and entered into possession of the same under their deeds.

That said grantees and their assigns have made large expenditures of money upon the lots and the plaintiff and others are making large expenditures thereon for the purpose of opening and developing mines of ore supposed to exist therein.

That the said grantees and this complainant, when they accepted their respective deeds, and when they made the said improvements, believed that the said deeds from Elisha Pickering with a release therein of his wife's right of dower, conveyed an absolute and indefeasible title in fee to said premises free from all incumbrances.

That said complainant is informed and alleges that the title to said premises, at the time of the execution of said deeds was in grantor's wife Maria F. Pickering, and that by accident or mistake said deeds were prepared and executed upon the supposition said Elisha owned the premises in fee and in his own name.

That said deeds did not pass the legal title to the premises therein described, although the said Elisha and Maria supposed they were conveying and intended to convey the same, and the grantees supposed they were receiving a perfect title to the several premises; that deeds were made to said Maria as grantee by mistake in consequence of the absence of her husband Elisha; but that said Elisha paid the whole consideration therefor, and that he and his wife always considered and treated the several premises as his property; that said Maria died intestate on September 14, 1876, leaving her said husband and said Anna her only child surviving; that said Maria, at time of her death, held the legal title to said lands subject to an implied trust in favor of and for the sole benefit of said grantees and their assigns; that since her death, said Anna has had the legal title thereto by descent sub ject to the same trust, and now holds the same in trust and for the sole use and benefit of the plaintiff, and that said Anna has no other interest whatever in the premises.

That said Anna is aware of the facts above set forth, and is willing that the complainant's title should be perfected, but that she is a minor and incapable of making a valid conveyance thereof;

that the defect in complainant's bill is a cloud thereon; and that the said Elisha is the duly appointed guardian of said Anna.

Prayer for a decree that defendants have no interest in the lands described; that they be enjoined from claiming any title thereto; and that they be ordered to convey to complainant all their right, title and interests in the same.

Answers substantially admit all the matters alleged in the bill; and that the conveyance to Maria F. Pickering was not intended as a gift.

The court to render judgment upon the bill and answer.

A. P. Wiswell, for the plaintiff.

J. B. Redman, for the defendants.

VIRGIN, J. Courts of equity are careful of the rights of infant defendants. A bill is never taken *pro confesso* against them. *Tucker* v. *Bean*, 65 Maine, 352. If an infant has no guardian by probate appointment, a guardian *ad litem* must be appointed; and the duty of having such appointment made devolves upon the plaintiff, if no motion to that effect proceeds from the other side. *Swan* v. *Horton*, 14 Gray, 179. And the guardian must have accepted before further proceedings, which must appear of record. *Daniel* v. *Hanagan*, 5 J. J. Marsh, 49.

It must also appear that the proposed guardian has no interest in the matter in suit adverse to that of the infant; and a co-defendant may be appointed, provided he have no adverse interest. 1 Dan. Ch. (4th ed.) 161, and cases cited in notes.

In the case at bar, the infant's father has been appointed her guardian by the probate court, and is also a co-defendant—all of which might be proper under certain circumstances; but inasmuch as he conveyed all the property in question, his interest in the result of this suit is adverse to that of his daughter and hence cannot rightfully represent his daughter in this suit, and a guardian *ad litem* must be appointed.

Moreover, it is the duty of the court to see that the rights of an infant are not prejudiced or abandoned by the answer of the guardian. (*Barrett* v. *Oliver*, 7 Gill. and J. 191;) and whatever admission there may be in the answer, the plaintiff is not exoner-

ated from his duty of proving, as against the infant, the whole case upon which he relies. 1 Dan. Ch. 163, 169-70. *Tucker* v. *Bean*, *supra*.

In the case at bar, the answer consents to the decree prayed for, but there is no proof of the allegations relied upon by the plaintiff.

The case is therefore remanded for the appointment of a guardian *ad litem*, and for the taking of testimony to sustain the bill.

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

FRANCES L. WHITMORE vs. ABEL LEARNED.

Cumberland. Opinion October 15, 1879.

Tax title. Evidence. Deed—office copy of. Trust.

It is only by a strict adherence to the mode prescribed by law that real estate can be conveyed for non-payment of taxes,—the same being for an inadequate consideration, and against the will of the land owner.

A description of the premises in proceedings under a tax sale thus, "house and lot bought of David Harris," is imperfect and does not contain the intelligible description required by R. S., c. 6, § 159.

In order to authorize the sale of the whole parcel taxed, it must distinctly appear of record that the sale of the whole was required to pay the tax, interest and charges.

Stats. 1874, c. 234, 1878, c. 35 and 1879, c. 117, do not affect a proceeding involving title to real estate for non-payment of tax where the sale took place prior to the passage of the first of said statutes, and the action was pending when the latter two were enacted.

Under R. S., c. 82, § 99, and the rule of court relating to the same subject, the production of an office copy of a deed in cases falling within the statute and rule, in the absence of any circumstances tending to remove the presumption arising therefrom, is *prima facie* proof not only of the execution but also of the delivery of the deed.

There may be circumstances attending the record of a deed which, if shown, will prevent any presumption of delivery arising therefrom, or will diminish the force of such presumption ; but it is the established practice, in cases falling within the rule, to receive the office copy as (in the first instance and in the absence of opposing proof) sufficient evidence of the execution and delivery of the original deed. *Patterson* v. *Snell*, 67 Maine, 562—examined, discussed and reaffirmed.

78 " 382
81 " 53
106
84 " 286

Parol evidence is inadmissible to prove that the grantee named in a deed is not the one intended by the grantor.

Where one purchases real estate with his own money and a deed is taken in the name of another a trust results, which, by a rule reluctantly adopted in equity, may be established by parol, but this rule was accompanied at its adoption with the requirement of full proof, or a high degree of force and weight in the testimony offered. *Baker* v. *Vining*, 30 Maine, 121, reaffirmed.

ON REPORT.

Forcible entry and detainer transferred from the municipal court for the town of Brunswick.

Date of writ July 30, 1877.

Plea, the general issue with brief statement of title in one Sarah E. Holbrook under whom the defendant claims the premises as tenant.

The case and facts are sufficiently stated in the opinion.

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

W. Thompson, for the plaintiff, in an elaborate brief, among very numerous authorities, cited *Smith* v. *Bodfish*, 27 Maine, 289. *Clark* v. *Pratt*, 47 Maine, 55. *Hubbard* v. *Little*, 9 Cush. 475. *Eaton* v. *Jacobs*, 52 Maine, 452. 2 Greenl. Ev. 294. *Patterson* v. *Snell*, 67 Maine, 559. *Brown* v. *Brown*, 66 Maine, 316. *Dwinel* v. *Holmes*, 33 Maine, 172. *Hawkes* v. *Pike*, 105 Mass. 560. *Hatch* v. *Bates*, 54 Maine, 136. *Small* v. *Clewry*, 62 Maine, 155. *Parker* v. *Hill*, 8 Met. 449. *Sampson* v. *Thornton*, 3 Met. 275. *Parker* v. *Parker*, 1 Gray, 409. *Shurtleff* v. *Francis*, 118 Mass. 154. *Fay* v. *Richardson*, 7 Pick. 91. *Sawyer* v. *Skowhegan*, 57 Maine, 500-6.

A. W. Coombs, for the defendant.

SYMONDS, J. This is a process of forcible entry and detainer, originally brought in the municipal court at Brunswick, where the general issue was pleaded, with brief statement of title in one Sarah E. Holbrook, under whom the defendant claims. No allegation that the brief statement was frivolous and intended for delay appears to have been made, and the case was thereupon regularly transferred and entered at the next term of the supreme judicial court in Cumberland county, where the evidence was

taken and reported to the law court. Upon the legal testimony contained in the report, judgment is to be rendered in accordance with the law and the facts.

Many objections are urged by the defendant to the use of this process, for the purpose of trying the title to lands, and enforcing the right of possession thereof, upon the facts disclosed, even if they were found to be as the plaintiff contends. But in the view taken by the court of the claim of title asserted by the plaintiff, it is not necessary, in order to reach the decision of the case, to consider the force of these objections to the form of action adopted.

The plaintiff claims title to the premises, first, under a deed, dated Feb. 1, 1865, from the treasurer of the town of Brunswick, where the land lies, purporting to convey it to James H. Tibbetts, as sold for non-payment of taxes assessed against John W. Marr, a non-resident owner;—and this tax-title is traced to the plaintiff by a quit-claim deed from James H. Tibbetts, the purchaser at the tax-sale, to John W. Bonholm, dated February 19, 1867, and a deed of warranty from John W. Bonholm to the plaintiff, dated September 11, 1873.

The title derived from this sale for taxes is obviously defective. In the argument it is not insisted upon as valid in itself, and the frequent adjudications in this state upon similar questions render it unnecessary to dwell minutely upon the errors and defects in the proceedings, which, under our decisions, prevent the treasurer's deed from having the effect to convey the interest which John W. Marr, or those holding under him, had in the premises. It is only by a strict adherence to the mode prescribed by law, that real estate can be so conveyed, for an inadequate consideration, and against the will of the land-owner.

The sale took place prior to the passage of the act of 1874, chap. 234, and is, therefore, by the last clause of the second section, expressly excepted from the operation of that statute. This action was pending when the public laws of 1878, chap. 35, and of 1879, chap. 117, were enacted, and is therefore not affected thereby. R. S., chap. 1, § 3.

So, it is open to the defendant, without tender of the tax, interest and charges, to contest the validity of the proceedings on

which the plaintiff relies to make out under the statute a *prima facie* title by force of the tax-sale. *Orono* v. *Veazie*, 57 Maine, 517. *French* v. *Patterson*, 61 Maine, 203.

In no part of the proceedings, the record of the valuation of estates from which the assessment was made, the list of assessments, the warrant to the collector, the advertisement, the record of sale, or the treasurer's deed, is there any fuller description of the premises than this, "house and lot bought of David Harris." This is not only an imperfect description, but it is clearly inaccurate. The deed introduced by the plaintiff shows that the land was bought by John W. Marr, against whom the taxes were assessed, of Phebe R. Harris and three other grantors beside David Harris; and David Harris joined in it apparently for the purpose only of releasing whatever interest he might have in right of his wife, Phebe R., to whom her interest in the house and land came under the provisions of her father's will. The description is not such as to identify the property sold with reasonable certainty. Especially with reference to the advertisement, it cannot be said to contain the intelligible description required by R. S., chap. 6, § 159. *Larrabee* v. *Hodgkins*, 58 Maine, 412. *Greene* v. *Lunt*, 58 Maine, 518. *Griffin* v. *Creppin*, 60 Maine, 270. *Nason* v. *Ricker*, 63 Maine, 381. *Bingham* v. *Smith*, 64 Maine, 450.

Within the rule established by the decisions in this state, we think, also, it is not sufficiently apparent from the record that the sale of the entire lot was necessary. In order to authorize the sale of the whole, it must distinctly appear of record that the sale of the whole was required to pay the tax, interest and charges. *Lovejoy* v. *Lunt*, 48 Maine, 378. *French* v. *Patterson*, 61 Maine, 209.

The second ground on which the plaintiff claims is, that John W. Bonholm, her grantor, was in open, peaceable and adverse possession, from a time prior to the tax-deed, and for several years after, until the deed to plaintiff was given; and that from that date she continued in such possession until it was unlawfully and without right disturbed by those under whom the defendant holds; who still retain, by the occupancy and tenancy of the defendant, the possession which they have illegally acquired.

The consideration of this claim on the part of the plaintiff leads directly to the inquiry, what title or right of possession does the defendant show; as clearly such prior possession of the plaintiff, under a tax-deed and claim of title, would be good against a stranger.

The defendant introduced an office copy, from the registry of deeds, of a deed of the same premises from John W. Marr, against whom the taxes before referred to were assessed, to one Andrew C. Bonholm, dated August 20, 1863, and a quit-claim deed of the land, dated March 28, 1876, executed in due form by an attorney properly authorized, from said Andrew C. Bonholm to Sarah E. Holbrook, under whom the defendant claims as tenant.

It is objected by the plaintiff that there is no proof of the delivery of the deed to Andrew C. Bonholm. But under R. S., chap. 82, § 99, and the rule of court relating to the same subject, the production of the office copy by the defendant, in the absence of any circumstances tending to remove the presumption arising therefrom, was *prima facie* proof not only of the execution, but also of the delivery of the deed. The word execution in the statute and the rule, undoubtedly includes delivery. The practice, under which office copies of deeds in cases within the rule are *prima facie* evidence of title, was settled in Massachusetts in *Eaton* v. *Campbell*, 7 Pick. 12, and has been uniformly followed; the reason assigned being that in this country the grantee of lands usually takes only the deed to himself, and has no right to the possession of the title-deeds of the estate. He ought not, therefore, to be required to produce the originals, nor to be obliged to prove their loss or destruction before offering secondary evidence. *Ward* v. *Fuller*, 15 Pick. 185. *Scanlan* v. *Wright*, 13 Pick. 523. *Commonwealth* v. *Emery*, 2 Gray, 80.

The opinion of the court in *Gragg* v. *Learned*, 109 Mass. 168, is decisive of the law on this point in that state. It is there held that "the copy from the registry was rightly admitted as *prima facie* evidence of the delivery as well as of the execution of the deed."

The same rule was declared by this court in *Wordman* v. *Coolbroth*, 7 Maine, 181, and has been frequently repeated. The

production of the copy from the registry could not be *prima facie* proof of title, unless it were at the same time evidence of the delivery of the original deed; and the cases are numerous in which the reading of an office copy has been regarded as making a sufficient link in a chain of title. *Blethen* v. *Dwinel*, 34 Maine, 133. *Hatch* v. *Bates*, 54 Maine, 136. *Webster* v. *Calden*, 55 Maine, 171.

A similar practice prevails in other jurisdictions. *Dick* v. *Balch*, 8 Peters, 30; 32 Barb. 469.

The language of the court in *Patterson* v. *Snell*, 67 Maine, 562, on which the plaintiff relies, was not intended to impair the operation of the rule of court in this respect, nor to change the well-settled practice under it. It was there said that the appearance of the deed upon the record did not operate as a delivery, nor supersede the necessity of proof of delivery. That case, like this, was before the court on report, for the determination of law and fact, and the language of the opinion was intended to go no further than to hold, that, in a case where the circumstances attending the alleged delivery were proved, there was nothing in the fact that the deed had been recorded which did not leave it still an open question, to be decided upon all the evidence, whether the deed had, or had not, been delivered; and upon examination of the whole testimony the decision of the court was adverse to the plaintiff who claimed that the deed had been delivered. Other evidence controlled and overcame the presumption, arising under the rule and statute referred to, of the due execution and delivery of deeds from the production of office copies, in actions touching the realty, where the party offering them in evidence "is not a party to the deed, nor claims as heir, nor justifies as servant of the grantee or his heirs." It was in view of the circumstances under which the deed made its appearance in that case, that the court thought there was neither proof nor presumption of its delivery. There may be circumstances attending the record of a deed, which, if shewn, will prevent any presumption of delivery arising therefrom, or will diminish the force of such presumption. In such cases, upon the whole evidence the fact must be established. To this extent it is true that the copy from the registry does not

supersede the necessity of proof of delivery. But it is the established practice, in cases falling within the rule, to receive the office copy, as, in the first instance, and in the absence of opposing proof, sufficient evidence of the execution and delivery of the original deed. "It raises a presumption that the grantor had sufficient seizin to enable him to convey, and operates to vest the legal seizin in the grantee."

Nor do we think the presumption removed by the fact that the original deed remained in the possession of John W. Bonholm, or by any other evidence in the case. Whatever may have been the capacity in which he was acting, he was doubtless the person who in fact received the deed; and he went into possession under it. The fact that he retained the deed, and that it was produced from among his papers at the trial, does not tend to prove that it was not delivered by the grantor. Upon the whole evidence we think there can be no question of the delivery of the deed.

But it is said that the grantor could not have intended to deliver the deed to Andrew C. Bonholm, as he did not know him, and supposed the name inserted in the deed was that of the Mr. Bonholm, with whom he made the negotiations, who was in fact John W. Bonholm.

Before considering this, it should be stated that the claim that the deed to Andrew C. Bonholm was void, as in fraud of John W's creditors, wholly fails upon the evidence. As against Andrew and his grantees, there is no legal evidence that there were any creditors of John W. Bonholm at the date of the deed; and if we were to receive the latter's declaration as proving that he was then in debt to a physician, there is no evidence in what amount, or whether it was paid, and no proof whatever that Andrew knew of the existence of such creditors, or was a party to any fraud.

The deed then having been delivered, no rights of creditors intervening, it cannot fail of effect, as between these parties, simply because without inquiry the grantor supposed that the grantee in the deed was the John W. Bonholm who in person made the purchase. In the absence of fraud, there can be nothing in this to defeat the deed. If the grantor did not know at the time, he acquiesced, and for a long time, after the deed was recorded. If

not the grantor, it was John W. Bonholm, who caused the deed to be written as it was. On what ground, then, can he, or his grantee, complain of its legal effect in favor of one holding under it?

But, on this point, it is enough to say that parol testimony is inadmissible to prove that the grantee named in the deed is not the one intended by the grantor. *Crawford* v. *Spencer*, 8 Cush. 418.

It is further claimed by the plaintiff, that the consideration for this deed was paid by John W. Bonholm, and that a trust thereby results, which will protect the latter and those claiming under him in the possession of the premises against the grantee in the deed and those holding under him with notice of the trust; and that the circumstances were such as to charge Sarah E. Holbrook with knowledge of the trust.

An examination of the testimony satisfies us that it fails to establish the facts, on which, so far as this branch of the case is concerned, the plaintiff relies.

The deed to Andrew C. Bonholm, the quit-claim deed of the land from him to Mrs. Holbrook, and the admitted fact of defendant's tenancy under her, establish in the first instance the rightfulness of defendant's possession. The record title is complete. If the plaintiff is to prevail upon the ground that the consideration for the deed to Andrew was paid by John, and that a trust thereby results, and an equitable interest sufficient to protect John's grantee in the possession of the premises, or to restore her to such possession, it is incumbent upon the plaintiff to make the fact on which she relies clearly appear. It certainly is not established by this testimony, unless we are to receive and act upon the declarations of John W. Bonholm, in regard to it, made in the absence of the grantee of record. A large part of the evidence reported on this point is clearly inadmissible; consisting of John W's statements, some time before the purchase, as to his purposes in regard to buying, his plans, his means and the reasons which inclined him to make the purchase. The same is true of his conversation with the witness, Thompson, about intending to buy and occupy this place, if he could make both ends meet, and the

expression of doubt whether he should take the deed in his own name. The witness, Humphrey, does not fix with certainty the time when John W. made the statement that the money drawn from the bank in Bath was to be applied in payment for this lot; although a comparison of the dates gives strong ground for the belief that it was near the time of the purchase. But the case is silent as to the source of the deposit in the bank; and, at most, this was a naked statement by John W. of his own intention in regard to the use to which he should subsequently apply the money. It was not a declaration, accompanying the act of payment.

If we consider the further evidence favorable to the plaintiff on this point, such as the declarations of John W. at the time of the delivery of the deed, and subsequently on the premises, and that he lived there in undisturbed possession from 1863 till his death, August 4, 1874, paying the taxes and claiming them as his own until he gave the plaintiff her deed, it fails to convince us under all the circumstances of the case that John W. Bonholm's money paid for the place. This cannot be said to be satisfactorily proved. Whether Andrew C. furnished the whole or a part of the purchase money is an open question upon the evidence. Andrew was wealthy, John was poor. They were relatives and on friendly terms. It is probable John thought the tax-deed gave him title. Andrew's absence in Europe left him in sole control of the place. If Andrew bought and paid for the place it was undoubtedly for John's use while he lived, and it is easy to see how under the circumstances John would have been the ostensible owner; but his claim of title is not proof that he paid the purchase money.

It is not a question of prescription, nor, except incidentally, of the character of the possession; nor do the declarations relate to boundaries. They are in his own favor, made in the absence and against the interest of one who held the record title.

The burden rests heavily on the plaintiff to establish against the record a passive trust, resulting by operation of law from the payment by her grantor of the consideration of a deed taken in the name of another. The law holds her to the requirement of strict proof. The fact must clearly appear, or her case fails. The

case leaves unexplained, in many respects, the relations existing between John and Andrew Bonholm, and the reason for taking the deed in the latter's name does not appear. Convincing evidence that the consideration for the deed was paid by the former which is the basis of the trust alleged is wanting. That such a trust may be established at all by parol, was a rule reluctantly adopted in equity, and accompanied, at its adoption, with the requirement of full proof, or a high degree of force and weight in the testimony offered. *Baker* v. *Vining*, 30 Maine, 121. *Dudley* v. *Bachelder*, 53 Maine, 403. *Kendall* v. *Mann*, 11 Allen, 15.

The result is that upon the issue of title alone, without discussing the form of the process, the defendant is entitled to prevail.

Judgment for the defendant.

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

WILSON MCLELLAN *vs.* CHARLES WHEELER.

Washington. Opinion October 29, 1879.

Statute 1874, *c.* 212. *Exceptions.*

While statute 1874, c. 212, relieves the judge presiding at *nisi prius* from all responsibility for correct results in the cases tried before him so far as such cases depend upon the finding of the jury as to the issues of fact arising therein, and requires him only to give, orally or in writing, correct instructions as to the matter of law involved, and forbids the expression of an opinion upon the issues of fact, making such expression sufficient cause for a new trial if the party unfavorably affected thereby desires it; yet it does not go so far as to prohibit the presiding judge from stating to the jury the questions which they are called upon to determine.

The statement by the judge of the matters proved, and not controverted, (or expressly admitted) is not an expression of opinion upon an issue of fact, however strong the inference therefrom may be; neither is the utterance of a mere truism, or of a matter of common experience which nobody would think of disputing, however it might bear upon the issue, an infringement of the statute prohibition.

It does not follow that the judge has expressed an opinion upon the issue because his opinion may be inferred from some allusion which he may make

to some obvious and indisputable fact; nor because an inference favorable or unfavorable to the position taken by one of the parties may be drawn from such obvious truth or fact.

On exceptions, and motion to set aside the verdict.

Assumpsit for price of a mowing machine, which the plaintiff alleges he sold and delivered to the defendant July 20, 1871. Writ dated July 25, 1876. Plea, the general issue.

The defendant denied the sale and purchase of the machine, claiming that he hired or borrowed it. The defendant kept the machine in his possession from July 20, 1871, to July 25, 1876, when he returned it on the same day the writ was served upon him. Both plaintiff and defendant testified to conversations and circumstances at, and subsequent to, the taking of the machine, but with unequal and disagreeing memories. The defendant's wife and daughter were likewise witnesses, but the view taken by the court renders a report of the evidence unnecessary.

The presiding judge in his charge to the jury remarked that "the defendant says he borrowed it, and that he kept it between five and six years,—which is a long time to borrow things in ordinary communities."

The verdict was for the plaintiff, and the defendant alleged exceptions to the above portion of the charge as being in derogation of statute 1874, c. 212, and also filed a motion to set aside the verdict as against law, evidence and the weight of evidence.

J. H. French, for the plaintiff.

J. F. Lynch and *E. B. Harvey*, for the defendant.

Barrows, J. While chapter 212 of the laws of 1874 relieves the judge presiding at *nisi prius* from all responsibility for correct results in the cases tried before him, so far as such cases depend upon the finding of the jury as to the issues of fact arising therein, and requires him only to give, orally or in writing, correct instructions as to the matters of law involved, and forbids the expression of an opinion upon the issues of fact, making such expression sufficient cause for a new trial if the party unfavorably affected thereby desires it, it does not go so far as to prohibit the presiding judge from stating to the jury the questions which they are called upon

to determine. Such statement when clearly and directly presented may often be of service by enabling the jury to apply intelligently the legal rules given them, a bald and abstract enunciation of which however accurate, might tend rather to confuse and lead them to disagree.

If a judge is of such a happy temperament as to be indifferent whether the cases tried before him are decided rightly or wrongly, or not at all, the statute will justify him in omitting such statement. But it does not prohibit it. It simply requires him in making it to refrain from expressing an opinion upon any issue of fact arising in the case. Exceptions like these indicate a misapprehension as to the nature and scope of the provision though its purport would seem to be sufficiently obvious. Matters of fact which are not in dispute between the parties but which appear in the case may be stated to the jury as proved or admitted. Inferences from such matters may be potent in disposing of the controverted questions: yet the statement by the judge of the matters proved and not controverted, (or expressly admitted) is not an expression of opinion upon an issue of fact, however strong the inference therefrom may be. Neither is the utterance of a mere truism, or of a matter of common experience which nobody would think of disputing, however it might bear upon the issue, an infringement of the statute prohibition.

It does not follow that the judge has *expressed* an opinion upon the issue because his opinion may be inferred from some allusion which he may make to some obvious and indisputable fact; nor because an inference favorable or unfavorable to the position taken by one of the parties may be drawn from such obvious truth or fact.

Such an inference as to the opinion of the presiding judge is all that can be imputed to the remark here excepted to. It was plainly not such an expression of his opinion upon the issue of fact as comes within the provision of the statute. An examination of all the testimony does not satisfy us that the jury erred in their conclusion.

Motion and exceptions overruled.

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

ELIAS G. GOULD *vs.* LEWIS W. MURCH.

Somerset. Opinion October 29, 1879.

Bond for Deed. Consideration. Notes—payment of. Fire. Loss. Rent.

When the owner of a lot of land, with buildings thereon, agrees to convey it at a future day on payment of the purchase money by the purchaser, and before payment and conveyance the buildings are destroyed by fire without the fault of either party, the loss must fall upon the vendor, and if the buildings formed a material part of the value of the premises, the vendee cannot be compelled to take a deed of the land alone and pay the purchase money.

Although such destruction of the buildings on the premises may be successfully set up as a defense to the notes given for the land bargained for, but not conveyed, yet by the contract, the use and occupation of the premises by the vendee from the time the agreement for the sale and purchase was made, being a part of the consideration for the notes, the vendor can recover thereon a sum equal to the value of the use of the premises while the vendee occupied them.

ASSUMPSIT brought to recover the amount of two promissory notes, dated December 17, 1875, given by defendant to plaintiff. The consideration for said notes with other notes was a bond in common form, dated December 17, 1875, to convey certain real estate described therein, when said notes were paid according to their tenor. Defendant took possession of said premises when said notes and bond were given and was in possession at the time of the fire.

In the fall of 1876 the buildings on said premises were destroyed by fire. Defendant claims that by reason of the loss of said buildings, the consideration for said notes has failed and that this suit cannot be maintained. It is agreed that if the law court consider the grounds assigned as any defense in this suit the same is to come back for trial to this court, otherwise the defendant is to be defaulted.

C. L. Jones, for the plaintiff, cited *Smith* v. *Sinclair*, 15 Mass. 171. *Reed* v. *Cummings*, 2 Maine, 82. *Manning* v. *Brown*, 10 Maine, 49. *Little* v. *Thurston*, 58 Maine, 86. Chitty Con. (6 ed.) 734.

Walton & Walton, for the defendant, cited *Wyman* v. *Heald*,

17 Maine, 329. *Coburn* v. *Haley*, 57 Maine, 346. *Little* v. *Thurston*, *supra*. *Knapp* v. *Lee*, 3 Pick. 459.

LIBBEY, J. The notes in suit, with three others, were given in payment for a lot of land on which were a dwelling-house and other buildings; and on payment of the notes at maturity, the plaintiff agreed to convey the premises to the defendant. The defendant was to have possession of the premises till he made default of payment as agreed, and he entered into possession under the agreement. Within a year from that time the buildings were burnt without the fault of either party.

The question presented to the court is whether the destruction of the buildings can be set up by the defendant as a defense to the notes. We think it can be.

When the owner of a lot of land with buildings upon it agrees to convey it at a future day on payment of the purchase money by the purchaser, and before payment and conveyance, the buildings are destroyed, by fire, without the fault of either party, the loss must fall upon the vendor; and if the buildings formed a material part of the value of the premises, the vendee cannot be compelled to take a deed of the land alone, and pay the purchase money; and if he has paid it he may recover it back. *Thompson* v. *Gould*, 20 Pick. 134, and cases there cited. *Gould* v. *Thompson*, 4 Met. 224. *Wells* v. *Calnan*, 107 Mass. 514.

In *Thompson* v. *Gould*, the authorities bearing upon the question were elaborately examined and considered, and Wilde, J., in the opinion of the court says: "In respect to the loss of personal property, under the like circumstances, the principle of law is perfectly clear and well established by all the authorities. When there is an agreement for the sale and purchase of goods and chattels, and after the agreement and before the sale is completed, the property is destroyed by casualty, the loss must be borne by the vendor, the property remaining vested in him at the time of the destruction. *Tarling* v. *Baxter*, 9 Dowl. and Ryl. 276. *Hinde* v. *Whitehouse*, 7 East, 558. *Rugg* v. *Minett*, 11 East, 210. No reason has been given, nor can be given why the same principle should not be applied to real estate. The principle in

no respect depends upon the nature and quality of the property, and there can therefore be no distinction between personal and real estate."

In *Wells* v. *Calnan* the same rule was affirmed. Gray, J., in the opinion of the court very clearly and tersely states it as follows: "When property, real or personal, is destroyed by fire, the loss falls upon the party who is the owner at the time; and if the owner of a house and land agrees to sell and convey it upon the payment of a certain price which the purchaser agrees to pay, and before full payment the house is destroyed by accidental fire, so that the vendor cannot perform the agreement on his part, he cannot recover or retain, any part of the purchase money."

The reasons upon which the rule is based are clearly and fully stated in the cases cited, and it is unnecessary to repeat them here.

But the use and occupation of the premises by the defendant, from the time the agreement for the sale and purchase was made, formed a part of the consideration for the notes: and the plaintiff can recover in this action a sum equal to the value of the use of the premises while the defendant occupied them. *Wells* v. *Calnan*, *supra*.

In accordance with the stipulations in the report,

The action must stand for trial.

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

SYMONDS, J., did not sit.

JACOB G. WITZLER *vs.* JASON COLLINS & others.

Kennebec. Opinion October 29, 1879.

Deposition. Rule 28 Superior Court Kennebec. Common carrier. Contract. Bill of lading. Delivery. Receipt. Evidence. Error.

Under Rule 28 of the superior court Kennebec county, a deposition, not filed with the clerk at the term for which it was taken, is not admissible in evidence.

Under a contract by a common carrier for the carriage of goods by water, evidenced by a bill of lading in the usual form signed by the proper agent

in the ordinary course of business, the owners of the vessel are responsible only for such goods as are embraced in the bill of lading and delivered on board the vessel, or into the actual custody of the master, or such as were so delivered as and for those embraced in the bill before the vessel sails.

It is not competent by evidence *aliunde* to show that such a bill of lading was intended to or did embrace goods elsewhere so as to make the owners responsible therefor.

Ordinarily the master has no authority to bind the owners by giving a receipt for goods at any other than the accustomed place of delivery.

There can be no constructive delivery of goods so as to bind the owners for their carriage except at such place, as where by constant practice and usage they have received property left for transportation.

It is error in a court to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered.

A bill of lading is an instrument of a two-fold character. It is a receipt as to the quantity and quality of the goods to be carried and a contract as to their carriage.

As a receipt it is open to explanation or contradiction the same as other receipts. Its acknowledgment of the apparent condition of the goods, though strong proof of its truth, is no exception to the rule. An admission of that which is not true is not binding except when an estoppel. In this case the admission is not an estoppel because there has been no assignment of the bill of lading, nor has the plaintiff acquired any new rights or changed his position in consequence of it.

On exceptions to the rulings of the superior court, for the county of Kennebec, and motion to set aside the verdict.

Assumpsit against defendants, as owners of the steamer "Star of the East," and as common carriers by water from Boston to Hallowell, for loss and damage of 19 packages of household goods delivered to them for carriage December 9, 1873.

Date of writ February 6, 1877, returnable to the March term 1877. Plea, the general issue.

The material facts, and likewise those portions of the judge's charge excepted to, are sufficiently stated in the opinion. The verdict was for the plaintiff in sum of $312.00. The defendant alleged exceptions and also moved to set aside the verdict.

O. D. Baker, (J. Baker with him) for the plaintiff, contended:

1. Rule 28 superior court, Kennebec county, is confined to that court, is under its discretion, so far as its enforcement is concerned, and that discretion is not reversible by this court.

Counsel strenuously contended that the deposition was properly

admitted, citing stat. 1878, c. 10, § 10, and, in an elaborate argument against the defendants' exceptions, cited *Gowdy* v. *Lyon*, 9 B. Mon. (Ky.) 112. *Keith* v. *Amende*, 1 Bush. (Ky.) 455. *Nelson* v. *Woodruff*, 1 Black. 156, 3 Blatch. 521. *Clarke* v. *Barnwell*, 12 How. 272. The Martha, Ole. Adm. 140. *Warden* v. *Grier*, 6 Watts, 424. *West* v. *Steamboat Berlin*, 3 Iowa, 532. *Benjamin* v. *Sinclair*, 1 Bailey, (S. C.) 174. 1 Greenl. Ev. § 305 and note 2. *Hastings* v. *Pepper*, 11 Pick. 41, 43. *Barrett* v. *Rogers*, 7 Mass. 297. *Shepard* v. *Naylor*, 5 Gray, 592. 2 Redf. Rail. §§ 156-174, par. 6, 7. *Bochm* v. *Combe*, 2 B. & S. 172. *Merritt* v. *O. C. & N. R. R.* 11 Allen, 80, 83. Redf. Car. §§ 100, 101. *Spring* v. *Haskell*, 4 Allen, 112. *Cushing* v. *Wells*, 98 Mass. 550. Sedg. Dam. 357, note 1.

L. Clay, for the defendants.

DANFORTH, J. The first exception in this case arises from the admission of the deposition of James L. Wilson, it having been objected to "on the ground that it was not filed at the term for which it was taken." From the caption it appears to have been taken for the June term and from the memorandum of the clerk thereon it was filed at the following September term, at which time the case was tried.

The R. S., c. 107, § 16, provides that depositions when not delivered to the court by the justice taking it, shall be "inclosed and sealed up by him and directed to such court . . and kept sealed till opened by their order," without any specification of time when this shall be done.

The rule of the superior court where this case is pending is as follows: "All depositions shall be opened and filed with the clerk, at the term for which they are taken; and if the action in which they are taken to be used shall be continued, such deposition shall remain on the files, and be open to all objections when offered on the trial, as at the term at which they were opened; and if not so left on the files, they shall not be used by the party who originally produced them, without the permission of the court, but the party producing a deposition may, if he sees fit, withdraw it, during the same term in which it was originally filed, in which case it shall not be used by either party." This language is so

clear and explicit as to leave no room for construction, no doubt whatever as to its meaning. The clause without permission of the court refers only to such depositions as have been filed, and by no possible construction can it be made to refer to such as have not been filed. The first clause is supplementary to the provisions of the statute, making that definite and certain which before was left indefinite and uncertain. The statute requires the deposition to be filed without fixing the time, the rule states the time when it shall be done. There is in the rule no provision whatever as to depositions not filed as there is no occasion for any, for, until that is done they are the property of the party taking them, and the court can have no control over them. *Webster* v. *Calden*, 55 Maine, 172. It is certain then that the ruling in question cannot be sustained on the ground that it was within the discretion of the court, nor does it appear from the case that it was so understood by the presiding justice.

Nor is the claim that the enforcement of a rule made by the court is within its discretion, any more tenable. It may be that a rule adopted solely for the purpose of regulating the proceedings of the court, to render them more simple, methodical and uniform, and when the rights of the parties are not involved, may as in *United States* v *Breitling*, 20 Howard, 252, be suspended or modified in their operation, when in the judgment of the court, convenience or justice may require it; or perhaps as in *Law* v. *Law*, 4 Maine, 167, in certain cases a noncompliance may be excused when caused by accident or mistake, and no injustice can result to the opposing party. But in this case the rule is not for the guidance of the court alone, but regulates as well the proceedings and involves the interests of opposing parties, and there is no suggestion of accident or mistake as the cause of a neglect of its requirements.

Nor in such case can the court waive any of its provisions. That can be done only by the party for whose benefit it was made. *Winnisimmet Co.* v. *Chelsea*, 6 Cush. 483. The result is that the superior court, with sufficient authority therefor having made the rule, is bound by its provisions so long as it remains in force precisely as if it had been a statute. *Maberry* v. *Morse*, 43

Maine, 176; *Thompson* v. *Hatch*, 3 Pick. 512; *Tripp* v. *Brownell*, 2 Gray, 402.

Nor is the superior court the final and conclusive judge of the construction and legal effect of its own rules. *Rathbone* v. *Rathbone*, 4 Pick. 92.

It is further contended that even under this construction of the rule the first clause is merely directory and not mandatory. It is true that this clause is not qualified by any words forbidding the use of depositions not filed as required, but it is also true that negative words are not the only test of a mandatory law. This question is fully discussed in *State* v. *Smith*, 67 Maine, 328, and *Boothbay* v. *Race*, 68 Maine, 351, and many of the cases are there collected and commented upon. In the former case page 333, it is laid down as a test of the mandatory character of the law when, "from the character of the act to be performed, the manner of its performance, or its effect upon public interests or private rights, it must be presumed that the legislature had in contemplation that the act had better not be performed at all than be performed at any other time than that named." In the latter case on page 354 the test laid down by Dwarris is quoted with approbation, thus, "Negative words will make a statute imperative; and it is apprehended affirmative may if they are absolute, explicit and peremptory, and show that no direction is intended to be given; and especially where jurisdiction is conferred;" and further where the clause relates to circumstances which affect the essence of the thing to be done it is imperative. This last is fully sanctioned by Lord Mansfield in *Rex* v. *Loxdale*, 1 Burr. 447.

The clause in question clearly comes within each and all of these tests. The words used are absolute, explicit and peremptory. It commands an act to be done at a specified time by one party, which involves the interests and is intended for the protection of the rights of the other party; and which fails of affording that protection if permitted at a later period. Time is not only of the essence of the act, but so far as the rule goes, is the act itself. The statute provides for the thing to be done, the rule specifies only the time when it shall be done, and if not then done it never can be without rendering the rule of no effect.

But what is more conclusive is the fact that it is only by force of the statute and the rules of court, that depositions can ever be used, instead of requiring the personal attendance of witnesses. If there is any omission of the requirements of the law in taking, if the caption is in any respect faulty, it is rejected without question. Just as important and necessary is it that such provisions as are made to bring it within the jurisdiction and control of the court should also be complied with. Until that is done, it has not those prerequisites required by law to make it evidence, and each one is necessarily a condition precedent to its use. In *Maine Stage Co.* v. *Longley*, 14 Maine, 447, Shepley, J., says, "It would seem to be the duty of the party proposing to use a deposition to show a compliance with the law and the rules of the court to entitle him to the use of it." The same doctrine is found in *Harris* v. *Brown*, 63 Maine, 51, and *Folan* v. *Larg*, 65 id. 11.

2. The defendant's counsel seasonably objected to the admission of testimony respecting damage, or loss of goods shipped, or delivered to the defendants at any other time than September 9, 1873, the time alleged in the writ, but it was admitted by the court.

The declaration in the writ contains two counts; but it is conceded that both are founded upon one and the same contract made on the ninth day of September, 1873, by which as is alleged "the defendants, as common carriers by water, in consideration that the plaintiff would and did then deliver to them nineteen packages of household goods . . undertook and promised to carry said goods safely and securely from said Boston to said Hallowell." As there is but one contract declared upon and that for the goods delivered on the specified day, it is evident that the defendants would not be liable for the loss of goods delivered at any other time, for such would be the subject of another and independent contract.

The case further shows that the plaintiff being about to remove from the city of New York to Hallowell packed up his household effects and started them by steamer and railroad to Boston. On their arrival in Boston he then employed a truckman to take them from the depot to the defendant's boat. On the ninth of Septem-

ber the truckman took what he supposed to be all the goods of the plaintiff and on delivering them at the boat took therefor the bill of lading dated on that day and which is in the case. Subsequently it was ascertained that some of the goods were missing and on looking for them, all or a portion were found still remaining in the depot. The truckman then forwarded these goods to the boat and took therefor the bill of lading dated October 3, 1873, which is also in the case. There is evidence in the case tending to show the specific articles packed and forwarded from New York; but there is none to show what were delivered to the defendants at any time except such as is contained in the two bills of lading.

In this state of the case there would seem to be two distinct independent contracts in relation to the carriage of the goods, and while the writ sets out the earlier the testimony in question relates to the later.

To meet this difficulty the plaintiff, admitting that if the two lots were distinct contracts the testimony was not admissible, claims that in reality there was but one, that of September 9; "that at that time the defendants accepted and assumed the charge of all his goods, the same in quantity and quality that came from New York to Boston," that this was a question of fact for the jury and the testimony was admissible to enable them to pass upon the question of damages, if they so found the contract.

In accordance with this theory the presiding justice gave to the jury the instructions referred to in the fourth, fifth and seventh specifications in the exceptions. If these instructions were authorized the testimony objected to was properly received. It is sufficient therefore to consider the propriety of the instructions, which may be sufficiently understood from the following extracts from the charge.

After accurately and clearly stating the delivery necessary to the defendant's assumption of their duties as common carriers in these words, "their liability commences when the goods have been delivered to the common carrier—have been delivered at the usual place set apart for the receipt of such articles—to the person appointed to receive them, to the proper servant of the carriers,

if not to the carriers themselves," the presiding justice adds: "now delivery to the carrier does not necessarily mean that the goods shall be placed actually upon the boat, or within his actual control. It means actually or constructively within his actual control. In other words if he assumes the custody and control he assumes the charge of the goods."

Then after stating the theory of the different parties upon this question of delivery he proceeds, "now in reference to this first point, what goods and chattels were delivered to the defendants, to be transported to Augusta on September 9, I shall submit to you as a question of fact, from the evidence in the case, what articles under the rules I have given you in reference to the delivery, were put in charge of these defendants at that time? Did they at that time by any thing that they did or said, or described in this receipt, intend to assume the charge, the custody, the control of anything more than was then open to inspection to them on the wharf, or was it then understood, and was their attention brought to other articles not in this receipt of nineteen packages, whether they were there on the wharf or elsewhere? For, I instruct you, that it is competent for a common carrier to receipt for articles which are not then at the usual place, and he will be bound by his receipt. If it is understood and they have been brought to his notice, and he receipts for articles not on the wharf he will be bound by that receipt. Ordinarily, it is true, and experience has shown that justice requires that the rule must be enforced that common carriers must be bound by the amount of merchandise in their receipts."

These instructions, as they were intended, clearly gave the jury to understand that they might infer, if the evidence in their opinion justified it, that the contract relied upon not only included the goods on the defendants' wharf but others elsewhere wherever they might be. This was erroneous certainly as applied to this case. The defendants were common carriers by water. Their duties as such began and ended upon the water or upon the wharf at each end of their route. A portion of these goods, as the case shows, at the time the contract was made were in the railroad depot, or had not arrived there in their transit from New York.

If therefore they had "assumed the charge" of them it would not have been as carriers, nor would their liabilities as such have attached until their arrival at their wharf.

But there is no proof of any such assumption. The only evidence of the contract set out in the writ is that contained in the bill of lading of September 9. The duties and liabilities of the defendants must rest upon that and the law applicable to it. So far as it is a contract it is not to be extended by parol testimony, and if there were any such in the case it would not be competent for the jury to infer "by any thing the parties said or did or described in the receipt" that it covered or included any goods not specified by its terms. As a written instrument its construction is a question of law and not of fact. Parol testimony, if offered, would have been competent to show what specific articles were contained in the packages mentioned in the bill of lading but not that it embraced other packages or goods elsewhere.

By its terms it clearly included only such as at the time were actually delivered upon the wharf. In it these goods are described as "shipped" and under that description it covers, and binds the defendants for no goods except such as are on the vessel or wharf, or such as shall be so delivered as and for the goods embraced in the bill of lading and before the vessel sails. *Rowley* v. *Bigelow*, 12 Pick. 314-15; The Delaware, 14 Wall. 600-1.

The liabilities of these defendants if any, are as owners of the steamer and in no other way. The same contract that would bind them for the safe carriage of the goods would also bind the vessel. In the Lady Franklin, 8 Wallace, 329, Davis, J., says: "The doctrine that the obligation between the ship and cargo is mutual and reciprocal, and does not attach until the cargo is on board, or in the custody of the master, has been so often discussed and so long settled, that it would be useless labor to restate it or the principles which lie at its foundation."

In the Delaware, *supra*, on page 602, Clifford, J., says: "Bills of lading when signed by the master, duly executed in the course of business, bind the owners of the vessel if the goods were laden on board or were delivered into the custody of the master, but it is well settled law that the owners are not liable, if the party to

whom the bill of lading was given had no goods, or the goods described in the bill were never put on board or delivered into the custody of the carrier or his agent."

The result must have been the same if the goods at the depot or "elsewhere" had been brought to the attention of the clerk who signed the bill of lading and it had been the intention that such goods should be embraced in the receipt. They were not so embraced and no receipt was given for any goods other than the "nineteen packages more or less" then on the wharf. It is not a question of intention simply except so far as that intention is learned from the language used in the writing.

It may be true as stated in 2 Red. on Railways, § 156, par. 6, "that an acceptance by the carrier at an unusual place will be sufficient to charge him," but by the same authority there must be an acceptance and by some one legally authorized. Here there was not only no acceptance, at any place except on the wharf, but no one authorized to make the acceptance elsewhere.

The action is against the defendants as owners of the boat. The goods were received by one employed for that purpose. So far as appears he had no authority other than that usually attached to such a position, certainly no more than the master ordinarily has; and that as already seen is sufficient only to bind the owners when exercised in the ordinary course of business and in relation to goods delivered on board, or into the actual possession of the master at the wharf. The Delaware, *supra*, on page 602.

Nor is there any evidence upon which the jury could find a constructive delivery. That can be, only when by the constant practice and usage of the carrier he receives property left for transportation at a particular place. 1 Chitty Con. 686 note.

If therefore the instructions were correct as abstract principles of law they were not applicable to this case for want of testimony upon which they can rest; and in this respect the case is analagous to that of the *United States* v. *Breitling*, 20 Howard, 252, and must be governed by the doctrine there laid down on page 255, as follows: "It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered. The instruction presupposes that there is some

evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures, instead of weighing the testimony."

In this case we must infer that the jury were led into error, for while there is no evidence tending to show any liability on the part of the defendants for loss of or damage to any goods not on the wharf at the time the bill of lading of September 9 was given, we are unable to account for the amount of the verdict except on the ground that they were held for all the goods started from New York though for aught that appears some of them and perhaps all that were lost may never have been put into their custody.

3. The court in ruling upon the admissibility of testimony offered by defendants upon the condition of the goods when received, held that the bill of lading was conclusive evidence as to their apparent condition at that time.

A bill of lading is twofold in its character. It is a receipt as to the quantity and condition of the goods shipped, and a contract to transport and deliver the same upon the terms specified. That used in this case began in the usual form: "Shipped in apparently good order and well conditioned," and describing the property as "19 packages H. H. goods more or less," and contains at the close the clause: "contents and condition unknown." The first clause if applied to the condition of the goods would be inconsistent with the last; for condition unqualified would include the apparent as well as the real; if the first is applied to the packages, then both can stand together and each have its full and proper meaning and effect. However it may be in this, in many cases this would be a matter of importance to enable the parties, if the goods were injured when delivered at the end of the route, to ascertain the more easily whether the injury happened during the carriage or was the result of a previous defect. This was the construction given to a similar bill of lading in *Clark* v. *Barnwell*, 12 Howard, 283, holding that the acknowledgment as to condition extended

only to the cases, "excluding any implication as to the quantity or quality of the article, condition of it at the time received on board, or whether properly packed or not in the boxes."

Under this construction as the testimony offered related to the condition of the goods and not to that of the packages, it is evident that it should have been received.

But if we discard the last clause and apply the first to the condition of the goods the result must be the same. So far as a bill of lading is a receipt it has the same character as other receipts and is subject to the same principles of law. We are not aware of any more solemnity in its execution or any more importance to be attached to it than to other instruments of a like nature. It has often been decided that it may be modified, controlled or contradicted by parol testimony. Upon this point the authorities are numerous and uniform or nearly so. *O'Brien* v. *Gilchrist*, 34 Maine, 554; *Tarbox* v. *Eastern Steamboat Co.*, 50 Maine, 339. *Sears* v. *Wingate*, 3 Allen, 103. *Shepherd* v. *Naylor*, 5 Gray, 591. *Blanchard* v. *Page*, 8 id. 287. *Richards* v. *Doe*, 100 Mass. 524. *Hastings* v. *Pepper*, 11 Pick. 43. *The Maryland Ins. Co.* v. *Rider's Admr.*, 6 Cranch, 340. *Nelson* v. *Woodruff*, 1 Black. 156. *Ship Howard* v. *Wissman*, 18 Howard, 231. The Delaware, 14 Wallace, 601. 2 Wharton Ev. § 1070. 1 Greenl. Ev. § 305.

Some of these cases as well as others are relied upon to sustain the ruling in question, at least by implication, but a careful examination of them we think, leads to a different conclusion. Perhaps one of the strongest is that of *Hastings* v. *Pepper*, in which it is said the acknowledgment in the bill of lading that the goods were in "good order and well conditioned, is *prima facie* evidence that as to all circumstances which were open to inspection and visible, the goods were in good order; but it does not preclude the carrier from showing, in case of loss or damage, that the loss proceeded from some cause, which existed but was not apparent, when he receives the goods." In this case there was no qualification to the acknowledgment, hence in terms it applied as well to hidden as to open defects. Still the court said it was *prima facie* as to the open and in effect that it had no bearing upon

such defects as were not visible. This is the only construction we can give the language without taking all meaning and effect from the phrase *prima facie* so unqualifiedly used. In the same opinion it is stated that this is one of the positions which "may be taken to be perfectly well established." This case is referred to and in this respect adopted in *Nelson* v. *Woodruff*. This will be found to be the result of most or all the cases where a construction is given to a bill of lading, with an admission thus unqualified, and it is unnecessary to refer to them more particularly. It would be singular indeed if a qualified admission is to have a greater effect than one without any qualification.

The reason given in some of the cases, as in *Barrett* v. *Rogers*, 7 Mass. 300, why the admission though unqualified should not apply to or be holden conclusive as to interior or invisible defects, "because such were not open to inspection" cannot avail as a reason why the admission should be held conclusive in regard to those matters which are open. The distinction between the visible and invisible defects is not to affect the construction to be put upon the language used. In either case it is but an admission and must be treated as such. It may and must affect the probative force of the acknowledgment. A receipt is open to explanation by evidence *aliunde*, not because the matters therein referred to are more or less apparent, but because it is an admission and nothing more than an admission, and its nature is the same whether written or verbal, qualified or absolute.

It is self-evident that every admission offered in evidence will depend for its force upon the circumstances under which it was made. If made without knowledge and when knowledge could not reasonably be expected, as held in some of the cases cited, it would have no effect whatever. If on the other hand it was deliberately made with knowledge or under such circumstances as to show a duty to know, the probative force would be great; and under some circumstances so great that a jury might hold a party to it, though he testified differently upon the stand; certainly unless he gave a satisfactory explanation of the change. This is undoubtedly what, and all that was meant by the remark found in a few of the cases cited, that the carrier is bound by the admis-

sion of the condition of the goods received when plainly visible. The context shows that nothing more could have been intended.

In accordance with these views the number of articles stated in the receipt, though clearly open to inspection, has always and without question been held open to explanation, and in *The Ship Howard* v. *Wissman*, *supra*, as in other cases, testimony as to the apparent, as well as the real condition of the cargo, was admitted without objection to overcome the *prima facie* case made by the bill of lading.

An admission in writing or otherwise, is not conclusive when not true, unless by way of estoppel, which is not applicable here. It might be, had the bill of lading been assigned to a *bona fide* purchaser of the goods. But such is not the case. This action is in favor of the shipper and the plaintiff has acquired no new rights, has in no respect changed his condition in consequence of the admissions made as to the quality of the goods.

Exceptions sustained.

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

INHABITANTS OF VASSALBORO' *vs.* JOHN R. SMART.

Kennebec. Opinion October 31, 1879.

Statute 1874, *c.* 232. *Taxes—collection of by suit. Declaration.*

Where in an action of debt brought under statute 1874, c. 232, no facts are alleged from which it appears that the defendant was liable to taxation in the plaintiff town for the years during which the taxes were assessed, the declaration is bad on demurrer. *York* v. *Goodwin*, 67 Maine, 260 re-affirmed.

ON EXCEPTIONS, from the rulings of the superior court for Kennebec county.

Action of debt to recover unpaid taxes for the years 1873-4-5, according to the account annexed, the balance alleged to be due being $23.88. Date of writ August 19, 1878. The defendant filed a general demurrer to the declaration which was joined. The

presiding judge sustained the demurrer and adjudged the declaration bad. To which ruling the plaintiff alleged exceptions.

The declaration was as follows: "In a plea of debt. For that whereas, the said defendant on the first day of August, A. D., 1878, at said Vassalboro', to wit: at Augusta, in said county, was indebted to the plaintiffs in the sum of $23.88, according to the account annexed, for taxes, duly assessed by the assessors of said town of Vassalboro' against said defendant for the years 1873, 1874 and 1875, as specified in said account annexed, and legal interest on said taxes to be paid to the plaintiffs by said defendant, which sum remaining unpaid by the said defendant, an action hath accrued to the plaintiffs by force of the statute in such case made and provided to demand and recover of said defendant the said sum.

The plaintiffs aver that the payment of said taxes and interest was duly demanded of the defendant on the first day of August, 1875, or before the bringing of this action. To the damage," etc.

H. A. Priest, for the plaintiff.

E. W. Whitehouse, for the defendant.

SYMONDS, J. This action of debt is brought under the following provision of chapter 232 of the public laws of 1874: "In addition to the methods now provided by law for the collection of taxes legally assessed in towns, against the inhabitants thereof, or parties liable to taxation therein, an action of debt may be commenced and maintained in the name of the inhabitants of any town to which a tax is due and unpaid, against the party liable for such tax."

The case is before this court on exceptions to the ruling in the superior court for Kennebec county, adjudging the declaration bad on general demurrer.

The declaration does not aver that the defendant was ever a resident or property-owner in Vassalboro'. No fact is alleged from which it appears that he was liable to taxation in that town, unless it is to be inferred from the averment of his indebtment to the town for taxes duly assessed.

We do not regard it as within the rules of pleading to hold that

the allegation of the due assessment of a tax includes an averment of the existence of the facts which create a liability to taxation. The words "legally assessed" in the statute are quite as broad as the words "duly assessed" in the declaration. But the statute declares that it is against the inhabitants of towns, or parties liable to taxation therein, that an action of debt may be brought for taxes legally assessed. The plaintiff's declaration in this respect fails to bring the case within the terms of the statute, on which it is based. An assessment may be in due form and yet create no legal liability. A non-resident, owning no property in a town, may rightfully resist the payment of taxes there, though no fault appears in the manner of making the assessment. The liability to taxation, and the regularity of the assessment, are distinct elements in the plaintiff's case.

It is unnecessary to consider the other objections to the declaration. The case of *York* v. *Goodwin*, 67 Maine, 260, shows very clearly what the court regard as a sufficient declaration in this class of actions.

Exceptions overruled.

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

FANNY A. HASKELL *vs.* INHABITANTS OF NEW GLOUCESTER.

Cumberland. Opinion October 10, 1879.

Negligence.

Whether a person travelling with a safe horse and carriage, in the night without a light, upon a highway wholly obscured by darkness, but in the vicinity of his residence, and over which he has travelled many years, is in the exercise of ordinary care, is for the jury to determine under all the circumstances of the case.

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

CASE, for an injury caused by a defective highway.

The facts appear in the opinion.

N. Webb & T. H. Haskell, for the plaintiff.

C. W. Goddard and *S. C. Strout & H. W. Gage*, for the defendants, cited *Rice* v. *Montpelier*, 19 Vt. 470. Angell Highways, § 291. *Winn* v. *Lowell*, 1 Allen, 177. *Macomber* v. *Taunton*, 100 Mass. 255. *Davenport* v. *Buckman*, 37 N. Y. 573. *Kellogg* v. *Curtis*, 65 Maine, 62. *Gavett* v. *R. Road*, 16 Gray, 501.

VIRGIN, J. The only defect alleged and attempted to be proved was that of insufficient railing. So far as this branch of the case is concerned, we have no hesitation in overruling the defendant's motion. For while towns are under no obligation to erect barriers of any description merely to prevent travelers, in the absence of any dangerous place in close proximity to highways, from straying therefrom, they are bound by the spirit of the statute of ways, to erect suitable railings upon causeways constructed, as this was, five or six feet above the natural surface of the earth. It would seem almost self-evident that on such ways a railing is necessary to the reasonable security and safety of travelers, especially in the night. *Morgan* v. *Hallowell*, 57 Maine, 375. *Willey* v. *Ellsworth*, 64 Maine, 57. *Hayden* v. *Attleborough*, 7 Gray, 338. Moreover the defendants do not very strenuously contend otherwise.

They do, however, stoutly contend that, not only the testimony fails to show affirmatively the exercise of ordinary care on the part of the plaintiff, but that it does show contributory negligence on her part. And they ask us to declare as the legal effect of her own uncontradicted testimony that she was guilty of such negligence.

The leading facts are these:

The plaintiff, thirty-two years old, residing in her father's family, consisting of herself, two sisters and one other lady, received a postal from her father stating that he would arrive at the station in the six o'clock p. m. train of November 10, and requesting her to meet him with the horse and carriage and carry him home—some two miles from the station. At five o'clock, p. m., she started with the horse and covered carriage, which she had fre-

quently driven, and went to the station over the road in question which she had travelled for fifteen years. On the arrival of the train between six and seven o'clock, the plaintiff, and her father sixty-nine years of age, started homeward. The evening, as the day had been, was rainy. During a part of the way, a carriage, in which was a lighted lantern, preceded them a short distance. From the time when the lanterned carriage left, the plaintiff and her father "could not see the road at all." They had no lantern and made no effort to obtain one. The horse walked the entire distance. As they were going along that portion of the causeway which was not railed, feeling the left wheels of the carriage settle a little, the father said to the plaintiff—who was driving with a tight rein—"too far to the left, go to the right."—Whereupon she "drew the horse slightly to the right." Thereupon the right wheel settling somewhat, he said to her—"too far to the right, too far to the right,"—when almost immediately the carriage slewed down the embankment, tipped over and injured the plaintiff. It also appeared by the testimony of the plaintiff that when her father directed her to go to the right she thought they were already too far that way. The horse, carriage and harness were safe.

"We cannot see judicially that the jury erred in finding for the plaintiff on this point." *Stevens* v. *Boxford*, 10 Allen, 25. *Williams* v. *Clinton*, 28 Conn. 263. *Norris* v. *Litchfield*, 35 N. H. 271. *Woodman* v. *Nottingham*, 49 N. H. 387. *Sleeper* v. *Sandown*, 52 N. H. 244. Shear. & Redf. Neg. § 413 *et seq.* and notes.

Motion overruled.

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

WILLIAM CALL *vs.* FRANKLIN HOUDLETTE.

Lincoln. Opinion November 1, 1879.

Several owners. Judgment. Appropriation. Administrator. Liability. Set off. Attorney. Agency.

Where a judgment is recovered, for the earnings of a vessel, in the name of only one of several owners of the vessel, the presumption is that the other owners are entitled to their share of the proceeds thereof, after deducting the costs and expenses of collecting the same.

An administrator, who collects money upon a judgment founded on a suit in the name of his intestate, is not individually liable to another for a share thereof belonging to such other person, unless before he appropriates the same to the use of the estate he has notice not to pay it over, or unless in paying it over he has acted in bad faith.

In a suit for money thus collected and wrongfully withheld, accruing from the earnings of a vessel owned by the plaintiff and defendant's intestate and another, the defendant cannot set off against the claim against himself an account due his intestate from the same vessel. Such matters can be adjusted only in equity.

The defendant would not be liable, if the money was collected in his name as administrator by the attorney who conducted the suit, and paid over by the attorney, without the assent of the defendant, to a person to whom the defendant's intestate had assigned the claim before judgment had been recovered thereon.

ON EXCEPTIONS.

ASSUMPSIT for money had and received. Plea, the general issue. At the trial, after the evidence was all in, the presiding justice instructed the jury *pro forma*, to return a verdict for the plaintiff for three-sixteenths part of so much of the judgment of *Franklin Houdlette, administrator* v. *Cheeseman & al.*, as was for freight and demurrage of Brig Yazoo, and interest, and the jury returned a verdict for plaintiff in the sum of $1021.81, the amount agreed upon by the parties. The defendant alleged exceptions.

The facts are stated in the opinion.

A. P. Gould and *J. E. Moore* for plaintiff contended as follows:

Plaintiff seeks to recover his share of a bill of freight earned by the Yazoo of which he and Hagar were part-owners. It accrued under a charter and bill of lading signed by McGown the master

as agent of the owners. Hagar, having possession of the bill of lading, brought a suit upon it in his own name, for the whole freight, which was pending at his death. The bill of lading fell into defendant's hands, and he appeared as administrator, prosecuted the suit to judgment and collected the execution, receiving the share of the money due to plaintiff, as well as to Hagar's estate. Defendant now claims, 1st, that Hagar assigned the whole claim to Whitmore to secure certain notes due from him and his mother and brother; and 2nd, that he is entitled to retain plaintiff's share of the money as an asset of Hagar's estate.

I. There was no written evidence offered to prove an assignment and the verbal evidence was rejected. But if there had been legal evidence of it, the assignment was void as to plaintiff's share.

Hagar could not assign plaintiff's interest in the charter or its proceeds. An agent or factor cannot transfer goods or choses in action or money which have come into his hands as such. *Denston* v. *Perkins & als.*, 2 Pick. 86. *Chesterfield Manufacturing Co.* v. *Dehon*, 5 Pick. 7. *Thompson* v. *Perkins*, 3 Mason, 232. *Thompson applt.* v. *White*, 45 Maine, 445.

II. One recovering money as administrator, is liable to the real owner of the funds individually. This has never been questioned; and the only doubt expressed in the authorities is, whether, if the plaintiff so elects, he is not also liable *de bonis testatoris*. *Cronan* v. *Cotting*, 99 Mass. 334. *Ashby* v. *Ashby*, 7 Barn. and Cres. 444. (14 E. C. L. R. 202). *Rose* v. *Bowler*, 1 H. Black. 109. *Powel* v. *Graham*, 7 Taunton, 581, (2 E. C. L. R. 501). *Childs* v. *Moninsdal*, 2 Brod. & Bing. 460. (6 E. C. L. R. 228). Red. Wills, P. II, 289, 290.

In *Cronan v. Cotting*, defendant recovered judgment as administratrix on a claim which belonged partly to the plaintiff and partly to the estate which the defendant represented he held as security for a debt due from plaintiff to it. The court say: "The balance of the money collected, after paying the debt due from the plaintiff, was not assets of the estate in her hands, and the defendant is not liable for such balance in her representative capacity. This action is accordingly well brought for money received by the defendant to the plaintiff's use."

In *Ashby* v. *Ashby*, Bayley, J. (p. 204) says: "Suppose a bill payable to the testator was remitted from a foreign country, half the amount applicable to the personal use of the testator, and the other half to be paid over by him to some other person. Before the bill arrives the testator dies, and his executor receives the money. It is possible that he may not have received advice as to the mode in which it is to be applied, until after he has applied it in the ordinary course of administration. The testator may be insolvent." Under such circumstances he concedes that an action for the money might be maintained against the executor personally, but, he says, "it would be hard if the party should not have his election, to be paid out of the funds of the testator, and I should be disposed to think that an action for money had and received, might, at the election of the party for whose benefit it was received, be maintained against the defendant in his representative capacity;" but he held, with the other members of the court, that upon the authorities an action would lie against the executor in his individual capacity only.

Holroyd, J., in the same case, says (p. 205), "If that is the plaintiff's money, he is entitled to it, whether there be assets or not, and whether the executors have or have not applied to other purposes the money which was received to plaintiff's use."

This is upon the ground, that the contract was with the executor, and not with the testator. Upon the reception of the money by the executor, the promise was implied, that he would pay it to the party to whom it really belonged. So in our case, defendant recovered judgment upon a charter due in part to plaintiff, which was held by defendant's intestate at his death, but upon which the judgment was recovered by the defendant, and the money collected on his execution by himself, or his agent. The privity of contract was, therefore, between plaintiff and defendant, not defendant's intestate.

Littledale, J., in same case (p. 205) says: "The defendants are charged with having received money in their character of executor and executrix. The question is, whether that makes the defendants liable in their representative character, so as to warrant a judgment *de bonis testatoris*. All the authorities show, that such a count

only makes the defendant liable personally; and it appears to me, that if the case were perfectly new, that would be the correct view of the law upon the subject. . . . In this case, there never was any simple contract debt owing from the testator. The debt stated in the declaration, is a debt contracted by the defendants, in their character of executor and executrix, by their having received a sum of money, to be paid over to the plaintiff. If the testator, in his lifetime, had been indebted to the plaintiff for money had and received to his use, there would not be any specific appropriation of the money so received to the plaintiff's use, but that money, on the death of the testator, would have gone into his general funds, and the debt must have been paid out of those funds in its regular order. But where an executor receives money to the use of a particular individual, it operates as a specific appropriation of that money belonging to the party, and he, in his individual capacity, must be liable for the money so received; it has nothing to do with the accounts of the testator."

III. No question of agency exists in this case, and the authorities on that subject cited by the defendant are cited *mal-apropos.* The argument that defendant may now set up the payment of Hagar's debts, as a lawful appropriation of plaintiff's money, rests upon the theory that an administrator is the agent of his intestate, or agent of the creditors and heirs of the estate. This is a novelty in the law of agency that will not bear criticism.

An administrator is the legal representative of his intestate, and impersonates him in the management and distribution of the estate. Choses in action descend to him, and "he has the same property in the effects of the deceased, as the deceased himself had when living, the same power of disposing of them, and the same remedies for recovering or protecting them." 2 Roberts Wills, 72.

Defendant did not receive or hold plaintiff's share of the charter money as agent of Hagar's estate, but did collect it as plaintiff's agent. The authorities already cited by us show that defendant did not hold this money as agent of Hagar's creditors or his heirs, and that whether he had notice that it was plaintiff's money before he paid it to Hagar's creditors, was entirely immaterial.

The authorities relied on touching the law of agency have no application to the case.

J. W. Spaulding, for the defendant.

PETERS, J. The evidence shows that the plaintiff and H. S. Hagar and another were the owners of the brig Yazoo, Hagar owning the controlling share; that the brig was let to Cheeseman & Marshall to carry a load of ice, the master of the vessel signing the usual bill of lading; that an action was commenced by Hagar in his life time, in his own name, against Cheeseman & Marshall, upon an account annexed, one item being for freight and demurrage for the voyage performed by the Yazoo; that an award of referees was made allowing the claim; that before the award was presented to court for acceptance Hagar died, and the defendant was appointed his administrator; that judgment was taken out in defendant's name as administrator, the execution collected, and the principal part thereof paid for the benefit of one Whitmore, to whom Hagar had assigned the claim before he died. This action is against the defendant in his individual capacity, and not as administrator.

The defendant contends that a presumption arises that Hagar was the hirer of the vessel from the other owners and sole owner of the freight, because he recovered therefor in his own name. We think the plaintiff's ownership is *prima facie* evidence of his right to a share of the sum recovered for the earnings of the vessel, notwithstanding a recovery in Hagar's name alone. And we see no legal obstacle in the way of the plaintiff recovering the same of the defendant in his individual capacity, if the facts sustain such a claim. The plaintiff was under no obligation to employ Hagar in his life time as his agent, or to continue the administrator of Hagar in such agency after his death.

But the defendant cannot be personally liable to the plaintiff for money collected in his name as administrator, unless he was notified not to pay it over before he did pay it over, or unless he acted fraudulently in withholding it from the plaintiff. It must be borne in mind that the defendant was not an intermeddler or a trespasser. His possession was in no sense a wrongful one. If

a person gets money into his hands illegally he cannot discharge himself by passing it over to another. Here the possession was legal.

Spencer, J., in *Hearsey* v. *Pryn*, 7 Johns. 181, says: "The law is well settled, that an action may be sustained against an agent, who has received money to which his principal has no right, if the agent has had notice not to pay it over, and in some cases the action has been sustained where no notice was given, if it appears that the money has not been actually paid over." In note j, to *Adams* v. *Hopkins*, 5 Johns. (2d ed.) 255, where the cases in support of the statement are liberally cited, it is said the action for money in the agent's hands "should be brought against the principal, unless in special cases, as when notice has been given to the agent not to pay it over or he has acted with *mala fides*." In *Cox* v. *Prentiss*, 3 M. & S. 348, Lord Ellenborough says an agent is liable "as long as he stands in his original situation, and until there has been a change of circumstances by paying over the money to his principal, or something equivalent to it." The following authorities are pertinent: *Lafarge* v. *Patterson*, 7 Cow. 456. *Morrison* v. *Currie*, 4 Duer, 79. *Langley* v. *Warner*, 3 Sandf. 209. *Elliot* v. *Swartwout*, 10 Pet. 137, 155. *Garland* v. *Salem Bank*, 9 Mass. 408. *Fowler* v. *Shearer*, 7 Mass. 14. *Jefts* v. *York*, 12 Cush. 196. *Thompson* v. *White*, 45 Maine, 445. *Smith* v. *Colby*, 67 Maine, 169, and cases. *Goodell* v. *Buck*, 67 Maine, 514. Story's Agency § 300, and cases in note.

If the defendant in good faith paid over the money or allowed it to be appropriated for the benefit of the estate he represented, without notice not to pay it over, he is not personally liable therefor. He cannot be charged with bad faith, there being no notice not to pay over, unless he knew that the money belonged to the plaintiff, and that he was committing a fraud upon the plaintiff by paying it or allowing it to be paid to another person. Nor does it necessarily follow that the defendant had such knowledge, or that he acted with bad faith, because it was known to him that the plaintiff was part owner of the vessel from which the earnings accrued. That fact is to be considered and weighed with all other facts and circumstances. For, notwithstanding that fact, he

may have believed that the funds belonged to his intestate, because recovered in the name of his intestate; or that the intestate had a claim or lien upon them, or an offset against them, through his accounts as ship's husband; or that for other reason he was justified in using the money as part of the property and assets of the estate; and, if honest in his conviction and conduct, however mistaken his conclusion, having had no notice not to pay over the funds, he would not be guilty of defrauding the plaintiff. If the rule were otherwise, there would be too little security to persons engaged in the administration and settlement of estates. See authorities *supra*.

The defendant contends, that the plaintiff cannot in any event recover more than what his share of the funds would be after deducting the expenses of obtaining and collecting the judgment. There can be no doubt of that proposition. We cannot perceive why the plaintiff should stand better excluded than if included as a party in the former litigation. Certainly, the doctrine of recoupment would allow the deduction. *Harrington* v. *Stratton*, 22 Pick. 510. *Carey* v. *Guillow*, 105 Mass. 18. 2 Pars. Con. 741.

We do not concur in the further position taken by the defense, that the defendant has a right to set off against anything due the plaintiff on this account, any demands that the estate of Hagar may have against the plaintiff growing out of disbursements expended upon and losses sustained by the same vessel. If all the matters concerning the vessel are to be settled, resort must be had by the parties seeking such a settlement to a bill in equity, —a remedy which would undoubtedly lie. And the state of the mutual accounts of the owners may be a fact bearing upon the question whether the defendant acted with *mala fides* or not, as has been before stated. The defendant raises the point that, the claim having been assigned by Hagar to Whitmore, he would not be responsible for any action taken by the attorney who had charge of the suit, unless done with his co-operation and assent. No doubt, that would be so. The defendant would not be liable for any act done by another person without his assent. If the appropriation was made by his direction, or if he assented to the appropriation when he could have prevented it, then he would be

liable for the act of another as if done by himself. If the money was paid over by the attorney employed (by his intestate), without the authority and assent of the defendant, the liability would rest elsewhere than upon him. He would not be liable therefor.

Exceptions sustained.

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

LORENZO CLAY *vs.* OLIVER MOULTON.

Kennebec. Opinion November 3, 1879.

Judgment. Bill of costs. Lien. Professional services.

A judgment recovered, including the bill of costs, is the property of the party recovering it, though subject to the lien of the attorney for costs.

The attorney is entitled to a just and fair compensation for services rendered, and it matters little whether the charge for services be a specific sum equivalent to the taxable bill of costs, less the witness fees, or the bill of costs specifically named.

ON EXCEPTIONS, from the superior court of Kennebec county.

ASSUMPSIT, on account annexed for professional services. Writ dated March 7, 1879. Plea the general issue.

The case was sent to a referee to be decided upon legal principles and on return of his report to the superior court, the defendant filed written objections thereto and against its acceptance, as follows:

I. "That in an attorney's bill against his client a bill of costs as such, recovered against the adverse party in a suit at law is not a proper subject of charge."

II. "The referee has submitted in his report only the amount decided by him to be due the plaintiff on the assumption that his ruling on said principle of law was correct, whereas the report should have been in the alternative, or in some manner should have presented to the court the sum found by him to be due the plaintiff, in case his said ruling should be erroneous." The report substantially is as follows: "To the objections of the defendant,

that in an attorney's bill against his client a bill of costs as such, recovered against the adverse party to a suit at law is not a proper subject of charge. I overrule that point, and decide . . that the taxable items in a bill of costs, aside from witness fees, may be charged and may be allowed and reckoned in determining the reasonable and proper compensation to be . . recovered of his client; and to the second point made by defendant's counsel 'that an attorney having collected a bill of costs against the adverse party is bound to account for the same to his client, exclusive of his disbursements in settlement,' I decide . . that an attorney is bound to account for and allow his client for all sums collected as costs of the adverse party, and make my award upon that principle, and . . I find the balance due plaintiff as a fair and reasonable compensation for the services rendered, after deducting credits and payments made, the sum of two hundred and fifty dollars and fifty-one cents," etc.

The report was accepted and the defendant alleged exceptions.

L. Clay, for the plaintiff.

A. L. Perry, for the defendant, cited R. S., 1871, c. 84, § 27. *Bodfish* v. *Fox*, 23 Maine, 90. *Stratton* v. *Hussey*, 62 Maine, 286.

APPLETON, C. J. This is an action on an account for professional services. The cause was referred to be decided on legal principles. A report was offered and the cause was recommitted, so that it has been twice under the consideration of the referee.

The presiding justice accepted the award of the referee, to which ruling exceptions have been filed.

The referee ruled that the taxable items in a bill of costs aside from witness fees, may be charged and allowed and reckoned in determining the reasonable compensation which an attorney is entitled to recover from his client. It is to this ruling of the referee that exception is taken.

The bill of cost primarily belongs to the successful party. It is included in his judgment. It is not the attorney's though he has a lien upon it. But the attorney is entitled to a just and fair compensation for services rendered. It matters little whether the

charge be a specific sum equivalent to the taxable bill of costs, less the witness fees, or the bill of costs specifically named. In either event, it represents the charge for services rendered. It means nothing else. The result is the same whether the charge be for the bill of cost as expressing the amount of services rendered or for such sum as the aggregate charge in the cause. The reasonableness of the claim is to be determined by the tribunal to whose judgment the case is submitted.

But even if the ruling of the referee as an abstract question of law was erroneous, there is nothing to show the defendant was thereby prejudiced by an allowance of the items to which objection is taken. The plaintiff in his writ claims to recover for a balance of $314.82. What the items constituting the debit were no where appears in any of the papers before us. The referee found the sum of $251.51 to be due the plaintiff "as a fair reasonable compensation for the services rendered, after deducting the credits and payments made." The defendant has no cause of complaint when compelled to pay only "a fair and just compensation for the services rendered."

Exceptions overruled.

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

THOMAS G. WHITE & others—selectmen of Dresden, petitioners for injunction *vs.* COUNTY COMMISSIONERS of Lincoln county.

Lincoln. Opinion November 4, 1879.

Way—location of. Injunction. Certiorari.

The writ of certiorari is the appropriate remedy for parties aggrieved by the doings of county commissioners in relation to highways and town ways.

The writ is not one of right, but grantable only on petition and at the discretion of the court.

Upon the hearing of the petition the court receives evidence aliunde the record and will not grant the writ if satisfied that defects of jurisdiction apparent on the record do not in fact exist.

When the writ has issued and the record is before the court, no evidence extraneous thereto is receivable; and when the record shows a defect or want of jurisdiction, proceedings will be quashed.

A bill in equity is not the proper process to bring the proceedings of selectmen of towns, city councils, or county commissioners in laying out streets and ways before this court to obtain a decision whether they have been legal and in conformity with law, and if defective to enjoin further proceedings.

The case is presented to the law court, on the following papers —under R. S., c. 77, § 13.

PETITION FOR INJUNCTION.

"To the Honorable Justices, etc.

Thomas G. White, Andrew J. Reed and Charles E. Allen all of Dresden in the county of Lincoln, selectmen of said town of Dresden in behalf of the inhabitants of said town, and in behalf of themselves, respectfully petitioning represent to this honorable court:

That the county commissioners of the county of Lincoln, at a meeting held by them at Dresden in said county on the sixteenth day of August, A. D., 1872, without lawful authority and having no jurisdiction in the premises, upon the petition of Knowles Gahan and others proceeded to lay out, and did lay out a town way wholly within the boundaries of the said town of Dresden, described as follows, to wit: . . .

That said commissioners made report and return of said laying out at the September term of said court, A. D., 1872, whereupon the same was continued to the December term of said court 1872, when said report was ordered to be recorded; all of which more fully appears by the record of the proceedings of said commissioners in the premises, a duly certified copy of which is herewith filed marked "A."

That the proceedings of said county commissioners were not according to the provisions of the statutes of this state for laying out, locating and establishing town ways, and that said county commissioners had no jurisdiction over said way—or authority in law to proceed to lay out and establish said town way as it appears by said record they undertook to do, for the following reasons, among others, viz.:

First. Because said county commissioners had no original jurisdiction of the matters embraced in the petition of said Knowles Gahan and others, and no authority in law to act thereon.

Second. Because it is not alleged in said petition of Knowles Gahan and others, nor is it set forth in the record of said commissioners that said Knowles Gahan, or any of the signers of said petition were inhabitants of the said town of Dresden, or that they, or any inhabitant of said town had petitioned the municipal officers of said town at any time before the filing or presentation of said petition to said county commissioners to lay out said way; and because it does not appear in said petition nor in said record, that said municipal officers of said town of Dresden had unreasonably neglected or refused to lay out said way on petition of any inhabitant of said town.

Third. Because it is not stated in said petition of said Gahan and others, and does not appear in said record that the said original petitioners presented said petition to said county commissioners at a regular session thereof, within one year after the municipal officers of said town of Dresden had unreasonably neglected or refused to lay out said way; nor that said municipal officers had unreasonably neglected or refused to lay out said way within one year prior to the time of the filing, or presentation of said petition.

Fourth. Because it does not appear in said original petition, or by said record, that any petition or application for the laying out of said way was made in writing to the municipal officers of said town of Dresden.

Fifth. Because the municipal officers of said town of Dresden had not in fact neglected or refused to lay out said town way, on petition of any of the inhabitants of said town, or on application of any of the original petitioners to said county commissioners, within one year preceding the presentation of said petition to said county commissioners by said Knowles Gahan and others.

That Robert Montgomery, David Chamberlain and Charles M. Davis, county commissioners for the county of Lincoln for the time being, at a court held by them at Wiscasset, in said county, on the first Monday of September, A. D., 1877, without jurisdic-

tion in the premises and without any lawful authority therefor, and against the protestations of your petitioners, upon the application of Knowles Gahan and others, ordered that Knowles Gahan of said Dresden be appointed agent to cause the town way thus unlawfully attempted to be laid out and established by the county commissioners of said county as is hereinbefore set forth, to be opened and made passable; and that when said Gahan shall have made a contract therefor, and filed a copy thereof in the clerk's office, the clerk shall certify to the assessors of said Dresden the time when the contract is to be completed, and the amount to be paid therefor, as more fully appears by a certified copy of said order herewith filed marked "B."

That they are informed and believe that said Knowles Gahan has made a contract with one Elbridge McFadden of said Dresden to open and make said road passable, and that said McFadden is now about to proceed to open, make and build said road, and that he threatens to do so forthwith.

That the inhabitants of said town of Dresden are in danger of suffering great wrong and irreparable injury, by means of the premises; that they are without any adequate remedy by any common or ordinary process of law:—

To the end, therefore, that the said Knowles Gahan may be perpetually enjoined from any further proceedings under the said order of said county commissioners, and that the said Gahan his servants and agents, and especially the said Elbridge McFadden may be restrained from opening and making said town way, and that said commissioners may be prohibited from issuing any warrant of distress against said town, for money expended by said agent, your petitioners pray, that a writ of injunction" etc.

Record of County Commissioners.

At a meeting of the county commissioners begun and holden at Wiscasset, within and for the county of Lincoln, on the last Monday of December, being the thirtieth day of said month, A. D., 1872.

No. 16. Gahan and als., for town way in Dresden.

Knowles Gahan and others, inhabitants of Lincoln county, by their petition respectfully represent, that a town way in the town

of Dresden, (county aforesaid,) from a point near the dwelling house of James H. Mayers on the east side of the river road leading from Dresden upper bridge to Bath to a point on the road known as the back road between the foot of the sand hill (so called) and the house of David Robbins, would be of great public convenience; that the selectmen of Dresden aforesaid, have unreasonably refused to lay out said way.

Wherefore your petitioners considering themselves aggrieved by such refusal, pray that your Honors would, agreeably to law in such cases made and provided, after due proceedings had, approve and lay out the said town way, and cause the same to be duly recorded and built. Dated at Dresden, Maine, March, 1872.

This petition was presented at May term, 1872, at an adjourned session thereof held on the second day of July, A. D., 1872, when notice was duly ordered.

Pursuant to the petition and notice thereon, the county commissioners of Lincoln county, met the parties at the time and place designated in said notice, and it appearing that all the notices had been legally served and published, we the said commissioners then proceeded with the parties to view the route prayed for and at a convenient place in the vicinity, heard said parties and their witnesses, and after a full hearing of all the facts, testimony and arguments by them presented, do adjudge and determine that the prayer of the petitioners should be granted; and in accordance with the foregoing adjudication we the said commissioners proceeded to lay out and establish a public town way as follows, etc.

Given under our hands this 2d day of September, A. D. 1872.

Which report was accepted.

The same was then continued to the present term, and now no petitions for increase of damages being presented or pending the proceedings under the said petition are this day (being the thirty-first day of December, 1872) closed, and it is ordered that the costs arising on the said proceedings which are taxed at the sum of $34.81 be paid by the said town of Dresden into the treasury of the county of Lincoln in three months from this date and that

the said proceedings be recorded by the clerk of this court and by the town clerk of said town of Dresden.

Certified to town clerk February 8, 1873.

AMENDMENT OF RECORD.

At a meeting of the county commissioners held at Wiscasset within and for the county of Lincoln on the last Monday of December, being the twenty-eighth day of said month, A. D., 1874.

Ordered: That the records of this court, upon the petition of Knowles Gahan and others, for the laying out of a town way, in the town of Dresden, commencing at a point near the dwelling house of James H. Mayers, on the east side of the river road leading from Dresden upper bridge to Bath, to a point on the road known as the "back" road, between the foot of the sand hill (so-called) and the house of David Robbins, which was presented at the May term, 1872, at an adjourned session thereof held on the second day of July, 1872, and upon which the report of the commissioners was made at September term, 1872, all of which is recorded in the records of the county commissioners' court, volume nine, page five hundred twenty-eight to five hundred thirty, inclusive, be amended in accordance with the facts found by the said commissioners upon the hearing of said petition, as set forth in the petition of said commissioners, presented to the supreme judicial court, at the October term, 1874, viz: by inserting in said record, on page five hundred and twenty-nine, after the words, "by them presented," in the fifteenth line thereof, the words following, to wit: "do adjudicate and determine that the selectmen of said town of Dresden, did unreasonably neglect and refuse to lay out said town way, as set forth in the petition of said Gahan and others, and in consequence of the above adjudication."

SEPTEMBER TERM, 1877. COUNTY COMMISSIONERS' COURT.

Knowles Gahan et als., Petitioners for Agent to Build Town Way in Dresden.

Notice ordered returnable August 7, 1877. Adjourned session June 24, 1877. Heard and continued for advisement. Adjourned session, August 7, 1877. Prayer granted, and ordered that Knowles Gahan of Dresden be and hereby is appointed agent to cause the

said town way to be opened and made passable. And when said agent shall have made a contract therefor and filed a copy thereof in the clerk's office, the clerk shall certify to the assessors of Dresden the time when the contract is to be completed, and the amount to be paid therefor.

GEORGE B. SAWYER, *Clerk.*

Injunction granted December 28, 1877, and motion to dissolve the same made October term, 1877.

A. P. Gould, for the petitioners, contended, *inter alia*, that the commissioners had no jurisdiction. A petition for the laying out of a town way must state clearly, distinctly and directly all such facts as are necessary to give them jurisdiction.

I. *Goodwin* v. *Commissioners*, 60 Maine, 328-330. *Bethel* v. *Same*, 42 Maine, 478-480. *Scarboro'* v. *Same*, 41 Maine, 604-606. *Fairfield* v. *Same*, 66 Maine, 385-387. *Small* v. *Pennell*, 31 Maine, 267. R. S., c. 18, § 23.

II. To confer jurisdiction in cases like this it must appear, 1st, That some inhabitant of the town had applied to the municipal officers to lay out the way. 2d, That they had unreasonably refused to lay it out within one year from date of the application to the commissioners. 3d, That the same inhabitant thus petitioning the selectmen was the petitioner to the commissioners. R. S., c. 18, §§ 18, 23. *Small* v. *Pennell*, *supra*. Pownal, pets. 8 Maine, 271. *State* v. *Pownal*, 10 Maine, 24. *Brown* v. *Com.* 12 Met., 208.

III. The proceedings of the county commissioners being void for want of jurisdiction, no writ of certiorari is necessary to set them aside. But in view of their action in appointing an agent to open the road and the provision of R. S., c. 18, § 28, this writ should issue to prevent wrong. The motion to dissolve the injunction is general, denies none of the facts alleged in the petition, and there is express authority for this proceeding. *Harriman* v. *Co. Com.*, 53 Maine, 83-87. R. S., c. 77, § 4. High. on Injunc. § 801. *Mohawk* v. *Artcher*, 6 Paige, 83.

IV. Although neither the petition to the commissioners, nor their record, exhibits the necessary jurisdictional facts, still their existence might be proved *aliunde*. Here the pleadings show they had no existence in fact.

W. H. Hilton, (county attorney) for the respondents.

APPLETON, C. J. This is a bill in equity in and by which the complainants, selectmen of Dresden and acting in behalf of said town, seek to enjoin and prohibit the respondents, county commissioners of Lincoln county, "from issuing any warrant of distress" against the town of Dresden to collect money expended or to be expended in making a certain road particularly described therein, being a town road in said town. The ground upon which an injunction is claimed is that the county commissioners had no jurisdiction over the subject matter of their action and that their proceedings are null and void.

By R. S., c. 18, § 23, "When the municipal officers unreasonably neglect or refuse to lay out or alter a town way or private way on petition of an inhabitant, or of an owner of land therein, for a way leading from such land under improvement to a town or highway," the petitioners may, within one year thereafter, present a petition stating the facts to the commissioners of the county at a regular session, who are to give notice thereof to all interested and act thereon as is provided respecting highways. When their decision is returned and recorded parties interested have the same right to appeal to the supreme judicial court and also to have their damages estimated by a committee or jury, as is provided in this chapter respecting highways.

The proceedings to which the bill relates are under § 23.

Assuming that there are very grave defects in the records produced—defects so important that on appeal or certiorari, the proceedings would be quashed, the question at once arises whether this is the proper process by which to procure such results. In other words, whether if this bill be not sustained, the inhabitants of Dresden "are in danger of suffering great wrong and irreparable injury" and that "they are without any adequate remedy by any common or ordinary process of law," as the bill alleges.

1. The statute gives to any party aggrieved by the doings of the county commissioners the right of appeal to the supreme judicial court. The record shows that due notice was given of the time and place of the meeting of the county commissioners "that all persons interested might then and there appear and show cause,

(if any they had) why the prayer of the said petitioners should not be granted." The record then shows that "the county commissioners of Lincoln county met the parties at the time and place designated in said notice, and it appearing "that all the notices had been legally served and published" they "then proceeded with the parties to view the route prayed for and at a convenient place in the vicinity, heard said parties and their witnesses, and after a full hearing of all the facts, testimony and arguments by them presented," adjudged and determined "that the prayer of the petitioners should be granted" and on December 31, 1872, the proceedings were closed.

These complainants represent one of the parties interested. They appeared before the county commissioners. They contested the laying out of the town road in question. They were beaten. They had the right of appeal. If there were jurisdictional defects, they would be open on appeal—and the proceedings would have been quashed had they been shown to exist. Instead of appealing these complainants remained quiescent until October 1877, when this bill was filed.

2. If the complainants neglected to appeal, still after the final close of proceedings, they had another remedy by certiorari. If there are important irregularities in the location of a road or in the assessment of taxes to build it, they can only be taken advantage of by certiorari. *Longfellow* v. *Quimby*, 29 Maine, 196. Banks & als., appellants, 29 Maine, 288. When the county commissioners have rendered a judgment in a matter over which they have no jurisdiction, this court will none the less grant the writ of certiorari, even though no injustice has been done, the wrong in such case consisting in the assumption and exercise of an authority not granted. *Bangor* v. *County Commissioners*, 30 Maine, 270. *Levant* v. *County Commissioners*, 67 Maine, 430. Whatever and however great the jurisdictional defects apparent of record, they may all be taken advantage of by this process and by this alone. *Goodwin* v. *Hallowell*, 12 Maine, 271.

It is apparent therefore that these complainants had ample remedies by the common and ordinary processes of law without resorting to a court of equity for relief.

The validity of the doings of the county commissioners have been once before the court on petition for a writ of certiorari, and the decision then made must be deemed conclusive. If the questions relating to jurisdiction which are now presented were not raised it was the fault of these petitioners. *Dresden* v. *County Commissioners*, 62 Maine, 365. The objections now raised should have then been presented for adjudication. It is gross laches, that these complainants neglected to avail themselves of them in the incipient stages of the proceedings. If no other reasons existed for non-interference this would suffice.

3. When the writ issues, the court can act only on the record as produced. No evidence *aliunde* is receivable. The record is conclusive, and if error exists the proceedings are quashed.

But the writ of certiorari is not of right. It is a writ grantable only at the sound discretion of the court. The petitioner must show that injustice has been done. It is not every error that will induce the court to permit the writ to issue. Upon the hearing of the petition for the writ evidence from without the record will be received to enable the court to determine upon the propriety of its issuing. Thus in *State* v. *Pownal*, 10 Maine, 24, the record being before the court, and it nowhere appearing that the selectmen of Pownal had unreasonably delayed or refused to lay out the road in question, the proceedings were quashed for this want of jurisdiction apparent of record. But upon petition, although the record fails to show that the selectmen unreasonably neglected or refused to lay out the road in question yet evidence will be received to prove that the county commissioners found the existence of this essential jurisdictional fact and they will be authorized to amend their record accordingly. *Dresden* v. *County Commissioners*, 62 Maine, 365. One of the grounds of complaint set forth in the complainant's bill as negativing the jurisdiction of the county commissioners is the failure to state "that they (the selectmen of Dresden) had unreasonably refused to lay it (the road) out within one year from the date of the application to the county commissioners." "But upon the hearing on the petition, evidence will be received to show that the application was made within one year as required by the statute and in that case the

writ for that cause will be denied." West Bath, petrs., 36 Maine, 75. Another objection taken is that it does not appear of record "that some inhabitant of the town had applied to the municipal officers thereof, by petition to lay out the way." If the petitioners in fact were inhabitants and that fact was shown on the petition, it would be a good ground for refusing to grant the writ. Indeed, "the want of the formal allegation of it in the petition to the commissioners could not be deemed fatal to the proceedings," remarks Barrows, J., in *Hebron* v. *County Commissioners*, 63 Maine, 314. So the court will receive evidence to show that expenditures have been made, with the knowledge of the petitioners and in such case the writ in the exercise of discretion will not be granted. *Noyes* v. *Springfield*, 116 Mass. 87.

Without a further or more extended examination of the authorities it is manifest that the writ of certiorari will be denied, when it is shown on hearing of the petition for the writ that defects relating to the jurisdiction and which are apparent of record do not in fact exist and that evidence *aliunde* the record is receivable for that purpose as well as to show that injustice would follow the issuing of the writ.

4. But if a bill in equity is a process by which proceedings in road cases may be quashed, as the court can only act on the record it may quash proceedings when upon petition for certiorari, it would in the exercise of judicial discretion deny the issuing of the writ. Hence the conclusion of Shepley, C. J., in *Baldwin* v. *Bangor*, 36 Maine, 522. "A bill in equity," he remarks, "is not the proper process to bring the proceedings of selectmen of towns, city councils or county commissioners, in laying out ways or streets, before this court to obtain a decision, whether they have been in all respects correct, formal, and in conformity to law. To entertain a bill for such a purpose would make a precedent for the transfer from this court, acting as a court of common law, of the purposes entrusted to it as the superintendent of all inferior tribunals, to be exercised by writs of error, certiorari or mandamus, or other proper process to the equity side of the court, to be exercised through the channel of a bill in equity." So in *Fiske* v. *Springfield*, 116 Mass. 88, it was held that the validity of an

order of a city council, for the alteration of a highway and the payment of damages thereby could only be impeached directly by petition for a writ of certiorari and not collaterally by petition in equity to restrain the appropriation and payment of money under it.

5. The learned counsel for the complainants relies upon the case of *Harriman* v. *County Commissioners* of Waldo county, 53 Maine, 83, as an authority to sanction the maintenance of this bill. That was a writ of prohibition and mandamus. In that case a judgment had been rendered in this court upon the report of a committee appointed in case of an appeal from the decision of the county commissioners. The committee refused to lay out and establish the road prayed for. Notwithstanding their report was accepted and duly certified to the commissioners, they not only refused to carry the judgment of this court into effect, but in direct disobedience of its decree proceeded to appoint an agent to open the way they had laid out. They were enjoined by the court. But their action was a flagrant violation of law. This court has the power to issue writs of error, mandamus, prohibition, etc., by R. S., c. 77, § 4, for the furtherance of justice or "the execution of the laws." The writ was issued by this court to compel obedience to its decrees, but it is no authority whatever for a bill like the one before us.

Injunction dissolved.

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

STATE *vs.* CHARLES B. GILMAN.

Kennebec. Opinion November 4, 1879.

New trial—motion for. Verdict. Jurisdiction.

In a criminal case, a motion after verdict, for a new trial on account of an alleged incompetence of a juror because of prejudice, or because of having previously formed or expressed an opinion as to the guilt of the prisoner, is addressed to the discretion of the justice presiding at *nisi prius* and is to be decided by him; to his decision no exception will lie.

The law court has no jurisdiction of such a motion.

ON EXCEPTIONS.

Indictment against respondent for assault upon one John Flood with intent to kill and murder. Tried October T., 1877. Plea, not guilty. Verdict, guilty. Exceptions were then filed and allowed, and the case sent to the law court.

February 7, 1879, the following order was sent down from the law court: "Exceptions overruled. Judgment on the verdict." Whereupon on March 28, (March term Kennebec co., 1879) and before sentence, the following motion signed and sworn to by defendant, was made to the judge presiding at *nisi prius ;* to wit:

"And now, after verdict and before sentence, the said respondent comes into court and moves that said verdict against him be set aside, and a new trial granted, because, he says, that since the last October term of said court, to wit, since the first day of March instant, he has been informed and believes that one Samuel B. Trafton of Waterville, Maine, a member of the jury that returned said verdict against him at said October term, A. D. 1877, was utterly disqualified to act as a juror in said trial, by reason of the fact that said Trafton was not an impartial and unbiased person, but was then and there grossly prejudiced against this respondent, and before the trial of said case, after said Trafton had received notice that he had been drawn as a juror, he, the said Trafton, had prejudged the case, and then and there formed and expressed an absolute, unqualified and unconditional opinion that said respondent was guilty and ought to be sent to state prison for twenty-five years, and then and there expressed a deter-

mination to 'go against the said respondent and do all he could to lock him up,' and otherwise disclosed his bias and prejudice as will appear by the testimony of witnesses herein after stated. Since the rendition of said verdict, to wit, on the first day of March instant, the respondent learned that one Lorenzo Gilley is a material witness in support of the foregoing motion and allegation, and if present in court would testify substantially as follows:

That on the night of the thirteenth of October, he staid at said Trafton's, and had a conversation with said Trafton relative to Charles B. Gilman shooting affair; that said Trafton said 'if I had my say he would be shut up, he ought not to run at large;' that 'said Gilman was not justified in shooting under any circumstances;' that 'the law provided a way for him to get his rights without shooting and cutting;' that 'he wouldn't hang him, but of course they will convict him;' that 'Noyes has got money, and he will shove him just as far as the law will put him, and I don't blame him a mite. I would. Gilman will be sentenced for some twenty or twenty-five years in state prison; he hasn't killed any body but has wounded two or three.' That afterwards, and while said Trafton was on the jury, said Gilley asked said Trafton what they would do with said Gilman, and Trafton said he calculated they would give him a good dose, that he deserved it and he had got to take it, and Trafton said 'I hope he will.' That Trafton said to him, (said Gilley,) 'I shall go against Gilman, and do all I can to lock him up.'

And said respondent has also learned since said verdict, to wit, on March fifth, instant, that one Charles M. Herrick is a material witness in support of said motion, and if present in court would testify substantially as follows:

That on October 13, A. D. 1877, said Trafton told him that said Gilman, on account of his shooting on that day ought not to run at large, but ought to be imprisoned, and ought not to be allowed bail, that a man had no right to shoot under any circumstances, not even for breaking into his house.

Said respondent has further learned since said verdict, to wit, on the twenty-fifth day of March instant, that one Charles D. Butterfield is a material witness in support of said motion, and if present in court would testify substantially as follows:

That he (said Butterfield) had a conversation with said Trafton before said Trafton was drawn on the jury, in which said Trafton said that said Gilman ought to be put in state prison if ever any one had, that he ought not to be allowed bail, and ought not to be allowed to run at large.

And the respondent further avers that prior to said first day of March instant, he had no knowledge whatever that said Trafton was so biased and prejudiced, or had so formed and expressed an opinion, or was in any manner disqualified to act as a juror in said trial, and had no knowledge of any part of the testimony of said witnesses hereinbefore stated. And he further avers that by the exercise of due and reasonable diligence he could not have obtained, prior to said date, said knowledge.

Respondent further avers that he has been grievously wronged and prejudiced by the fact that said Trafton ser ved as a juror in said trial, and that he has thereby been deprived of his constitutional right to be tried by an impartial jury."

On the twenty-fifth day of the term, being April 1st, 1879, the court having fully heard the foregoing motion, was of the opinion that the motion came too late, and was not sustained by the evidence, and ordered that the same be dismissed. To which opinion and order the defendant alleged exceptions.

In case the ruling is erroneous, the law court to make such disposition of the motion as the law and evidence require.

Other facts sufficiently appear in the opinion.

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

E. F. Pillsbury, *Foster & Stewart*, for the defendant cited *Rex* v. *Tilley*, 5 Leach, 66, 670. 4 Black. Com. 376. Bouv. L. Dict. Burr L. Dict. *Com.* v. *Lockwood*, 325. Hill. New Trials c. 9, § 5. *Studley* v. *Hall*, 22 Maine, 201. *People* v. *Plummer*, 9 Cal. 309. *Rollins* v. *Adams*, 2 N. H. 349. *McLane* v. *State*, 10 Ga. 241. *Alfred* v. *State*, 37 Miss. 296. *Bradbury* v. *Cony*, 62 Maine, 225.

DANFORTH, J. This is a motion by the respondent for a new trial on the ground that one of the jurors who rendered the verdict "was grossly prejudiced against the respondent and after he had

received notice that he was drawn as a juror and before the trial he had prejudged the case, and had formed and expressed an absolute, unqualified and unconditional opinion that said respondent was guilty."

The case is before us on exceptions and the whole evidence is reported with the provision that if "the ruling of the justice presiding is erroneous, the law court is to make such disposition of the motion as the law and the evidence require."

I. The first ruling was that the motion was made too late.

The verdict was rendered at the October term, 1877, and exceptions allowed. February 7, 1879, an order was received from the law court to enter "Exceptions overruled—judgment on the verdict." This was all the law court could do. By our statute it has no authority to pass sentence, and of course cannot render final judgment. This can be done only in the court in which the trial is had. The effect of the order was that all matters pending to prevent final judgment had been disposed of, and that alone remained to be done by the proper tribunal. As that can be done only in term time, the case must stand upon the docket until the next term for that purpose. Such was the condition of the case when this motion was made; a conviction but no final judgment, for which it was awaiting.

While the case is thus pending it is not only competent but eminently proper that the respondent should be heard as to the limit of the sentence to be imposed, or whether it shall be postponed to a future time that the defendant may have an opportunity to show to the proper tribunal that he has been improperly convicted. If there had been any defect in the indictment, or in the proceedings at the trial apparent upon the record no doubt a motion in arrest of judgment would have been seasonable. *State* v. *Soule*, 20 Maine, 19.

The purpose of these two motions being the same, that of ultimately defeating the final judgment it is apparent that a seasonable time for the one would also be seasonable for the other. But while the motion in arrest is a recognized step in the proceedings of a criminal trial presented for the purpose of correcting some error in the law, the motion for a new trial is addressed to the

judicial discretion of the court. True every party has a legal right to a fair and impartial trial, and to secure this he is to be tried by the principles of law applicable to his case and the proceedings, as well for the selection of a jury as in other respects, are to be such as are established by law; and for a violation of any of them the remedy is by exceptions. Hence when these exceptions are disposed of ordinarily the legal rights of the respondent have been complied with, or legally it must be so presumed. If therefore by any subsequent developments or newly discovered evidence there is reason to suppose the defendant has not been fairly tried, his appeal must be to the discretion of the court. *Com.* v. *Green*, 17 Mass. 515. The remarks in the opinion in that case on page 538, though applied to the admission of a witness claimed from subsequently discovered evidence to have been incompetent, are forcible, and equally applicable to the subsequent discovery of the supposed incompetence of a juror.

In *State* v. *Elden*, 41 Maine, on page 171, Tenney, C.J., in the opinion says: "It was then (after conviction, exceptions having been filed and disposed of) the right of the attorney for the state to move for sentence, and no power in the least effectual could the convict claim, as his right under the laws of this state, to interpose a valid objection thereto."

Thus though it was discretionary with the justice presiding whether the sentence should be delayed for a hearing upon the motion, yet the ruling that the motion was too late was technically erroneous; but if in such case exceptions will lie, we see no occasion for sustaining them in this case for a full hearing was had, all the evidence was taken and the whole is now here.

II. A further ruling excepted to is that the motion is not sustained by the evidence and that it be dismissed. This involves a question of jurisdiction. It is contended that such a motion is for the law court only, and should have been at once reported to that tribunal for a decision.

Under the present organization of our judiciary the law court is not a court for trials and has such and only such jurisdiction as is conferred upon it by statute, and the only provision relied upon to support the rule contended for, is found in R. S., c. 77, § 13, as

amended by c. 231 of the acts of 1874. It is this: "Cases in which there are motions for new trials upon evidence reported by the judge." In the same section is another clause which reads thus: "cases, civil or criminal, presenting a question of law."

In *State* v. *Hill*, 48 Maine, 241, in a well considered opinion it was held that the former clause referred to civil cases alone while the latter included criminal. In *State* v. *Smith*, 54 Maine, 33, that decision was affirmed. The reason upon which these decisions rest would seem to be conclusive. It is found in other provisions of the statute providing the manner in which different questions shall be carried from the trial to the law court. In c. 82, § 33, R. S., which relates exclusively to civil cases, is a provision for reporting motions to the law court. This provides not only for motions such as was considered in *State* v. *Hill*, but "for motions founded on any alleged cause not shown by the evidence reported" but depending upon testimony to be taken. This includes of course such a motion as is here pending when made in a civil action. In R. S., c. 134, § 26, which relates to criminal cases only, is found the provision for questions of law in such cases and this provides that all such questions shall be raised by exceptions, or "any question of law allowable by exceptions," may be reported. Hence this motion like that in *State* v. *Hill*, is not provided for by statute, and like that must depend upon the principles of the common law and can therefore be heard only in the court where it was tried. That it can there be heard has never been doubted since the decision in *Com.* v. *Green*, *supra*. In *State* v. *Kingsbury*, 58 Maine, 238, where a motion of this kind was entertained, it came up with the bill of exceptions and no question as to its propriety was raised. On the other hand a motion depending upon the same law, in *State* v. *Verrill*, 54 Maine, 581, a case of great importance, defended and prosecuted by able counsel and carefully examined by at least two justices, was passed upon by the court in which it was tried without any question as to its jurisdiction.

III. Notwithstanding our conclusion that we have no jurisdiction of this motion, we deem it proper to say that under the provisions in the exception that if any of the rulings were erroneous "the

law court is to make such a disposition of the motion as the law and evidence require," we have carefully examined the evidence reported and find no error in the ruling that the motion is not sustained.

As regards the testimony of the witness Gilley it is so contradictory in itself and so entirely overborne by the testimony on the part of the government that it can have no weight whatever in sustaining the allegations.

The testimony of Herrick giving it its full force proves no opinion or prejudice on the part of the juror. It does not appear that before the conversation testified to, the juror had any information upon the subject or that during the conversation any question was made as to the respondent's guilt or innocence, but rather a condemnation of such an act in any man. It was evidently such a conversation as under the circumstances might take place without leaving any impressions upon his mind inconsistent with his impartiality as a juror, and certainly entirely insufficient to show his answers under oath to the questions put as to his qualifications untrue. *State* v. *Kingsbury, supra.*

The exceptions must be dismissed. The entry to stand upon the docket as ordered by the court below. Motion heard and dismissed.

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

AMASA BARRETT and wife, petitioners for increase of damages, *vs.* THE CITY OF BANGOR.

Penobscot. Opinion November 5, 1879.

Penobscot river. Boom privileges. Damages. Sheriff's jury. Challenge. Exceptions.

Owners of shores, on the Penobscot river, used for boom privileges are entitled to compensation for any loss, injury or diminution of value occasioned by flowage by the dam erected by respondents under legislative authority.

But they are not entitled to compensation for the possible loss of drift wood which may never reach their shores, and to which they have no title.

The right of peremptory challenge does not exist when the question of damages is to be determined by a sheriff's jury.

When evidence manifestly immaterial has been admitted, and it does not appear that it could in any way have prejudiced the excepting party, the verdict will not be disturbed.

On exceptions, to the rulings and instructions of the officer presiding over sheriff's jury upon a question of damages under Stat. 1876, c. 264, § 4, and motion to set aside the verdict.

The facts and questions presented are sufficiently stated in the opinion.

J. Crosby, for the petitioners, cited Stat. 1875, c. 168, 1876, c. 260. *B. & P. R.R. Co.* v. *McComb*, 60 Maine, 290. *Vinton* v. *Welch*, 9 Pick. 87. *Lunt* v. *Hunter*, 16 Maine, 9. *Parker* v. *Cutler*, 20 Maine, 353. *State* v. *Wilson*, 42 Maine, 9. Stat. 1869, c. 49. R. S., c. 18, § 53. Stat. 1872, c. 46. *Rogers* v. *Judd*, 5 Vt. 223.

T. W. Vose, city solicitor, (F. H. Appleton with him) for the respondents, cited *Burr* v. *B. & M. R. R.*, 64 Maine, 131. *Fitchburg R. R.* v. *B. & M. R. R.*, 3 Cush. 88. *China* v. *Southwick*, 12 Maine, 238. Stat. 1868, c. 448; 1869, c. 232; 1870, c. 332, 456. *Davis* v. *B. & P. R. R.*, 60 Maine, 303.

Appleton, C. J. In 1875 "an act for supplying the city of Bangor with water" was passed. By § 2 the city was authorized to erect a dam across the Penobscot river. The act was amended by c. 260 of the special acts of 1876.

By § 4 of the last named act, it is provided that the "said city shall be liable to pay all damages that shall be sustained by any person or corporations in their property, by the taking of any land or by flowage, or excavating through any land for the purpose of laying down pipes, building dams or constructing reservoirs, or making excavations." In case of disagreement the damages are "to be ascertained and determined in the same manner and under the same conditions, restrictions and limitations as are by law provided in the case of damage by the laying out of highways."

The damages alleged to be sustained by these petitioners by reason of the erection of the dam across the Penobscot river were assessed by the county commissioners but being dissatisfied with their estimate the petitioners filed their petition for an increase of damages to be determined by a jury.

The case was heard by a jury and numerous exceptions are filed by the respondents and the petitioners to rulings made at that hearing.

I. The jury were instructed to find the damages sustained to the petitioners' boom privilege by reason of the erection of the respondent's dam. To this the respondents except.

We think this exception cannot be sustained. By an act extending the charter of the Bangor boom company, being c. 49, § 3 of the special laws of 1869, the corporation were authorized to "take and use the shores of the Penobscot river contiguous to their boom, for the purpose of booming and securing all logs and lumber, hanging their boom or booms and operating the same" with an exception having no bearing on the present case. But there was a proviso that "the said corporation shall pay to the proprietor or proprietors of such shore or shores so taken used or occupied, such annual rent or yearly damages as may be agreed upon by the parties." In case of disagreement provision was made for the assessment of damages.

These petitioners are shore owners. They had made an agreement with the boom company for the yearly damages to be paid them. They allege that the respondent's dam has materially injured or destroyed the value of their shore for booming purposes. That they had rights of property which were to a certain extent injured, the jury have found. For this loss and injury they are legally as well as equitably entitled to compensation.

II. The petitioners except because the jury were not instructed that if they found the petitioners' boom privilege to be as good and as safe as it was before the dam was built, and that if the reason why business does not come to their shores is because the dam by flowing back the water on to other shores has made other like privileges desirable for boom purposes, to which business now

goes instead of coming to their shores, then the city will not be responsible for such indirect damages.

The instruction is based upon the hypothesis that the "petitioners' boom privilege is as good and safe as it was before the dam was built." If so it cannot have been harmed.

But whether it be so or not, is immaterial, because the jury have negatived the hypothesis upon which the instruction was based. They have found that the boom privilege was not as "good and safe" as before the dam was built. They have given damages in consequence of such fact. The instructions elsewhere authorized the giving full compensation for all damages sustained, and we must presume they have so done.

III. The petitioners claim that less drift wood comes to their shores than before the dam was erected and they claim damages in consequence thereof.

By the special act of 1869, c. 232, the throwing of slabs and other refuse lumber in the Penobscot river is prohibited and a penalty for each offense is imposed. By repeated decisions of this court the so doing is declared a nuisance, for which the party offending is civilly liable in damages to the party thereby injured. *Veazie* v. *Dwinell*, 50 Maine, 479. *Washburn* v. *Gilman*, 64 Maine, 163. The petitioners' claim is based upon the violations of the law by others. If the law is observed, no slabs and refuse lumber is thrown into the river. It is only when the law is disobeyed that the petitioners can claim any damage. The benefit claimed is one arising from admitted violations of law by which the petitioners are gainers. But a possible gain from the misdoings of others affords no basis for compensation when it is lost.

Further, the petitioners have no title to the drift wood except when reduced into actual possession—and then it would not be a valid one against the true owner. Others may seize it before it reaches their shore and they cannot complain. The only loss is the possible chance of the petitioners taking what does not belong to them—that to which they have no title—and that through the violations of law by others.

IV. It is objected that the petitioners were denied the right of peremptory challenge.

The objection cannot be sustained. By R. S., c. 82, § 73, the

right to the peremptory challenge of one juryman is given. But this chapter relates entirely to "proceedings in court."

By the act of 1876, c. 264, § 4, as before stated, the damages in case of disagreement are to be ascertained and determined as "in the case of damages by the laying out of highway."

By R. S., c. 18, § 10, relating to ways, and providing how a jury is to be summoned, no right of peremptory challenge is given. But twelve men are to be drawn as jurors "when a full jury is not obtained from those drawn, on account of interest or absence, the officer attending may return talesmen." The section excludes the idea of peremptory challenge, for no authority is found for supplying the vacancy, which would arise in such event.

V. It is objected, that Palmer, a witness called by the defense was permitted to testify that the boom company had contemplated for two years, taking up their boom on the Brewer shore and using only the Bangor shore. They did not do it. What they contemplated and did not carry into effect was undoubtedly immaterial, but it is not easy to perceive how this evidence could have affected the petitioners injuriously.

"Where evidence purely immaterial has been admitted," observes Devens, J., in *Wing* v. *Chesterfield*, 116 Mass. 356, "and it is not shown that such admission can have in any way prejudiced the excepting party, the verdict will not be disturbed." *Burghardt* v. *Van Deusen*, 4 Allen, 374. *Bragg* v. *Boston & Worcester R. R.*, 9 Allen, 54. This is especially so when all the evidence is reported as in this case.

The other exceptions taken to certain questions and answers are of too little importance to require consideration. The petitioners have not been harmed thereby.

No sufficient reason is shown by either party for disturbing the verdict. The amount allowed for drift wood should be deducted, and

Motion and exceptions overruled.
Judgment for the petitioners for the balance with interest after deduction for drift wood $23.85.

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

CHRISTIANA SAWYER *vs.* EDWIN J. THAYER.

Piscataquis. Opinion November 5, 1879.

Executor de son tort.

The declaration against an executor *de son tort* should be in the same form as if he were the rightful executor.

ON REPORT.

This action was originally entered before a trial justice and the writ, alleging and declaring defendant to be an executor in his own wrong, was framed to attach the goods or estate of the said Edwin J. Thayer, the said alleged executor *de son tort*. At the return day the defendant appeared and filed a motion to abate, because the officer's return did not show any attachment of property.

Whereupon the said trial justice allowed the officer to amend his return so as to show an attachment of the property of the said defendant, Edwin J. Thayer, and the officer did so amend his return.

The defendant then seasonably filed a motion to dismiss said action because the writ authorized and directed the attachment of the property of the said defendant which the said trial justice overruled, whereupon the parties pleaded the general issue and went to trial on the merits, and upon appeal by defendant to this court, the same motion to dismiss for same cause was seasonably made by defendant. Then plaintiff filed a motion to amend in these particulars to be used, should the decision of the court make these amendments necessary, to which defendant objected.

Whereupon the parties agree that the case shall be reported upon agreed statement, to the full court for decision. If the writ authorizing the attachment of the executor's property against him, as executor *de son tort*, is proper, the case to stand for trial. If not proper and not authorized by statute, and the amendments are not legally allowable, the action to be dismissed, and the defendant to have his costs.

A. G. Lebroke, for the plaintiff.

J. B. Peaks, for the defendant.

APPLETON, C. J. An executor *de son tort* is one, who without rightful authority assumes the administration and disposition of the personal estate of a deceased person, when there is no rightful executor, or administration has not been granted. If there has been probate of the will, or administration has been granted, any stranger interfering with the estate of the deceased is a trespasser.

The declaration against an alleged executor is the same in form, whether the defendant be the rightful executor, or executor *de son tort*. *Myrick* v. *Anderson*, 68 E. C. L., 719. An executor *de son tort* is to be declared against as if he were the lawful executor, though the party died intestate. *Brown* v. *Leavitt*, 6 Foster, 495. The liability of such an executor is enforced against him as if he were rightful executor. *Shaw* v. *Hallihan*, 46 Vt. 389. The executor *de son tort* may be sued and treated as the rightful executor. *Stockton* v *Wilson*, 3 Penn. 129. Such has been the rule in this state. *Allen* v. *Kimball*, 15 Maine, 116 *White* v. *Mann*, 26 Maine, 361. *Lee* v. *Chase*, 58 Maine, 432.

The plaintiff may amend and declare against the defendant as if he were executor in fact. The declaration should be against him as if he were a lawful executor and not one by wrong.

By the agreement of parties the case is to stand for trial.

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

EBENEZER R. HOLMES *vs.* JOHN. S. FRENCH.

Oxford. Opinion November 7, 1879.

Mortgage. Conditional judgment. Costs.

The purchaser and owner of a mortgage debt is the equitable owner and assignee of the mortgage. He has the right to use the name of the mortgagee in a suit to enforce the mortgage and is not required to resort to the court in equity for that purpose, unless the mortgagee refuses to permit his name to be used.

81 me 287

In such suit the same rules of law are applicable to the assessment of the amount of the conditional judgment that would be applicable if the debt and mortgage were owned by the mortgagee.

It is now the settled law of this state, that in assessing the amount due on the mortgage, the costs in a judgment to enforce payment of the mortgage debt are to be included, as well as the costs in the action on the mortgage.

ON EXCEPTIONS.

WRIT OF ENTRY, brought on a mortgage made by John S. French, to the plaintiff, Ebenezer R. Holmes, dated May 13, 1857.

At the December term of the court, 1878, the plaintiff moved to have the amount of conditional judgment assessed by the court, and as evidence of the amount due, offered a copy of a judgment, obtained in the superior court of Cumberland county, at the November term, 1878, in a suit upon the said mortgage note wherein George F. Holmes was plaintiff, and the said John S. French was defendant, for $1,258.21 debt, and $114.44 costs of suit.

George F. Holmes, for the plaintiff, testified that the note secured by the mortgage, which is the foundation of the suit in this case, was purchased by him from the nominal plaintiff in this case, prior to the bringing of either of the suits upon the note or the mortgage. "At the time of the purchase, I was at his house in Oxford—the papers were delivered to me, but no assignment of the mortgage was made, because there was no justice of the peace, who could be had to take the acknowledgment. A suit was then brought in Oxford county upon the mortgage, another suit was brought in my own name, in Cumberland county in the superior court upon the note.

The only reason that the mortgage was not assigned, was the one already given. It was deemed advisable to bring a suit upon the mortgage, before there was a convenient opportunity to have an assignment, and indeed before I saw the original mortgage again. I not only bought the note and mortgage, but paid for them.

According to my best recollection I bought the note in June or July—probably in July—of the same year in which the suit was brought in August. The suit on the mortgage was brought first.

I owned the note, when the suit was brought on the mortgage. It had been indorsed and delivered."

No other testimony, or evidence was put into the case. The defendant claimed, that if anything was due, on the mortgage debt—that at any rate, the conditional judgment in this action should not include the costs of suit, in the action brought by George F. Holmes, against him in the superior court aforesaid, whereupon the court made the following finding and order:

"I find upon the testimony that this suit is brought and prosecuted, for George F. Holmes, the purchaser and owner of the note and mortgage—and that he has recovered judgment as appears by the copy of the judgment at the superior court in his favor, against the mortgagor, and that the conditional judgment in the case should be rendered, for the amount of the judgment in the superior court, including costs, as well as debt."

To which ruling of the presiding judge the defendant alleged exceptions.

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

J. J. Perry, for the defendant, contended that the judgment recovered by G. F. Holmes in the superior court at Portland should not be included in the conditional judgment in this case.

I. There is no legal assignment of the mortgage, here in suit, to G. F. Holmes; must be by deed and not by parole. *Vose* v. *Handy*, 2 Maine, 322. *Prescott* v. *Ellingwood*, 23 Maine, 345. *Smith* v. *Kelley*, 27 Maine, 237. *Dwinel* v. *Perley*, 32 Maine, 197. *Stanley* v. *Kempton*, 59 Maine, 472. *Warden* v. *Adams*, 15 Mass., 233. *Crane* v. *March*, 4 Pick. 131. *Young* v. *Miller*, 6 Gray, 156. *Adams* v. *Parker*, 12 id. 53.

II. The mortgagee, in an action for possession, must "declare on his own seizin," and the "conditional judgment" is for the sum due the mortgagee—not what may be due a third party. R. S., c. 90, §§ 7, 8.

III. This plaintiff had sold the mortgage note, and received pay for it, before he commenced this suit. He has no interest or property in it. *Vose* v. *Handy, supra*

IV. If the plaintiff had a right to file the judgment obtained by

G. F. Holmes in the superior court, as evidence of the amount due on the mortgage, it did not authorize the presiding judge to admit it as such without proof that said judgment was still due and unsatisfied.

V. The plaintiff being the owner of the mortgage, and G. F. Holmes the owner of the note, or the judgment rendered thereon personally for him in another court, in another county, and it not appearing in this case that the plaintiff had proved any indebtedness subsisting under the mortgage to himself, judgment should have been rendered for defendant. R. S., c. 90, § 9.

Counsel cited, in support of objections to the amount of conditional judgment as awarded. *Johnson* v. *Candage*, 31 Maine, 28. *Moore* v. *Ware*, 38 Maine, 496. *Parsons* v. *Wells*, 17 Mass. 425. *Crane* v. *March*, 4 Pick. 131. R. S., c. 77, § 5; Stats. 1841, c. 125, § 9; 1857, c. 90, § 8.

VI. Does it comport with right, and is it law that a father holding a mortgage to secure a dozen notes can sell to each of his twelve sons one of the notes, who can bring in each of their names a suit on the note they hold, get twelve bills of costs, and then in the name of the father sue the mortgage and cover the same in the conditional judgment?

LIBBEY, J. This is a writ of entry on a mortgage. A motion was made by the plaintiff for the conditional judgment as of mortgage, and it was ordered. On a hearing for the assessment of the amount due on the mortgage the presiding judge ruled as follows:

"I find upon the testimony that this suit is brought and prosecuted for George F. Holmes, the purchaser and owner of the note and mortgage; and that he has recovered judgment as appears by the copy of the judgment, at the superior court, in his favor, against the mortgagor, and that the conditional judgment in the case should be rendered for the amount of the judgment in the superior court, including costs as well as debt." To this ruling exception was taken by the defendant.

We think the ruling correct. The purchaser and owner of the mortgage debt is the equitable owner and assignee of the mortgage. The mortgage is incident and collateral to the debt secured by it, and an assignment of the debt carries with it, in equity, the

mortgage. This rule is too well settled to require the citation of authorities in its support.

When the mortgage is not legally assigned with the debt, the assignee of the debt has a right to use the name of the mortgagee in a suit to enforce the mortgage; and he is no t required to resort to the court in equity for that purpose unless the mortgagee refuses to permit his name to be used.

In such suit the same rules of law are applicable to the assessment of the amount of the conditional judgment that would be applicable if the debt and mortgage were owned by the mortgagee.

It is now the settled law of this state, that, in assessing the amount due on the mortgage as the amount of the conditional judgment, the costs in a suit to enforce payment of the mortgage debt are to be included, as well as the costs in the action on the mortgage. *Hurd* v. *Coleman*, 42 Maine, 182. *Rawson* v. *Hall*, 56 Maine, 142. A refusal by the mortgagor to pay the debt secured by the mortgage, gives the mortgagee the right to maintain an action to enforce it. The costs of the suit become an incident to the debt, and, when judgment is rendered, inseparable from it. To redeem, the mortgagor must pay, or tender the amount of the mortgage debt. After judgment in the action to enforce payment of the debt, to pay or satisfy the debt the cost must be paid. A tender of the amount of the debt without costs would not be a good tender.

It is urged on the part of the defendant that this rule works a great hardship upon the mortgagor. The answer is that it is the legal result of his refusal to pay as he agreed. He has the power of preventing the hardship by paying his debt, without putting the mortgagee to his action to enforce it.

Exceptions overruled.

APPLETON, C. J., WALTON, PETERS and SYMONDS, JJ., concurred.
VIRGIN, J., did not concur.

CHARLES H. WRIGHT *vs.* HOWARD D. TROOP.

Cumberland. Opinion November 7, 1879.

Partnership. Indenture—construction of.

In March, 1876, the plaintiff and defendant having been negotiating business as a partnership for several years, agreed in writing to extend the partnership business another year, the plaintiff to receive $1500 salary, and "the profits of the business after that payment to be divided equally." Subsequently the plaintiff by written indenture assigned to the defendant all interest, claim and demand to the goods belonging to the firm, "all and singular the debts and sums of money owing to the plaintiff severally or jointly with the defendant," "also all and singular bills, bonds, specialties and writings whatsoever for and concerning the debts and the late copartnership;" and in consideration thereof the defendant covenanted to save the plaintiff harmless from all debts and liabilities of the firm; and thereupon the parties stipulated that the partnership be dissolved, and the agreement of March, 1876, be cancelled. *Held*, that the plaintiff could not maintain an action at common law to recover for his services under the agreement of March, 1876, that having been cancelled.

Also *held* that whatever remedy the plaintiff has is upon the covenants in the latter indenture.

ON REPORT, from the superior court in and for the county of Cumberland.

ASSUMPSIT on account annexed for $1125, for services from April 1, 1876, to January 1, 1877, at $1500 per year.

The facts sufficiently appear in the opinion.

C. P. Mattocks, for the plaintiff.

The law will allow a claim for services of a partner where there is a special agreement to that effect. *King* v. *Hamilton*, 16 Ill. 190. *Roach* v. *Perry*, Id. 37.

A promise to pay, upon the performance of an act, by which the party is injured, becomes binding, when the act is performed. *Hilton* v. *Southwick*, 17 Maine, 303.

Although an agreement be made without consideration, yet if it be executed, no objection can be made on that ground. *Robertson* v. *Gardiner*, 11 Pick. 146.

To render the recission of a contract valid, the rescinding party must place the other in *statu quo*. *Perley* v. *Balch*, 23 Pick. 284. *Thayer* v. *Turner*, 8 Met. 550.

A party cannot rescind a contract and at the same time retain the consideration in whole, or in part, which he has received under it. *Tisdale* v. *Buckmore*, *supra*.

An express promise by one partner, out of his share of the income, to pay another partner for his personal services in the business of the concern, may be enforced in assumpsit, although the articles of copartnership are under seal and provide for such payment. *Paine* v. *Thatcher*, 25 Wend. 450.

A stipulated compensation may be recovered at law, though payable out of the profits of the partnership. *Robinson* v. *Green*, 5 Del. 115.

A partner is entitled to charge for his services in the partnership business, if an agreement can be implied from the course of dealing among the partners, or from the nature of the service performed. *Caldwell* v. *Leiber*, 7 N. Y. 483. *Lewis* v. *Moffet*, 11 Ill. 392. *Phillips* v. *Turner*, 2 N. C. Eq. 123.

A partner is entitled to compensation for his attention to the business of the firm, if there is a special contract to that effect. *Bradford* v. *Kimberly*, 3 Johns. Ch. Rep. 431. *Dougherty* v. *Van Nostrand*, 1 Hoffm. (N. Y.) 68. *Drew* v. *Ferson*, 22 Wis. 657.

If a special contract has been fully executed according to its terms, and nothing remains to be done but the payment of the price, plaintiff may sue, either on it, or in *indebitatus assumpsit*, relying upon the common counts, and in either case the contract will determine the rights of the parties. *Dermott* v. *Jones*, 2 Wall. 1. *Parish* v. *United States*, 1 Ct. of Cl. 357.

A recovery may be had for work and labor, when the defendant has accepted the work, although it does not amount to a complete performance of the special contract. *Bailey* v. *Woods*, 17 N. H. 365. *Dubois* v. *D. & C. Co.*, 4 Wend. 285.

W. L. *Putnam*, for the defendant.

LIBBEY, J. In 1870 the plaintiff and defendant, by articles of agreement, formed a copartnership to carry on the business of ship chandlers in the city of St. John, N. B., for the term of five years; the defendant putting into the business as capital four

thousand dollars and the plaintiff two thousand. The plaintiff was to carry on the business, with the advice and counsel of the defendant, and they were to share the profit and loss equally.

On the 21st day of March, 1876, an agreement was drawn to extend and continue the copartnership one year from the first day of April, 1876, on the same terms and conditions contained in the original articles of agreement, with certain exceptions and reservations, among which is the following: "That the said Charles H. Wright shall receive for each year by way of salary the sum of fifteen hundred dollars, and the profits of the business after that payment shall be divided between us, the said Howard D. Troop and Charles H. Wright, share and share alike." This agreement was signed by the plaintiff only. Under the clause above quoted the plaintiff brings and claims to maintain this action for $1125 for his services from April 1, 1876, to January 1, 1877.

Assuming that the evidence is sufficient, as claimed by the plaintiff, to show that the defendant is bound by this agreement of March 21, 1876, we are of opinion that the plaintiff cannot maintain this action at law for his services, without showing a settlement of all the partnership affairs. By the terms of the agreement, the compensation to the plaintiff for his services was a charge against the copartnership. It was to come out of the assets of the firm. In a legal point of view it was the same as if the plaintiff had put into the concern as capital $1500 to be repaid at the end of the year, out of the partnership assets. In such case the plaintiff could not maintain a suit at law for the $1500 against his copartner, because it would be a debt against the firm of which he is a member. His remedy is in equity for a settlement of the partnership affairs. *Holyoke* v. *Mayo*, 50 Maine, 385.

But, passing this point, there appears to be another objection to the maintenance of this action.

On the first day of January, 1877, the plaintiff and defendant entered into an indenture, by which the plaintiff "granted, assigned and set over unto the defendant all his right, title, interest, claim and demand of, in and to the said stock of goods, wares and mer-

chandise belonging to them, the said Charles H. Wright and Howard D. Troop, as copartners aforesaid" and also "all and singular such debts and sums of money as are owing to him, the said Charles H. Wright, severally or jointly, with said Howard D. Troop." "Also all and singular bills, bonds, specialties and writings whatsoever, for, and concerning the said debts and the late copartnership between us."

In consideration of which the defendant covenanted and agreed to save the plaintiff harmless from all debts and liabilities of the copartnership. And the parties therein stipulated and agreed that the partnership be dissolved, and that the original articles of agreement therefor, and the agreement of March 21, 1876, extending the same, "by their mutual consent and agreement have been cancelled."

On the same day the parties executed another indenture by which the defendant covenanted and agreed with the plaintiff to wind up the partnership affairs, and pay the partnership debts within six months, and account to him for one-half of the remaining assets, if any, as therein specified.

If the plaintiff had any right of action for his services under the agreement of March 21, 1876, it was extinguished by his said transfer and assignment to the defendant, and the cancellation of that agreement. *Wiggin* v. *Goodwin*, 63 Maine, 389. *Lesure* v. *Norris*, 11 Cush. 328.

After that his rights in the partnership assets were defined and secured to him by the second indenture of January 1, 1877, and whatever remedy he may have is upon the covenants in that agreement.

Judgment for the defendant.

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

CARROL C. HOMER *vs.* Schooner LADY OF THE OCEAN.
LEWIS ROBBINS *vs.* SAME.
ELBRIDGE G. COLBY, Jr., & others *vs.* SAME.

Hancock. Opinion November 12, 1879.

Launching. Lien. Repairs and construction.

The launching of a vessel is a definite period, and one well understood as applied in shipbuilding; and it is the only period from which the four days can be computed under the first clause of R. S., c. 91, § 7.

When work and materials are furnished for repairs and not for the construction of a vessel, the lien under the first clause of R. S., c. 91, § 7, does not attach.

The test to be applied in distinguishing between a new vessel and one repaired does not depend upon the comparative amount of new and old material used.

Nor is it necessary that the dimensions or burden should remain unchanged to constitute a repaired vessel.

The real test is whether the existence and identity of the vessel remain.

ON REPORT. The law court to determine the law and the facts and render judgment according to the legal rights of the parties.

ASSUMPSIT by the plaintiffs in the three several actions for materials and labor furnished for, and used in, rebuilding schooner "Lady of the Ocean," brought to secure lien.

The only question was whether the vessel was rebuilt so that she was again to be launched; or whether she was simply repaired.

Joseph L. Buck, called by the defendants, testified in substance that the vessel was hauled in, in the first place, at the side of the wharf and dismantled, her rigging taken off, her spars taken down, then blocks laid down on the beach and she floated upon the blocks; that thereupon she was raised somewhat aft; was supported with shoes under the bilge and deck under the transom; the timber was taken out, stick by stick, and replaced with new so far as the old was removed; the outboard skin was mainly left on; some streaks taken off for convenience, but, in the main, her timber plank remained until she was timbered and ceiled, when her outboard plank was taken off. The stem and lower apron was old; her floor timbers mainly old—some new timbers put in —some new naval timbers. The stem was in the same situation

with reference to the keel. The apron remained as it was originally in the same position and has not been taken out. It would be next to impossible to take it out and put it in again or to take the stem off and put it on again. The floor timbers and navals were not taken out. The floor timbers and naval timbers were bolted together as they were in the first place; they remain so today. The tide flows over a wall ahead of her some eight or ten feet from her stern. The wall is perhaps some three feet in height; she lays stern to the water; the tide flows all around the vessel at ordinary tides; perhaps at extremely low tides it would not. In full tides it flows so as to flow over the top of the wall. I have observed the vessel within three weeks when there was water enough around her to float her if she had been tight; it was quite a full tide. There are holes in her for the purpose of allowing the tide to ebb and flow to prevent her floating; without the holes in her it would not be safe to leave her in a full tide; she would go adrift.

H. D. Hadlock, for the plaintiff, cited R. S., c. 91, § 7, contending that building, rebuilding, constructing and reconstructing were synonymous. Ferax, 1 Sprague. Having been changed as to dimensions she must as to lien claims, be treated as a new vessel; for altered form or burden requires new register. 1 Pars. Mar. L. 35, U. S. R. S., §§ 4170, 4147, 4169. *Blanchard* v. *Martha Washington*, 1 Cliff. 468. U. S. R. S., § 4136.

DANFORTH, J. In these actions the several plaintiffs claim a lien upon the vessel attached under R. S., c. 91, § 7. That the lien as claimed once existed is not denied; and the only question involved is whether it continued up to the time of the attachment. If it accrued under the first clause of the statute it is conceded that it did so continue, otherwise it did not. The first clause continues the lien four days after the vessel is launched; the last clause four days after the labor has been completed.

It is quite evident that in contemplation of the statute, when labor or materials are furnished for a vessel in the water, whether for construction or repairs, the lien accrues under the last clause only, otherwise there can be no definite time from which the four days can be reckoned. Under the first clause the lien ceases in

four days after the vessel is launched. But a vessel already in the water cannot be launched, the meaning of which in such cases is, "to cause to move or slide from the land into the water." During all the time the work in this case was going on this vessel was in the water, certainly not upon the land. It was not in a situation where it could be moved from the land into the water. It was at no time upon the "stocks" as a vessel in process of building. True it was blocked up, but in a place where, by a preponderance of evidence at least, it is shown that it was floated by the water and whence, whenever the blocks are removed, it may be floated again. The launching is a definite period, one well understood as applied in shipbuilding, and the only period provided by law from which the four days can be computed under the first clause of the statutes. In this case there is no possibility of any such launching as the statute contemplates.

Another reason why the lien in these cases cannot attach under the first clause of the statute is, that the work and materials must be considered as having been furnished for the purpose of repair and not of construction. The test to be applied, is not the comparative amount of new and old material used. It is undoubtedly true that a new vessel may be built out of material all of which may have been taken from another one, or a vessel may be so repaired that in process of time not a particle of the material of which it was originally built shall remain. Nor is it necessary that the dimensions or burden should remain precisely the same.

The statute of the United States relied upon by the plaintiff, R. S., § 4170, which requires a new register when a vessel has been "altered in form or burden, by being lengthened or built upon," clearly contemplates that such a change does not make a new vessel, else the act would be a work of supererogation. Other acts provide for the registering of new vessels, this provides for old vessels already registered but which have been "altered."

The real test is whether the existence and identity of the vessel remains. In this case the preponderance of the evidence leaves no question of that fact, though as the burden of the proof is upon the plaintiff to bring the case within the provisions of the statute he must fail unless the preponderance is in his favor. The work

was begun and ended upon the "Lady of the Ocean," one and the same vessel from the beginning to the end; during its progress the form and identity of the vessel remained; there was no time when the existence of one vessel ceased and that of another commenced. As the work progressed old and decayed material was taken out and replaced by new, leaving the vessel in existence just the same as if the work had been done at different times for a series of months or years.

More than "four days after the work has been completed" having expired before the attachment was made, the entry must be

Judgment against the vessel denied in each case.

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

INHABITANTS OF ORNEVILLE *vs.* INHABITANTS OF GLENBURN.

Piscataquis. Opinion November 18, 1879.

Pauper settlement. Emancipation.

Where the father, the week after the birth of his son, went to sea, and returning in a few weeks, found his wife had deserted him and her child, leaving the child at his grandfather's where he was born, gave him to his grandfather, telling him he should never claim him again, and he remained with the grandfather who took entire charge of him till his death, the father never afterwards doing anything for his support:

Held, that the child was emancipated.

The settlement of the father at the time of the emancipation of the child determined that of the child.

ON REPORT.

ASSUMPSIT for pauper supplies furnished by plaintiff town to Frank P. Staples in May, 1877. Writ dated January, 1878. Plea, the general issue.

The facts sufficiently appear in the opinion. The court to order a nonsuit, or default as the law and evidence may warrant.

A. M. Robinson & W. P. Young, for the plaintiffs, cited *Veazie* v. *Machias*, 49 Maine, 105. *Sumner* v. *Sebec*, 3 Maine, 223. *Garland* v. *Dover*, 19 Id. 441. *Bangor* v. *Readfield*, 32 Id. 60. *Oldtown* v. *Falmouth*, 40 Id. 106. *Clinton* v. *York*, 26 Id. 167. *Portland* v. *New Gloucester*, 16 Id. 427. *Sanford* v. *Lebanon*, 31 Id. 124. *Munroe* v. *Jackson*, 55 Id. 55. *Tamworth* v. *New Market*, 3 N. H. 472. *Salisbury* v. *Orange*, 5 N. H. 348.

L. Barker, *T. W. Vose*, and *L. A. Barker*, for the defendants.

APPLETON, C. J. This is an action for supplies furnished for the support of Frank P. Staples.

The pauper was born at the house of his grandfather in Garland, the 11th October, 1852.

The father, Samuel V. Staples, testifies that about a week after the birth of his son he went to sea and was absent about six weeks; that on his return his wife had left and that he did not know where she had gone; that the child remained in the grandfather's family; that he gave the boy to his grandfather; that he told him he should never claim him again; that the boy remained in the grandfather's family till his death and that he did nothing for him considering him as belonging to the grandfather, who took the whole care and charge of him.

The father was a wandering, shiftless man, who had no home. The mother never lived with her husband, having been shortly after the birth of the pauper convicted of adultery and sentenced to the state's prison.

The evidence shows an emancipation. The pauper when an infant was given to the grandfather and since that time the father has exercised no control over and had no care of his child. *Portland* v. *New Gloucester*, 16 Maine, 427. *Lowell* v. *Newport*, 66 Maine, 78.

The emancipated child ceases to follow any settlement acquired by the father after such emancipation.

The settlement of the father of the pauper at the time when he became of age is shown to be in the defendant town. The evidence fails to show where the father's settlement was at the date

of the pauper's emancipation. Consequently, the liability of the defendant town is not established.

Plaintiffs nonsuit.

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

INHABITANTS OF CORINNA *vs.* INHABITANTS OF HARTLAND.

Penobscot. Opinion November 18, 1879.

Pauper. Evidence. Pauper supplies.

A town book kept by the overseers of the poor for the purpose of preserving facts relating to the paupers of the town, contained the following memorandum or record in the handwriting of one of the overseers: "March 16, 1846. Received notice from J. C. P., jailer at N., that I. J. W. was in jail for taxes and claimed relief as a pauper." "April 2, 1846, J. C. P. gave notice that the town of H. had promised to settle the bills of I. J. W." In an action involving the settlement of I. J. W.—*Held*, that the memorandum sworn to by the witness who made it at the date, is admissible as to all facts it contains which were within the personal knowledge of the witness, although such facts may have escaped from his recollection when he testified.

Also, *held*, that as to the other facts, they are hearsay, and the memorandum is not admissible.

The fact that a jailer notifies a town that a person is in jail for taxes, and claimed relief as a pauper is not sufficient to interrupt the prisoner's residence under the pauper act, unless the town actually furnished supplies by payment or upon its credit.

ON REPORT.

ASSUMPSIT for pauper supplies furnished to one I. J. Withie.

The facts sufficiently appear in the opinion.

Josiah Crosby, for the plaintiffs.

Wilson & Woodard, for the defendants, upon the point of supplies furnished the pauper while in jail, cited R. S., 1840, c. 32, § 48. *E. Sudbury* v. *Sudbury*, 12 Pick. 1. *Norridgewock* v. *Solon*, 49 Maine, 385.

DANFORTH, J. The only question involved in this case is whether Imlah J. Withie had, at the time the supplies sued for

were furnished, a legal settlement in the town of Hartland, and this depends upon whether he gained such a settlement by a residence in that town from 1842 to 1849. That he so resided there the case clearly shows; but it is contended on the part of the defense that it cannot have the effect claimed, because he was furnished with supplies as a pauper in March, 1846. If such were the fact it is apparent that no settlement was gained; otherwise it was.

Upon this question the burden of proof is upon the defendant. To sustain it evidence is introduced showing that in March, 1846, Withie was committed to the jail in Norridgewock for nonpayment of taxes on a warrant issued by the assessors of Hartland. There is also offered in evidence what is claimed as the record of the overseers of Norridgewock of the following purport: "March 16, 1846. Received notice from John C. Page, jailer at Norridgewock, that Imlah J. Withie was in jail for taxes, and claimed relief as a pauper." "April 2, 1846, John C. Page gave notice that the town of Hartland had promised to settle the bills of Imlah J. Withie."

A question is raised as to the admissibility of this document. For present purposes it is immaterial whether we call it a record or a memorandum. It is produced and sworn to by a witness in whose handwriting it is, and who so far as appears wrote it at the time of the transaction. As such an instrument it is admissible so far as it contains facts within the personal knowledge of the witness, though such facts may, at the time he testified, have escaped from his recollection. *Anderson* v. *Edwards*, 123 Mass. 273. With this qualification the record proves that notice was given to the overseers of Norridgewock that Withie was in jail and claimed relief as a pauper. It does not show that he actually did claim such relief, nor that he actually was in need of such relief. These facts so far as they appear at all, came from Mr. Page and are therefore mere hearsay testimony, and under the objection must be rejected. It does not appear that any action on the part of the overseers of Norridgewock followed this notice, except that notice by one of them was given to the overseers of Hartland. There is no evidence whatever that any investigation

into the condition of Withie was made by the overseers of Norridgewock as was clearly their duty before furnishing aid. Nor is there any other proof in the case which shows the necessity for immediate relief. Hence all foundation for furnishing pauper supplies fails.

But farther, so far as the case shows no supplies were in fact furnished. Undoubtedly Page furnished the alleged pauper his board while in jail and possibly he might have done so relying upon the liability of Norridgewock under the notice given. But the overseers paid nothing, nor did they by any act of a majority as in *Fayette* v. *Livermore*, 62 Maine, 233, make themselves liable to pay anything. Nor does it appear that they were legally liable. If the act of Page was a sufficient "notice and request" under the statute which may perhaps be doubted, still that would not be sufficient to enable him to sustain an action for his board.

Before that could be done, there must be proof of distress and need, of which as we have seen the case is entirely barren. We do not however mean to admit that such liability would be sufficient to break the continuity of the residence. The supplies must be actually furnished though it may not be material whether actually paid for by the town, or furnished upon its authorized credit, otherwise they would not be supplies within the pauper act. *Hampden* v. *Bangor*, 68 Maine, 368.

The case is equally wanting in evidence to show that any supplies were furnished by Hartland. The record produced shows a promise only to pay, but for reasons already given it was not competent proof even of that. It was a fact obtained from Page and is no more than hearsay. But were it otherwise Hartland under the statute stood in the place of creditor to Withie and whatever might be the debtor's condition the town might be made liable to pay his board and it might prefer in the character of creditor to pay the bills accrued and discharge him rather than risk a greater liability. In *Norridgewock* v. *Solon*, 49 Maine, 385, and *E. Sudbury* v. *Sudbury*, 12 Pick. 1, cited in defense, supplies were actually furnished, and are therefore not applicable to this case.

The result is that the continuity of the pauper's residence in

Hartland was not broken and he gained thereby a settlement in that town.

Defendants defaulted.

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

WILLIAM A. N. LONG *vs.* JAMES E. WADE, appellant.

Kennebec. Opinion November 20, 1879.

Mortgagee. Tenant. Rent.

A mortgagee is not entitled to the rent of the mortgaged premises from the tenant of the mortgagor till he takes possession, or requires the tenant to attorn to him. Prior thereto the mortgagor is entitled to the rent.

ON FACTS AGREED.

ASSUMPSIT for rent.

Certain premises situated in Augusta were mortgaged by a prior owner to the Augusta Savings Bank by a valid mortgage duly recorded. The plaintiff became the owner of the equity of redemption. The mortgage was foreclosed by publication, duly recorded, but the equity of redemption had not expired February 17, 1877, when the plaintiff let the premises to the defendant as a tenant at will for rent of $50 per year. On May 1, 1877, the defendant paid the rent sued for in this action (rent due from February 17 to May 1,) to the mortgagees, who as mortgagees, had demanded it. Subsequently the plaintiff commenced this action.

The plaintiff to become nonsuit, or the defendant to be defaulted as the law court shall adjudge from the above agreed statement of facts.

H. M. Heath & B. Wilson, for the plaintiff.

S. & L. Titcomb, for the defendant.

APPLETON, C. J. The plaintiff, being the owner of the equity of redemption of certain mortgaged premises of which a fore-

closure had been commenced by publication, on February 17, 1877, leased the same to the defendant for one year as tenant at will. On the first of the following May the defendant paid the mortgagees the rent from February 17 to that date, the mortgagees having demanded the same. This action is for the rent accruing between those dates.

The plaintiff owning the equity, leased the mortgaged premises to the defendant, who entered into possession and occupied under him. Nothing shows or tends to show that the mortgagees were in possession or did any act claiming the rents and profits till the demand in May, when the rent in controversy was paid.

The plaintiff represents the mortgagor. The mortgagor, so long as he remains in possession, or until entry by the mortgagee, may receive the rents and profits to his own use and is not liable to answer for them to the mortgagee. *Boston Bank* v. *Reed*, 8 Pick. 459. He is not even liable for those accruing between the commencement of action to foreclose and the time of taking possession upon execution. *Mayo* v. *Fletcher*, 14 Pick. 525. The purchaser of the equity stands in the place of the mortgagor, with a right to take the rents and profits to his own use until the mortgagee shall enter or do some equivalent act. *Field* v. *Swan*, 10 Met. 112. Here no entry nor any equivalent is shown earlier than May 1, for it is absurd to suppose that the plaintiff would have given, or the defendant have taken, the lease if the mortgagees had previously entered or were in possession, when the lease was given.

The entire weight of the authorities is in favor of the plaintiff's right to recover. *Noyes* v. *Rich*, 52 Maine, 115. *Wilder* v. *Houghton*, 1 Pick. 87. *Russel* v. *Allen*, 2 Allen, 44.

Judgment for the plaintiff.

WALTON, BARROWS, DANFORTH and SYMONDS, JJ., concurred.
LIBBEY, J., did not sit.

STATE *vs.* LEANDER B. STOYELL.

Franklin. Opinion November 21, 1879.

Evidence. Medical expert. Former declarations.

In the trial of an indictment for an assault with intent to kill, it is within the province of a medical expert, and legally admissible, for him to state what were the dangers naturally and usually attendant upon blows upon the head such as would produce the wounds described at the trial.

To the extent to which it is competent to prove the former declarations of a witness at all, whether under oath or not, he is a competent witness to prove them, unless some legal right of personal privilege is thereby impaired.

ON EXCEPTIONS.

Indictment containing three counts, the first for an assault with intent to murder, the second for an assault with intent to kill, and the third for assault and battery committed on Andrew T. Tuck.

During the trial the county attorney asked Dr. P. Dyer, a regular physician of long practice, a government witness, if such wounds (as were claimed to have been made in this case upon the head with a hatchet,) were dangerous to life; and the witness answered that "we always consider blows upon the head dangerous." The witness was then asked, "From what does the danger arise." The question was seasonably objected to, but the objection was overruled, and the witness allowed to answer.

Said Tuck was called by the state and on cross-examination was asked if he testified to certain things before the trial justice, but, objection being made, it was excluded.

Among other instructions given the jury the court instructed them in this manner: "You have a right to infer from the nature of the act that he (the defendant) intended to take life, if the means used were calculated to effect that object. Are you satisfied that it was a deadly weapon, and was it used in a manner calculated to cause death?"

To which instructions and adjudications, (the verdict being guilty under the second count in the indictment,) the respondent alleged exceptions.

Elias Field, (county attorney) for the state.

H. L. Whitcomb, for the defendant.

SYMONDS, J. The indictment in this case, in three counts, charges first, assault with intent to murder, secondly, assault with intent to kill, thirdly, assault and battery.

The verdict was against the respondent upon the second count, charging assault with intent to kill.

The first exception states that "during the trial the county attorney asked Dr. Dyer, a regular physician of long practice, and a government witness, if such wounds (as were claimed to have been made in this case upon the head with a hatchet) were dangerous to life; and the witness answered, "we always consider blows upon the head dangerous." The witness was then asked, "from what does the danger arise." The question was seasonably objected to, but the objection was overruled and the witness allowed to answer.

From this extract from the exceptions we infer, that the only objection was to the last question proposed to the medical expert, from what does the danger from blows on the head arise. The case does not state the reply of the witness—and it is difficult to see, without knowing the answer, how the respondent was aggrieved by admitting the question; even if we were to assume that there was some irregularity about it, either of form or substance.

But it would be strictly within the province of a medical expert to state to the jury in answer to a question like this what were the dangers naturally and usually attendant upon blows about the head, such as would produce the wounds described at the trial.

In another clause of the exceptions, two sentences from the charge are given, as to the inferences which might properly be drawn by the jury from the use by the respondent of a deadly weapon, at the time of the assault; if they were satisfied that such a weapon was employed, and in a manner calculated to cause death.

But the exceptions further state, that "all of the stenographer's report of the charge upon the subject to which these sentences relate, is a part of these exceptions for the purpose of showing how they were qualified or enlarged."

No such report has been given to this court, and this exception is not before us for consideration.

The exceptions further state that the complainant, Andrew T. Tuck, on whom the assault was committed, "was called by the state, and on cross-examination was asked if he testified to certain things before the trial justice, but objection being made it was excluded."

Here, also, the exceptions fail to show that the respondent has been in any manner aggrieved. What was the testimony excluded, whether it was material or pertinent in any aspect of the case, or what was the ground of the objection or the exclusion, on all these vital points, without which the court cannot determine that the respondent has been aggrieved by any error in law, the case is silent. It may be true that the complainant testified to many things before the trial justice, which were not admissible in evidence, either for or against him, and about which it was not competent to interrogate him again. This court, at all events, cannot assume the contrary.

This exception must be overruled.

The rule referred to in *State* v. *Knight*, 43 Maine, 128, that a witness cannot be called upon to state his testimony given on a former occasion, in a trial where the same evidence is relevant, we have no doubt arose under the conflict of authority which long prevailed upon the question, how far the previous statements of a person, made under oath, can be proved against him when on trial for crime.

This question is very elaborately considered in the case of *State* v. *Gilman*, 51 Maine, 206, and the decision was in favor of the admissibility of the evidence in that case.

So far as it is competent to prove what have been the declarations of a witness on former occasions, whether made under oath or otherwise, we see no reason why it is not competent to prove them by himself, if it can be done without interfering with any right he may have to claim the privilege of not criminating himself. Except to the extent of such a privilege, where it has not been waived, the witness should testify, if called upon, to all facts within his knowledge that are pertinent and legally admissible.

The witness being competent, and the testimony admissible, there can be no exception of certain matters about which the witness is not to be interrogated, unless it arises from a personal privilege claimed. In fact, it is a very general practice in the courts of the country, although not in all instances in this state, to require the attention of the witness to be called to the time and place of an alleged declaration inconsistent with his present testimony, in order to lay the foundation for offering impeaching evidence.

Although there is nothing in this case to require it, it may contribute to uniformity of practice in this respect in the future, for the court to establish the rule, that, to the extent to which it is competent to prove the former declarations of a witness at all, whether under oath or not, he is a competent witness to prove them, unless some legal right of personal privilege is thereby impaired.

Exceptions overruled.
Judgment for the state.

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

Ex parte Nason :—*In re* Thompson & another.

York. Opinion March 1, 1880.*

Insolvency. Private and partnership indebtedness. Proof of claim.

The holder of a joint and several note given by partners in their partnership name, they being in insolvency as partners and individuals, is entitled to prove his note against the joint estate of the firm and also against the several estates of the individual members of the firm, and to receive dividends from all the estates.

The holder is entitled to receive dividends upon the whole claim, provided he does not receive in all more than his full due, unless he has received a dividend on one estate before making proof against another. Where a dividend has been paid, and generally when declared, on one estate before proof is made against another, the amount thereof should be deducted, and a dividend from the balance only allowed from the other.

*This and the following case are published early, and without regard to chronological order, on account of importance of the opinions. Rep.

When the members of a firm, having no firm name and no joint estate other than that of the firm, give a joint note in their individual names for money borrowed for and used in their partnership business, such note is provable in insolvency against their partnership estate.

ON EXCEPTIONS.

Joseph Titcomb & W. L. Thompson had for many years been engaged together in ship building in Kennebunk, and were reputed to be wealthy.

In consequence of losses and a continued depreciation of their property and the ship building business, they determined that it was their duty, and that the interests of their joint and separate creditors required a suspension of their business and an application of their property to the payment of their liabilities before any further depreciation took place. Under advice of counsel, to accomplish this purpose they made the voluntary assignment appearing in the records, under the provisions of the insolvent law, c. 74, 1878.

The records show that said Titcomb and Thompson were duly adjudicated bankrupts, individually and as copartners. The schedules filed by them show they were copartners and show copartnership liabilities, and assets; they also had individual assets to a still larger amount.

Charles W. Lewis and another, appellants in this proceeding from decree of judge of insolvency, were creditors of said Titcomb and Thompson, and duly proved their claim against them as partners.

Joseph T. Nason, respondent, is also a creditor of said insolvent debtors; his said claim comprised two notes of hand of the following tenor, to wit:

"$6600. KENNEBUNK, Apr. 11, 1874.

For value received we jointly and severally promise to pay Joseph T. Nason or order sixty-six hundred dollars on demand with interest at seven per cent per annum payable semi-annually.

JOS. TITCOMB.

W. L. THOMPSON."

"$2750. KENNEBUNK, May 28, 1878.

For value received we jointly and severally promise to pay Joseph T. Nason or order twenty-seven hundred and fifty dollars on demand with interest at seven per cent payable semi-annually.

JOS. TITCOMB.

W. L. THOMPSON."

Nason duly proved his claims against the separate estates and also against the partnership estate and the same were duly allowed by the judge of insolvency; at a subsequent period these appellants put in their objections, and the same were overruled and the proofs ordered to stand as made. From this the appellants appealed to the supreme judicial court at *nisi prius*, where the decree of the court of insolvency was affirmed, and appellants alleged exceptions.

The objections filed by the appellants were that the proofs of said claim were filed and allowed against the said Titcomb and said Thompson as alleged copartners and against their alleged copartnership estate, and also against said Titcomb and said Thompson severally and individually and against their several and individual estates.

That said claim is in fact and in legal effect a debt, that should be proved, if at all, either against said Titcomb and said Thompson as copartners and against their copartnership alone, or against said Titcomb and said Thompson, severally and individually and against their several and individual estates alone.

That one of said proofs of claim, to wit, the one against said Titcomb and said Thompson as copartners, or the one against them severally and individually should be disallowed and expunged.

Other facts appear in the opinion.

J. M. Goodwin, for the appellants, contended, *inter alia;* I. that such a claim is not a partnership debt to be proved against the partnership estate, and cited, *In re* Tesson, 9 B. R., 378. Bump. Bank., 234, 763. *In re* Bucyrus, Mac. Co. 5 B. R. 303. *In re* Webb, 2 B. R. 614.

II. If these notes can be regarded as a firm debt, and liable to be proved against the copartnership assets as well as the individ-

ual assets, it is so only in the alternative; the holder having the right to elect his remedy against firm or individual estate.

Hilliard on Bank. (2 ed.) 722, and cases cited. Byles Bills and Notes, 6, note 2. Story Part. §§ 385, 388, 384. *Ex parte* Rowlandson, 3 Peere Will. 405, 406.

R. P. Tapley, for the respondent.

PETERS, J. A question in the case is this: If a person holds a joint and several note given by partners in their partnership name, they being in insolvency as partners and also as individuals, is such person entitled to prove his note against the joint estate of the firm and also against the several estates of the individual members of the firm, and to receive dividends therefrom? We are of the opinion that he may do so.

The authorities of the present day are strongly in favor of such a rule in the settlement of bankrupt or insolvent estates. The English courts, after some hesitation, at an early day decided against the doctrine. The earliest and the leading case in our own country upon the question was a judgment pronounced by Judge Sprague in the United States district court, Massachusetts District, in 1843. *In re* Peter Farnum, 6 (Boston) Law Reporter, 21. This important case was never published in any regular book of reports, probably because the bankrupt law of 1841, under which the question arose, had been repealed before the decision was announced, thereby rendering the case as a precedent of less practical consequence. Judge Sprague vigorously opposes what was then the view of the English courts upon this question. Judge Story, in his work on partnership (§ 384, *et seq.*) published in 1841, admits that the English doctrine was too firmly established to be shaken, though he declares against it as, in his opinion, not having solid ground of equity or general reasoning to stand upon. The question has excited considerable attention in the courts of this country in cases arising under the late bankrupt law, and the decisions have been quite uniformly in accordance with the rule laid down by Judge Sprague in the case referred to. In 1861 the English rule became partly, and in 1869 wholly, changed by statutory enactments. The rule of practice in their

courts, in this respect, is now the same as it is generally in the courts of this country. It will be noticed, both in the American and English cases hereafter cited, that no distinction is made, in the application of the principle of double proofs and dividends, between that class of cases where the note is signed by a partnership as a joint and several note, and the cases where the note is signed by a firm payable to one member of the firm as payee and by him indorsed to the holder. The following cases are pertinent to the propositions before stated. *Harvey Weston*, Appellant, 12 Met. 1. *Borden* v. *Cuyler*, 10 Cush. 476. *Ex parte* Farnsworth, 1 Low. 497. *In re* F. F. Holbrook, 2 Low. 259. *Mead* v. *National Bank*, 6 Blatch. 180. *In re* Cram, 1 B. R. 132. *In re* Bigelow, 2 B. R. 374. *In re* Tesson, 9 B. R. 378. *Emery* v. *Canal Bank*, 7 B. R. 217. *In re* Dow, 14 B. R. 307. *Simpson* v *Henning*, L. R. 10 Q.B. 406. *Ex parte* Honey, L. R, 7 c. 178. *Ex parte* Stone, L. R. 8, c. 914. *In re* Plummer, 1 Phillips, 56.

We have no hesitation in adopting the doctrine of the federal courts upon this question, and if the question was untouched by authority we do not see how a contrary conclusion could logically be reached. A joint and several note contains in one instrument two contracts separate and distinct from each other. The makers promise as a firm and also as individuals. In a legal sense, the parties to the two contracts are not the same but different parties. The parties meant something by this form of double contract. The holder intended to have a security upon more than one estate. The presumption is, that the creditor would not have paid the consideration he did, had it not been upon the expectation of a double security. Why should not a creditor have, as Lord Eldon (*Ex parte* Bevan, 10 Vesey, Jr. 107) thought he ought in justice to have, "the benefit of the caution he has used." He might have taken separate notes for the same debt. Why not allow the same thing to be simply and directly done? As said in *In re* Honey, *supra*, "if people are allowed by law to take a joint and several security, it seems unreasonable that those who have given such a security should not be bound by it, according to its terms." One of the judges, in that case, remarked: "The effect of our revers-

ing the registrar's decision would simply be to necessitate the use of a little more paper and a little more ink for the purpose of doing the same thing." The prime obstacle in the way of this rule in the early bankruptcy practice in England, was an idea of their courts that the remedy at law on a joint and several contract must be by suing either jointly or severally, and not suing both ways. This technical difficulty does not exist in this state, where the double remedy is permitted in suits at law. *Turner* v. *Whitmore*, 63 Maine, 526. Our insolvent act provides, as did the late bankrupt law, for administering the joint and several estates of a firm separately. The firm as a firm and the partners as individuals may not be in insolvency at the same time. *Corey* v. *Perry*, 67 Maine, 140. Our conclusion is that in this case the dividends from the three estates must be allowed upon the whole claim, provided the holder does not receive in all more than his full due.

Where a dividend has been paid, and generally when declared, on one estate before proof is made against another, the amount thereof should be deducted, and a dividend on the balance only allowed from the other. Here the different proofs have the same effect as if they had been made simultaneously. *In re* Peter Farnum, *ubi supra*. *Sohier* v. *Loring*, 6 Cush. 537, and citations. *Ex parte* Wildman, 1 Atk. 109. *Ex parte* Taylor, 1 De Gex and J, 302. *Ex parte* Talcott, 2 Low. Dec. 320. *Ex parte* Harris, Id. 568.

Another question is raised upon the part of the objectors. Is the estate of the firm holden upon this note, the members of the firm signing their individual names thereto, and not affixing any name as copartners? The note was given for money borrowed for and used in the partnership business. The partners had never adopted a firm name. This was one of their modes of signing as partners. And there was no joint estate outside of the estate of the firm. This mode of signing binds the partnership as effectually as any other could. There are many cases, under different phases of fact, that sustain this position. *Agawam Bank* v. *Morris*, 4 Cush. 99. *Trowbridge* v. *Cushman*, 24 Pick. 310. *In re* Thomas, 17 B. R. 54. *Richardson* v. *Higgins*, 23 N. H. 106. *Tucker* v. *Peaslee*, 36 N. H. 167. *Maynard* v. *Fellows*, 43 N.

H. 255. *Kendrick* v. *Tarbell*, 26 Vt. 512. *Turner* v. *Jaycox*, 40 N. Y. 470. *Norton* v. *Seymour*, 3 Man. G. & S. 792. *Brackett* v. *Stokes*, 58 Tenn. 442. *Tilley* v. *Phelps*, 18 Conn 295. *In re* Warren, Davies R. 324. *Forsythe* v. *Woods*, 11 Wall. 486. *Hoare* v. *Oriental Bank*, L. R 2 c. 589. *Waite* v. *Foster*, 33 Maine, 424. *Paine* v. *Dwinel*, 53 Maine, 52. Pars. Con. vol. 1, *214. *Berkshire Woolen Co.* v. *Julliard*, 75 N. Y., 535. When partners make covenants under seal, the true mode of signing is individually.

Exceptions overruled.

APPLETON, C. J., WALTON, BARROWS, DANFORTH, LIBBEY and SYMONDS, JJ., concurred.

Ex parte First National Bank of Portland:—*In re* Thompson & another.

York. Opinion March 1, 1880.

Insolvency. Individual and partnership debts. Proofs of claims.

Two persons, partners, not having adopted any firm name, made notes in their individual names, one as maker and the other as payee and indorser, and got the notes discounted at a bank, for the purpose of using the money obtained thereon, and using it, in their partnership business. They are in insolvency and have estates both as partners and as individuals. It was not known to the bank, when the notes were discounted, that they were partnership paper or given for partnership purposes. *Held:* That the bank had an election to prove its claim either against the partnership estate, or against the estates of the individual members of the firm; but was not entitled to prove them against both the joint and the several estates.

The bank having filed the claims against all the estates before the rule affecting its interests had been established by statute or judicial decision, a reasonable time is allowed to reconstruct the proofs in accordance with the principles of the decision given.

ON EXCEPTIONS.

On October 28 and November 6, 1878, the partnership of Joseph Titcomb and Wm. L. Thompson, as well as they individually, were duly adjudged insolvent by the court of insolvency, in and for the county of York, on due proceedings had.

On December 28, 1878, the First National Bank, appellants in this proceeding, filed in said court proof of a debt against the partnership amounting to $5,827.93, comprising $5,476.16 (making the proper rebate of interest) "for money loaned on the two promissory notes and in form signed by said Thompson as maker, payable to said Titcomb and indorsed by him, but really made, discounted, and proceeds used in the course of their partnership business and for partnership purposes." Also $351.67 for money loaned to Joseph Titcomb and Wm. L. Thompson as joint indorsers of a promissory note signed by David Clark, payable to said Joseph Titcomb and Wm. L. Thompson and by them indorsed, which note has been protested for non-payment.

The deposition of the appellant's cashier, filed as proof of the debt, averred that the appellants had no "security whatsoever, except the right to prove said notes against the separate estates of said Thompson and said Titcomb, which said bank does not waive, but expressly reserves to itself."

On the same day the appellants also filed proof of a debt against Joseph Titcomb individually for the said sum of $5,476.16 as indorser of the two notes first above mentioned, the deposition of the cashier averring that the bank had no security whatsoever, except the right to prove said notes against said Thompson's individual estate, and also the right to prove said notes against the joint estate of said Thompson and Titcomb as partners, which said rights and proofs already made, are not waived but expressly claimed.

Like proofs were made and reservation claimed against the individual estate of W. L. Thompson.

On the same 28th December, Cyrus K. Brock, a creditor of W. L. Thompson, filed objections to the allowance of the appellant's claim against the separate estate of Thompson, in substance, as follows:

1. Because Thompson is not liable upon said notes as maker, as upon his distinct and separate contract, and neither is Titcomb, as his distinct and separate contract as indorser;

2. Because the consideration of the notes passed to Thompson and Titcomb jointly as partners and for partnership uses, and

were given and accepted as partnership notes and not as the separate notes of Thompson as maker and of Titcomb as indorser individually;

3. Because said notes have been proved and allowed against the partnership estate of Thompson and Titcomb, and are in fact and in law partnership notes and not provable against their respective separate estates; and

4. Because said bank is not a creditor of Thompson individually so as to be entitled to any distribution from his separate estate.

Joseph Dane, assignee of the insolvents, also on the same day filed objections to the allowance of said first two notes against the separate estate of Titcomb, the same in substance as the first three above named, adding a fourth in substance that, if in law said notes constitute a debt, either against the partners and the partnership estate, or against them individually, yet they are not provable against their joint and separate estates; but that the appellants are bound to elect against which they will prove them; and that they are entitled to dividends only from the partnership or separate estates, against whichever they may so elect to prove their claim.

The judge of the court of insolvency allowed the proofs against the partnership estate, but disallowed them against the separate estates of Titcomb and of Thompson, whereupon the bank appealed and duly entered their appeals at the January term, 1879, of the supreme judicial court, holden at Saco, when the 18th of February, 1879, was duly assigned for the hearing, which was then commenced and adjourned to March 20, 1879, when it was concluded. The cases were then continued for advisement, until the 31st March, 1879, when the presiding justice directed that the judgment and decree of judge of the court of insolvency be reversed and that the proofs of the appellants on the two notes made by said Thompson and indorsed by said Titcomb be allowed against the individual, but not against the joint estate of Titcomb and Thompson—putting the ruling upon the ground that commercial paper is different from other written contracts, and that nothing *dehors* the notes is admissible to change their terms or the liabil-

ities of the parties to them—that the notes themselves disclose no partnership or partners in the transactions.

The appellants alleged exceptions, and the parties agreed that the law court may pass such final orders and decrees concerning the proof of said debts as the law of the case requires, and may consider the facts found, if in their opinion evidence of such facts is admissible.

M. M. Butler & C. F. Libby, for the appellants, contended that the appellants are entitled to prove against both the partnership and individual estates, and cited *Emery* v. *Canal Bank*, 7 Bank Reg. 217. *Ex parte* Farnham, 6 Law R. 21. *Mead* v. *Nat. Bank*, 2 Bank Reg. 173. *In re* Bigelow, 2B. R. 371. *In re* Bradley, 2 Biss. 515. *Stephenson* v. *Jackson*, 9 B. R. 255. *In re* Thomas, 17 B. R. 54. *In re* Holbrook, 2 Lowell, 262. *Ex parte* Young, 2 Rose, 40. *Trowbridge* v. *Cushman*, 24 Pick. 310. *In re* Warren, 2 Ware, 322-6-7. *In re* Thomas, 17 N. B. R. 54. *Richards* v. *Higgins*, 23 N. H. 106. *Kendrick* v. *Tarbill*, 26 Vt. 512. 1 Story Eq. Jur. § 175 and cases cited. *Ex parte* Norfolk, 19 Ves. 458. *Robinson* v. *Wilkinson*, 3 Price, 538. *Millidge* v. *B. I. Co.*, 5 Cush. 158, 170. *Emerson* v. *Prov. H. M. Co.* 12 Mass. 237, 245. *Reimsdyk* v. *Kane*, 1 Gallison, 630. *Ex parte* Adamson, 8 Law R. Ch. Div. 807. 2 Lind. Part. 1248. Robson Bank. 617. *Ex parte* Bentley, 2 Cox, 218. *Ex parte* Bond, 1 Atk. 98.

S. C. Strout & H. W. Gage, for C. K. Brock, objecting creditor, contended that notwithstanding the form of the notes, they are to be treated in insolvency as partnership notes, and so must be proved by the appellants against the firm, and cannot be proved against the individual estates. *Wild* v. *Dean*, 3 Allen, 579. *Babb* v. *Mudge*, 14 Gray, 534.

The weight of authority here, as in England sustains our position, that commercial paper, no matter what its form, if really made, and proceeds used for firm purposes, is treated, in insolvency, as partnership paper. *In re* Warren, 2 Ware, 322. *Kendrick* v. *Tarbell*, 27 Vt. 512. *Norton* v. *Seymour*, 3 M. G. & Scott, 792. 23 N. H. 206.

"The bankrupt court acts upon equitable principles," Judge Lowell says, *In re* Holbrook, 2 Lowell, 262. In *Mead* v. *U. Bank*, 2 B. R. 177, Judge Hall calls this doctrine a reasonable one, that the form of the security does not determine its character as a firm or individual debt, and cited with approval, *ex parte* Brown, 1 Atk. 225, and *ex parte* Emity, 1 Rose, 61, in which one partner gave his own bond for money borrowed for the firm and it was held a firm debt. *In re* Thomas, 17 B. R. 55. *In re* Gesson, 9 B. R. 378.

To constitute a firm note at law, it must be signed by the firm name. The firm in law, is an entity as distinct from its members, as a corporation from its stockholders, and a note signed by every member of a firm in his individual name, would be an individual and not a firm liability, at law, but such paper, in bankruptcy, is uniformly treated as firm paper, if it is proved to have been made and used in and for firm purposes. And yet such paper, if payable to order, is as much commercial paper, as the notes in controversy here. *Ex parte* Weston, 12 Met. 1.

In the case at bar, the notes are executed in one form—there is no firm contract and individual contract on their face. They are either individual or firm liabilities—not both, and therefore fall within the equitable principle, that being proved to have been made and used in that form for partnership purposes, they are to be treated, in marshalling the assets in insolvency, as firm liabilities, to be paid from the firm assets and not individual. *Agawam Bank* v *Morris*, 4 Cush. 99.

We do not overlook the fact found by the court, that at the time the notes were discounted, the bank had no knowledge that they were for firm purposes. Undoubtedly if the bank took the paper as individual paper, according to its form, they would have the right to say that they would rely upon the liability apparent upon the paper, and hold the parties as maker and endorser individually, but when they learned the fact, which they state in their proofs against the firm, that the note, notwithstanding its form, was made and discounted for the firm, and proceeds used for firm purposes, they had the right to elect whether to stand upon the form of the paper or rely upon the firm liability. But they were

bound to elect when they proved, they then having knowledge of all the facts, and by proving against the firm, they did elect to hold the firm, upon the equitable doctrine administered by the courts and enacted in our statutes (§ 54), and thereby waived their right to stand upon the form of the paper. They cannot set up the form of the notes for one purpose and ignore it for another. They have had their proof against the firm allowed upon the ground that these notes are not what they appear, but are really to be treated as firm notes, and they still retain and have the benefit of it. It is therefore too late for them to fall back upon the form of the paper, and their ignorance of the facts, at the time the notes were discounted. The reservation of this right in the proofs is of no avail. Their two claims are inconsistent—they cannot both stand—and after weighing the probabilities they have elected to hold the firm, and by so doing have lost the claim against the individuals. Hilliard on Bankruptcy, § 4, 527. Watson, 19 Vesey, 459. *In re* Herrick, 13 B. R. 312.

The creditor is bound to make his election when he knows he has the right of choosing his debtor. Per Lord Tenterden, in *Thomson* v. *Davenport*, 9 B. & C. 87. *Patterson* v. *Gandasequi*, 15 East. 62. *Raymond* v. *Cramer & Eagle Mills*, 2 Met. 327.

We think, therefore, that the bank must stand to its proof against the firm, and cannot prove against the individual estates. It follows, of course, if we are right in our position, that a note in form individual, is to be treated, in insolvency, as a firm note, if it was made for firm purposes; that evidence is admissible to show such a state of facts as would bring the paper within this principle. *Trowbridge* v. *Cushman*, 24 Pick. 313.

Joseph Dane, assignee, *pro se*, contended that the appellants must prove against the joint, or several, estates; and in a very elaborate, learned and interesting brief said, *inter alia ;*

1. In the matter of proof of claim, in the course of insolvency proceedings in this state, the creditor's only right is to make his proof upon contracts against partnership or separate estates, or against all of said estates, just as such creditor's claim shall be found to be in its nature partnership or individual, or partnership and individual. Determine the nature of the contract in respect

to its being partnership or individual, distinctively so, or as hav ing both of these as distinct contracts and the question is solved as against the estate or estates where provable.

And further, such a creditor cannot prove double upon one distinct contract in order to elect against which estate he will draw dividend—but only against the distinct estate against which he has his distinct contract; and cited Insolvent act 1874, c. 74, §§ 13, 54. Stat. Mass. 1838, § 21. U. S. B. law, 1841, § 14, 1867, § 36. *Conant* v. *Perkins*, 107 Mass. 81. Stat. 1874, §§ 53, 22, 35. *Ex parte* Whitside, 1 Rose, 319 (year 1813). *Ex parte* Graham, 1 Rose, 458 (year 1813). *Turner* v. *Whitmore*, 63 Maine, 526.

It will be seen on reference to the cases, that changes in proof have been allowed from one estate to another for special equitable reasons. Generally because the first was made under mistake and in ignorance of the right to prove against the other estate. *In re* Adamson cited by counsel the first proof was made in utter ignorance of any right to prove against the other estate and consequently the court held that he was not concluded for there could be no election about a matter of which there was no knowledge, (a ground on which the bank here cannot rest as we shall hereafter show it had full knowledge.) The cases in England upon the subject of proof are conflicting and contradictory. The whole matter was for a very long period governed by equitable considerations, it being said that the court had "a legal and equitable jurisdiction." If we look at the proceedings carefully we find it was as much a matter of practice as anything. The first statute was passed, 34 and 35 Hen. 8, year 1543, entitled an "Act against such persons as do make bankrupt." Under this the "Lord Chancellor," (and others enumerated) "shall have power and authority" . . . "to take by their wisdoms and discretion such order and direction" in brief as seemed proper "over the bodies and property of the persons described, for the true satisfaction and payment of the said creditors." There were no commissioners under this statute. These were provided for, Stat. 13, Eliz. chap. 7, year 1571, and were appointed by the Lord Chancellor. By the Stat. June 24, 1732, 5 Geo. 2 chap. 30, provision was made for assignees, proof of

debts, commissions to order dividends, and the Lord Chancellor was authorized to have proceedings of record. This act was for three years but finally made perpetual. See acts in full in "Cooke on Bankruptcy." It was the practice in cases of partnership to issue commissions generally, joint commissions and several commissions, and sometimes proof was all made under one. The irregularity was such that *in re* Simpson, 1 Atkyns, 138, the Lord Chancellor said "it should seem for the future that where there is a joint commission depending, separate creditors ought not to take out a separate commission but apply for an order to be let in and prove their debts under the joint commission." As late as 1815, *Roffrey, ex parte*, 19 Ves. 469, the Lord Chancellor says: "In bankruptcy the Lord Chancellor exercises more by habit and practice than authority." * * * "Upon the statutes and the decisions in bankruptcy it is obvious that no authority is given by the statute for a great part of the jurisdiction now exercised, and unless Lord Hardwicke was right in supposing (according to a note which I have,) that the legislature giving the jurisdiction to the Lord Chancellor intended him to exercise both a legal and an equitable jurisdiction, there is no authority for a vast deal that is done. It is impossible to support what we do upon joint and separate commissions, even to the harsh proceeding of commitment, except upon the principle, which I was happy to find in that note of Lord Hardwicke's, as it has explained much that perplexed me."

It would not seem that the few exceptional cases in England in which double proof has been allowed to stand in order that the creditor could ascertain the greater store from which to draw a supply, should constitute any precedent by which claims are to be proved here in Maine under statute authority, when such ruling in England was "more by habit and practice than authority."

2. Parol evidence is admissible in bankruptcy and insolvency proceedings *dehors* the notes, in order to show that although in form apparently individual, yet that in fact they are really partnership notes and therefore provable as such.

It must not be forgotten in the discussion of this proposition that the notes in this case are to be examined as notes held

between the immediate parties and not as notes between third parties. *Ex parte* Hunter, 1 Atkyn's Chancery Rep. 223. *Ex parte* Stone, 8 Law Rep. Ch. Appeals, 914. *Hoare et als.* v. *Oriental Bank*, 2 Law Rep. Appeal Cases, 589. *The Berkshire Woolen Co.* v. *Julliard*, receivers. Copy of opinion court of appeals, N. Y. The case not yet published. *Ex parte* Law, 3 Deacon Rep. Cases in Bankruptcy 541, year 1839. *Linden* v. *Bradwell*, 5 C. B. 583, year 1848. *Edmunds* v. *Bushell & Jones*, 1 Law Rep. 2 Q. B. 97, year 1865. *Simpson* v. *Henning*, 10 Law Rep., Q. B. 406, year 1875. *In re* Warren, Davies Rep. 324. *Richardson* v. *Higgins*, 23 N. H. 106. *Kendrick* v. *Tarbell*, 27 Vt. 502. *In re* Thompson & Sivyer, 17 N. B. R. 54. *Tilley* v. *Phelps*, 18 Conn. 295. *Weston*, appellant, 12 Met. 2. *Forsythe* v. *Woods*, 5 N. B. R. 80.

3. If the facts found in the case are admissible, the bank occupied a position (according to the authorities already considered,) where it might stand either upon its notes as several contracts, or elect to stand upon them as joint contracts.

It is manifest that if they relied upon the notes as contracts, they could not prove them both as joint and several. Upon this we do not propose to add more to what has been already stated, than to apply the language of Wallace, J., *in re* Herrick, 13 N. B. R. Rep. (p. 314,) where he says: "The attempt of the creditor here is one to obtain satisfaction from the joint estate and from the individual estates of a demand, which was originally either several or joint, but was never both several and joint. The position is not sanctioned by precedent or analogy or principle; it would be repugnant to common honesty to sustain it."

4. The bank exercised its right to elect upon its contract, and right of proof when it proved against the partnership estate, and therefore has no right of proof against the separate estates.

5. The counsel for the appellants claim a right to prove against the estates upon the ground of fraud on the part of the insolvents, because of an alleged concealment of the partnership character of the paper, at the time of its discount.

We think there is no foundation for this proposition to rest upon in law or in fact, and the bank is not in position to raise this

question. It has made its proof founded upon the notes as valid contracts.

6. If the "facts found" are not admissible, then the proofs against the separate estates should stand; on the other hand if such "facts" are admissible, such proofs should be disallowed, and the proof against the partnership estate should stand as allowed.

PETERS, J. The insolvent debtors, Thompson and Titcomb, were partners, having no regular partnership name. All the promissory notes given by them in their partnership business were signed either by one partner as maker and by the other as payee and indorser, or by both partners as joint makers in their individual names. The note in the present case was given in the first named form, probably to give the appearance of there being two parties to the note instead of one. The officers of the bank who discounted the note were ignorant of the fact that a partnership existed between the parties. With the partners themselves, the transaction was the same as if the money had been borrowed upon their note in strictly partnership form. The money was borrowed for and applied to partnership purposes. But for failure, the partners would have paid the note from the money of the firm. One partner could have no advantage over the other, although one was indorser only. As between themselves, both were makers and both indorsers. Presumably, they intended to give a partnership note. They have themselves treated it as a partnership liability under all circumstances. In executing the written evidence of a partnership promise, they made an instrument which, for that purpose, may be regarded as informal and literally incorrect.

Is the bank entitled, in insolvency, to prove its note, or, what is in substance the same thing, to prove its claim for the money given as a consideration for the note, against the partnership estate of Thompson and Titcomb? We think it is. The borrowed funds are a part of the partnership estate. It is just and equitable that the same estate, proportionally to its sufficiency, should restore such funds to the lender.

The doctrine applicable to this question, and based upon considerable authority, is stated by Prof. Parsons in his work on Part-

nership, p. *498. Treating of estates in bankruptcy, he says: "It not unfrequently happens that persons who actually are in partnership, and in one firm, appear to the world as distinct traders, or as distinct firms, for the convenience and advantage of using the names separately upon negotiable paper. Thus, if there are three partners, who call themselves so, they could use only the name of A., B. & Co. But, if not known as partners, A. may draw on B. in favor of C., and B. may accept and C. may indorse, and the paper have apparently three distinct liabilities. The question may then arise, may the holder proceed against the several estates of all these persons, or only against the joint fund of these firms? The authorities on this point are conflicting; nor do they cover the whole ground. We would state the result, however, thus: If the holder took the paper on the credit of the several names, and in ignorance of their joint interest, he certainly may prove against all the parties severally. But he may elect to proceed against the firm, or the joint fund, because what he held was in fact partnership paper." See Story's Part. § 388; note and cases.

It is said that an objection to this doctrine is the rule of law that oral evidence is not admissible, in cases of commercial paper, to prove any person a party to a bill or note who does not appear to be such upon the face of the paper itself. But equity looks more to the fact than to form. And the rule of distribution incorporated into our insolvent law is one imported from the principles and practice of courts of equity. *In re* Warren, Davies, 327. *Ex parte* Foster, 2 Story, 131. *In re* Holbrook, 2 Lowell, 262. The cases in which the strict legal view has been upheld will be found to be mostly actions at law, where the effort has been by the holder of a bill or note to fix the liability upon some defendant whose name was in no manner written or indicated on the instrument itself, or where the facts differ in some other essential respects from the facts of the present case. Here the names of both partners are upon the note. Both are holden thereon.

It would not be pressing the facts too far, to bring the partnership estate within the limit of liability, upon the ground that this note was executed as and for partnership paper under a style

adopted as a partnership signature. It is well settled that a partnership may adopt the name of a single partner as a firm name. It may have most any kind of a name, and more names than one. The name may be expressly agreed upon, or it may come about in the course of dealing and by a usage of the firm. Pars. Part. *213. Story's Part. § 142, and cases. In the case of *Ex parte* Nason,—*In re* Thompson et al., *ante*, we have found that the law would authorize evidence to show that a note jointly signed by these parties (Thompson and Titcomb) in their individual names was a partnership note, and the cases cited in that case will shed light upon the present case. That was one mode of partnership signing. This is another mode. They were accustomed to sign in the one or the other manner for all partnership liabilities.

The bank, it is to be presumed, would have taken a note in a better commercial form had its officers known the fact of partnership, and had they preferred the paper of the firm. Not having an opportunity to make the election then, through misunderstanding, they should not be debarred from the right afterwards. *In re* Warren, cited *supra*. *Paine* v. *Dwinel*, 53 Maine, 52. *Palmer* v. *Elliott*, 1 Cliff. 63. Nor, taking the paper upon the faith of the several promises of the parties, should the bank be compelled to prove against the joint estate. It may pursue the contracts appearing upon the note. But it should not prove in both ways. There is nothing to indicate to our minds that joint and several promises were either made or understood to be made.

We think the bank should have elected which remedy to pursue when the proof was tendered, had the views of the court upon the question of law involved in the matter been known at that time. Under the circumstances, a future day may be assigned for an election of proofs, the record to be amended and rectified accordingly. It will be noticed that the parties, by agreement, submit to us the right of making any final orders and decrees that may be proper in the premises.

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

HELEN E. HOBBS *vs.* GEORGE H. HOBBS.

Kennebec. Opinion December 6, 1879.

Husband and wife. Coverture. Suit. Bar.

An action of assumpsit on account annexed to the writ cannot be maintained by a wife against her husband while the connubial relation remains in full force.

Neither party to the marriage contract can sue the other at common law while the marriage relation subsists.

ON EXCEPTIONS, from decision of judge of the superior court of Kennebec county.

ASSUMPSIT upon account annexed.

WRIT dated February 24, 1879. Plea, the general issue. Tried without the intervention of a jury, and the parties submitted to the justice of said superior court the following agreed statement: "The plaintiff and defendant are husband and wife. They were married on September 15, 1878, and lived together until January 1879, or about that time, when the defendant left the plaintiff's residence. If the action can be maintained, the defendant is to be defaulted and heard in damages by the court, but if the action cannot be maintained the plaintiff to become nonsuit." Said justice decided "that coverture is a bar to the action," entered a nonsuit, and plaintiff alleged exceptions.

E. F. Webb, for the plaintiff, cited Stat. 1866, c. 52. *Blake* v. *Blake*, 64 Maine, 177. *Abbott* v. *Abbott*, 67 Maine, 308 *Clough v. Russell*, 55 N. H. 279.

M. P. Hatch, for the defendant.

APPLETON, C. J. This is an action of assumpsit by a wife against her husband, the connubial relation remaining in full force.

It was held in *Blake* v. *Blake*, 64 Maine, 177, that the husband, after divorce, might recover against the wife for improvements made at her request upon her real estate, for which she promised to pay from her estate. Since that decision there has been further legislation in relation to the rights of married women, and

the question now presented is whether either party to the marriage contract can sue the other at common law while the marriage relation is subsisting.

By the act of 1876, c. 112, "She may prosecute and defend suits at law or in equity, either of tort or contract, in her own name, without the joinder of her husband, for the preservation and protection of her property and personal rights, or for the redress of her injuries, as if unmarried, or may do it jointly with her husband, and the husband shall not settle or discharge any such action or cause of action without the written consent of the wife. Neither of them can be arrested on such writ or execution nor can he alone maintain an action respecting his wife's property." Under previous decisions of this court it has been held that neither husband nor wife could sue the other directly in assumpsit. *Crowther* v. *Crowther*, 55 Maine, 358. This statute was not intended to give such right. It relates to cases when, by the very assumption, the husband may be a party with the wife, or not, at her election. The design is to protect her from all marital interference in suits commenced by the wife alone or jointly with her husband, and to prevent his maintaining alone any action respecting his wife's property.

In *Clough* v. *Russell*, 55 N. H. 279, it was held that a husband might transfer a note to his wife in payment of a loan made by her to him from her private funds. To that decision no exception can be taken. But that the wife cannot maintain an action at common law against her husband during the existence of the marriage relation has always been held to be the law in this state.

Exceptions overruled.

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

GEORGE H. HOBBS *vs.* HELEN E. HOBBS.

Kennebec. Opinion December 6, 1880.

Husband and wife. Replevin. Bar.

An action of replevin cannot be maintained by a husband against his wife while the marital relation between them is in full force.

Exceptions from superior court of Kennebec county. Replevin. Writ dated February 11, 1879. Plea, the general issue. Submitted to the justice of said court under same agreed statement of facts and on same conditions as in *Helen E. Hobbs* v. *Geo. H. Hobbs*, *ante*, who decided that coverture was a bar to the maintenance of the action, and thereupon entered a nonsuit.

The plaintiff alleged exceptions.

M. P. Hatch, for the plaintiff.

E. F. Webb, for the defendant.

APPLETON, C. J. This is an action of replevin by a husband against the wife, the marital relation between the parties being in full force.

Replevin is an action of tort. It was decided in *Abbott* v. *Abbott*, 67 Maine, 304, that a wife after divorce could not maintain an action for an assault committed on her during coverture.

A fortiori, an action of tort cannot be maintained by the one against the other during coverture.

Exceptions overruled.

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

YORK COUNTY SAVINGS BANK *vs.* J. W. ROBERTS and another.

York. Opinion December 8, 1879.

Mortgage debt. Appropriation.

Money once paid, and appropriated by the parties to a mortgage note and endorsed upon it, cannot by a subsequent agreement be transferred to credit of another demand and such paid indebtedness thereby become revived and good against second mortgagees.

After the condition in a mortgage deed has once been performed, the mortgage becomes void, and no agreement of the parties to continue it in force can affect the legal title.

Bill in equity, inserted in writ to redeem real estate from mortgage, heard on bill, answer and proof. Writ dated December 20, 1878.

Complainant alleges that one Louis Seguin of Biddeford, in the county of York, being seized as of fee of a certain parcel of land, described in said bill, on the 12th day of December, A. D. 1874, conveyed the same in mortgage to the respondents to secure the payment of one thousand dollars, in ten monthly payments of one hundred dollars each, and interest according to the terms of a note of same date, given by said Seguin to the respondents.

That afterwards, on the 16th day of March, 1875, said Seguin mortgaged to the complainants the same premises as collateral security for the sum of ten hundred dollars, then loaned to said Seguin by them.

And that afterwards at different dates other sums, in all about four thousand dollars, were loaned to said Seguin upon mortgage of the same premises to the complainants, which sums are still due and unpaid.

That the defendants reside out of this state, to wit, in Boston, Massachusetts, and have commenced proceedings for the foreclosure of said mortgage to them, under § 5, c. 90, R. S., by publication of a notice to foreclose the same, in a newspaper printed in said Biddeford, the first publication thereof being September 6, A. D. 1878.

That on the 11th day of December, 1878, the complainant made a demand upon the respondents for a true account of the sum due on their said mortgage, and of the rents and profits, and

money expended in repairs and improvements by them, if any, to the end that said plaintiffs might redeem from the respondents' mortgage.

That said respondents refused to furnish or render said account.

That the amount due to said respondents on their said mortgage, as the complainants are informed and believe, is less than one hundred dollars, the other sums once due on said mortgage to the respondents having been paid them by said Seguin.

And the complainants, paying in court into the hands of the clerk at the time of filing their bill one hundred dollars, for the respondents to take such part as may be found due, pray the court to consider the matter — that the respondents be required to answer fully, and that the complainants be allowed to redeem from the respondents, and that they be decreed to release to complainants their right and title in the mortgaged premises, and for such other relief as complainants may be in equity entitled to, and for their costs.

In answer, the respondents say that the mortgage to them was given by said Louis Seguin as set forth in complainants' bill.

That the conditions of said mortgage being broken, they commenced proceedings on the 31st day of August, A. D. 1878, to foreclose the same, as also set forth in complainants' bill.

They allege that on or about December 11th, 1878, they informed the plaintiffs of the amount due on said mortgage by exhibiting to their attorney for that purpose the mortgage note, with the indorsements thereon of all payments made on account of said mortgage, and a paper attached to said note.

A copy of which note and indorsements thereon and said paper attached thereto, are annexed to said answer.

That on the 14th day of June, 1875, an account was existing between them and said Seguin, to the amount of $727.50 due the respondents for merchandise sold by them to said Seguin.

That it was then agreed between them and said Seguin, that a payment of $600 on said account should be made by said Seguin by transferring that sum from the payments made and indorsed on said note, and for that purpose said Seguin gave them the paper aforesaid, marked B.

That said respondents credited said Seguin said sum of six hundred dollars on his said account and at the same time made the indorsement on said note as follows, "Boston, June 14, 1875. Transferred six hundred dollars of the above amount to Louis Seguin's book account. $600."

That the last three indorsements on said note were made by said Seguin, and received and appropriated by the respondents in part payment of said note so restored to the sum of one thousand dollars.

That on the 20th day of December, A. D. 1878, there was due to them on said note secured as aforesaid by said mortgage, the sum of eight hundred and twelve dollars and ninety-three cents, with eight dollars more for expenses of foreclosure.

That all payments made by said Seguin on said note and mortgage were truly indorsed on said note at the several times they were made, and said note and indorsements thereon and order connected therewith are hereto annexed, and made part of this answer.

That said last three indorsements were not intended by the parties thereto to be applied as payments on said note, with the prior indorsements remaining in force thereon, but as payments on said note considered as restored to the sum of one thousand dollars.

All of which the respondents are ready to prove, wherefore they pray that a decree may be made that the plaintiffs shall pay them said sum of $820.93, and reasonable cost, before the respondents shall be required to discharge said mortgage. General replication by the plaintiff.

A.

$1000. Biddeford, December 12, 1874.

For value received I promise to pay to J. W. and H. Roberts, one thousand dollars, in ten monthly payments of one hundred dollars each, and interest. LOUIS SEGUIN.

Indorsements and writing on back of said note.

Biddeford, January 9, 1875. Received of the within, one hundred five dollars. $105.

Biddeford, February 16, 1875. Received of the within, one hundred four and 50-100 dollars. $104.50.

March 16, 1875. Rec'd one hundred and four dollars. $104.

April 13, 1875. Received one hundred and three 50-100 dollars. $103.50.

May 11, 1875. Received one hundred and three dollars. $103.

June 14, 1875. Received one hundred two and 50-100 dollars. $102.50.

Boston, June 14, 1875. Transferred six hundred dollars of the above amount to Louis Seguin's book account. $600.

January 12, 1876. Received one hundred and thirty-five dollars. $135.

February 14, 1876. Received one hundred four 50-100.

April 10, 1876. Received one hundred eight dollars.

B. Paper or order annexed to said note.

To J. W. Roberts:

Gents:

Please appropriate $600 which I have paid you on the note, in payment or part payment of the accounts against me June 14, 1875.

LOUIS SEGUIN.

The loan made by the plaintiffs to Seguin as mentioned in plaintiffs' bill, in the mortgage of date March 16th, 1875, was for money paid over to Mr. Thos. H. Cole, to satisfy note or notes to that amount, which he held against said Louis Seguin, secured by mortgage on the same property, covered by plaintiffs' mortgage, and plaintiffs being told by said Seguin that no other incumbrance existed on the property except said mortgage to said Cole, and a small mortgage to one Boulter, which was afterwards paid and discharged, consented to make said loan and take a new mortgage on the property directly to themselves, instead of taking an assignment of said Cole's mortgage, which was prior in point of time to defendants' mortgage. The plaintiffs had no knowledge in fact of the existence of the defendants' mortgage, or that the defendants claimed anything as due upon it from said Seguin, until some time in the summer or fall of the year A. D. 1878. On the 11th day of December, A. D. 1878, the plaintiffs made a written demand upon the defendants for a true account of the sum due on their said mortgage, as set forth in the plaintiffs' bill, but

no account thereof was ever rendered by the defendants. Some week or ten days prior to that date, plaintiffs' counsel called on defendants' counsel and requested him to show plaintiffs' counsel the note and order referred to in defendants' answer, which was done, and some conversation was had between the counsel about the law of the case, but no specific sum was stated or claimed as the amount due the defendants.

The plaintiffs' first mortgage is still all due, and other mortgages, amounting to over four thousand dollars.

For the purposes of this case it is not denied that on the said June 14, 1875, said Louis Seguin owed on account to said J. W. and H. Roberts the sum of six hundred dollars, and that this order was given by said Seguin as it imports on its face.

No payment of said note or account other than appears by said indorsements is proved or claimed as far as this case is concerned.

J. M. Goodwin, for the plaintiffs.

S. W. Luques, for the defendants, cited *Com.* v. *Ward*, 2 Mass. 397. *Id.* v. *McLane*, 1 Ark. 311. *Richardson* v. *Woodbury*, 12 Cush. 279. *Hubbell* v. *Flint*, 15 Gray, 550.

SYMONDS, J. This is a bill in equity to redeem real estate from mortgage. The only question is, what amount the complainants must pay in order to redeem, or, in other words, how much is due on the mortgage.

The mortgage note was for $1000, dated December 12, 1874, payable in ten monthly payments of $100 each, with interest. The first six payments had been made and indorsed on the note as they fell due, when, on June 14, 1875, the maker of the note gave to the respondents, the payees, an order of that date authorizing them to transfer and appropriate $600, which had been paid on the note, to the payment, in whole or in part, of a certain account which they had against him and which was not secured by the mortgage.

Credit to that amount was thereupon given upon the account, and a memorandum of the transfer of that amount from the indorsements to the credits on book-account was made, on that date, on the back of the note.

It is conceded that, as against the complainants who were then second mortgagees of the same property, such a transfer of credits from the note to the account could not legally be made. To the extent of these payments, the mortgage debt had been extinguished, and could not be revived by agreement of the maker and the payees of the note, to the prejudice of the vested interest of subsequent mortgagees.

Subsequently, on January 12, 1876, $135; on February 14, $104.50; and on April 10, $108, were paid and indorsed on the note.

It is claimed by the respondents that these payments were made under the belief that the transfer of the $600 was valid, and that the interest-bearing principal had been thereby raised to the original sum of $1000.

Each one of these three payments, it is urged, was intended to be a payment of $100, and the interest then due on a restored principal of $1000.

It is highly probable this was the fact. Each indorsement on the note is equal in amount to the sum of $100, and the interest then due, and the last three payments in each instance correspond in amount with a payment of $100, and the interest on a principal of $1000. Probably the parties to the note, after June 14, 1875, regarded it as restored to its original amount, and supposed the subsequent payments were of $100, and interest. But this is only a probability. There is no division of principal and interest expressed in the indorsements.

The argument seems to be that these last payments, having been applied to the note under a misapprehension as to the validity of the attempted transfer, and under the belief that the principal had not previously been reduced, should not now, when effect cannot legally be given to the transfer of credits, be allowed in reduction of the balance due on the note;—that if the law cannot allow the agreement, as to the transfer of the $600, to take effect, it can apply the later payments, so as, to that extent at least, to serve the purpose which the parties had in mind when the order was given.

Notwithstanding the force with which the argument to the con-

trary is urged, we cannot escape the conclusion that the parties themselves have appropriated these payments—that they have applied them upon the note. We assume that the payees of the note had but two claims against the maker, the note and the account. The case shows no other. These payments were not made on the account. They were indorsed in the usual form upon the note. There is a high degree of probability that, if it had not been supposed the transfer was effective, the later payments would have been made on the account rather than on the note; but such a probability is no substitute for proof that the money was in fact paid on the account, nor can there be anything in it to defeat an appropriation once made, and leave the money unapplied. In order to be applied upon the account, the money must either have been paid upon it, or paid without appropriation. Here we have neither fact.

But it is said these payments were not upon the balance of the note after deducting the $600, but upon the note supposed to be restored to the sum of $1000. The argument is, that it was competent, and no injury to the complainants, for the maker to pay the whole or any part of the $600, twice, if he saw fit;—and that, the transfer being defeated, these later payments, so far as they go, merely repeat the payment of the $600.

Upon this point, it is enough to say that the case is wanting in proof that either the payees or the maker intended anything of the sort, and it certainly is not a thing to be presumed. It would leave the maker without credit for the amount of the last three payments, either upon the note or the account. It would compensate the payees for a failure to make a valid transfer of $600 from the note to the account, by giving them half that amount twice. We do not think the parties intended double payment of any part of the claim.

The controlling fact in regard to the matter is that these payments when made were applied to the note by the parties themselves. They were received and indorsed upon it. It was a valid claim, which they partially discharged, and the fact that the parties were in error as to their power to change prior indorsements on the note into credits on the account and supposed more due

upon the note than was legally due does not enable the court to treat subsequent payments on the note as mere repetitions of former payments, nor to apply them in discharge of the account. Their application by the parties at the time, to the payment of an existing debt, precludes the interference of the court. Such an error as to the legal effect of the order and as to the amount due upon the note is not a mistake which invalidates a subsequent appropriation of payments. Nor can there be any certainty that the maker of the note would not have insisted on the payments being applied precisely as they were applied, had he known that the order was without effect. Whether in January, February and April, 1876, he was as disposed to pay the account as he was in June, 1875, is a matter about which there is a probability, but no proof.

We see no way in which these three payments can either be applied to the account or treated as a substitute *pro tanto* for the $600 erroneously credited thereon.

The amount which the complainants will be required to pay in order to redeem, will be the amount due according to the tenor of the note, allowing all the indorsements and disregarding the memorandum of June 14, 1875, in regard to the transfer of payments; and in addition to this the expense of proceedings to foreclose the mortgage, which is agreed to be the sum of eight dollars ($8).

This amount having been brought into court by the complainants, the respondents are to take the same, less costs awarded against them, and the decree will be that the complainants may redeem from the respondents, and that, the respondents release to the complainants their right title and interest in the mortgaged premises.

Decree accordingly.

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

WILLIAM F. HEMMINGWAY *vs.* INHABITANTS OF GRAFTON.

Oxford. Opinion December 6, 1879.

Soldier. Equalization bounty. Proof—burden of.

In a suit to recover payment of a town order drawn by the selectmen upon the town treasurer for the plaintiff's supposed "proportion of equalization bounty" in "all moneys that may be received from the state under" Stat. 1868, c. 225, "over and above the amount actually paid out by the town for bounties," and it appears by the official certificate of the adjutant general (R. S., c. 82, § 101) that the town has actually paid out for bounties more than it has received ; such certificate is *prima facie* proof, and must be overcome by evidence on the part of the plaintiff in order to entitle him to recover.

The burden of proof in such case is upon the plaintiff to prove the existence of the surplus in which he claims to share, and his holding a town order therefor, drawn for such divisional surplus, neither enlarges his right, nor extends the liability of the town.

ON REPORT.

ASSUMPSIT upon an order drawn and signed by the selectmen of the defendant town, of the following tenor: "Order No. 39. To Benjamin Brown, treasurer of the town of Grafton, or his successor in that office. Pay to Wm. F. Hemmingway twenty-five dollars—it being his portion of equalization bounty. Dated at Grafton the 14th day of March, A. D., 1872."

There was also a count for money had and received. Writ dated July 24, 1876.

Plea the general issue, with brief statement alleging that the order was given without consideration, that it was never accepted, that plaintiff never went on any quota of defendant town, that the town was never reimbursed on his account a single dollar, that the town had paid out $575 and received from the state only $500.

At a legal meeting of defendant town, April 7, 1869, it was voted "that all moneys that may be received from the state of Maine under the act providing for the equalization of municipal war debts, approved March 7, 1868, over and above the amount actually paid out by the town for bounties, be and hereby is appropriated to the soldiers who enlisted or were drafted for said town any time during the war." . . .

The plaintiff introduced a certificate, duly authenticated, from the adjutant general dated March 7, 1877, "that it appears from the records of this office that Wm. F. Hemmingway, a private, in company H., 14th Regt., Maine Vols. enlisted on the 31st day of Oct., 1861, and was mustered . . . . on the 14th day of Dec., 1861, for three years, unless sooner discharged; and was discharged June 22, 1862, for disability. Residence, when enlisted, Grafton, Oxford Co., Maine."

Plaintiff also introduced a copy of the following paper from the secretary of state's office, and signed and sworn to by the selectmen of Grafton:

"To the commissioners on equalization of municipal war debts, appointed by the governor and council of the state of Maine to audit the claims of cities, towns and plantations for reimbursement:

Gentlemen:—We certify that this town furnished the following named men and for the term of service given in the proper column against the name of each, towards its quota under the call of the president of July 2, 1862, and subsequent calls, and we claim that the town is entitled to reimbursem ent for the same, as provided by an act of legislature, approved March 7, 1868.

NAMES.	Term of Office.	Date of Entering service.	Letter of Co.	Regiment or Corps.	Amount Paid.
Bennett Morse	3 years	Jan. 4, 1864		5 Battery	$225.
Eugene Taylor	3 years	1862, July call		5 Regt. Co. D.	50.
Nathaniel Marden	3 dur'g war	May 5, 1864		32 Regt. Co. I.	25.
					$300.
Orin D. Bartlett	3 dur'g war	Jan. 4, 1864	A.	12 regt. Paid $200 by stat.	200.
					$500.
Credited to and claimed by Hanover.	Volunteers.				
Torrence C. Jones	3 years	Dec. 18, 1863	B.	30 Regt.	
Credited to and claimed by Newry.					
Alanson Proctor	3 years	Dec. 18, 1863	B.	30 Regt.	
Credited to and claimed by Hanover.					
Ovestes J. York	3 years	Dec. 18, 1863	B.	30 Regt.	
Credited to and claimed by Hanover.					
A. M. Bartlett	3 years	Dec. 18, 1863	B.	30 Regt.	
Maurice Crowley	3 dur'g war	Feb. 29, 1864	H.	30 Regt.	
1861 and did not re-enlist.					
Isa. Morse	1 year	Dec. 14, 1861		5 Battery.	
1861 and dis. in 1862.					
Jonathan B. Winslow.	1 year	Dec. 12, 1861		13 Regt.	
1861 and died in 1862.					
Richard H. Welch	1 year	Dec. 12, 1861		13 Regt.	
1861 and dis. in 1862.					
William F. Hemingway	1 year	Dec. 14, 1861		14 Regt.	

Grafton, Jan. 25, 1869."

The interlinear entries were made in the adjutant general's office.

The plaintiff likewise introduced the following paper duly authenticated by the state treasurer:

"Augusta, March 20, 1877.

I hereby certify that it appears from the records in this office that on the 17th day of February, 1870, the town of Grafton was paid the sum of five hundred dollars on account of the equaliza tion of municipal war debts, and it further appears that said amount was paid to John Kilgore on the order of James Brown, treasurer of the town of Grafton."

The plaintiff testified that he received the order, sued, from the hands of one John Kilgore, one of the selectmen of Grafton; that in October, 1874, he presented it for payment to the town treasurer, who refused to accept the order; that when Kilgore delivered the order he said that he "had counted me on the quota of Grafton and thought I was entitled to the bounty. Since the order was sued, one of the selectmen notified me that the order was issued under a mistake. I enlisted October 31, 1861, in Grafton—mustered same year and was discharged June 22, 1862;" that after his discharge, and in the year 1863, the selectmen came to him and wanted to know if he was enlisted for any town; that he told them he didn't know; that they said they should claim him upon their quota to save a draft; that he did not object, and nothing more was said till they told him that there was an order drawn for it, that the town had never paid him a dollar, and the order had never been paid.

The defense introduced the following paper signed by the adjutant general and otherwise duly authenticated:

"STATE OF MAINE.

(STATE SEAL.) *Adjutant General's Office.*

Augusta, March 14, 1877.

I hereby certify that it appears from the records of this office, that the town of Grafton paid the sum of five hundred and seventy-five dollars ($575.00) on account of bounties to soldiers under the several calls of the president of the United States, during the rebellion—and that said town was reimbursed by the state,

February 17, 1870, in the sum of five hundred dollars—and no more, under the act providing for the equalization of municipal war debts."

After the testimony was out, the case was made law on report; the law court to render such judgment as the legal rights of the parties require, upon so much of the foregoing evidence as is legally admissible.

S. F. Gibson, for the plaintiff cited *Pearson* v. *Hamlin's Grant*, 60 Maine, 157. *Bartlett* v. *Same*, 63 Maine, 292. Stats. 1868, c. 225, § 6; 1867, c. 111.

E. Foster, Jr., for the defendant.

SYMONDS, J. The plaintiff fails to prove that the town of Grafton has received from the state more than the amount actually paid out by the town for bounties. The official certificate of the adjutant general shows that the town has paid out for bounties the sum of $575, and has received only $500 from the state. We think this is a matter, in regard to which such certificate of the adjutant general is *prima facie* evidence. R. S., c. 82, § 101.

The certificate of the selectmen of Grafton, relied upon as proof to the contrary, does not purport to be a full statement of the amount paid by the town for bounties. It was a certificate made for another purpose, in which it was of no importance that the amounts paid by the town should appear, the town being entitled to receive $100 for every man furnished as prescribed, without regard to the question whether bounty was paid, or in what sum. All that this certificate and the oath of the selectmen contain would be just as true, if the town had paid more than is specified, as it is if that is a full statement of all bounties paid. It does not overcome the *prima facie* proof by the adjutant general's certificate.

The plaintiff, therefore, fails to prove the existence of the surplus in which he claims to share.

It has already been decided that the holding of the order by the plaintiff, under the circumstances of this case, neither enlarges his rights nor extends the liability of the town. *Sturtevant* v

Inhabitants of Liberty, 46 Maine, 457. *Bartlett* v. *Hamlin Grant Plantation*, 63 Maine, 292.

Judgment for defendant.

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

INHABITANTS OF CAPE ELIZABETH *vs.* GEORGE H. LOMBARD.

Cumberland. Opinion December 12, 1879.

Pleading.

A charge in an account annexed to a writ "For cash paid for your support at the Insane Hospital," means, in a legal sense, money paid at the defendant's request; and, if paid at his request, the money may be recovered under that form of declaring. A demurrer to such a count admits the request.

If no request is proved or admitted, and the money is recoverable only by force of the statutory provision, then the facts must be specially alleged, and the money expended could not properly be sued for upon an account annexed. In such case the evidence would not support the declaration.

It is a common mode of pleading to unite the common money counts in one count, and a declaration containing such an omnibus count cannot be defeated by demurrer.

It does not vitiate a common count to allege that it is designed to cover a bill of particulars in an account annexed, although the action could not be sustained upon an account annexed. One count might correctly, and another incorrectly, describe the cause of action, and the specification be the same for both counts.

ON EXCEPTIONS.

ASSUMPSIT, to recover the amount paid by the plaintiff town, for the support of the defendant, a resident of said town, at the hospital for the insane at Augusta, Maine, where he had been duly committed, and for whose support the plaintiffs were in the first instance liable. The declaration in the writ is as follows:

"In a plea of the case for that the said defendant, at said Cape Elizabeth on the day of the purchase of this writ, being indebted to the plaintiff in the sum of five hundred and eighteen dollars and sixty-five cents, according to the account annexed.

76 Me. 496
78 " 256-257
81 " 274

George H. Lombard *alias* Henry G. Lombard,

To the Inhabitants of Cape Elizabeth, Dr.

1872. To cash paid for your support at Insane Hospital, at Augusta, Maine,	$ 94 09
1873. To same,	163 03
1874. " "	207 43
1875—to May 3. To same,	54 10
	$518 65

In consideration thereof, then and there promised the plaintiffs to pay them said sum on demand. Also for that the said defendant at said Cape Elizabeth heretofore, to wit, on the day of the purchase of this writ, being indebted to the plaintiffs in the one other sum of five hundred and eighteen 65-100 dollars, for goods before that time sold and delivered by the plaintiffs to the defendant at his request; and also for work before then done and materials for the same provided by the plaintiffs for said defendant at his request; and also for other money before then lent by the plaintiffs to said defendant at his request; and also for other money, before then paid by the plaintiffs for the use of said defendant at his request; and also for other money before that time had and received by the said defendant for the use of the plaintiffs; and also for other money, for interest upon other moneys, then due and owing from said defendant to said plaintiffs and by the plaintiffs lent and advanced to said defendant at his request, for divers long spaces of time then elapsed; and also for other money found to be due from the said defendant to the plaintiffs upon an account then stated between them—in consideration thereof then and there promised the plaintiffs to pay him the several moneys aforesaid on demand. Yet said defendant has never paid any of said moneys, but wholly neglects and refuses so to do.

Under the money counts plaintiffs will claim to recover the sum named in the first count of this writ being money expended and paid out by the town of Cape Elizabeth for the support of the defendant in the insane hospital at Augusta, as set forth in the first count of this writ, for which defendant is by law liable. Yet the said defendant," etc. A general demurrer to the declaration

was filed by the defendant, joined by the plaintiffs and sustained by the presiding justice. The plaintiff alleged exceptions.

It is agreed that if the demurrer is sustained by the law court, and the writ is not amendable a nonsuit is to be ordered. If the demurrer is overruled, judgment is to be entered for plaintiffs.

If the demurrer is sustained, and the writ is amendable upon payment of costs from the time when the demurrer was filed, and filing the amendment, judgment is to be entered for plaintiffs. The damages to be assessed by the judge presiding at *nisi prius*.

N. Cleaves & H. B. Cleaves, for the plaintiffs.

J. J. Perry, for the defendant, cited *Saco* v. *Hopkinton*, 29 Maine, 268. *Bennet* v. *Davis*, 62 Id. 544. *Harrington* v. *Tuttle*, 64 Id. 474. *Annis* v. *Gilmore*, 47 Id. 152. *Milliken* v. *Whitehouse*, 49 Id. 527. *Cooper* v. *Waldron*, 50 Id. 80. *Page* v. *Danforth*, 53 Id. 174. R. S., c. 82, § 89. *Stinson* v. *Norton*, 45 Maine, 281.

PETERS, J. The declaration consists of a count upon an account annexed and an omnibus money count. If the liability of the defendant arises only by force of the statute regulating the support of insane persons at the state hospital, the action in this form could not be sustained. There would be no contract express or implied to found such a style of declaration upon. It is a well established rule of law that, when a statute gives a special remedy upon particular facts, those facts must be specially alleged. *Drowne* v. *Stimpson*, 2 Mass. 444. *Salem* v. *Andover*, 3 Mass. 438. *Bath* v. *Freeport*, 5 Mass. 326. *Rogers* v. *Newbury*, 105 Mass. 533. *Augusta* v. *Chelsea*, 47 Maine, 367. *Sanford* v. *Haskell*, 50 Maine, 86. *Hathorn* v. *Calef*, 53 Maine, 471. *Bethel* v. *Bean*, 58 Maine, 89. *Fryeburg* v. *Brownfield*, 68 Maine, 145. An exception to the rule would be when by the statute it is provided it may be otherwise, as it was in *Gilman* v. *Portland*, 51 Maine, 458. Most of the above cases were essentially like the case at bar.

To this declaration a demurrer is filed. Had there been a demurrer to the evidence, or an objection to the admission of evidence as not supporting the declaration, and it did not appear

that there was any contract between the parties, in such case the defendant would have gained the point which evidently he had in view. But the question before us is not one of evidence, it is one of pleading. The only thing we are to decide is whether the declaration would be sufficient, if supported by the evidence. The demurrer is proof, by way of admission, that the facts alleged are true. We are to ascertain what facts are alleged.

The account annexed is "For cash paid for your (defendant's) support at the insane hospital." What is the legal meaning of that charge, and what, in a legal sense, did the plaintiffs intend by it? As their meaning is not fully expressed in words, the omission is to be supplied by a legal inference. The legal presumption is that they mean to say, that the money was paid at the special instance and request of the defendant. If so paid, then the allegations in the count upon an account annexed would be proved and the action be sustained.

By ancient usage, this form of declaring has been sanctioned in this and other states, and in our practice is more commonly used perhaps than all other forms of declaration put together. The account annexed to the writ is allowed to supply the want of proper allegations in the body of the declaration. The account when in the writ is to be read as its words would naturally be interpreted when out of the writ. Therefore, by usage, it has always been understood and allowed, that an item "for merchandise" shall mean "merchandise sold and delivered," whether the goods be sold at a fixed price or not, and whether actually or constructively delivered, and even delivery is not necessary where title to the goods passes without delivery; that an item "for work and materials" shall mean "done and expended for the defendant at the defendant's request; that an item "for cash" shall mean and imply "money lent"; and that an item "for money paid" shall mean, by implication, "money paid at the special instance and request of the defendant." It is not ordinarily to be supposed that one person would pay money for another unless requested. As to what may be considered merchandise, or work, or materials, or money lent or paid, the interpretation has been so liberal that a very great variety of subjects may be sufficiently and are com-

monly declared for in this form of action. The account annexed is a substitute in practice for the common money counts, as a readier and more direct mode of declaring. From this it follows that the first count in the writ is good. *Hilton* v. *Burley*, 2 N. H. 193. *Bassett* v. *Spofford*, 11 N. H. 167. *Newmarket Iron Foundry* v. *Harvey*, 23 N. H. 295. *Kinder* v. *Shaw*, 2 Mass. 398. *Rider* v. *Robbins*, 13 Mass. 284. *Gilman* v. *Portland*, *supra*. See 2 Chitty Plead. (17th Am. ed.) page 27 *et seq.*, where a mass of cases variously illustrating the use of the money counts will be found collected.

The second count is good. It is the common counts consolidated into one count. It was held good by Chief Justice Saunders, and commended by Sergeant Williams in his note to *Webber* v. *Tivill*, 2 Saund. 122, as a practice avoiding prolixity of pleading and saving expense. Mr. Chitty (Pleadings) says: "Several distinct debts due in respect of different contracts not under seal, of the same or a different nature, as demands for work, and debts for goods, money lent, etc., might always be included in one count of this description." Such a count may be sustained or defeated in part or whole. It may be demurred to in part without demurring to the whole. *Bailey* v. *Freeman*, 4 Johns. 280. Oliver's Prec. 153, *et in nota*. See 24 Pick. 406.

Had the first count been bad, the second count would not have been vitiated on account of its referring to the account annexed for its bill of particulars. One count might correctly and another incorrectly describe the cause of action, and the specifications be the same for both counts. The very object of double counts is that one may succeed if others should fail, in a correct description of the cause of action. *Keyes* v. *Stone*, 5 Mass. 391. *Little v. Blunt*, 13 Pick. 473. *Hotchkiss* v. *Judd*, 12 *Allen*, 447.

Exceptions sustained.
Demurrer overruled.
Judgment for plaintiffs.

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

STATE *vs.* SALLY MORRISSEY.

Cumberland. Opinion December 12, 1879.

Indictment. Pleading.

Where the statutory form is used for an indictment of murder, and there is added thereto the allegation that the accused committed an assault upon the deceased, the particular means by which the assault was committed need not be set forth,—although in such case the government would be bound to prove that the murder was committed by force of some kind. *State* v. *Verrill*, 54 Maine, 408, re-affirmed.

In an indictment for infanticide, although convenient and advisable when it can be safely done, it is not indispensable that the sex of the murdered child be stated even though its name be unknown or it has no name.

ON EXCEPTIONS, from superior court for Cumberland county.

Indictment alleging "that Sally Morrissey of Portland, single woman, on . . . at Portland . . . being pregnant with a male child, did then and there bring forth the said male child alive of the body of her the said Sally Morrissey, alone and in secret, which said male child so being born alive, was by the laws of said state a bastard. And that afterwards, to wit, on the same seventeenth day of October, in the year of our Lord one thousand eight hundred and seventy-eight, she the said Sally Morrissey with force and arms, at Portland, in said county of Cumberland, in and upon the said male child in the peace of said state then and there being, feloniously, wilfully and of her malice aforethought, did make an assault, and the said male child, she the said Sally Morrissey, did then and there, feloniously, wilfully and of her malice aforethought, kill and murder, against the peace of said state and contrary to the form of the statute in such case made and provided."

"And the jurors aforesaid upon their oaths aforesaid do further present that said Sally Morrissey otherwise known by the name of Sarah Welch, single woman, on the seventeenth day of October 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 an infant child by name to said jurors unknown, in the peace of said state, then and there being, felon-

iously, wilfully and of her malice aforethought, did make an assault, and the said infant child then and there feloniously, wilfully and of her malice aforethought, did kill and murder against the peace of said state, and contrary to the form of the statute in such case made and provided."

A general demurrer to the indictment was filed by the respondent, joinder made by the state, the demurrer overruled, and the indictment adjudged good; whereupon the respondent alleged exceptions.

T. H. Haskell, (county attorney) for the state.

C. P. Mattocks, for the respondent.

This is an indictment for murder containing two counts, the first alleging the secret delivery and murder of a bastard child; the second alleging simply the murder of an infant child, not stating the sex. The accused demurred. Neither the general verdict of a jury nor the plea of guilty are sufficient to indicate the degree of murder. *State* v. *Cleveland*, 58 Maine, 564.

The Mass. statute had no such provision as our own when *Green* v. *Commonwealth*, 12 Allen, 155, was decided. The fact that the punishment for murder in the first and second degree is now the same, does not deprive the accused of the right to have the degree of his crime judicially determined.

Neither count sets out the manner or means of the death, and neither follows the statute. R. S., c. 134, § 7.

Both counts contain an allegation of an assault which was not a necessary allegation under our statute. In all the old precedents which have the element of violence an allegation of an assault is included in the other allegations. 2 Bish. Crim. Proc. § 516, § 538. 1 Whar. Prec. (229.)

But where no violence is used as in cases of poisoning, the allegation of an assault is omitted. Id. (125.) 2 Bishop's Crim. Proc. § 553-4.

In the case at bar, the prosecuting officer having departed from the simple allegation allowed by statute, and having alleged an assault as the means of the killing, was bound to give the particulars thereof. The accused could not have been convicted of

murder by poison, under this indictment, because the language of the indictment negatives a killing by any means except by violence, nor could the accused have been convicted of murder by violence because the pleader having alleged an assault generally and no more, could not be allowed to prove particular acts of violence.

Until the decision in *Com.* v. *Webster*, 5 Cush. 295, it was the general opinion of the courts that the manner and means must be set out. That case merely decides that where manner and means are unknown they may be omitted if the indictment states that they are unknown. The statute of Maine enacted in 1865, (R. S., c. 134, § 7,) allows this omission in all cases. *State* v. *Verrill*, 54 Maine, 408.

But does not preclude the use of the old precedents.

In *State* v. *Verrill*, it was not contended that the indictment did not conform to the statute (p. 413).

In our practice as also under the common law, it is not necessary to prove that the death was occasioned by the instrument described, but it is sufficient if shown to have been caused by an instrument of similar character. 2 Arch. Crim. Prec. 207. *State* v. *Smith*, 32 Maine, 373.

The second count alleges the murder of an infant child, whose name is unknown. The sex of the child is not stated, nor does the indictment state that the sex was unknown. Nor, indeed, can we discover any reason for omitting to state the sex. It is believed that no precedent can be found in which both name and sex have been omitted. The greatest practicable particularity is required in designating the person killed or injured.

In all indictments for the murder of children which we can find, the sex is stated. *R.* v. *Mary*, 2 M. & Rob., 38. *R.* v. *Hicks*, 2 *Ib.* 302. See also cases, 1 Whar. Prec. (2.)

PETERS, J. The first count is the copy of a form provided by an English statute (St. 14 and 15, Vict. c. 100, § 4); adopted by our legislature (Laws 1865, c. 329); approved and sustained by this court (*State* v. *Verrill*, 54 Maine, 408); with this difference, that in the statutory form the allegation does not appear, as it does in this indictment, that the prisoner "made an assault upon

the deceased." The wisdom of the statute we have no doubt of. There was no part of criminal pleading so difficult, as to safely and correctly describe in an indictment the means and manner by which a murder was committed. The declaration of Sir Matthew Hale seemed to be justified when (2 Pleas C. 193) he said that "over-grown curiosity and nicety has become the disease of the law, and more offenders escape by the over easy ear given to exceptions in indictments, than by their own innocence." Under this general mode of alleging the crime, a court can order such specification of details and particulars as may be proper, and allow amendment or alteration thereof, without imposing hazards upon the state or inflicting injury upon the prisoner. We accept the occasion to express our opinion of the correctness of the decision in *State* v. *Verrill*, and to affirm the same.

It is contended that, inasmuch as an assault is alleged in this indictment, not in accordance with the statutory form but additional thereto, the particular means by which the assault was committed must be set out. It is claimed that in *State* v. *Verrill* this point was not presented. If the indictment be good without such unnecessary allegation, it must be as good with it. The pleader adding words to what was complete before, only requires him to prove all that he has alleged. He is required to prove the murder to have been committed by force. But it does not follow because he has alleged more than is needful, that he is in a dilemma of not having alleged enough. He is not required to spread out his general averment of assault into particulars. *State* v. *Noble*, 15 Maine, 476. *State* v. *Smith*, 32 Maine, 369.

We think the second count sufficient. We have seen no precedent of indictment that omits an allegation of the sex of the infant child, nor has any case come to our notice which decides that the allegation is necessary. Mr. Wharton in his Criminal Precedents remarks that the averment is necessary. But why necessary? The law requires a person to be described by his name. We take it that if an infant has a name, there would be no more occasion for averring the sex than in any other case. But it is laid down as a rule that, the name being unknown, it is

sufficient to aver the name of the killed or injured person to be unknown. The law requires that an indictment shall be so certain as to the party against whom the offense was committed, as to enable the prisoner to understand who the party is, and upon what charge he is called upon to answer, as to prevent the prisoner from being put in jeopardy a second time for the same offense, and as will authorize the court to give the appropriate judgment on conviction. What would it practically add, in these respects, to the rights and safety of the accused in this case to have the sex alleged? In a criminal proceeding, the allegation of name is enough though there may be more than one person of the same name in the same place. *State* v. *Grant*, 22 Maine, 171. It is enough to allege the name to be unknown, although the grand jury might have ascertained what the name was. *Com.* v. *Stoddard*, 9 Allen, 280. An indictment need not describe, by an addition, the person upon whom an offense is committed. *Com.* v. *Varney*, 10 Cush. 402. In Bac. Ab. (Indictment G.) it is said, "Sometimes it may be convenient, for distinction sake, to add it," but not essential, "for it is sufficient if the indictment be true, viz, that J. S. was killed or robbed, though there are many of the same name." The tendency of modern decisions is to less strictness than formerly in describing persons and properties in indictments. If it is sufficient to describe a man by his name alone without an addition, when there are many others of the same name, or allow the person to be nameless in a presentment of the grand jury because they do not know what the name is, although they could have ascertained it by some painstaking, we think it can be no stretch of legal principle, to say that in the case at bar it is not essential that the sex should have been stated. *Com.* v. *Brettun*, 100 Mass. 206. *Com.* v. *Campbell*, 103 Mass. 436. *Com.* v. *Strangford*, 112 Mass. 289.

Demurrer overruled.

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

LUCY A. KING & another *vs.* CITY OF LEWISTON.

Androscoggin. Opinion December 12, 1879.

Highway. County Commissioners. Jurisdiction.

County commissioners have original jurisdiction to lay out a county road wholly within the limits of a town or city, when such road connects with other county roads; and the town or city within which it is laid out may construct the road any time within six years after the time allowed therefor by the commissioners, unless done by authority of law before that time.

ON REPORT.

Trespass to recover damages, sustained by reason of the construction of a road or way upon and across the plaintiffs' land, by the city of Lewiston. It is admitted that the title to said land was, at the time said trespass is alleged to have been committed, and now is, in Lucy A. King, one of the plaintiffs, and that Moses King, Jr., is her husband, and as such joins with her in this suit.

The county commissioners of Androscoggin county, in August, 1872, on the petition of A. B. Furbush and fifty-six others, after due notice, laid out a road or way, extending from Main street in said Lewiston, across College street to Sabattus street, in said Lewiston, which said road or way as laid out by said commissioners extend over, upon and across, the plaintiffs' land, substantially as set forth in the writ, and said county commissioners made return of their proceedings, on the 4th day of February, 1873, and therein allowed the said city of Lewiston two years from the time when all proceedings on said petition should be closed, in which to make and open said road or way, and all proceedings on said petition were closed September 2, 1873.

The termini of said road or way and the entire route thereof as prayed for in said petition and as laid out by the county commissioners are wholly within the limits of the city of Lewiston.

The said city of Lewiston did not make and open said road or way, or any part thereof, so laid out as aforesaid, within said two years, nor did said city take any action thereon until August, 1877. In August, 1877, John Read, street commissioner of said city of Lewiston, duly elected and qualified, and acting by and

77 " 132
78 " 136
79 " 527

under the express authority of the city government of said city of Lewiston, built and constructed that portion of said road or way, as laid out by said county commissioners as aforesaid, which extends from its terminus on said Main street to and across College street, and which said road or way so built and constructed, extends over, upon, and across plaintiffs' land as set forth in the writ.

It is admitted that Main street, College street and Sabattus street are county roads. The said petition of Furbish alleges "that common convenience and necessity requires the opening of a new highway which shall lead from the county road leading from Lewiston bridge to Green corner, starting at some point on said county road between the dwelling-houses of Lewis Ware, sen., and John H. Pettingill, and running south-easterly to the county road in Lewiston known as College street, there to join with and follow a range way (running south-easterly) to its intersection with the county road leading from Lewiston to the village of Sabattisville, said road being known as Sabattus street."

No damages were awarded the plaintiffs, by commissioners, and no appeal taken.

If the county commissioners had jurisdiction and authority to locate, and the city of Lewiston had authority to build and open the road or way at the time it did build and open it, the plaintiffs are to be nonsuited; otherwise the case is to stand for trial.

Pillsbury & Potter and H. C. Wentworth, for the plaintiffs, in an elaborate brief, cited R. S., c. 18, § 1. *Orrington* v. *Commissioners*, 51 Maine, 570. *Waterford* v. *Same*, 59 Id. 450. *Dresden* v. *Same*, 62 Id. 365. *True* v. *Freeman*, 64 Id. 573. *Hebron* v. *Same*, 63 Id. 314. *Com.* v. *Westboro'*, 3 Mass. 406. *Same* v. *Cambridge*, 7 Mass. 158. Livermore Pet. 11 Maine, 275. *Waterville* v. *Barton*, 64 Id. 321. *Goodwin* v. *Commissioners*, 60 Id. 328. *Scarboro* v. *Same*, 41 Id. 604. Stat. 1821, c. 118, § 6. R. S., 1857, c. 18, § 1. Stat. 1831, tit. Cor. Sessions. R. S., 1840, c. 125, § 1. *Howland* v. *Commissioners*, 49 Maine, 143. *Small* v. *Pennell*, 31 Id. 267. *Cyr* v. *Dufour*, 62 Id. 20. *Fairfield* v. *Commissioners*, 66 Id. 385. *Woodcock* v. *Calais*, 66 Id. 234.

Ludden & Drew, for the defendants.

PETERS, J. The commissioners of Androscoggin county laid out a county way wholly within the city of Lewiston, leading from one county road to another, and crossing a third county way. The plaintiffs contend they had no power to do this, submitting a written argument of counsel in that behalf which is elaborate and ingenious. We cannot, however, put out of consideration the fact that this power of county commissioners has been directly recognized and admitted by several important and, we think, binding decisions. *New Vineyard* v. *Somerset Co.*, 15 Maine, 21. *Harkness* v. *Waldo Co.*, 26 Maine, 353. *Hermon* v. *Penobscot Coms.*, 39 Maine, 583. *Smith* v. *Cumberland Coms.*, 42 Maine, 395. These decisions were made upon statutes which are the same now as then. The legislature, in the subsequent revisions of the statutes, making no alteration has seen fit to abide by the judicial interpretation. The defendants do not contend that county commissioners have jurisdiction to lay out within a town an isolated way having no connection with other county roads at either terminus. Here the new road became a part and parcel of a system of county or common roads. It shortens the distance from place to place over the county roads, affording a new convenience for the public travel.

There can be no doubt that the city could lawfully build the road after two and within six years. After two years the commissioners could compel its construction, if neglected to be built. But what the commissioners can do for them, they can certainly do for themselves.

Plaintiffs nonsuit.

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

JOHN C. SCHWARTZ *vs.* DAVID G. DRINKWATER.

Cumberland. Opinion December 12, 1879.

Insolvent law of 1878. *Pre-existent debts. Proceedings in court.*

Whether an insolvent shall or not have a stay of proceedings in an action against him until his petition in insolvency may be disposed of, is a matter of discretion with the judge before whom the action is pending, whose ruling is not reviewable by this court.

The insolvent law of this state enacted in 1878, so far as it provides for a discharge of the debtor's liabilities existing before the law was passed and not proved against the debtor's estate, is unconstitutional and void.

ON EXCEPTIONS, from the superior court for Cumberland county.

ASSUMPSIT on account annexed for $250.82. Writ dated February 20, 1877, entered March term, 1877. At the October term 1878, defendant suggested his insolvency, filed a motion setting forth said insolvency, and moved that said suit be stayed to await the result of said insolvency proceedings. Said action was continued from term to term till May term, 1879, when the court denied said motion, and ruled that the suggestion of insolvency by defendant did not operate as a stay of proceedings as prayed for in said motion. Whereupon the defendant alleged exceptions.

H. C. Peabody, for the plaintiff.

P. J. Larrabee, for the defendant.

PETERS, J. The defendant, being in insolvency, and having had some delay of this suit on that account, moves for a further stay of proceedings until his petition in the court of insolvency has been disposed of. Under the late bankrupt law a stay of proceedings for a reasonable time was a matter of right, whether the discharge sought to be obtained in bankruptcy would be pleadable to the pending action or not. The object was to prevent a bankrupt being needlessly hampered and embarrassed by the calls of different courts at the same time. Bankrupt Act, § 5106. Bump's notes thereto. *Ray* v. *Wright*, 119 Mass. 426. The insolvent act of this state contains no such provision. Section 47 (act of 1878) does not apply here. Therefore whether the motion should

78 Me. 538
79 " 381

be granted or not was for the judge to determine as a matter of discretion. His ruling, unless some palpable error was committed, could not be reviewed here. *Barker v. Haskell*, 9 Cush. 218. Undoubtedly a court of bankruptcy or insolvency might enjoin a creditor against pressing his debtor in another court, under circumstances calling for its interposition.

In this case the insolvent debtor has no cause of complaint anywhere. The suit was commenced before the insolvent law was passed. His discharge, if obtained, could not be pleaded in bar thereto. We notice that section 45 of the act of 1878 provides that a discharge shall be a bar to all the insolvent's provable liabilities. But so far as it bears upon debts existing before the law was passed, thus impairing the obligation of a contract, it is unconstitutional and void. It is too late to regard this an arguable question. The supreme court of the United States has settled the question, and their determination of it is, as far as all other courts are concerned, both state and national, final and conclusive. Nor has any court attempted to avoid it. *Sturges* v. *Crowninshield*, 4 Wheat. 122. *Ogden* v. *Saunders*, 12 Wheat. 213. *Boyle* v. *Turner*, 6 Pet. 635. Cool. Const. Lim., 2nd ed. 360, *294. 3 Pars. Con. *553.

Exceptions overruled.

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

ALBION K. KNAPP in eq. *vs.* ALBION P. BEATTIE & wife.

Oxford. Opinion December 12, 1879.

Stat. 1862, *chap.* 106, § 2. *Attachment. Volunteer. Exemption.*

The act of 1862 (c. 106, § 2), which exempted from attachment during his term of service the personal property of a volunteer to the amount in value of one thousand dollars in addition to other property by law exempted, does not apply to land held in his wife's name after his expiration of service, although bought by him with his own money before that time, he having at the time of the purchase no more property than the amount exempted.

BILL IN EQUITY, inserted in writ dated March 30, 1872, and heard on bill, answer and proof.

The facts sufficiently appear in the opinion.

R. A. Frye, for the plaintiff.

S. F. Gibson, for the defendant.

PETERS, J. It is admitted by the respondents, husband and wife, that the husband purchased a parcel of land, paid for it with his own money, took a deed in his wife's name, and that he has but little or no other attachable property. The bill is prosecuted to obtain out of the land the collection of a debt due the complainant before the purchase was made. This case is governed by the decision in the case of *Sampson* v. *Alexander*, 66 Maine, 182, and by other similar cases therein cited.

The only objection set up against maintaining the bill is, that the means taken to pay for the land was bounty money received by the husband as a volunteer in the late war, not exceeding the amount of property exempted to a soldier in the service from attachment by the act passed in 1862. This is not a defense. The act referred to (Laws 1862, c. 106, § 2) allowed the privilege of exemption only "during the term of service of such volunteer," and the respondent's term of service has long ago expired. And the exemption allowable was to be of "personal property," while this is real estate.

The question whether this provision in the act of 1862 was constitutional or not, raised by counsel, needs no discussion.

Bill sustained with costs. A master to be appointed to appraise and set off, with like powers, as in Sampson v. *Alexander, supra.*

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

ALFRED C. WEBBER *vs.* JOHN L. LIBBY & another.

Androscoggin. Opinion December 16, 1879.

Bond. Pleading. Evidence. Variance.

In an action of debt against two of the three obligors on a joint and several bond, the bond is admissible to sustain the issue on the part of the plaintiff raised by the defendants' several pleas of *non est factum*.

In such case there is no variance, in point of law, between the deed declared on and that proved. It is still the joint deed of the parties sued, although others have joined in it.

ON EXCEPTIONS.

Debt on a poor debtor's bond, in regular form, given under R. S., c. 113, § 24, and was originally commenced against John L. Libby, Edwin Fairbanks and Charles White, who executed the bond October 20, 1877. Charles White was insane at date of the writ, May 3, 1878, and ever since, and no service was made upon him. Plaintiff entered his action at the September term. At the January term, 1879, when the case came up for trial, the plaintiff discontinued as to Charles White and offered the bond in evidence, to which the defendants objected on the ground that the bond purported to be signed by John L. Libby, Edwin Fairbanks and Charles White, and therefore not admissible in this suit against John L. Libby and Edwin Fairbanks jointly, after discontinuance as to Charles White.

Also, that the bond offered, being in its terms a joint and several bond, signed by Libby, Fairbanks, and White, the plaintiff could not maintain an action on the same against two of the joint and several obligors, but must elect to proceed either against the whole, or singly.

The presiding justice allowed the bond to be read in evidence subject to the objection.

Defendants severally pleaded the general issue, *non est factum*, and by way of further plea, that the bond was obtained by duress of imprisonment, and in support of the same offered the same testimony presented by the plaintiff in the action *John L. Libby* v.

Alfred C. Webber and Frank W. Dana, and the presiding justice, for the purpose of presenting the case to the full court, ruled that the evidence offered, if admitted, would not constitute a defense to the suit, whereupon the defendants became defaulted, and alleged exceptions.

F. W. Dana & F. B. Osgood, for the plaintiff.

A. P. Moore, for the defendants, cited *Rand* v. *Nutter*, 56 Maine, 339. Chitty Con. 127. *Harwood* v. *Roberts*, 5 Greenl. 441. *Bank* v. *Treat*, 6 Id. 207. *Turner* v. *Whitmore*, 63 Maine, 526. 1 Chitty Plead. 43 (9 Am. ed.). Chitty Con. 153 (10 Am. ed). R. S., c. 82, §§ 11, 32, 47. R. S., c. 113, § 40.

VIRGIN, J. In the absence of any report of evidence tending to prove the alleged duress, the only question presented by the bill of exceptions or argued by the defendants pertains to the admissibility of the bond. And we have no doubt of the correctness of the ruling which admitted it. The plea was *non est factum*, and the only issue was whether a bond jointly and severally executed by three would prove that it was executed by two of them. We have no doubt of the correctness of the ruling admitting the bond. This practice is sustained by ancient and modern authorities.

"It is material," said Story, J., "to state that the bond on which the suit is brought, is a joint and several bond. Under such circumstances, the plaintiff might have commenced suit against each of the obligors severally, or a joint suit against all. But in strictness of law, he has no right to commence a suit against any intermediate member. He must sue all or one. The objection however is not fatal to the merits, but is pleadable in abatement only; and if not so pleaded, it is waived by pleading to the merits. The reason is that the obligation is still the deed of all the obligors who are sued, though not solely their deed; and therefore there is no variance in point of law, between the deed declared on and that proved. It is still the joint deed of the parties sued, although others have joined in it." *Minor* v. *Mechanics' Bank*, 1 Pet. 46, 73. 1 Saund. 291, c. n. 4. Gould's Pl., c. 5, § 114. *Neally* v. *Moulton*, 12 N. H. 485. *Gove* v. *Lawrence*, 24 N. H.

128. *Richmond* v. *Toothaker*, 69 Maine, 451, and cases there cited. *Hapgood* v. *Watson*, 65 Maine, 510. *First National Bank of Biddeford* v. *McKenney*, 67 Maine, 272.

If it be said that the action was originally against all and after the time for filing pleas in abatement had expired the plaintiff discontinued as to one, the answer is the defendants should have demurred instead of pleading the general issue. *Richmond* v. *Toothaker, supra.*

Exceptions overruled.

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

MARTIN PRIEST in error *vs.* ANNIE SOULE.

Kennebec. Opinion December 18, 1879.

Bastardy. Default. Declaration. Adjudication. Error.

It is not error, where a defendant in bastardy duly served with process and having given a valid bond for his appearance to abide the order of court upon the complaint, submits to a default before the declaration required of the complainant under R. S., c. 97, § 5, has been filed, for the judge to proceed thereupon after the filing of such declaration to adjudge him the father of the child, and to stand charged with its maintenance and give bonds accordingly in pursuance of the provisions of R. S., c. 97, § 7.

It is not necessary to the validity of the judgment to renew the entry of a default after the filing of such declaration.

When the declaration and adjudication appear by the docket to have been made on the same day, the presumption is that the declaration was filed before the adjudication was made, and this presumption is not overcome by the fact that the adjudication stands apparently first in the order of the docket entries.

The defendant in the bastardy process should have presented his defense at the court where his bond required him to appear. It was open for him to move to take off the default and set up a defense, if he had any, after the filing of the declaration. If the default was inadvertently entered and he had a valid defense, his remedy after judgment entered against him is by petition for review.

ON REPORT.

Error to reverse a judgment, in a bastardy case under R. S., c.

97, recovered by the defendant in error against the present plaintiff in the superior court for the county of Kennebec at the September term thereof 1878.

The facts sufficiently appear in the opinion. It was agreed that a copy of the writ and plea, copy of the docket entries and complaint, warrant, officer's return, order of court, recognizance and declaration of complainant shall constitute the report of the case, "to be submitted to the determination of the law court to decide whether error lies, and, if so, to what extent it shall affect the proceedings and judgment in the original action, and to make such order as the law requires."

Humphrey & Appleton, for the plaintiff in error, cited R. S., c. 97, §§ 5, 7. *Chapel* v. *White*, 3 Cush. 539. *Jones* v. *Thompson*, 8 Allen, 334. *Fisher* v. *Shattock*, 17 Pick. 252. *Stiles* v. *Eastman*, 21 Id. 132. *Rice* v. *Chapin*, 10 Met. 5. *State* v. *Kirby*, 57 Maine, 30. *Jewell* v. *Brown*, 33 Id. 250. *Smith* v. *Keen*, 26 Id. 411. *Hollis* v. *Richardson*, 13 Gray, 392. *Hemmenway* v. *Hickes*, 4 Pick. 497. *Bridge* v. *Magoun*, 8 Maine, 292. *Drowne* v. *Stimpson*, 2 Mass. 441. *Foster* v. *Beaty*, 1 Maine, 304. *Dennett* v. *Kneeland*, 6 Id. 461. *Loring* v. *O'Donnell*, 12 Id. 29. *Rice* v. *Chapin*, 10 Met. 5.

G. T. Stevens, for the defendant in error.

Barrows, J. The plaintiff in error, having been arrested on a warrant duly issued upon the complaint of the defendant in error charging "him with being the father of a child with which she was then pregnant and which was likely to be born a bastard," gave a bond in due form conditioned for his appearance at the June term of the superior court in Kennebec county and for abiding the order of said court on her complaint in bastardy against him. The case shows that he did enter an appearance at that term, was defaulted on the first day of the next September term, and on the 19th day of said September term was adjudged the father of the child and to stand charged with his maintenance with the assistance of the mother, and to this end to pay certain sums and give certain bonds in accordance with the provisions of R. S., c. 97, § 7.

The plaintiff in error claims that there was error in making this adjudication upon a default which was entered up on the first day of the term before the complainant i n bastardy had filed the declaration required by R. S., c. 97, § 5. It appears that this declaration was filed the same day that the adjudication was made, and, presumably, before the entry of the adjudication; for the order in which the entries stand upon the docket signifies nothing. Clerks usually consult their own convenience within the limited space allowed; and the terms of the adjudication indicate that the judge had the declaration before him when he directed the entry of the adjudication, in which the fact of the birth and the sex of the child as stated in the declaration are referred to.

If the plaintiff in error would claim that the adjudication was made before the required declaration was filed it is incumbent on him to establish it. A judgment will not be held to be erroneous where for aught that appears it may have been legally rendered. *Spaulding* v. *Rogers*, 50 Maine, 123. Was it error to make the adjudication upon a default of the defendant entered previous to the filing of this declaration? We think not. It was no fault of the complainant or of the court that the defendant chose to be defaulted when he was. The complainant could not compel him to appear further. She had taken his bond to abide the order of the court upon the complaint, but she could not insist upon his defending the suit. Where the complaint is instituted in the early stages of gestation it may not infrequen tly happen in some counties that more than one term of court will e lapse before the complainant can file the required declaration. If the defendant would not be regarded as assenting to its truth he should be in court to deny it when it is filed and an adjudication upon it is demanded.

His submitting to a default before this is done will not prevent the court from proceeding to adjudge him the putative father of the child when the declaration comes in. If the entry of the default before the filing of the declar ation in question could be regarded as an irregularity, it was cause d by the act of the plaintiff in error; and a judgment will not be reversed on error for an irregularity caused by the party complaining. *Jewett* v. *Tom-*

linson, 3 Watts and Serg. 114. If need were, we should presume a default entered (though not noted on the docket) after the filing of the declaration. A judgment against a defendant who did not in fact plead or appear is not reversible because the record fails to show that he was solemnly called, and came not, &c. *Hart* v. *Flynn*, 8 Dana, 190.

The defendant in the original process here, if he supposed he had any valid defense to the charge made against him by Annie Soule, should have presented it at the court at which he was called upon to appear. It was open to him to move to have the default taken off if he found anything in the declaration which he was able to deny. His remedy, after judgment thus entered upon his default, if the same was suffered inadvertently when he had a good defense, is by petition for review.

The only errors in the original process of which we can take cognizance here are those which the plaintiff in error alleges and establishes.

The only ground upon which he claims to maintain a writ of error not being tenable, the entry must be.

Judgment affirmed with costs.

WALTON, DANFORTH, LIBBEY and SYMONDS, JJ., concurred.

DISSENTING OPINION BY APPLETON, C. J. This is a writ of error to reverse a judgment rendered in a bastardy process in which the defendant in error was complainant.

"A writ of error," observes Mellen, C. J., in *Bath Bridge Co.* v. *Magoun*, 8 Greenl. 292, "is a writ of right; a writ of certiorari is not; it is a matter of sound discretion to grant or refuse it." Whenever errors are apparent of record, in error the judgment is reversed, and in certiorari, the proceedings are quashed. In each case the court act only on the record and no evidence *aliunde* is receivable.

The plaintiff in error, having been arrested on a warrant duly issued upon the complaint of the defendant in error, charging him with being the father of a child with which she was then pregnant and which was likely to be born a bastard, gave a bond in due

form conditioned for his appearance at the June term of the superior court in Kennebec county, and for abiding the order of said court in her complaint in bastardy against him. The plaintiff in error entered an appearance at that term, was defaulted on the first day of the September term, and on 19th day of said September term was adjudged the father of the child, and to stand charged with its maintenance, with the assistance of the mother, and to this end to pay certain sums and give certain bonds in accordance with the provisions of R. S., c. 97, § 7. After this adjudication, the next entry on the docket, as of the same day is complainant's declaration filed. Since which time there has been no default.

The plaintiff in error was defaulted on the first day of the September term. But at that time there was only on file a complaint by the defendant in error that she was pregnant with a child which if born alive might be a bastard, and charging the plaintiff with its paternity, and stating the time of its begetting; and the recognizance entered into by him in accordance with R. S., c. 97, §§ 1 and 3.

But the complaint contained no allegation that a bastard child had been born, or that in travail the mother had charged the plaintiff with being its father, as is required by § 5. The plaintiff in error, by the most liberal construction of his default could not be regarded as admitting more than the allegations in the complaint. He could not be adjudged the father of the child for there was not on file anywhere the allegation of an existing child whose father he could be adjudged to be, or with whose maintenance he could be ordered to stand charged.

Nor does the statute give the slightest authority for an adjudication of paternity under such conditions by §§ 1 and 3, but the reverse.

By § 5, "Before proceeding to trial, the complainant must file a declaration stating that she has been delivered of a bastard child begotten by the accused, the time and place when and where it was begotten, with as much precision as the case will admit; that being put upon the discovery of the truth during the time of her travail, she accused the respondent of being the father of the child, and that she has been constant in her accusation."

By § 7, "If on such issue, the jury find the respondent not guilty, he shall be discharged; but if they find him guilty, or the facts in the declaration filed are admitted by default or on demurrer, he shall be adjudged the father of the child; stand charged with its maintenance with the assistance of the mother, as the court orders," etc.

These sections are precise and definite. They prescribe what shall be done before the adjudication of paternity and the order as to maintenance. The declaration must be filed before proceeding to trial. It must be filed before default or demurrer, for the default or demurrer only admits "the facts in the declaration filed," not those which may be stated in a declaration thereafter to be filed.

There can be no doubt as to the legislative intention. No adjudication could have been had on the first day of the term when the default was entered because then there was no declaration filed which was admitted by such default. It could not have been made on the 19th day of the term when the declaration was filed because after that was done, there has been neither trial by a jury, finding guilt, nor any admission of the facts in the declaration by default or demurrer.

A declaration, and the allegations therein to be set forth are specifically required by statute "before proceeding to trial or default or demurrer." The facts must be proved as alleged.

The views above expressed are in accord with the entire weight of judicial authority. In *Drowne* v. *Stimpson*, 2 Mass. 441, which was on a writ of error, Parsons, C. J., uses the following language: "It is a uniform rule of law, that when a statute gives a remedy under particular circumstances, the party seeking this remedy should in his plaint or information, allege all the facts necessary to bring him within the statute. In this complaint it ought to have been averred, not only that she has been delivered of a bastard child, of which the defendant was the father, but that she had accused him in the time of her travail, had been examined on oath before a justice, and had continued constant in her accusation." The proceedings were quashed for this defect. In *Beatty* v. *Foster*, 1 Greenl. 304, there was an application for a

certiorari. In delivering the opinion of the court Mellen, C. J., says: "Some of the most important facts necessary to justify a verdict against the original defendant, are omitted. No declaration was ever filed in the case; of course no issue joined; in fact, no foundation for the verdict and judgment is disclosed. There is nothing but the examination taken before the magistrate, and this was considered as the basis of the proceedings in the court below, and as a sufficient complaint or charge or declaration, on which the case could be tried; and yet it appears that such complaint or examination was merely used as evidence. Nor does it appear that any child has been born. In fact the record is wholly defective and irregular." Yet such was the record in the present case when the default was entered. But as there had been a fair and full trial and "the birth of the child as a bastard" had been proved, and the paternity of the defendant—and as the case was before the court on an application for a certiorari, they declined to grant the writ, but add, "in future, similar indulgence will not be shown by the court, where such irregularities are allowed to occur." The granting was a matter of discretion, but as Parsons, C. J., remarks, in *Drowne* v. *Stimpson*, before cited, "error is of right." In *Dennett* v. *Kneeland*, 6 Greenl. 461, Weston, J., says: "We are all of opinion, as she (the complainant) did not accuse the respondent with being the father of the child, in the time of her travail, before delivery, that this is a defect fatal to her prosecution." But this fact should be averred in the declaration "before proceeding to trial." "In this declaration she should state that she has been delivered of a bastard child; that it was begotten upon her body by the person accused, &c., and that, being put upon the discovery of the truth respecting the same accusation in the time of her travail, she did thereupon accuse the defendant of being the father of such child." *Loring* v. *O'Donnell*, 12 Maine, 29. "Such complaint," observes Dewey, J., in *Rice* v. *Chapin*, 10 Met. 5, "must allege, particularly, that the complainant, in the time of her travail, accused the defendant of being the father of the child. No prosecution can be supported without proof of this fact; and it ought to be distinctly alleged. *Stiles* v. *Eastman*, 21 Pick. 132." "It is a well settled rule of

law," remarks Dewey, J., in *Jones* v. *Thompson*, 8 Allen, 335, "that the complaint filed in the superior court is one upon which the defendant in a bastardy prosecution is tried. Such complaint must state all the facts necessary to charge the defendant as the father of the bastard child, and all facts necessary to sustain the proceedings against him under the statute." The complaint referred to in the remarks of the court was the declaration in the count which contained no direct averment that the respondent was the father of the child. Evidence that he was the father was received subject to exceptions, which were sustained because of the want of such averment, and leave was granted to amend. In that case there was no averment of the delivery of the bastard child—but in the case at bar there was no such averment when the default was entered.

The judgment is erroneous. The statute provides that "before proceeding to trial," default, or demurrer, a declaration must be filed, but there was none filed when the default was entered and the facts then on record as alleged do not justify an adjudication of paternity, &c.

After the declaration was filed, there has been no trial, default, or demurrer, and consequently there can be no legal judgment on such declaration unless a judgment can be rendered on a declaration, on which there has been neither trial by a jury, nor any admission by default or demurrer. The judgment should be reversed.

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

Penobscot. Opinion December 23, 1879.

In an action by an officer upon a receipt for property attached, it is not a defense that there were irregularities in the proceedings in the original suit. To relieve the receiptors from liability it must appear that the judgment rendered was absolutely void.

In a process *in rem* against pine, spruce, hemlock and hard wood logs, it is not objectionable that the officer attaches only the hemlock and spruce logs.

In a proceeding *in rem* against logs to secure a laborer's lien thereon, an order from the law court in the abbreviated form of "judgment against the logs," describes only the logs attached. The judgment being correctly ren-

dered, it is immaterial whether the record of the judgment has been properly extended or not, if the court permits the record to be amended. The judgment itself is the vital thing.

Errors and deficiencies in court records are to be expected. R. S., c. 79, § 10, requires their correction. Third parties may be affected thereby, but they are presumed to know that if a clerk has made a mistake it may be corrected.

The settled rule in this state is, that the court will allow an amendment of a mistake committed by a recording officer, when such amendment will be in the 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 record been originally in proper form.

ON REPORT.

ASSUMPSIT by plaintiff as deputy sheriff against defendants on a receipt given by them to him for certain logs attached on certain lien suits, one by John Sheridan, and sixteen by other parties, against Daniel E. Ireland and certain logs. Plea, the general issue and brief statement, alleging "that the proceedings by the plaintiff and the alleged judgments in the original actions, have not established any valid lien claim, or claims, on or against the said logs named in defendant's said receipt and agreement."

This is the sixth time that the subject matter of this suit has been, in different forms, before this court on questions of law. See *Sheridan* v. *Ireland*, and logs, 61 Maine, 486. *Same* v. *Same*, 65 Id. 65. *Same* v. *Same*, 66 Id. 138. *Bean* v. *Ayers*, 67 Id. 482. *Same* v. *Same*, 69 Id. 122.

In the original writ of *Sheridan* v. *Ireland*, and logs, the officer is commanded "to attach the goods and estate of Daniel E. Ireland . . . to the value of . . and also attach hemlock, spruce, hard wood and pine logs in Penobscot river, in and below Penobscot boom, marked, NXVIIXI, and summon the defendant . . . to answer unto John Sheridan . . in a plea of the case," upon the following account annexed.

Aug. 14, 1872.

"DANIEL E. IRELAND,

To JOHN SHERIDAN, Dr.

To 76 days work cutting and hauling hemlock, spruce, hard wood and pine logs on No. 7, the past winter, now in Penobscot river in and below Penobscot boom, marked NXVIIXI, at $1.00 per day, $76 00

And the plaintiff claims to have a lien on said logs for personal services in cutting and hauling the same during the past winter,

to the amount of $76.00 and this action is brought to enforce said lien according to the statute in such cases made and provided.

"Also, for that said plaintiff heretofore, to wit: during the winter and spring last past, had, at the request of said defendant, labored in said state of Maine, at cutting and hauling on and from a place called Kossuth, or township No. 7, into the waters of Penobscot river and its tributaries, and to the Penobscot boom, certain hemlock, hard wood, spruce and pine logs, masts, spars, and lumber, of the following marks, to wit: NXVIIXI, and the sum and balance actually due and unpaid, of the amount stipulated by defendant to be paid to the plaintiff for his personal services therein, was and is the sum of seventy-six dollars and cents, (as is specified in the annexed account,) and in consideration of the premises, said defendant, at said Bangor, on the day of the purchase of this writ, promised the plaintiff to pay him said last named sum on demand; and plaintiff claims a lien upon the said logs and lumber, under the laws of this state, for said sum so due, and brings this suit to enforce and secure the same."

The officers return on said writ is as follows:

"PENOBSCOT, ss. On this sixteenth day of August, A. D. 1872, at 3 o'clock in the afternoon,

By virtue of this writ I have attached as the logs within named, and simultaneously with attachments made by me by virtue of sixteen other writs, all against the same defendant and logs, bearing the same date, and returnable to the same court to which this writ is returnable, and each writ sued out for the purpose of enforcing a lien claimed by the plaintiff therein, for personal services in cutting and hauling the same, nineteen hundred and forty-five spruce and hemlock logs marked as herein described, and at the direction and with the approval of the attorneys for plaintiff, have taken a receipt therefor, furnished by A. C. Ayers, of and for firm of Shaw & Ayers, who claimed to own said logs so attached, and who thereupon took possession of the same."

Record as extended Oct. Term, 1876.

No. 36—SHERIDAN *vs.* IRELAND AND LOGS.

John Sheridan, of Exeter, in the county of Penobscot, plaintiff,

vs.

Daniel E. Ireland, of said Exeter, and also the hemlock, spruce,

hard wood and pine logs in Penobscot river, in and below Penobscot boom, marked NXVIIXI, defendants.

Plea of the case. Declaration, count upon an account annexed.

Writ dated August 14, 1872. Attachment August 16, 1872. Service Sept. 12, 1872. This action was entered at the October term, A. D. 1872, and judgment was rendered at this term, October 3, A. D. 1876, for plaintiff against defendant and the logs, for ninety-one dollars and ten cents damages, and seventy-nine dollars and forty cents costs of suit.

Execution issued October 10, 1876.

DESIRED AMENDMENT OF THE RECORD.

No. 36, October term, 1876.

John Sheridan of Exeter, in the county of Penobscot, vs. Daniel E. Ireland of said Exeter, and also hemlock, spruce, hard wood and pine logs, in Penobscot river and below Penobscot boom, marked NXVIIXI, in a plea of the case; for that the said defendant at said Bangor, on the day of the purchase of this writ, being indebted to the plaintiff in the sum of seventy-six dollars according to the account annexed, then and there, in consideration thereof, promised the plaintiff to pay him that sum on demand. And the plaintiff claims to have a lien on said logs for personal services in cutting and hauling the same during the past winter to the amount of $76, and this action is brought to enforce said lien according to the statute in such cases made and provided. Also, for that said plaintiff, heretofore, to wit, during the winter and spring last past, had, at the request of said defendant, labored in said state of Maine, at cutting and hauling, on and from a place called Kossuth, or township No. 7, into the waters of Penobscot river, and its tributaries, and to the Penobscot boom, certain hemlock, hard wood, spruce and pine logs, masts, spars, and lumber of the following marks, to wit, NXVIIXI, and the sum and balance actually due and unpaid, of the amount stipulated by defendant to be paid to the plaintiff for his personal services therein, was and is the sum of seventy-six dollars (as is specified in the annexed account) and in consideration of the premises, said defendant, at said Bangor, on the day of the purchase of this writ, promised the plaintiff to pay him the last named sum on

demand; and plaintiff claims a lien upon the said logs and lumber under the laws of this state, for said sums so due, and brings this suit to enforce and secure the same. Yet, though often requested, said defendant has not paid said sum, nor any part thereof, but neglects and refuses so to do, to the damage of the said plaintiff (as he says,) the sum of two hundred dollars, which shall then and there be made to appear with other due damages.

This writ was dated the fourteenth day of August, A. D. 1872, and the said logs attached on the 16th day of said August, and service made on said defendant September 12th, 1872, and the action entered in this court at the October term, A. D. 1872, at which term the plaintiff appeared to prosecute his said action; but the personal defendant —Daniel E. Ireland—did not appear, although called to come into court, &c., but made default; and said action was thence continued from term to term to the January term, A. D. 1874, at which term the plaintiff appeared and moved the court for notice of this suit to be given to the owners of said logs and lumber; and thereupon the court ordered that notice of this suit be given to the owners of said logs and lumber, by publication in the Bangor Courier, three weeks successively, the last publication to be thirty days before the next term of this court, and the action was thence continued to the next April term of this court, at which term notice of this suit to the owners of said logs and lumber, as ordered, was proved to the satisfaction of the court, and the case was thence continued from term to term to the October term, A. D. 1875, at which term the plaintiff appears, and Whiting S. Clark, Esq., appears for said logs, and Shaw & Ayers, owners of said logs and lumber; and for plea say they never promised the plaintiff in manner and form as he in his writ and declaration hath alleged against them, and of this put themselves on their country, by W. S. Clark, their attorney; and the plaintiff, likewise, by Barker & Son, his attorneys; and the said owners of said logs and lumber, for a further brief statement, say that they deny that the plaintiff has any lien on said logs and lumber, as he in his writ and declaration has alleged, for the reason that the said logs were not attached within sixty days after their arrival at the place of destination for sale,

and allege that said logs and lumber were for sale, and that their place of destination for sale was Penobscot boom.

Whereupon the cause was opened to the jury, and before verdict the cause was withdrawn from the jury by agreement of the parties and submitted upon report to the law court then next to be held at Bangor, in and for the eastern district, to render such judgment as the legal rights of the parties require; and said action was thence continued from term to term to this term when the said law court ordered "judgment for the plaintiff against the personal defendant and against the logs."

"It is therefore, considered and adjudged by the court that the said John Sheridan recover judgment against Daniel E. Ireland and said logs, marked NXVIIXI, the sum of ninety-one dollars and ten cents debt or damage, and costs of suit taxed at seventy-nine dollars and forty cents.

Ex'on issued October 10, 1876."

STATE OF MAINE.

Penobscot ss. Supreme Judicial Court.

Law Term, Eastern District, 1879.

Gustavus S. Bean *vs.* Ariel S. Ayers et als.

Supplemental report.

This case was made up, signed by the presiding judge, and printed and placed in the hands of the clerk of courts, and a copy was given to counsel.

Afterwards the plaintiff, not being satisfied with his amendment of the records, which he was allowed by court to make, (as appears by desired amendment of record) revised his said amendment, withdrew the original amendment and the printed copies—which the clerk had compared and certified—had his revision printed and attached to the copies, as now appears in the report, and immediately sent two copies to counsel for defendants and returned the papers as amended by him without leave of court to the clerk of courts.

W. S. Clark, counsel for the defendants, informed the clerk that he objected to what had been done, and requested him not to certify them.

Thereupon the plaintiff at the coming in of the court on Monday, June 16th, 1879, after a full statement of facts, asked for such suggestion or order as the rights of the parties require, defendants' counsel being present and objecting. And the court suggested that the plaintiff move to amend his suggested amendment of the extended records, and the case go to the law court as originally certified by the clerk, the law court to allow the amendment proposed or not, as the rights of the parties require. And thereupon the plaintiff moved to amend by substituting for the last part of the printed case the following, viz., the defendant objecting:

"Action was thence continued from term to term to the April term of this court, when the said law court ordered "judgment for the plaintiff against the personal defendant and against the logs," and said action was further continued to this term.

"It is, therefore, considered and adjudged by the court that the said John Sheridan has a lien upon so many of said logs as were attached on the original writ, for his personal labor in cutting and hauling the same; and that he recover judgment against Daniel E. Ireland and said nineteen hundred and forty-five spruce and hemlock logs, marked NXVIIXI, being the same attached on and described in said writ, the sum of ninety-one dollars and ten cents debt or damage, and costs of suit taxed at seventy-nine dollars and forty cents.

Ex'on issued October 10, 1876."

The defendant denies that the amendment was in accordance with the fact.

The proposed amendment is reported to the full court with the above statement of facts, and subject to such action as the court deem proper as to its consideration.

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

W. S. Clark (*W. H. McCrillis* with him) for the defendants, in a very elaborate and lengthy brief, among other things, contended:

I. Smith & Ayers, the owners of the logs attached in the original lien actions involved in this suit, are under no legal equitable

or even moral obligation to pay the debts in question. *Bicknell* v. *Trickey*, 34 Maine, 273, 281.

II. The plaintiff, to sustain his writ, has put in defendants' receipt, with evidence of demand thereon, after judgment in the suits wherein the receipt was given; also, the original writs, the alleged judgments thereon, and the executions issued on the judgments.

The defendants have put in evidence that Shaw & Ayers were owners of the logs; and that the defendants have restored the logs to the owners.

The question is—Which has the best title?

III. As the logs have been restored to the owners, the defendants were under no liability on the demand of the officer, to restore them to him, unless he had a right to them for the benefit of the plaintiffs in the original actions, and by virtue of valid lien judgments *in rem* against the logs rendered in those actions.

The plaintiffs in those actions had no legal right to call on the officer for the logs, unless they had obtained valid lien judgments *in rem*. The officer was under no liability to those plaintiffs, unless the plaintiffs had such judgments *in rem*. The logs had been restored to the owners, and the officer was under no liability to them. Therefore, if the officer was under no liability to the plaintiffs in the original lien writs, his liability was wholly terminated. And that terminates the liability of the defendants as receipters. *Sawyer* v. *Mason*, 19 Maine, 49. *Moulton* v. *Chapin*, 28 Maine, 505. *Plaisted* v. *Hoar*, 45 Maine, 380. *Mitchell* v. *Gooch*, 60 Maine, 110. *Butterfield* v. *Converse*, 10 Cush. 317. *Shumway* v. *Carpenter*, 13 Allen, 68.

IV. In these cases the logs were not attached "as the property of the defendant," but simply and solely in pursuance of the *in rem* command in the writ, by an attachment *in rem*. So far as the proceedings "in ordinary actions of assumpsit" are concerned, there was no attachment of the logs on these proceedings. To constitute any attachment of the logs on these proceedings, the logs must be attached and the officer's return must be "in the usual and common" and indispensable form, "as the property of the defendant." *Bicknell* v. *Trickey*, *supra*. *Redington* v. *Frye*, 43 Maine, 586. *Parks* v. *Crockett*, 61 Id. 489.

V. The alleged judgments are invalid—which appear upon inspection of the record.

1. Because the alleged judgments do not show notice to log owners.

2. Because the alleged judgments do not show the "nature" of the judgments rendered against the logs.

3. Because the alleged judgments do not appear or purport to be rendered by the court.

4. Because the alleged judgments do not show that they were rendered by the court upon a hearing of the parties, or on default after notice to log owners.

5. Because the alleged judgments do not show the grounds of the sentence against the logs.

6. Because the alleged judgments do not show that the court adjudged that the plaintiffs had a lien on the logs attached.

3 Black. 395-6. Const. Maine, § 7, art. 1. Amend. Const. U. S. art. 5. Stat. 1874, c. 196. Cool. Con. Lim. 335. Freeman Judg. §§ 37, 50, 52. *Meeker* v. *Van Ransalaer*, 15 Wind. 397. *Jones* v. *Woolson*, 5 Yerg. 427. *Davidson* v. *Murphy*, 13 Conn. 213. *Baker* v. *Bronson*, 5 Blatch. C. C. 5. *Taylor* v. *Runyan*, 3 Clarke, 474. *Wheeler* v. *Scott*, 3 Wis. 362. *Martin* v. *Bernhardt*, 39 Ill. 9. *Hinson* v. *Wall*, 20 Ala. 298.

As to the fifth defect—Being a judgment *in rem*, the grounds of the judgment must appear in the record. Freeman on Judg. § 618. *Bernardi* v. *Motteux*, 2 Doug. 575. *Lothian* v. *Henderson*, 3 B. &. P. 499. *Calvert* v. *Bovill*, 7 T. R. 523. *Pollard* v. *Bell*, 8 T. R. 434. *Fisher* v. *Ogle*, 1 Camp. N. P. 419. *Robinson* v. *Jones*, 8 Mass. 536. *Fitzsimmons* v. *Newport Ins. Co.*, 4 Cranch. 185.

As to 6th defect, see *Annis* v. *Gilman*, 47 Maine, 152. *Thompson* v. *Gilmore*, 50 Id. 436. Counsel claimed defects of such a nature in the original writs that no valid judgment could be entered against the logs, and cited, 1 Mass. 181. 17 Id. 229. 1 Pick. 368, 162. 8 Id. 83. 32 Maine, 178, and as to liability of receipters. *Albee* v. *Ward*, 8 Mass. 79, and cases there cited.

As against the rights of third parties, the court will not enter a judgment, *nunc pro tunc*, nor allow an amendment, *nunc pro*

tunc. *Jay* v. *Carthage*, 48 Maine, 353. *Glidden* v. *Philbrick*, 56 Maine, 222. *Pierce* v. *Strickland*, 26 Maine, 217. *Milliken* v. *Bailey*, 61 Maine, 316. Freeman on Judg. §§ 66, 68.

Nor will the court allow a judgment to be vacated and a new judgment entered to revive an attachment in that way. *Sugdam* v. *Hegguford*, 23 Pick. 465. *Leighton* v. *Reed*, 28 Maine, 87. *Fairfield* v. *Paine*, 23 Id. 42.

More especially courts will not erase their judgments and say they shall stand for nought, and new entries of the same judgment made at a future term, when third parties, sustaining the relation of bail or surety, are to be made liable in this way to respond to the new judgment. Amendment without leave is contempt and void. *Bank* v. *Hewey*, 21 Maine, 38. *Childs* v. *Ham*, 23 Maine, 74. *Fletcher* v. *Pratt*, 4 Vt. 182. *Brainerd* v. *Withey*, 5 Vt. 97. *Orvis* v. *Isle La Mott*, 12 Vt. 195. *Smith* v. *Howard*, 41 Vt. 74.

PETERS, J. This is an action by an officer upon an accountable receipt. The defense is, that no valid judgment was rendered in the original suit. To establish this defense, it is not enough to show that there were errors and irregularities of a merely formal character in the former proceedings. It must appear that the judgment rendered was utterly void. *Brown* v. *Atwell*, 31 Maine, 351. *Drew* v. *Livermore*, 40 Maine, 266. *Thompson* v. *Smiley*, 50 Maine, 67.

I. Are there any fatal deficiencies in the original writ? None are pointed out to us that we can regard as anything more than merely formal and technical matters such as are cured by the judgment, even if they would have been open in the original cause to special demurrer.

II. Was the officer's return valid? He was directed in the writ (*in rem*) to attach pine, spruce, hemlock and hard wood logs of a certain mark. He omitted to take the pine and hard wood, but attached the others. He attached less and not more than he was directed to. This point fails.

III. Was the judgment valid as rendered by the court? This is a more important question. But the objection raised here has not foundation to rest upon. The order from the law court was

this: "Judgment for the plaintiff vs. the personal defendant and against the logs." Against what logs? The argument by the defendants is, that it may mean the logs declared against in the writ, rather than the logs attached upon the writ, not necessarily being the same logs. But what logs had the court been considering? What logs had been before the court and constructively in its possession? The process was *in rem*. As in an action of replevin, the return of the officer becomes a part of the declaration, limiting its operation to the articles actually taken and attached. See *State* v. *Howley*, 65 Maine, 101, and cases cited. The logs attached were before the court, and the litigation related to them and nothing else. Can it be supposed that the court had been deliberately considering the right of the plaintiff to have judgment against logs that he had never attached? What did the court mean by "the logs"? Courts are in the habit of using abbreviations and short formulas to indicate what would require many more words to express in full. Suppose an action of replevin is instituted against two vessels, one only being found and returned by the officer as attached, would the words "judgment for return," sent down from the law court, be understood to apply to any other than the vessel attached? The logs attached were in one sense a defendant. The mandate from the law court went against them as a defendant, describing them with the same certainty that it described the personal defendant.

IV. A valid judgment having been rendered, is the record of the judgment sufficient to establish the plaintiff's claim?

It is immaterial in this case whether the record is defective or not, if it is by permission of court amended. The vital thing is the judgment. The record is only evidence of the judgment, and if erroneous, it fails truly to represent the judgment. For the purposes of this case, there was no need of any record, beyond the papers on file and the docket entries, which are a record of themselves. *Willard* v. *Whitney*, 49 Maine, 235. The only object of a more formal record is to avoid the danger of losing original papers and of mistaking, after a lapse of time, the meaning of brief docket entries which are sometimes obscure and difficult to understand. *Garfield* v. *Bemis*, 2 Allen, 445. A book

of judgment records is to the clerk what a ledger is to a mercantile book-keeper. When the record is made up, however, it is not subject to explanation or contradiction by evidence outside of it. If there be error in it, it can only be corrected by the court. See cases *supra*; also *Noyes* v. *Newmarch*, 1 Allen, 51.

Why not correct an erroneous record, if the judgment be right? Why should it not be made to tell the truth? It is but a form. The error is usually a clerical one. It is the result of an attempt of a clerk to obey the direction of the court, failing to do so. It would be strange if slips and inadvertencies did not occur in extending the records. The work cannot be done under the eyes of the judges. The law expects deficiencies and diminutions of the records, and provides (R. S., c. 79, § 10) that the court, as often at least as there is a change of clerk, shall cause the records to be examined, and when deficient shall "direct them to be immediately made or corrected." It would be a misfortune if the corrections could not be made. It is contended that an amendment would work injustice in the present instance because the defendants are in the situation of bail or sureties. But the defendants are presumed to know what the judgment itself was and that it is valid. In legal intendment, they are presumed to know that if the clerk has made a mistake it can be and should be corrected. "It makes no difference that the amendment affects third persons; all amendments more or less affect third persons," says Spenser, J., in *Close* v. *Gillespey*, 3 Johns. 526. Of course, there may be cases when it would not be in the furtherance of justice to allow an amendment. *Hayford* v. *Everett*, 68 Maine, 505. But 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 record been originally in proper form. *Caldwell* v. *Blake*, 69 Maine, 458. In this view our decisions all concur. See cases *supra*. *Hall* v. *Williams*, 10 Maine, 286. *Glidden* v. *Philbrick*, 56 Maine, 222. *Knight* v. *Taylor*, 67 Maine, 591. A judgment is one thing; the record of a judgment is another thing. The one is a judicial act; the other

a clerical act only. In most of the cases cited by the defendants, the difficulty was in the judgment pronounced by the court.

We think it unnecessary to decide whether the record, as it stands, is deficient or not, as it may be made full and complete by amendment. The amendment last asked for will make it good. The subject matter of this suit has been five times before this, in different forms, presented upon questions of law to the court. We have carefully examined the elaborate and able brief of the defendants' counsel, who has "kept the flag flying to the end," but are unable to agree with his views. *Interest reipublicæ ut sit finis litium.*

Amendment allowed.
Defendants defaulted.

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

MELVILLE J. JEWETT *vs.* DANIEL W. HUSSEY.

Piscataquis. Opinion December 23, 1879.

Deed—calls in. Easement. Adverse possession.

Calls in a deed thus, "Thence by the road to Peter Staples' land, thence southerly by said Staples' land to J. Weymouth's land," are answered by running on the road to Peter Staples' land, thence southerly five and a half rods, thence at right angles westerly eleven rods, and thence at right angles southerly one hundred and fifty rods to Weymouth's land, if such is the correct description of the divisional line (or lines) between the land of the grantor and the land owned by Peter Staples.

An easement may be acquired by a use of land, the use being continued long enough, having its origin and continuance in a parol gift or grant. Any occupation or enjoyment of the land of another under a claim of ownership, is in a legal sense an usurpation of the right of the true owner, constituting an adverse possession.

ON REPORT.

Writ of entry dated February 6, 1878. Plea *nul disseizin* with brief statement.

1. The defendant says that plaintiff, never at any time had title to or was seized of the demanded premises, but that the same were during the times mentioned in plaintiff's writ, ever since, and still are owned by one William Gould, or by his heirs.

2. That if the title was not in said Gould or his heirs as above stated, it was and is in defendant subject to the right of plaintiff to the use of a certain spring on the premises.

The questions presented are stated in the opinion.

A. G. Lebroke, for the plaintiff.

J. Crosby, for the defendant.

PETERS, J. The question presented is this: Are calls in a deed thus, "thence by the road to Peter Staples' land, thence southerly by said Staples' land to J. Weymouth's land," answered by running on the road to Peter Staples' land, thence running southerly five and a half rods, thence westerly eleven rods, and thence at right angles southerly one hundred and fifty rods to Weymouth's land, if such is the correct description of the divisional line (or lines) between the land of the grantor and the land owned by Peter Staples. We have no doubt of it.

The second line would not be a continuous southerly-going line, as literally called for by the deed, but the land conveyed would adjoin Peter Staples' land at the road, and be bounded by his land all the way from the road to the end of the lots. The monument called for is Peter Staples' land. The general direction (southerly) corresponds with the call for most the distance of one hundred and sixty rods.

The defendants contend that the line (to go southerly) should commence at the road upon land in the possession (not in the ownership) of Peter Staples, making a straight line southerly, running for the first ten rods on land possessed by Staples, and for the remaining distance of one hundred and fifty rods on land which Staples owned.

We think the safer rule is, to adhere to the line marked by ownership rather than to the line marked by possession. If parties commit mutual mistakes in drawing their deeds, a resort may be had to equity to correct them. Possessory lines are usually

indefinite guides to go by. Besides, Staples had no exclusive possession of the nook or notch here in question. Our interpretation of the deed makes it convey neither more nor less land than the grantor owned when his deed was given. There is no reason to believe that he intended by his deed to convey any less land than he there owned. The point involved in the description in this deed has been settled in cases in this state heretofore. *Wiswell* v. *Marston*, 54 Maine, 270. *White* v. *Jones*, 67 Maine, 20.

Has the defendant an easement over and upon the land in dispute? The case does not necessarily call for a decision of this question, but its discussion briefly may have the effect to prevent future litigation. The exact question is, whether an easement can be acquired by a possession or enjoyment that has its origin and continuance in parol license or consent. We think it can. It depends upon the nature of the consent or license given. It may or may not be. An easement by prescription is gained by an adverse possession, if the adverse possession continues long enough. But an adverse possession of land is not necessarily a hostile possession as against the true owner. It is enough that the occupant is seized in fact, and the owner is disseized. The occupier may obtain his seizin wrongfully or rightfully. It matters not whether he gets it as a purchaser or a trespasser. The word disseizin is used in different senses. Sometimes an act of disseizin is meant and sometimes a title by disseizin is meant by the use of the term. We are apt to suppose that an act of disseizin must be an invasion or usurpation of the true owner's right. In a strict legal sense it may be so, while sometimes in a popular sense it would not be so. Taking possession of land from the true owner without legal authority, is an invasion of his right, although he acquiesces in the act, not knowing that his right is invaded. For instance, A. gives to his son B. a farm by a paper not amounting to a deed. A. and B. both believe that the transaction makes a valid transfer of the land. B. occupies the land as his own precisely as he would and could have occupied it had he a strict legal conveyance. B. becomes seized in fact of the land by the consent of A., and B. occupies adversely to A. in a legal sense, and occupying the land in this way unmolested for

twenty years he becomes himself the absolute owner thereof. Here the adverse possession had its origin in permission. Had B. gone into possession, not under a supposed deed, but under a levy made against A. upon the land, the levy being void for some cause, in such case his possession would have been without permission. The principle is concisely and clearly stated and illustrated in the opinion in the case of *Sumner* v. *Stevens*, 6 Met. 337. In that case it was held that, if a son enters upon land under a parol gift thereof from his father, who owned the land, and has the sole and exclusive possession for twenty years, he acquires title thereby. Chief Justice Shaw there says: "Had the tenant simply shown an adverse and exclusive possession for twenty years, he would have shown that the owner had no right of entry, and that would have been a good defense to this action. Is it less so that the tenant entered under color of title? A grant, sale or gift of land by parol is void by the statute. But when accompanied by an actual entry and possession, it manifests the intent of the donee to enter and take as owner, and not as tenant; and it equally proves an admission on the part of the donor, that the possession is so taken. Such a possession is adverse. It would be the same if the grantee should enter under a deed not executed conformably to the statute, but which the parties, by mistake, believe good. The possession of such grantee or donee cannot, in strictness, be said to be held in subordination to the title of the legal owner. . . . The owner may reclaim and reassert his title, because he has not conveyed his estate according to law, and thus regain the possession; but until he does this, by entry or action, the possession is adverse." The doctrine that a parol demise and exclusive occupation under it by the grantee may amount to an adverse possession that would transfer the title to land, was approved and applied in the case of *Webster* v. *Holland*, 58 Maine, 168.

So a person may, by gift or sale, dispose of an easement by parol, and the donee or vendee obtain a prescription thereby after the lapse of sufficient time. It must appear that the privilege was not used under a letting, or license, or in any way in subordination to the title of the legal owner. The distinction is, whether

I grant you a right over or upon my property to use as your own or as my own—as an enjoyment and privilege belonging to you or as belonging to me. The grantee or donee must accept and enjoy the use of the premises as his own, and because he claims it to be his own, and because the grantor sold or gave it to him to be his own as a perpetual thing. In *Arbuckle* v. *Ward*, 29 Vt. 43, it was held that the use of land originating in permission will not prevent it becoming a right by prescription, if continued long enough, if the permission was of a "perpetual or unlimited character." That case involved a construction of the rights of different persons to the privilege of a spring, the use of which had been granted under a verbal agreement, and presented the question very much as does paper A in the case at bar. Other authorities concur in this view of the question. *Ashley* v. *Ashley*, 4 Gray, 197. *Ripley* v. *Bates*, 110 Mass. 161. Washb. on Ease. c. 1, § 4, and cases there cited.

Judgment for demandant for the land; the judgment not to preclude the defendant from any easement (if any) he may have in or upon the locus.

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

INHABITANTS OF MONTICELLO *vs.* GEORGE W. LOWELL & others.

Aroostook. Opinion December 24, 1879.

Treasurer's bond—breach of.

An omission on the part of a town treasurer to render the detailed report prescribed in R. S., c. 3, § 31, constitutes a breach of his official bond.

A neglect or refusal of a town treasurer to render an account of the state of the finances of his town and exhibit all the books and accounts pertaining to his office to the municipal officers thereof whenever required, constitutes a breach of his official bond.

A neglect or refusal of a town treasurer to pay town orders presented to him for payment when he has funds of the town in his hands, constitutes a breach of his official bond.

73 Me. 127

A town treasurer neglected and refused to account for town funds in his hands when required by the municipal officers as provided in R. S., c. 6, § 152, and refused to pay town orders duly presented, when in fact he had in his hands $506 of the town's funds received in the ordinary way from the collection of taxes. In an action upon the treasurer's bond, *Held:* That the destruction of such money thus unlawfully detained, by an accidental burning of his house containing it, two weeks after his office expired, is no defense; nor is the unauthorized setting apart of such money for the equalization fund.

On exceptions.

Debt on the official bond of George W. Lowell, treasurer of the town of Monticello.

The facts sufficiently appear in the opinion. After the evidence was all in, the presiding justice ruled that admitting the evidence for the defense to be true, it constituted no defense in law, and directed a verdict for the plaintiffs for the amount claimed, $567.11, to which the defendants alleged exceptions.

Madigan & Donworth for the plaintiffs.

J. B. Hutchinson (*Powers & Powers* with him) for the defendants.

Symonds, J. This is an action of debt on the official bond of the treasurer of the town of Monticello for the municipal year 1876. The defendant, Lowell, was the treasurer, and gave the bond as principal, the other defendants as sureties. The plea of *non est factum* was filed by the defendants with a brief statement alleging full performance of the condition of the bond. This condition was, that the treasurer should well and faithfully perform all the duties of his office.

Some of these duties are defined by the statutes, and the following is one of the statutory requirements. R. S., c. 3, § 31: "The selectmen, treasurer, and every other person charged with the expenditure of the money of any town, shall, on or before the morning of the annual meeting in each year, make detailed written or printed reports of all their financial transactions for, or in behalf of, the town during the municipal year immediately preceding . . . . ."

No such report was made by the defendant, Lowell, during the

year in which he held the office of treasurer, and in this respect, therefore, he failed to discharge an important duty of his office and the condition of the bond was broken.

R. S., c. 6, § 152, provide that "every treasurer shall render an account of the state of the finances of his town and exhibit all the books and accounts pertaining to his office to the municipal officers thereof . . . when required . . ."

Two of the selectmen testify—and their testimony on this point is not denied by the defense—that on several occasions they requested to see the books of the treasurer, in order to compare them with the town books, but that he did not exhibit them, nor produce them when they met with him for settlement, and they did not see them during his term of office. In March, 1877, prior to the annual meeting at the close of the municipal year, he was required to account to the municipal officers. He did not produce his books and did not account truly. He admitted only about $6 in his hands, while, as he now states, he had $500 more of the money of the town in his possession, received from collections of taxes, of which he gave no account whatever. Orders were drawn on him as treasurer, and were accepted, so that the town became liable for interest upon them. They were not paid, and in some instances the reason assigned was that he had no money to pay them with; while his present statement is that during this same period he had $500 of the moneys of the town deposited at his house for safe keeping, for the subsequent loss of which by fire he asks now to be relieved from the forfeiture of the bond. Having the funds of the town in his hands at the time, it was his legal duty to pay these orders when presented, and his neglect and refusal to do so was a breach of the condition of his bond. He and his sureties at once became liable thereon for the $500, which he had in his keeping, for which he did not account, and which he refused to pay on orders presented. The right of action was then complete and such moneys of the town were then recoverable in an action like this. The liability was fixed at that time, and it is no defense against such liability to say that the money thus illegally detained by the treasurer was subsequently lost in the destruction of his house by fire. When the fire occurred,

April 9, but very little of it, if any, ought to have been in his hands at all, and none of it ought to have been there unaccounted for to the selectmen. Nor would it have been, if the obligation of the bond had been kept.

The attempt to distinguish the $500 from other moneys of the town, as a fund set apart for the benefit of soldiers, wholly fails upon the evidence.

In the first place, the defendant, the treasurer, received no moneys from the state for such a purpose, nor was any such fund kept separate, and transmitted to him, as such, by his predecessor in office. The whole $500 was money received in the ordinary way from the collections of taxes. He had no authority to withdraw it, or to divert it, from the legal municipal uses for which it was raised, and hold it as a separate fund for a specific purpose.

In the second place, if he had had such authority, it would have been his duty to account for it, quite as much as if it had been a part of the general funds of the town.

The claim, therefore, that the defendant had set apart the $500 as a distinct fund to be used only for a single purpose, is without avail, because the separate fund was one of his own creation, without authority; and because in any event it was a breach of his bond not to account for it.

The case shows, without contradiction, that the defendant in March, 1877, acknowledged a small indebtedness to the town as before stated, besides the $500, and allowing interest on these sums from the date when the breach of the bond occurred, it is apparent that the amount for which the verdict was directed was not too large.

Exceptions overruled.
Judgment on the verdict.

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

INHABITANTS OF DEXTER *vs.* INHABITANTS OF SANGERVILLE.

Piscataquis. Opinion January 1, 1880.

Pauper settlement. Insane Hospital. R. S., c. 143, § 20.

If an insane person be duly committed to the insane hospital by the municipal officers of a town under R. S., c. 143, § 12, and the friends of such insane person without filing the required bond in fact, and in the first instance pay all the expenses of commitment and support and the town makes no payment, the time of commitment and stay at the hospital is to be included in the period of residence, in the town where the insane person then had his home, necessary to change his settlement under R. S., c. 24, § 1, VI.

In such case the insane person is not supported by the town at the hospital, within the meaning of the last sentence of R. S., c. 143, § 20.

FACTS AGREED.

Action to recover of defendant the expenses of supporting Mrs. Nancy Bridgham, a pauper, whose settlement is alleged to have been in defendant town during the time supplies were furnished. Writ dated August 1, 1878. Plea, the general issue.

It is agreed that —— Bridgham, the husband of Nancy Bridgham, formerly had his settlement in Dexter, having resided there from his birth to May, 1870; was married in Dexter to said Nancy previous to that time, they then being both of age—over 21 years.

In May, 1870, Bridgham and his wife Nancy moved to Sangerville, and there made it their home for more than five successive years without receiving any supplies as a pauper except as herein stated. But it is admitted that in summer of 1874 she became insane; her husband carried her to the insane hospital at Augusta, —not having proper papers, he returned with her to Dexter, and then on due complaint September 23, 1874—she being then in the town of Dexter—she was duly committed as an insane person to said hospital by the selectmen of Dexter, and was discharged therefrom April 27, 1876. She was duly committed under c. 143, § 18, R. S. No bond was filed by her friends or others with the treasurer of the hospital. The town of Dexter was liable for her support under § 19. As a matter of fact her friends paid her expenses at the hospital during all the time she was there on the

aforesaid commitment—but upon her being duly committed again July 26, 1876, in similar manner, under similar circumstances by selectmen of Dexter, and the town of Dexter having become liable as on first commitment, they (the town of Dexter) have actually paid to the hospital expense: December 27, 1877, $33.01; March 29, 1877, $33.38; July 17, 1878, $29.34; of all of which defendants were duly notified and demand made within ten days after each payment and due denial made. If plaintiff is entitled to recover, it is for the above sums and interest thereon.

To simplify the case it is agreed on both sides that every condition of the case is complete, so as to present this question and this only, viz: what shall be the effect of her residing on a due commitment in the insane hospital a portion of the five years (as herein stated) ordinarily required to constitute a pauper settlement. If that circumstance does not affect the case of her settlement defendants are to be defaulted—if otherwise plaintiff to be nonsuited. She never returned to Sangerville after her first commitment, and her husband moved from Sangerville to Dexter in the fall of 1876, and there died.

J. Crosby, for the plaintiffs.

A. M. Robinson, for the defendants, cited R. S., c. 143, §§ 18, 20. R. S., c. 1, § 4, rule 2. *Veazie* v. *Chester*, 53 Maine, 29. *Pittsfield* v. *Detroit*, 53 Id. 442. *Jones* v. *Jones*, 18 Id. 313. *Burlington* v. *Swanville*, 64 Id. 78. *Hallowell* v. *Gardner*, 1 Id. 93.

SYMONDS, J. The person, to recover the expenses of whose support at the insane hospital this action is brought, at the time of such support had obtained a legal settlement in Sangerville by having her home there for five successive years without receiving aid as a pauper, unless the facts attending her commitment to the hospital on September 23, 1874, and her stay there till April 27, 1876, were such as to interrupt the residence and prevent her from acquiring a settlement.

She was duly committed by the municipal officers of Dexter under R. S., c. 143, § 12. The required bond was not filed by her friends with the treasurer of the hospital, and the plaintiff town

became liable under § 18 of the same chapter for the expense of her support. But in point of fact, the town paid nothing. Her friends, without filing the bond, paid all the expenses of the commitment, and of her support while she remained at the hospital.

Having been discharged on April 27, 1876, she was again committed in the same way by the municipal officers of Dexter on July 26, 1876, and they have paid about $100 for her support during this second commitment which they claim in this action to recover.

When first committed, September 23, 1874, she had had her home four years and four months in Sangerville. Her husband continued to reside there till the fall of 1876.

The question is, whether this first commitment and stay at the hospital interrupted her residence in defendant town, and prevented her acquiring at the expiration of the five years a legal settlement under R. S. c. 24, § 1, VI. It is agreed that if there is nothing in this to prevent, then the period of residence is complete and her settlement is in Sangerville. The agreed statement of facts, on which the case is submitted, specifically provides that this question only is to be determined, what shall be the effect of her residing in the insane hospital, under the circumstances stated, a part of the five years ordinarily required to give a pauper settlement.

The statute, R. S., c. 143, § 20, provides that "no insane person shall suffer any of the disabilities incident to pauperism, nor be hereafter deemed a pauper by reason of such support. But the time during which the insane person is so supported shall not be included in the period of residence necessary to change his settlement." The issue, then, is narrowed to the single inquiry, what is the meaning of the words "so supported" in the last sentence of the statute cited. If during the period of her first commitment, she was "so supported," that is to say, supported in the manner and in the sense which the statute intends, then, notwithstanding she is not to be deemed a pauper therefor, still this time cannot be included in the period of residence necessary to enable her to acquire a settlement in Sangerville.

Except as applied to cases in which the state assists in the sup-

port of the insane, we think the words "so supported" in this section mean supported at the hospital by the town; and that in this instance it cannot be said that the insane person was supported by the town during the first commitment. Her friends without giving bond paid for her support. A mere liability of the town to pay in the first instance, with right of recovery against those ultimately chargeable, is not support by the town.

In ordinary cases of furnishing supplies directly by a town to a pauper, it matters not whether the town has paid for the supplies or has obtained them on its own credit. *Fayette* v. *Lawrence*, 62 Maine, 234.

But in regard to the insane, an action is given by § 20 to the town chargeable in the first instance, and paying for their commitment and support, to recover the amount paid of the insane, or others legally liable for their support. This right of action, it was held in *Bangor* v. *Fairfield*, 46 Maine, 558, does not accrue till the sums due to the hospital are paid. Notice to the town where the settlement is, after the liability for hospital expenses has been incurred, but before their payment, is premature. *West Gardiner* v. *Hartland*, 62 Maine, 246.

The town, then, does not stand in the position of having furnished supplies, which, except in case of insanity, would be pauper supplies, until it has paid the dues at the hospital. Till then the town has no right of action; till the right of action accrues the position of the town is not that of one which has furnished support, and till support has been furnished by the town, there is no reason why the five years should not run.

The friends who pay the expenses in the first instance support the insane patient, whether the bond is filed or not. As the case stood, the town of Dexter was liable in the first instance for the expenses at the hospital. If we are to understand by her friends, who paid all these expenses, her kindred, they were liable over to the town therefor, if the town had first paid them. We think it much more true to say, that she was supported by those who were finally liable and who paid in the first instance, than that she was supported by those who were only intermediately liable and who did not pay at all.

It would be opposed to the spirit of the statute, in a case where the expenses were first paid by the friends of the insane and there was no payment by the town, to allow the commitment to the hospital to have any effect whatever upon the pauper settlement.

We are, therefore, of the opinion that the legal settlement of the insane person was in the defendant town when the expenses attending her support during the second commitment to the hospital were incurred and paid by the plaintiffs, and that the plaintiffs are entitled to recover the amounts so paid.

It is unnecessary to consider what the effect of this statute would have been upon the husband's settlement, or upon the derivative settlement of the wife, if the time of the first commitment were excluded from the period of residence necessary to give the insane person a settlement, had she been capable of acquiring one in her own right. If the facts were not such as to prevent the lapse of five years from giving her a settlement, had she been unmarried, they could not prevent the husband's residence from maturing into a legal settlement, and so giving her one by derivation. We have, therefore, for sake of convenience, discussed the matter as if it were her sole residence which at the expiration of the five years gave the legal settlement.

Judgment for plaintiffs.

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

EBEN INMAN *vs.* EPHRAIM WHITING, appellant.

Piscataquis. Opinion January 1, 1880.

Trial Justice. R. S., c. 83, § 12. Record. Jurisdiction.

Under R. S., c. 83, § 12, when a trial justice is unable to attend at the time and place at which a writ is returnable before him, and the action is thereupon continued by a justice of the peace and quorum to a day certain,—in order to give another trial justice, residing as specified in said section, jurisdiction to try said action at the time and place to which it was continued, it must appear of record that the inability of the justice named in the writ to attend had not been removed.

On exceptions.

Action of assumpsit originally made returnable before James S. Holmes, esquire, a trial justice, residing and holding court in Foxcroft, in said county, and afterwards entered and tried before Elihu B. Averill, esquire, a trial justice in and for said county, residing in Dover, but holding court in said Foxcroft, where said writ was originally made returnable, and comes into this court upon appeal by the defendant. On the second day of the first term in this court, the defendant by his attorney, filed a motion to dismiss said action and for his costs, for the reason that said Elihu B. Averill, the trial justice from whose judgment said defendant appealed had no jurisdiction as appears by inspection of the copy of the writ and record of said trial justice filed in the case. Said motion by said defendant was overruled by the justice presiding in this court, and the defendant alleged exceptions.

The case is fully stated in the opinion.

D. L. Savage, for the plaintiff.

J. B. Peaks, for the defendant.

Symonds, J. The writ in this case was originally returnable on October 19, 1878, before James S. Holmes, esquire, one of the trial justices for the county of Piscataquis. On the return day, the trial justice named in the writ being absent from the state and unable to attend, the action was continued by Augustus G. Lebroke, a justice of the peace and quorum residing in the same town as the trial justice.

On the date to which the action was so continued, November 2, 1878, it was tried before Elihu B. Averill, esquire, another trial justice of the same county, and judgment was rendered for the plaintiff. From this judgment appeal was taken to the next term of the supreme judicial court in that county, where on the second day of the term the defendant moved that the action be dismissed, and for costs, alleging want of jurisdiction in the justice by whom the judgment was rendered. The case is now presented on exceptions to the overruling of this motion to dismiss.

The action is assumpsit and the plea before the justice was the general issue.

That the jurisdiction of trial justices depends upon statutory provisions and cannot be enlarged by presumption or by implication, and that the facts which determine the jurisdiction must appear of record, are familiar rules, resting upon long established law and practice. *Lane* v. *Crosby*, 42 Maine, 327. *State* v. *Hall*, 49 Maine, 412. *Stanton* v. *Hatch*, 52 Maine, 244.

The power to continue the action on account of the absence of the justice named in the writ, and the authority for trying it before another justice are derived from R. S., c. 83, § 12. The construction of this section, so far as it affects the vital question of the jurisdiction of the justice rendering the judgment appealed from, is not difficult, and it is only necessary to say in general terms, first, that the power to continue an action, at the time and place and in the manner specified in that section, is only given "when the trial justice is unable to attend;"—and, secondly, that the jurisdiction of another justice to try the action on the day to which it is continued only exists in case the justice, before whom it was returnable or pending, still remains unable to attend. The inability of the first justice to attend on the return day authorizes the continuance, the fact that such inability has not been removed at the time and place fixed for the hearing in the order continuing the action, gives jurisdiction, to try it, to another justice whose residence is according to the requirement of the statute. Whether the justice who tried this case had jurisdiction, or not, depended upon the question whether the justice before whom the process was returnable was then, on November 2, still unable to be present.

The record of the proceeding before the magistrate is silent on this point. It is nowhere alleged that the inability of the first justice to attend, which existed on the return day, continued to the day of trial. In fact, the record of the proceedings on November 2, contains no allusion to a continuance of the action but is made up as if the writ was originally returnable before the justice who rendered the judgment. For all that appears, the justice named in the writ might have been able to attend at the trial.

The jurisdiction of the magistrate clearly fails upon the record, and that, in the appellate court, advantage may be taken, by motion to dismiss, of such want of jurisdiction apparent in the record has been repeatedly held. *Call* v. *Mitchell*, 39 Maine, 465. *Stanton* v. *Hatch*, 52 Maine, 244.

As this is a civil proceeding, the plea of the general issue before the justice was no waiver of the rights of the defendant in this respect. R. S., c. 83, § 14. *Call* v. *Mitchell*, *ubi supra.*

Upon the exceptions, no question of the right of amendment is presented, and the entry must be, (*Forsyth* v. *Rowell*, 59 Maine, 133.)

Exceptions sustained.

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

MICHAEL FAHAY *vs.* EMERY BOARDMAN.

Waldo. Opinion January 1, 1880.

Belfast municipal court. Police court of the city of Belfast. Special Laws 1879, *c.* 180; 1850, *c.* 363, §§ 11, 14.

Special Laws of 1879, c. 180, establishing the Belfast police court, by necessary implication, repealed §§ 11, 14 of c. 363 Special Laws of 1850, establishing the Belfast municipal court.

ON FACTS AGREED.

Action of trespass, and for false imprisonment, submitted upon the following agreed statement of facts: On the eighteenth day of April, A. D. 1879, the plaintiff was arrested and held for trial upon a warrant issued by the defendant as judge of the police court of the city of Belfast.

Said court was established by virtue of private and special laws 1850, c. 363, §§ 11, 12, 13, 14, 15. On the third day of October, 1877, the defendant was duly appointed and commissioned, by the governor of this state, as judge of said court for the term of four years; and, on the sixth day of said October, he duly took and subscribed the oaths prescribed by the constitution of this

state and a law of the United States to qualify him to execute said trust, and thereafterwards entered upon the discharge of the duties of said office. He has received no subsequent commission, and is competent to act under that before mentioned, unless disqualified by reason of private and special laws of 1878, c. 26, and a private and special law of 1879, entitled—"An act to establish the police court of the city of Belfast, and to abolish the Belfast municipal court."

If this action can be maintained, defendant is to be defaulted, and damages are to be assessed by the court at *nisi prius* in the county where the action originated; if the action is not maintainable, judgment to be for defendant.

Thompson & Dunton, for the plaintiff.

W. H. Fogler, for the defendant, contended:

I. That the act of 1878 was an amendment to said c. 363.

II. That the act of 1879 was and is, an amendment thereto, repealing said act of 1878, which was a portion thereof, and reenacting various provisions of said chapter. Said act of 1879 is, throughout, *in pari materia* therewith; and the only effect of construing it otherwise than as an amendment thereto is to substitute one man for another as judge. It is not to be presumed against the defendant, or the legislature, that the legislature intended said act to be so construed in order to effect that object. Both of said acts being amendments, the defendant was, and is, *de jure* judge of the police court of the city of Belfast by virtue of his original appointment.

III. Should the court, however, construe said act of 1879 as an independent statute establishing a police court, *de novo*, said act does not, expressly or by necessary implication, take away the general jurisdiction of the original police court, which it exercises in concurrence with trial justices. The establishment of one court, having the same general jurisdiction as another, does not abolish the former court any more than the appointment of a trial justice ousts all such previously commissioned for the county for which the latter appointment was made. Even should the court entertain a supposition that the probable purpose of the legisla-

ture was to repeal *in toto* both said act of 1878 and the above cited sections of said c. 363,—courts cannot supply defective enactments by an attempt to carry out fully the purposes which may be supposed to have occasioned those enactments. *Swift* v. *Luce*, 27 Maine, 285.

Counsel also cited *State* v. *Lunt*, 6 Maine, 412. *Noble* v. *State*, 1 Greene, (Iowa) 325. Private and Special Laws 1876, c. 298. *Harrell* v. *Harrell*, 8 Fla. 46. *Holbrook* v. *Nickol*, 36 Ill. 161. *Turney* v. *Wilson*, Id. 385. *People* v. *Durick*, 20 Cal. 94. *Alexander* v. *State*, 9 Ind. 337. *Chegaray* v. *Jenkins*, 3 Sandf. (N. Y.) 409. *Hadden* v. *Collector*, 5 Wall. 107. *Flynn* v. *Abbott*, 16 Cal. 358. *State* v. *Cazean*, 8 La. Ann. 114. *Robbins* v. *Omnibus*, 32 Cal. 472. *Pratt* v. *At. & St. L. R. R.*, 42 Maine, 579. *Barnawell* v. *Threadgill*, 5 Ired. (N. C.) Eq. 86. *Morris* v. *Canal*, 4 Watts. & S. (Pa.) 461. *Tyman* v. *Walker*, 35 Cal. 634.

SYMONDS, J. On April 18, 1879, a warrant for the arrest of the present plaintiff was issued by the defendant as judge of the police court for the city of Belfast. Thereupon the plaintiff was arrested and held for trial.

This is alleged to have been an illegal assumption of authority on the part of the defendant, and a false imprisonment of the plaintiff. To recover the damages sustained thereby, the present suit is brought.

For what offense the warrant directed the arrest does not appear, and in other respects the statement of the case is incomplete. But it is apparent from the arguments that the main purpose of the proceeding, on either side, is to submit to the court in proper form the question whether the defendant was in fact and lawfully the judge of the police court at the date of said warrant, arrest and trial.

The police court was originally established by the Spec. Laws of 1850 c. 363, §§ 11-14. In October, 1877, the defendant was appointed judge of the court, received his commission for four years, took the qualifying oaths and entered upon the discharge of the duties of the office.

The first change in the organization of the court, to which

attention is directed in argument, was by Spec. Laws of 1878, c. 26, when the style of the court was changed to that of the Belfast municipal court, and a very essential modification and enlargement of its powers were introduced; but by express provision the defendant was continued in office, as judge of the court with its new name and enlarged powers, under the commission he then held and till the expiration of the term for which he had been appointed.

The effect of this act of 1878, or the force of the objections urged on constitutional grounds to some of its provisions, it is not necessary to consider in deciding the present case.

It was repealed in 1879, and a new act,—Spec. Laws, c. 180—was passed, establishing a court of the same name as that created by the act of 1850, but with a jurisdiction larger than that court had, and less than the jurisdiction of the municipal court.

The act of 1879 expressly repealed the act of 1878, and we think by necessary implication it repealed §§ 11-14, of the act of 1850, and created a new court of which the defendant is not the judge under his commission received in 1877. It was entitled "An act to establish the police court of the city of Belfast and to abolish the Belfast municipal court." It gave the new court, which it created, concurrent jurisdiction in all cases in which the court of 1850 had had such jurisdiction, and exclusive jurisdiction where it had had the same. Precisely the same powers and more were conferred upon it. It was provided that "the court hereby established shall be the depository of all records of the police court heretofore existing in said city;"—and also of that part of the records of the municipal court which were within the new jurisdiction conferred;—"and shall have full power and authority to issue and renew executions, and carry into effect any judgment of, and to complete all processes and proceedings commenced in or by, said courts as aforesaid, and to certify and duly authenticate the records of said courts, as effectually in all respects as said courts heretofore existing could have done, had this act not been passed."

It would be manifestly against the intention of the legislature to hold that the act of 1879 merely modified an existing court, or

that it left the old police court in existence, after its exclusive jurisdiction and its records, with the usual powers of courts over their own records, had been transferred to a new court, to which the same concurrent powers that it formerly possessed, were also given. The former police court is in terms referred to as a thing of the past.

The act of 1879 went into effect on April 12, 1879. The warrant was issued and arrest made on April 18, 1879.

According to the agreement of counsel, the defendant is to be defaulted and the damages are to be assessed at *nisi prius*.

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

STATE *vs.* SAMUEL G. LITTLEFIELD.

Androscoggin. Opinion January 1, 1880.

Indictment. Former conviction. Pleading.

The defendant committed a violent assault upon one George Morton on the third day of March, 1879, and on the fourth day of March was prosecuted before the municipal court of Lewiston, and convicted of assault and battery. On the twenty-third day of March said Morton died of the injuries inflicted by the defendant, and the defendant was thereupon indicted for manslaughter, and when arraigned pleaded the former conviction of assault and battery in bar. *Held*, that the plea was no bar to the indictment.

The general rule is that if the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal or conviction on the first indictment will be a bar to the second.

To this general rule there is this exception. When after the first prosecution a new fact supervenes, for which the defendant is responsible, which changes the character of the offense and together with the facts existing at the time constitutes a new and distinct crime, an acquittal or conviction of the first offense is not a bar to an indictment for the other distinct crime.

While the defendant under our statute may be convicted on this indictment of assault and battery, on failure of proof that death resulted from the injuries inflicted, still he may protect himself from being twice in jeopardy for that offense by pleading in bar the former conviction of the crime of assault and battery embraced in the indictment and not guilty of manslaughter, and then if convicted of manslaughter he shall have judgment therefor. If acquitted of manslaughter he shall have the benefit of his plea in bar as to assault and battery.

On exceptions.

The defendant was indicted for manslaughter, in causing the death of one George Morton. The indictment was found at the April term of the supreme judicial court in said county 1879, and contains two counts substantially as follows:

I. . . . "That Samuel G. Littlefield, of Lewiston, in the county of Androscoggin aforesaid, on the third day of March, in the year of our Lord one thousand eight hundred and seventy-nine, at Lewiston aforesaid, in the county of Androscoggin aforesaid, in and upon the body of one George Morton unlawfully, wilfully and feloniously did make an assault, and him the said George Morton then and there unlawfully, wilfully and feloniously did kill and slay, against the peace—" etc.

II. . . . "that Samuel G. Littlefield of Lewiston, in the county of Androscoggin aforesaid, on the third day of March, in the year of our Lord one thousand eight hundred and seventy-nine, at Lewiston aforesaid, in the county of Androscoggin aforesaid, in and upon the body of one George Morton unlawfully, wilfully and feloniously did make an assault, and that the said Samuel G. Littlefield, then and there with his hands and feet the said George Morton unlawfully, wilfully and feloniously did strike, beat and kick, in and upon the head, neck, breast, and other parts of the body of the said George Morton; and did, then and there unlawfully, wilfully and feloniously cast and throw the said George Morton down unto and upon the floor with great force and violence, there giving unto the said George Morton then and there, as well by the beating, striking and kicking of the said George Morton in manner and form aforesaid, as by the casting and throwing of said George Morton down as aforesaid, several mortal strokes, wounds and bruises in and upon the head, neck, breast and other parts of the body of the said George Morton, of which said mortal strokes, wounds and bruises the said George Morton, from the said third day of March in the year aforesaid until the twenty-third day of March in the year aforesaid, did languish, and languishing did live, on which said twenty-third day of March, in the year aforesaid, the said George Morton, at Lewiston aforesaid, in the county aforesaid, of the said mortal strokes, wounds and bruises, died.

And so the jurors aforesaid, upon their oaths aforesaid, do say that the said Samuel G. Littlefield the said George Morton in the manner and form aforesaid, unlawfully, wilfully and feloniously did kill and slay, against the peace of said state, and contrary to the form of the statute in such case made and provided."

To this indictment, the defendant when arraigned, April term, 1879, pleaded the following plea in bar:

"And the said Samuel G. Littlefield in his own proper person cometh into court here, and having heard the said indictment read, saith that the said state ought not further to prosecute the said indictment against the said Samuel Littlefield, in respect of the offense in the said indictment mentioned, because he saith, that heretofore, to wit, at the municipal court for the city of Lewiston, in the said county of Androscoggin, on the fourth day of March, A. D. 1879, Samuel Littlefield of Lewiston, in said county, was brought before Adelbert D. Cornish, judge of the said municipal court for the city of Lewiston, in said county, upon the complaint, on oath, of J. C. Quimby, of Lewiston, in said county, and issued by the clerk of said court, charging him, the said Samuel Littlefield, with the crime of assault and battery upon one George Morton, at Lewiston, on the third day of March, A. D. 1879, as is fully set forth in said complaint, in the words following, to wit:

STATE OF MAINE.

"ANDROSCOGGIN, ss.

To the clerk of our municipal court for the city of Lewiston, in the county of Androscoggin:

"J. C. Quimby, of Lewiston, in the county of Androscoggin, on the fourth day of March, in the year of our Lord one thousand eight hundred and seventy-nine, in behalf of the state, on oath complains: that Samuel Littlefield of Lewiston, in said county, laborer, on the third day of March, in the year of our Lord one thousand eight hundred and seventy-nine, at said Lewiston, in said county, with force and arms and unlawfully in and upon one George Morton, in the peace of the state then and there being, an assault did make, and him, the said George Morton, did then and there beat, wound and ill-treat, and other wrongs to the said

George Morton then and there did, to the great injury of the said George Morton, against the peace of said state, and contrary to the form of the statute in such cases made and provided.

"Wherefore the said J. C. Quimby prays that the said Samuel Littlefield be apprehended and held to answer to this complaint, and further dealt with thereon as to law and justice shall appertain."

(Signed.) J. C. QUIMBY."

"ANDROSCOGGIN, ss.

On the fourth day of March aforesaid, in the year aforesaid, the above-named J. C. Quimby personally appeared, and made oath to the truth of the foregoing complaint.

Before me, EVERETT A. NASH, *said clerk.*

"And the said complaint was read to him, and being asked if he was guilty or not guilty, said that he was not guilty, and thereupon on the eighth day of March, A. D. 1879, after a full hearing of the evidence adduced, it appeared to said judge that said Samuel Littlefield was guilty in manner and form as is in said complaint alleged.

"It was therefore considered and ordered by the said judge, that the said Samuel Littlefield be sentenced to three months' labor and imprisonment in our county jail at Auburn, and stand committed until this sentence be performed; and he was committed, as by the record thereof, in the said court remaining, more fully and at large appears, which said judgment and conviction still remain in full force and effect, and not in the least reversed or made void.

"And the said Samuel G. Littlefield fu rther saith, that the said Samuel G. Littlefield and the said Samuel Littlefield, so complained of and convicted are one and the same person, and not other or different. And the said Samuel G. Littlefield further saith, that the offense of which the said Samuel G. Littlefield was so complained of and convicted as aforesaid, and the offense for which he is now indicted are one and the same offense, and not other or different.

"And this the said Samuel Littlefield is ready to verify; wherefore he prays judgment if the said state ought further to

prosecute the said indictment against the said Samuel G. Littlefield, in respect of the said offense in the said indictment mentioned, and that the said Samuel G. Littlefield may be dismissed and discharged from the same."

To the foregoing plea, the attorney for the state filed a general demurrer, which was joined.

The presiding justice sustained the demurrer, and adjudged the plea bad.

The defendant, being ordered to plead further, plead guilty.

If the plea in bar is adjudged good by the law court, the defendanr is to have leave to retract his plea of guilty. The defendant alleged exceptions.

W. H. White, (county attorney) for the state.

L. H. Hutchinson & A. R. Savage, for the defendant, cited Stat. 1874, c. 626. Const. U. S. Const. Maine, Stats. 1871, c. 118, § 5. 1872, c. 82. R. S., c. 131, § 9. *State* v. *Smith*, 32 Maine, 369. *Smith* v. *State*, 33 Id. 48. R. S., c. 135, § 2. Stat. 1877, c. 183. *Com.* v. *Bubser*, 14 Gray, 84. *Com.* v. *Cunningham*, 13 Mass. 245. *Com.* v. *Bosworth*, 113 Mass. 200. R. S., c. 131, § 4. *Com.* v. *Drum*, 19 Pick. 479.

LIBBEY, J. This is an indictment for manslaughter. The indictment alleges, in substance, that the defendant on the third day of March, 1879, made an assault upon one George Morton, and inflicted upon him certain mortal wounds of which he died on the twenty-third of said month.

The defendant pleaded in bar a former conviction of simple assault and battery upon said Morton, on said third day of March, before the municipal court of Lewiston, on the fourth day of said March.

To this plea the county attorney filed a general demurrer, which was joined, and the demurrer was sustained by the court, and the defendant ordered to plead over, and thereupon pleaded guilty.

The case comes before this court on exceptions to the foregoing ruling, with the stipulation that, if the plea in bar is adjudged good by this court the defendant is to have leave to withdraw his plea of guilty.

No objection is made in argument to the sufficiency of the defendant's plea in bar, but the case is presented by both sides upon the facts, assuming that the pleadings are in proper form to raise the legal questions involved. We, therefore, have no occasion to consider the sufficiency of the plea either in form or substance.

The precise question presented is, whether the conviction of the defendant, before the municipal court of Lewiston, on the fourth day of March, of simple assault and battery, for the same battery of which Morton died, on the twenty-third day of March, is a bar to the indictment for manslaughter.

The plea of former conviction, like that of former acquittal, is founded upon that great principal and fundamental maxim of criminal jurisprudence, that no man shall be twice put in jeopardy for the same offense. This is one of the ancient and well established principles of the common law, sanctioned and enforced in the constitution of this state in the following words: "No person, for the same offense, shall be twice put in jeopardy of life or limb." Const. of Maine, art. 1, § 8. This clause is, in substance, embraced in most, if not all of the constitutions of the several states, and in the constitution of the United States; and, as construed by the court, is equivalent to a declaration of the common law rule that no person shall be twice tried for the same offense.

To constitute a bar to the indictment against the defendant it is a well established rule that the former conviction must have been for the same offense in law and in fact.

Mr. Justice Blackstone states the rule thus: "It is to be observed that the pleas in *autrefoits acquit* and *autrefoits convict*, or a former acquittal, and a former conviction, must be upon a prosecution for the same identical act and crime." 4 Black. Com. 336.

It is believed that this rule is uniformly recognized and sanctioned by courts governed by the rules of the common law. *Rex* v. *Vandercomb*, 2 Leach C. C. 708. Stark Cr. Pl. 355 (1 Am. ed.) *Comm.* v. *Roby*, 12 Pick. 496. 2 Lead. Cr. Cas. 555, (note by B. & H.) and cases there cited.

Mr. Chitty states the rule as follows: "as to the identity of

the offense, if the crimes charged in the former and present prosecution are so distinct that evidence of the one will not support the other, it is inconsistent with reason, as it is repugnant to the rules of law, to say, that the offenses are so far the same, that an acquittal of the one will be a bar to the prosecution for the other." 1 Chit. Cr. Law. 453.

In *Comm.* v. *Roby*, Shaw, C. J., says: "In considering the identity of the offense, it must appear by the plea, that the offense charged in both cases was the same in law and in fact."

The general rule, by which it is to be determined whether an acquittal or conviction on one indictment is a good bar to another, is stated by many authorities, in substance, as follows: if the first indictment were such as the prisoner might have been convicted upon, by proof of the facts contained in the second indictment, an acquittal or conviction on the first indictment will be a bar to the second. *Rex* v. *Vandercomb*, *supra*. 2 East's P. C. 522. *Comm.* v. *Roby*, *supra*.

This general rule is, however, subject to this exception. When, after the first prosecution, a new fact supervenes, for which the defendant is responsible, which changes the character of the offense, and together with the facts existing at the time constitute a new and distinct crime, an acquittal or conviction of the first offense is not a bar to an indictment for the other distinct crime. Case of Nicholas, Foster's Cr. L. 64. *Comm.* v. *Roby*. *Burns & Cary* v. *The People*, 1 Parker, C. C. 183. *Comm.* v. *Evans*, 101 Mass. 25. *State* v. *Hattabough*, Cen. Law Journal, August 1, 1879, page 87 (S. C. Indiana).

Comm. v. *Roby*, was an indictment for murder. The defendant pleaded in bar a conviction of assault with intent to murder, before the death of the party assaulted. Shaw, C. J., in discussing the question of the identity of the offenses, says: "The indictment for murder necessarily charges the fact of killing, as the essential and most material fact, which gives its legal character to the offense. If the party assaulted, after a felonious assault, dies within the year and a day, the same act, which till the death was an assault and misdemeanor only, though aggravated, is by that event shown to have been a mortal wound. The event, strictly

speaking, does not change the character of the act, but it relates back to the time of the assault, and the same act, which might be a felonious assault only had the party not died, is in truth shown by that event to have been a mortal wound; and the crime, which would otherwise have been an aggravated misdemeanor, is thus shown to be a capital felony. The facts are essentially different, and the legal character of the crime essentially different." The same principle is affirmed in *Comm.* v. *Evans*, *Burns* v. *The People*, and *State* v. *Hattabough*, *supra*, which in their facts, are like the case at bar.

At the time of the first prosecution and conviction the defendant had not committed the crime with which he is now charged. True the force had been inflicted upon the body of Morton, but his death had not ensued. The force was acting to produce its effect, and the defendant was as much responsible for its natural and necessary result as if he had all the while been pressing it upon the body of his victim. When death was caused by that force a new and distinct crime was consummated by the defendant, of which he was not before guilty, and for which he could not have been convicted at the time of the first prosecution. The offenses are not the same in fact, and therefore are not identical.

It is claimed in behalf of the defendant, that, as by the statutes of this state, the crime of assault and battery is now a felony, he may, under this indictment, be again convicted of that crime and thus be twice punished for the same offense. If the homicide was caused by the injuries inflicted, which is not denied by the plea in bar, but admitted by the plea of guilty, which is a part of the case, the defendant cannot properly be convicted upon this indictment of assault and battery, because it must be either murder, manslaughter, or justifiable homicide. *Burns* v. *The People*, 1 Parker, 183. A conviction of assault and battery would be authorized only on failure of proof that death resulted from the injuries inflicted.

But it frequently happens that a man is in a certain sense, twice punished for the same acts; as when the facts constituting the first offense, taken in connection with other facts, for which he is responsible, constitute a distinct and different offense. In such

case, although he has been convicted of the first offense, he may be convicted of the second, notwithstanding that to convict of the second, it is necessary to prove the facts embraced in the first. The rule upon this point is very clearly and fully stated by Walton, J., in *State* v. *Inness*, 53 Maine, 536.

But, admitting that the defendant may be legally convicted of the crime of assault and battery, on this indictment, still we are of opinion, that, under the rules of pleading, he may protect himself from being twice in jeopardy for the same offense. He may plead the former conviction in bar of the offense of assault and battery, embraced in the indictment, and not guilty of manslaughter; and then if acquitted of manslaughter, he will have the benefit of his plea in bar. At common law the plea of former conviction in bar must set forth the record of the former conviction, and plead over as to the felony. 2 Hale, 255-392. Arch. Cr. Pr. and Pl. 352. *Comm.* v. *Curtis*, 11 Pick. 133. Stark. Cr. Pl. 370, 375. Upon this point Starkey says, "and in general the pleading not guilty is no waiver of a special plea, and does not render it double." "But if A., having the king's pardon of manslaughter be arraigned upon an indictment for murder, he ought not to plead not guilty, for he would thereby waive his pardon. He ought to confess the indictment as to manslaughter, and plead the king's pardon; and as to the killing with malice prepense he shall plead that he is not guilty. Then if he were found guilty of murder, he would have judgment; if acquitted of murder, his plea would be allowed." Stark. Cr. Pl. *supra*. The same principle applies to a plea of former conviction.

This rule is recognized in *Comm.* v. *Curtis*, *supra*, which was an indictment for larceny in a dwelling-house, and a plea of former conviction of larceny. Wilde, J., in the opinion of the court says: "The defendant should have pleaded *autrefois convict* as to the larceny, and not guilty as to the residue of the charge."

The result is, that, both on principle and authority, the defendant's plea is not a bar to the indictment.

Exceptions overruled.
Judgment for the state.

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

ORRAN E. BOYNTON in eq. *vs.* HENRY INGALLS, administrator *de bonis non.*

Lincoln. January 5, 1880.

Equity. Administrator de bonis non.

A supplemental bill cannot be sustained against the administrator *de bonis non* of an intestate estate for the allowance of certain necessary charges and expenses incurred in prosecuting the original bill, comprising the employment of counsel, travel to another state for the procurement of evidence, although the complainant was subjected to the same in consequence of the fraud and wrong of the administratrix of the estate.

BILL IN EQUITY, heard on bill and answer.

The complainant alleges in substance that, at the December term 1877, he recovered judgment on his original bill, declaring a certain deposit, the subject matter of his original bill, then remaining in the custody of the Saco and Biddeford savings institution, made by Clara Boynton in her life time with the bank book thereof, to be subject to a pledge in the right of the complainant as security to him for the debt of the intestate to him, and requiring the administratrix to tender or pay to the complainant the amount for which the pledge was made, with costs; that the administratrix died thereafterward, and whereupon the present defendant was duly appointed administrator *de bonis non;* that in consequence of the fraud and wrong of the administratrix, and as in the original bill set forth, the complainant has been subjected to sundry necessary expenses and charges in the employment of counsel, in travel to and from Boston to Maine and back, and the procurement of evidence in and out of Massachusetts, with loss of time incidental to the protection of his interest in the pledge and such taxable costs as in the original process to which this is supplemental. Prayer that said expenses and charges be allowed in addition to the taxable costs already decreed.

The answer admitted the charges and expenses, but denied that the pledge, or her estate, deposit or bank book ought or can be liable therefor, or that this defendant is in any manner liable for any part thereof.

R. K. Sewall, for the complainant.

Henry Ingalls, pro se.

SYMONDS, J. This is a bill in equity against the administrator *de bonis non* of the estate of Clara Boynton, praying that certain necessary expenses and charges, not taxable as costs, incurred in a former proceeding in equity in which judgment with costs was rendered in favor of the present complainant against an administratrix of the same estate, and alleged to have been incurred through her fraud and wrong, may be allowed and decreed to be paid in addition to the taxable costs in the original process, to which this bill is claimed to be supplemental.

The proceeding is admitted to be without precedent, and the objections to it both in form and in substance are numerous and conclusive; but the parties seem to have waived all formality, for the purpose of submitting to the court certain questions of law raised by the bill and answer.

No reason is perceived why the precise questions which are now presented should not have been raised at the original hearing and determined by the former decree. Whether the complainant should be allowed for counsel fees, or for travel for the purpose of procuring evidence out of the State, or for time employed in protecting his interest in the pledge, are all questions, on which certainly no reason appears why the original decree should not have passed. There is no averment of the occurrence, or of the discovery of any material fact since that decree. Apparently all these charges to which the complainant alleges he has been subjected by the fault of the administratrix, then representing the estate now represented by the respondent, had been incurred before the decree and in the same proceeding in which it was entered. The court had the same control over the allowance of counsel fees and other expenses in that proceeding, that it can have in this. The discretion of a court of equity over the whole subject of costs was as broad there as here. It was not limited then, more than now, to the allowance of the ordinary taxable costs only.

"A supplemental bill ought to be filed as soon as the new mat-

ter sought to be inserted therein is discovered; and if the party proceeds to a decree after the discovery of the facts on which the new claim is founded, he will not be permitted afterwards to file a supplemental bill, in the nature of a bill of review, founded on such facts." *Pendleton* v. *Fay*, 3 Paige, Ch. 204.

This bill aims at what is in effect an enlargement of the original decree, without assigning any error therein, or averring the existence or discovery of any new material fact.

The bill clearly cannot be sustained as supplemental, and if we were to treat it as an original proceeding, and were to look at the substantial rights without regard to form, it would be equally unavailing.

It avers that all the expenses, for the payment of which in addition to the taxable costs a decree is sought, were caused by the fraud and wrong of the administratrix. If this is the fact, the remedy is at law and against the administratrix personally, or her representatives, not in equity against the estate which she once represented. If she became liable for costs and expenses incurred through her fault, these would be no charge upon the estate. R. S., c. 87, § 2. For damages arising from her wrongful or fraudulent act, the administratrix personally was liable at law, not the estate nor her successor in the administration. Between her and the respondent, in such case, there is no privity, nor can one be said in any sense to represent the other. *Taylor* v. *Sewall*, 69 Maine, 148.

Bill dismissed with costs.

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

BLAKE A. HARWOOD *vs.* JOSEPH SIPHERS.

Kennebec. Opinion January 5, 1880.

Warrant—form of. Exception. Waiver.

A warrant, wherein the only description of the accused is, "a person whose name is unknown but whose person is well known, of Vassalboro, in the county of Kennebec," is too defective in matter of substance to afford any protection to the officer who makes an arrest upon it.

Such a warrant is too defective to be aided by any waiver in pleading.

A point not covered by the bill of exceptions, cannot be raised at the argument before the law court.

ON EXCEPTIONS, to the rulings of Whitehouse, justice of the superior court in and for the county of Kennebec.

TRESPASS to recover damages alleged to have been sustained by being arrested and imprisoned by the defendant.

It was admitted that the defendant was a deputy sheriff of the county, duly qualified.

In justification of the acts complained of the defendant read in evidence a certified copy of a warrant issued by the judge of the police court of the city of Gardiner in said county of Kennebec dated October 2, 1878, which, with the complaint therein referred to, the officer's return thereon, and the doings of said police judge are parts of the case.

The only description of the accused contained in the complaint (to which the warrant referred) or in the warrant, is, "a person whose name is unknown but whose person is well known, of Vassalboro, in the county of Kennebec."

Defendant contended that said complaint and warrant were sufficient authority for him to do all that he did do and relied upon the same as a complete justification for all acts proved to have been committed by him, in the premises.

The presiding judge ruled that said warrant was insufficient to authorize the arrest and detention of the plaintiff, and that the same did not contain any sufficient description of the person whom the officer was commanded by the magistrate to arrest.

"That the warrant held by the officer at that time of which this is a certified copy was not legal and sufficient upon its face, it was

not sufficient to protect the officer, and therefore the arrest was unauthorized and the detention comes within the ordinary definition of false imprisonment."

To so much of the charge of the judge as is above specified and all other statements in relation to the legality and sufficiency of said warrant, the defendant excepted.

The presiding judge also instructed the jury, *inter alia*, as follows:

It is the duty of a magistrate when he issues a warrant for the arrest of any person and for crime in this state, to insert in the mandatory part of his warrant, a sensible intelligible description of the person, if he is not known by name. Either to insert the name of the person whom he has commanded the officer to arrest or insert an intelligent description, as far as the circumstances and situation will admit, in order that the officer may know whom he is commanded to arrest; and that the person whose liberty is threatened, when he is informed by the officer that he has a warrant against him, may know whether he is required to submit to the arrest, or whether he would be justified in resisting the arrest.

I instruct you that there should be a sensible and intelligible description of the person whom the officer was commanded to arrest, in the warrant itself; and that this warrant does not contain any sufficient description of the person whom this officer was commanded by the magistrate to arrest. . . .

It is the mandatory part of the warrant, what the command in the warrant says, which gives the warrant its efficacy. It is upon that, and by the force of that, that the officer seeks to justify himself. I therefore give you this instruction as matters of law; that this warrant, the warrant held by the officer at that time, of which this is a certified copy, was not legal and sufficient upon its face, although issued from a court of competent jurisdiction, it was not sufficient to protect the officer, and therefore that the arrest was unauthorized and the detention comes within the ordinary definition of false imprisonment. The only question, therefore, submitted to you, and upon which you have to pass, is one of damages.

Bion Wilson, for the plaintiff.

L. Clay, for the defendant, cited on the point of waiver by pleading the general issue before the magistrate, 1 Chit. Cr. L. 39, 44. Davis Cr. Jus. 17. *Turns* v. *Com.* 6 Met. 225, 236. *State* v. *Carver*, 49 Maine, 588, and cases there cited.

SYMONDS, J. The defendant is a deputy sheriff, who is sued in this action for an illegal arrest and false imprisonment of the plaintiff. He justifies under a warrant from the police court of the city of Gardiner, issued upon complaint made by himself against the present plaintiff for larceny. The only description of the accused in the complaint or warrant is in the following terms: "a person whose name is unknown but whose person is well known, of Vassalboro, in the county of Kennebec."

The presiding judge ruled that a warrant containing only this description of the accused, although issuing from a court of competent jurisdiction, failed upon its face to afford protection to an officer who arrested and detained a prisoner upon it.

We think the ruling was correct. The knowledge of the complainant of the person intended by the warrant does not aid a defect in it. The averment of such knowledge, therefore, cannot supply any deficiency otherwise existing. This is substantially a warrant against a resident of Vassalboro whose name is unknown; without further designation or description.

"No warrant to search any place, or seize any person or thing, shall issue without a special designation of the place to be searched, and the person or thing to be seized." Const. of Maine, article 1, § 5.

The warrant in this case is in accordance neither with the requirements of the constitution nor with the precedents of the criminal law.

"If the name of the party to be arrested be unknown, the warrant may be issued against him by the best description the nature of the case will allow." 1 Chit. Cr. L., 39. *Com.* v. *Crotty*, 10 Allen, 404.

The omission of the name, as a means of identification, is justified only on the ground of necessity; and when this is not known the warrant must indicate on whom it is to be served in some other way, by a specification of his personal appearance, his occu-

pation, his precise place of residence or of labor, his recent history, or some facts which give the special designation that the constitution requires.

The conclusion from all the authorities, as given in Bishop on Criminal Procedure, § 680, is, "that, both at the common law and in conformity with our constitutional guaranties, proceedings may be instituted and carried on against an offender whose name cannot be ascertained; but, in such a case, such a description of him must be given as will point to his identity, while yet there is no exact form of the description required. It must be suggested by the particular circumstances; and of course it must conform also to any statutory provisions which may exist in the individual state."

The warrant in this case was so irregular and insufficient upon its face as to afford no protection to the officer who proceeded to make an arrest upon it.

It is claimed in the argument that by pleading the general issue before the magistrate in Gardiner, the plaintiff waived the informality in the warrant, and cannot now re-assert, in his action against the officer, any rights based upon such defect.

There is a discrepancy in the statement of the case on this point. By the record of the police court, it appears that the plaintiff was arraigned, pleaded not guilty, and was discharged after an examination of the case.

In the judge's charge—which is made a part of the case as stating substantially the facts relied upon by each party—it is said the plaintiff was brought before the magistrate, notified there was no evidence against him, and accordingly discharged.

Whatever the fact in this respect may be, we are satisfied that the question of the effect upon the present suit of a plea of not guilty in the police court, is not one that is reserved upon the exceptions. "The defendant contended," the exceptions state, "that said warrant and complaint were sufficient authority for him to do all that he did, and relied upon the same as a complete justification for all acts proved to have been committed by him in the premises." It was to the ruling upon this point "and to all other statements in relation to the legality and sufficiency

of said warrant," that exceptions were taken and allowed. This reserves no question as to the effect of the general issue pleaded in the lower court.

It is not doubted that by such a plea all objections to matters of form in the warrant would be waived. *State* v. *Regan*, 67 Maine, 380.

As was said in a civil case—*Trull* v. *Howland*, 10 Cush. 113—"it may be difficult to draw the line with precision between cases which are to be held of no validity by reason of entire failure to describe the party, and those which are properly cases of misnomer, or erroneous description of a part of the name of the defendant."

While we do not regard it as a matter presented for our determination in the present case, we entertain no doubt that this warrant falls within the former class and was too defective in matters of substance to be aided by any waiver in pleading.

Exceptions overruled.
Judgment on the verdict.

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

LORENZO S. RUGGLES v. EDWIN G. COFFIN.

Kennebec. Opinion January 17, 1880.

Practice. Instructions. Exceptions.

A presiding justice has the discretionary power to reopen a case and permit a party to introduce further testimony after the defendant's counsel has commenced his argument to the jury, though the matter to which it relates occurred during the argument.

To be available in a bill of exceptions, special objections to the admissibility of testimony must be made when it is offered.

In a trial involving the title to a horse, the plaintiff set up title under a bill of sale absolute in its terms, which the defendant claimed was intended for security only. The scrivener, called by the plaintiff, gave testimony tending to show that the purchase was absolute; when the defendant's final argument was closed, the court permitted the defendant to be recalled and testify to certain declarations of the scrivener made to him after the testi-

mony on both sides was closed, which were to some extent inconsistent with the scrivener's testimony. The court instructed the jury in relation to the testimony of the scrivener and the defendant that, it was "all for their consideration and so far as it tended to corroborate one or the other, it was material to the issue;" *Held*, that the plaintiff had no ground for exceptions.

The statute does not prohibit the presiding justice from calling the attention of the jury to the questions of fact upon which they are to pass, and to the testimony that relates to them.

On exceptions.

Replevin for a horse.

The presiding justice instructed the jury, *inter alia*, as follows:

"Now you see that the plaintiff and Wheeler who are the witnesses to this material part of the case, are directly at issue in regard to the fact. There is another witness who was present and a party acting in that transaction, and you have his evidence, and he is Mr. Mitchell the attorney, who drew the bill of sale. I don't remember that he was asked by either side whether he saw any money delivered by the plaintiff to Wheeler, you will remember whether he has testified that the $50 was paid, bearing in mind that he is the witness to the bill of sale. This is a piece of evidence that you have a right to consider in connection with this part of the case. You have on the one side the evidence of the plaintiff, absolute and positive, and corroborated by the written bill of sale, absolute in terms. On the other hand you have the positive evidence of Wheeler, and it is said that there are several facts and circumstances which strongly corroborate him, and one of them is the evidence of Mr. Mitchell, the absence of evidence from him of the delivery of any money from the plaintiff to the defendant. You have heard Mr. Mitchell's evidence, and you have heard the evidence of the defendant of what occurred during the argument. It is all for your consideration, and so far as it tends to corroborate one or the other, it is material to the issue here. Then another fact relied upon to corroborate Mr. Wheeler in regard to his version of the real nature of that transaction is the value of the horse. Wheeler tells you he was worth $115, $120, or $125. You have heard his statement at that time. The defendant tells you that in June, when he bought

him, he was worth $115 which he paid for him. You have no definite and particular description of the horse, so you can judge the value any further than of his age. He is said to have been seven years old, and warranted sound, the plaintiff tells you. If you are satisfied that the horse was worth $115 or $100, it is a fact that you have a right to consider as tending to corroborate the one side or the other, whether you would expect an absolute sale of a horse of that value, with no right of redemption for $50. Then another fact that is relied upon as corroborating the defendant's proposition, is that the horse was permitted to remain in the possession of Wheeler.

"The plaintiff did not take him into his possession, and it is said that this is inconsistent with the idea of an absolute purchase in the ordinary course of business; but then another fact that the parties went to a lawyer to have a formal bill of sale. It is said by counsel that that is not consistent with the ordinary course of business among men who are merely buying and selling a horse. These facts, so far as they have been developed in the evidence, are proper matters for consideration in weighing the evidence of these two witnesses, and in coming to a conclusion as to the real nature of that transaction."

The remaining facts sufficiently appear in the opinion.

Pillsbury & Potter, for the plaintiff, cited *Brackett* v. *Weeks*, 43 Maine, 291. *Winslow* v. *Bailey*, 16 Maine, 319.

Foster & Stewart, for the defendant.

Barrows, J. One Wheeler owned the horse which was here replevied, executed a bill of sale of him to the plaintiff in which the consideration is stated to be $50, and afterwards sold him for $115 to defendant who claims that the plaintiff's bill of sale, though absolute in its terms, was really intended by the parties to it as a mortgage, and so, not being recorded, is not valid as against a bona fide purchaser without notice. Whether, as against plaintiff's claim that his purchase was an absolute one, parol evidence was admissible to show that the transaction between him and Wheeler was intended to be a mortgage, and thereby affect the written contract, was a question which perhaps might have been but was not raised in the case.

In *Shaw* v. *Wilshire*, 65 Maine, 485, the only written conveyance was a receipted bill of parcels, and the plaintiff denied that he purchased the chattels, and testified that he took the property and writing as security for certain notes which he held, and this was conceded by all the parties concerned, so that no such question could arise in that case. The plaintiff here seems to have entered without objection into parol evidence as to the character of the transaction between himself and Wheeler, and called the scrivener who wrote the bill of sale to support his claim that the purchase was an absolute one; and he gave testimony tending that way. He seems to have been confronted with a note for $50, also in his handwriting, said to have been given by Wheeler to the plaintiff at the same time, but he denied any knowledge that they were parts of the same transaction or that the bill of sale was given to secure the note, or that he had ever said it was; and he pointedly denied the statement of Wheeler that he asked him at the time to make a mortgage; said Wheeler always called them bills of sale, and he had made many of them, and that he did not understand that he had any reason to suppose that Wheeler supposed it was a mortgage. But after this testimony had been given, and the case had been closed and while defendant's counsel was arguing it to the jury, the scrivener said to the defendant that "he had made these documents for these parties a number of times, sometimes in the form of a bill of sale and sometimes in the form of a mortgage," and that he "had always had his doubts but this was given as security on that $50 note—that he was not positive whether the note and bill of sale were made at the same time or not," &c. Upon defendant's motion, and against plaintiff's objections the judge allowed the defendant to be recalled to testify to this conversation, which was admitted only for the purpose of contradicting the scrivener's testimony. This reopening of the case and admission of testimony, and the instruction given by the presiding judge that the testimony of the scrivener together with that of the defendant as to what occurred during the argument, "is all for your consideration and so far as it tends to corroborate one or the other it is material to the issue here," are now the burden of the plaintiff's complaints, although the excep-

tions include the remarks of the judge upon the pregnant testimony that the horse was worth from $100 to $125, and was allowed to remain in the possession of the alleged vendor.

We see no error in the proceedings or instructions.

Our statute does not prohibit the presiding judge from calling the attention of the jury to the questions of fact upon which they are to pass, and to the testimony that related to those questions.

That he has discretionary power to reopen a case and permit a party to present further testimony after the testimony has been declared closed and the argument for the opposite party has commenced was settled in *McDonald* v. *Smith*, 14 Maine, 99. Nor is the exercise of that power subject to revision on exceptions, whether the testimony thus presented has been inadvertently omitted, or the matters to which it relates have occurred, or have been first brought to the knowledge of the party after the case was closed. The plaintiff objects now that the testimony thus received if otherwise admissible, did not tend to contradict the scrivener, but he made no such objection at the trial, nor does it appear that he made any except a general objection to the reopening of the case and the reception of any testimony whatever.

If he had special objections to any portion of the testimony (or to the whole of it as not conflicting with the testimony it was offered to impeach) he should have raised them then. Not having done so, they are not available now according to the rule laid down in *Longfellow* v. *Longfellow*, 54 Maine, 245, and numerous other cases before and since. Moreover, the scrivener's conversation with the defendant was to some extent inconsistent with the testimony he had given and therefore admissible. *State* v. *Kingsbury*, 58 Maine, 238.

Exceptions overruled.

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

HINKLEY & EGERY IRON CO. *vs.* GEORGE N. BLACK.

Penobscot. Opinion February 27, 1880.

Fixtures. Contract of purchase.

Where a person entered into possession of a tract of land without the payment of rent therefor, and to use and occupy it as his own in accordance with the terms of a contract for its purchase, and erected large and substantial buildings thereon with engines and machinery for the manufacture of an extract of bark for tanning purposes, and then failed to perform the conditions of the contract on his part and thereby acquire the title, the erections, engines and machinery are a part of the realty and cannot be sold as personal property as against the owner of the land.

Nor does it make any difference that the erections were made by a firm while the contract was only with two of its members—provided that the contract was held for the benefit of the firm who made the partial payments and were to have the benefit of the title when obtained.

ON REPORT.

TROVER to recover the value of certain personal property, situated and being in and upon township No. 39, Hancock county, and particularly upon that portion of said township, excepting the western mile strip, viz: The extract works and buildings, the circular saw mill and all tools and machinery in said works and buildings, and all staves and barrel machinery and tools, and the stable sheds and dwelling-house therein, all of the value of nine thousand dollars ($9,000).

The question was, in which party was the title.

The plaintiffs to sustain their title introduced a sealed contract duly executed and delivered to John D. Hopkins and James H. Hopkins, on November 17, 1866, by the defendant, wherein he covenanted and agreed with the said Hopkins their heirs, etc., to convey by deed of warranty to them a certain large tract of land described, the conveyance to be subject to "the following qualifications and explanations, namely, all taxes to be by said Hopkins borne and paid upon any and all of said property which may be apportioned or assessed after the date of this paper, and all losses by fire or freshets, and all other injuries, losses, depreciations, or destructions which may occur without my fault from and after this date, to be upon the risk and liability of said Hopkins, the

same as if they had become absolute purchasers of said property as of this date."

"And said conveyance is also to be made only upon the express condition that the said Hopkins shall pay me on or before the time when the same may become due, severally, the following described notes, of this day, given by said Hopkins to me, namely, four notes, each for the sum of nineteen thousand two hundred and sixty dollars, payable, with interest annually—one in one year, and one of them in two years, and o ne in three years, and one in four years, respectively, from date; and if said notes and interest thereon, or any one of the same, shall not be paid as the same may become due, then my obligation to convey shall become null and void, time being expressly regarded as of the essence of this agreement. And although the said Hopkins are permitted to go into immediate possession of said prop erty, to use and occupy as their own, still I retain the right, to me and my heirs and administrators, to assume and take and enjoy, without notice or suit, or process or hindrance, possession of any and all of said property, and whatever may be taken from the same, at any and all times, when I may deem such a step expedient for the purposes of my own security."

A mortgage from J. D. Hopkins & Co., a firm composed of John D. Hopkins, James H. Hopkins, Charles D. McDonald and Edward K. Hopkins, to the plaintiffs of the property in controversy, dated October 14, 1876, to secure the payment of four certain promissory notes given by the mortgagors to the mortgagees was introduced, also a notice of the foreclosure of the mortgage dated November 13, 1877. All of which were duly recorded.

There was testimony in behalf of the plaintiffs tending to show that J. D. Hopkins & Co. entered into possession under the contract soon after its execution; that they commenced erecting the buildings thereon in March, 1875, and completed them before October 14, 1876, when the works were completed and in full operation; that partial payments were made upon the contract, the last payment having been made in 1876, and that they suspended December 5, 1877, and the contract was surrendered to the defendant; that the partial payments were made by J. D.

Hopkins & Co., and receipts therefore given to J. D. & J. H. Hopkins.

That the defendant knew of the erection of the works and did not object thereto; and that they were erected by and for the firm.

In cross-examination it appeared that at the time of erecting the works, the firm expected to receive the title eventually; that the machinery was put in with the intention that it should be permanent; that the defendant never gave any express consent for the erection of the works, or the putting in of the machinery, nor was there any understanding with the defendant that it should ever be taken off the land; that the firm refused for a while to give the mortgage for the reason that they did not own the land, but finally yielded, being embarrassed at the time.

The buildings were as follows:

A leach house 45 feet square, 48 feet high, in which was an engine, main line of shafting, three pumps, leaches and elevator. The earth was excavated for foundation, and stone foundation, with stone piers under the building. The engines rested on the piers, fastened by anchor bolts. The main shaft ran out into another building, called bark mill, held by couplings bolted to posts. Another upright engine in the condenser house—another building. Steam pumps sat on floor on a six inch timber fastened to the floor through timbers.

Next adjoining was the boiler house 22 by 54 feet brick, and containing the furnaces, two boilers set in masonry in the ground, the building also sitting on masonry. Then the condenser house 52 by 54 feet and 45 high containing large tanks known as coolers. The condensers were built solid in a cradle fastened to the timbers, the whole resting on abutments under the floor. The coolers and condensers were connected with the leaches by pipes.

The bark mill, 13 by 35 feet, into which the main shaft passed, standing on stone piers. The bark mills were built on a foundation in an excavation. The limb cutter was driven from the shaft in the main line and was bolted to the floor. The elevator ran from under the bark mills through into the roof of the main building and delivered the bark into the leaches.

The stave mill contained stave machinery fastened to the floor with bolts.

The saw mill 22 by 65 feet, the foundation of which was excavated and stoned.

All these buildings were connected together and intended to be permanent.

The dwelling house, 24 by 30 feet, sat on cedar posts, intended to be permanent and used for boarding the men engaged in running the mills.

The remaining facts appear in the opinion.

This case was submitted to the law court upon the foregoing evidence, or so much thereof as is legally admissible. If, in the opinion of the court, any of the property claimed in the writ is the property of the plaintiff, judgment is to be rendered for the plaintiff, for such articles as belong to them, without damages; it being agreed that no damages are claimed, the plaintiff instead thereof to have the right to remove such articles within a reasonable time after judgment, with free access to them for that purpose. If none of the property belongs to the plaintiff, then judgment for defendant.

Wilson & Woodward, for the plaintiffs, contended that the question involved had already been substantially decided. *Russell* v. *Richards*, 10 Maine, 429. *Wells* v. *Bannister*, 4 Mass. 514. *Osgood* v. *Howard*, 6 Maine, 452. *Pullen* v. *Bell*, 40 Maine, 314. *Rines* v. *Bachelder*, 62 Maine, 95.

Black's knowledge of the erection of the buildings and receipts of further payments in 1876 and 1877, operated as a subsequent assent that the erections might remain and made them personal property same as if he had given previous consent to their erection. *Fuller* v. *Tabor*, 39 Maine, 519. The plaintiffs had a right to rely upon the law of that case as they did. Otherwise they would not have furnished the machinery.

Massachusetts doctrine is different. *Milton* v. *Colby*, 5 Met. 78. *Eastman* v. *Foster*, 8 Met. 19. *Murphy* v. *Morland*, 8 Cush. 575. *Oakman* v. *Dorch. M. F. Ins. Co.* 98 Mass. 57. *Stare decisis.* Broom's Leg. Max. 114-116. 1 Kent's Com. 475-6, 8. *Goodlittle* v. *Atway*, 7 T. R. 395, 415. *Spicer* v.

Spicer, Cro. Jac. 527. *King* v. *St. Paul*, 13 East. 320. *Western* v. *Mayor of Brooklyn*, 23 Wend. 334, 341. Ram. Judgmt. c. 14, § 4, appendix 3. *Briscoe* v. *Bank Com.* (Ky.) 11 Pet. 257, 285.

C. P. Stetson & L. A. Emery, for the defendant.

SYMONDS, J. On the seventeenth day of November, 1866, the defendant gave to John D. Hopkins and James H. Hopkins an agreement to convey to them a large tract of land in Hancock county upon certain specified terms and upon the express condition that the said Hopkins should pay him on or before maturity four notes for $19,260 each, payable with interest annually in one, two, three and four years from that date. If the notes and interest, or any one of the same, were not paid when due, then the obligation was to be void, time being expressly regarded, as of the essence of the agreement. The said Hopkins were to go into immediate possession of the land, to use and occupy it as their own, the defendant reserving the right to take possession of the property, and of whatever might be taken from the same, whenever he deemed it expedient for his own security.

The said Hopkins, with Edward K. Hopkins and Charles D. McDonald, forming the firm of J. D. Hopkins & Co., went into possession under the contract, erected large and substantial buildings, with engines and machinery, for the purpose of manufacturing an extract from bark, to be used in tanning. These are referred to in the writ as the Extract Works. There were also mills, dwelling-house, stable, and appurtenances.

On the fourteenth day of October, 1876, the said firm of J. D. Hopkins & Co., gave to the plaintiffs a personal mortgage of the buildings so erected, and of the machinery and other property, for an alleged conversion of which by the defendant the plaintiffs in this case claim to recover.

The payments were not all made as required by the contract, and for a certain period there seems to have been a waiver by the defendant of the requirements in regard to time by accepting partial payments at later dates. The last payment upon the notes was made in June or July, 1877, in the sum of about $2700.

In December, 1877, the firm of J. D. Hopkins & Co. failed, and went into bankruptcy, leaving about $30,000 of the amount required to entitle the obligees (for it is convenient to speak of this paper as a bond for a deed, though it was in form merely a contract to convey) to a conveyance still unpaid. The contract for conveyance was thereupon given up by J. D. Hopkins & Co. to the defendant, who claimed title and possession of the land and buildings.

The title of the defendant to the land is not disputed. Neither the obligees in the bond, nor the firm of J. D. Hopkins & Co., had any claim to the township except what this paper conferred. There is some discrepancy in the testimony upon the question whether the plaintiffs were expressly notified at the date of their mortgage that the defendant then claimed to hold the buildings as a part of the realty, but there is nothing in the evidence to prove that the plaintiffs had any reason to suppose, or did suppose, that the mortgagors had any other rights than those which grew out of the contract for conveyance and possession and improvement there-under; unless an inference to the contrary is to be drawn from the terms of the mortgage itself, which contained the usual warranty of title, and from the statement of the president of the plaintiff company, contradicting John D. Hopkins on this point, that there was nothing said about any defect of title at the time the mortgage was given.

The plaintiffs claim the buildings, with their contents of engines machinery and other fixtures, under their mortgage, as personal property.

The defendant claims that, upon failure of the Hopkins to perform the express condition of the bond, the buildings being substantially and to all appearances permanently built, together with whatever appertained to them, were a part of the realty and the property of the owner of the land. By agreement of counsel the court is to pass only on the question of title.

An examination of the evidence, and of the description of the property, satisfies us that upon this issue in regard to the title the property mentioned in the mortgage and claimed in the writ may properly be regarded as an entirety; because upon the proof we

find no conversion by the defendant of any property which would not upon familiar principles be part of the realty, if the buildings themselves were real estate. The engines, pumps, elevator, furnaces, condensers, coolers, machines for cutting the limbs and grinding the bark, saws and other apparatus, were all parts of the machinery for the extract works and for the mills, connected by shafting and belts, or by pipes, suited and intended for the process of obtaining the extract from the bark, and for other purposes connected with the mills as such, and in the main bolted or secured in a permanent way to the buildings themselves. Such machinery was a part of the mill or factory and real or personal estate according to the character in this respect of the building itself. *Symonds* v. *Harris*, 51 Maine, 20. Our attention in the argument is not called to anything, nor do we perceive anything in the description given by the witnesses, of which on this evidence a conversion by the defendant can be predicated, which would not under our decisions follow the fortunes of the buildings themselves, in respect of being real or personal property.

The dwelling-house stood on cedar posts, but in regard to most of the other buildings, the evidence shows that excavations were made and foundations secured on which the buildings were supported by stone piers and other masonry.

Was this property, on failure of the Hopkins to make the payments in the bond, the real estate of the defendant, or the personal property of the plaintiffs under their mortgage?

In *McRea* v. *Bank*, 66 N. Y. 490, the court, following and approving an earlier decision, states the criterion of an irremovable fixture to be, "the union of three requisites, first, actual annexation to the realty, or something appurtenant thereto; second, application to the use or purpose to which the part of the realty with which it is connected is appropriated; third, the intention of the party making the annexation to make a permanent accession to the freehold."

By the words "actual annexation," in the first of the requisites mentioned we do not imagine that the court intended physical annexation; and we should prefer in its place the phrase, annexation, real or constructive. For, the sufficiency of constructive

annexation in the case of heavy bodies, or of articles, like keys or parts of machinery, specially fitted and designed for particular places, is, we think, universally conceded. It has been very clearly held by this court: "It is the permanent and habitual annexation, and not the manner of fastening, that determines when personal property becomes a part of the realty. . . . . A thing may be as permanently affixed to the land by gravitation as by clamps or cement." *Strickland* v. *Parker*, 54 Maine, 266.

Nor do we perceive that the words "or something appurtenant thereto," in this first requisite, extend the meaning of the words, "the realty," previously used.

Of these three tests by which to determine what constitutes an irremovable fixture, "the clear tendency of modern authority seems to be to give pre-eminence to the question of intention to make the article a permanent accession to the freehold, and others seem to derive their chief value as evidence of such intention." Ewell on Fixtures, 22.

And another authority, after stating the intent, actual or presumed, to be usually the most important circumstance in determining the fact, adds: "But there are some cases in which, though the erection is made by one not the owner of the freehold, an intent to retain the property in the fixtures as chattels could not be presumed, and others in which the policy of the law could not suffer effect to be given to it, if it actually existed. Thus, if one, though not the owner, is in possession under an executory contract of purchase, it is a reasonable presumption that he expects to complete the purchase, and that whatever he attaches to the realty in such a manner that if it were so attached by the owner of the freehold it would become a part of it, he intends shall be a part of it." Cooley on Torts, 429.

"Fixtures attached to premises by one in possession under a contract of purchase, where he fails to perform on his part and thereby to acquire a title, become a part of the realty, like fixtures annexed by a vendor or mortgagor, and may not be removed by him." 1 Wash. R. Prop. 6.

"It is also well settled that the right to remove fixtures annexed to real estate by one in possession thereof under a contract for its

purchase without paying rent therefor, is to be determined by the rule prevailing between grantor and grantee, mortgagor and mortgagee, and not that between landlord and tenant. Fixtures erected under such circumstances may, as against the vendor of the land, neither be removed by the vendee, mortgaged nor sold by him, nor seized and sold on fi. fa. against him as his personal property. . . . . .

According to the better opinion, also, it seems that the rule is the same where possession is taken, and the annexations made under a parol agreement for the purchase of the land, though there is some conflict of authority on the question." Ewell on Fix. 273.

In one of the later notes in Kent (*343) precisely the same rule is given.

These citations undoubtedly state the result of the authorities on this point. The clear weight of authority is in their support. That this rule holds in Massachusetts is conceded in argument. *Eastman* v. *Foster*, 8 Met. 19, 26. *McLaughlin* v. *Nash*, 96 Mass. 138. *Oakman* v. *Ins. Co.* 98 Mass. 57, and cases cited. *Poor* v. *Oakman*, 104 Mass. 309, 318. *Madigan* v. *McCarthy*, 108 Mass. 376.

The rule declared in these cases is that if one erects a permanent building, like a dwelling-house, on the land of another, voluntarily and without any contract, express or implied, with the land-owner that the building shall not become part of the realty but shall remain personal property, it becomes a part of the realty and belongs to the owner of the soil.

In *Ritchnyer* v. *Morss*, 40 N. Y. 350, it was held that, except in cases where the relation of landlord and tenant exists, one claiming the building as personal property must prove that it was erected upon an agreement between the builder and the owner of the fee of the land that it was to be considered strictly a personal chattel; which is in effect the Massachusetts rule. See, also, *Smith* v. *Benson*, 1 Hill, 176. The same point was expressly decided in *Ogden v. Stock*, 34 Ill. 526, and the court says, "if the party making the improvement, as between himself and the owner of the soil, has no right to erect the same as property sep-

arate and distinct from the freehold, an intention so to do, no matter how clearly manifested, is of no avail."

The cases of *Perkins* v. *Swank*, 43 Miss. 349, and *Leland* v. *Gassett*, 17 Vt. 403, are to the same effect, and *Christian* v. *Dripps*, 28 Penn. St. 271, indicates that the same would be held in that state.

It is to be observed that the rule laid down, so far as applicable to this case, is in terms extended only to cases in which the conveyance fails because the obligee does not meet the conditions which were to entitle him to the deed; not to a case in which the obligor on his part refuses to perform the contract. And it was held in *Yates* v. *Mullen*, 24 Ind. 278, that "where A. by permission of B. built a mill on B.'s land under an agreement to purchase the land as soon as B. should have paid an outstanding judgment which formed a lien upon it and in the meantime to own the mill, and B. having failed to satisfy the judgment the land was sold, ... the mill remained A.'s personal property and did not pass with the estate."

If the rule is limited to the case of contracts for the conveyance of land, where the failure to perform is on the part of the proposed purchaser, we think it is not in conflict with any decision in this state.

Thus in the case of *Rines* v. *Bachelder*, 62 Maine, 95, cited by the plaintiffs, it appears that the fault was not on the part of the purchaser, but on the part of the vendors, who were unable to give a valid conveyance of the lands; whereupon the purchaser was allowed a reasonable time to remove the buildings as his own personal property.

The cases of *Osgood* v. *Howard*, 6 Maine, 452, and *Fuller* v. *Taber*, 39 Maine, 519, fall substantially within the rule. We think the consent of the land-owner, as intended in these cases, includes not only his consent that the building should be erected on his land, but also that it should remain the personal property of the builder.

Nor can the cases of *Russell* v. *Richards*, 10 Maine, 429, and 11 Maine, 371, and *Pullen* v. *Bell*, 40 Maine, 314, be accepted as settling the law in this state that erections, made under a parol

contract for the purchase of lands, under such circumstances, remain the personal estate of the builder. In the former case it was on the ground, first, that the mill was built on the land of the father with his permission, at the expense and as the property of the son, with an open and express disavowal by the father of any interest in, or claim upon it, and, secondly, that it was a building erected for purposes of trade and manufacture, that the court held the mill to be the personal property of the son and those claiming under him. The decision of *Pullen* v. *Bell*, simply follows that of *Russell* v. *Richards*, and would seem to be justified on the ground that the dwelling-house was not so attached to the realty as to become a part of it.

We think the opinions of the court in these two cases, properly considered, do not conflict with the rule we have drawn from the authorities. The essential distinction in this respect is not between a written and a verbal contract, but between the class of cases in which the failure to convey results from the fault of the vendor, and those in which the purchaser fails to meet the conditions which entitle him to the deed. The right of the latter is merely to perfect his title by performing his contract.

In a later case than those to which we have last alluded, the learned chief justice, delivering the opinion of the court, treats it as well-settled law that such erections made by one occupying land under a bond for a deed are to be regarded as real estate, and are not removable by the occupant as personal property. *Hemenway* v. *Cutter*, 51 Maine, 408. And in regard to verbal contracts for the sale of lands the same result has been distinctly reached in the recent case of *Lapham* v. *Norton*.

Nor do we perceive that it can make any difference that the erections were by the firm, while the contract was only with two of the members who constituted the firm. The contract was made, or at least held, in the interest and for the benefit of the firm. They made the payments upon it. When title was obtained it was to be for the benefit of the firm. If a conveyance had been made to the two, it would have been in trust for the partnership, and would have inured to their advantage. The firm by arrangement with the obligees undertook the performance of their

contract, expecting to have their rights. We do not see that they could have expected, or are entitled to, more.

Judgment for the defendant.

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

INHABITANTS OF HAMPDEN *vs.* INHABITANTS OF TROY.

Penobscot. Opinion February 27, 1880.

Pauper. Emancipation.

A legitimate minor child, whose father had no settlement in this state at the time of his decease, follows the settlement of his mother and is not emancipated by her second marriage.

ON MOTION AND EXCEPTIONS.

ASSUMPSIT to recover $250.29, for pauper supplies furnished Eliphaz Keizer, a pauper. No question was made in relation to the supplies or legal notice and denial.

It was admitted that David Keizer, father of the pauper, never had had any settlement in this state when he died; that the pauper was born January 10, 1822; that Charles Pratt had a settlement in Palermo before he went to Troy and was married to Polly Keizer, mother of the pauper, January 29, 1839, and went to live with her in Troy where she had a small house and twelve acres of land; that the pauper received pauper supplies from Troy in 1845 while he was living at his uncle's in Troy, and that he never gained a settlement in his own right.

The main question was whether or not the pauper was emancipated.

Upon the subject of emancipation the presiding justice instructed the jury as follows:

"A child takes the settlement of its parent until emancipated. The law emancipates that child at the age of twenty-one years, ordinarily, but not always. A child may be more than twenty-one and not become emancipated, or it may be less than twenty-

one, and be emancipated; the twenty-one years are a general legal test—not conclusive either way. A child may not become emancipated from its parent till long after, as, for instance when the child is *non compos mentis*, and not able to take care of itself. It continues unemancipated as long as it is under his care and control, receiving support from him; and it follows his settlement as long as such condition exists, no matter how long it is after such person arrives at full age. . . On the other hand a child may be emancipated before it becomes twenty-one. It may be done by contract between father and son, or a widow and her son. One instance would be where marriage is contracted with the consent of father or mother. A daughter under age is married with the consent of her father. That consent is a contract that she shall be free from his control, and be controlled by somebody else. Another case is when the father deliberately gives him his own earnings; the same relations then exist as when the boy is twenty-one. Such a contract may be an express contract or one proved by circumstances. It is not presumed, but it may be proved and inferred from facts and circumstances, if the facts and circumstances are sufficient in the minds of the jury to warrant the conclusion. And emancipation may be produced otherwise than by contract; and emancipation has the same relation or condition, however produced. Emancipation is the same thing, when existing, whether it is brought about by contract or in any other way. . . If a parent forces a child to leave his house, or deserts or abandons him, the child is released from all filial duties which the law will enforce; and if he accepts the situation, and seeks his own living in his own way, he is to be regarded as emancipated; the tie between the parent and child is broken, not necessarily because all affection between them is gone; that may still exist in smaller or larger degree, or not at all. . . As I understand the defendants, the first claim is that the marriage itself, between the mother of Eliphaz Keizer and Charles Pratt, emancipated the minor boy. I do not give you that instruction. I rule that it is not so.

"Then the defendants claim that, if the pauper was supported by the town while a minor, after its mother's intermarriage with

Pratt, with the knowledge of the mother and her husband, and such support was in good faith, furnished to relieve want and distress, such act would break the continuity of residence, either affecting the settlement of the father or the mother, or both of them, or directly affecting the settlement of the son, Eliphaz, irrespective of the father. That is, they say, if otherwise, they were put into a position of necessity to support the child—and still the child was gaining a residence in their town in spite of that support. I instruct you that the settlement of the minor would not be affected by this circumstance, unless there was emancipation in fact. The mother could emancipate her minor son. The mother had the power to emancipate her minor son, and this could take place in either one of two ways, if borne out by the testimony. First, it could be by contract, and that contract could be expressly proved, by a writing or newspaper notice; or it could be inferentially proved by facts and circumstances, if they are sufficient therefor.

"If you are satisfied that there was a mutual understanding and agreement between the mother and the minor, that he should have his own time, enjoy his own earnings and control his own actions, and that they acted upon such understanding and agreement, that would be emancipation—one mode of emancipation. It could also take place by necessity or abandonment. I give this instruction or rule: If you are satisfied that Charles Pratt and his wife neglected to support the minor, and ceased to exercise over him parental control, turning him out upon the world to take care of himself; and he ceased to be under their control, and acted for himself independently of them, such a condition of things would amount to emancipation by abandonment. And I further rule that the effect is the same whether such a state of things were brought about willingly by the mother, or whether she did it, if she did it, through the influence or compulsion of her husband. That is, the motive is immaterial; but the motive to do it or not to do it, may have a bearing upon the question as to whether, or not, she did it."

The jury found for plaintiffs and the defendants alleged exceptions.

L. Barker, *T. W. Vose* and *L. A. Barker*, for the plaintiffs.

William McCrillis & W. H. McLellan, for the defendants.

At the common law, the minor child of a widow who married again did not take the step-father's settlement. This was changed by Stat. 1821, c. 122, § 2. *Plymouth* v. *Freetown*, 1 Pick. 198. *Parsonsfield* v. *Kennebunkport*, 4 Maine, 47. *Dennysville* v. *Trescott*, 30 Maine, 470. *Great Barrington* v. *Tyringham*, 18 Pick. 264. *Goshen* v. *Richmond*, 4 Allen, 461.

This statute has been repeatedly re-enacted, thereby adopting this construction. 48 Maine, 410.

A step-father need not, but may, stand *in loco parentis*. *Storer* v. *Com.* 3 Esp. 1. If he does he assumes the same obligation that he is under to his own child.

It is customary for wife's children to be received as members of step-father's family. *Mulhorn* v. *McDavitt*, 16 Gray, 405. *Bush* v. *Blanchard*, 18 Ill. 46. *Mowbray* v. *Mowbray*, 62 Ill. 385. *Gorman* v. *State*, 42 Tex. 221. *St. Ferd. L. Acad.* v. *Bobb*, 52 Mo. 357. *In re Goodenough*, 19 Wis. 274. *Williamson* v. *Hutchinson*, 3 Comst. 312.

The pauper, in 1840, received supplies from Troy. If he was not then a member of his step-father's family, then, the pauper was emancipated; and thus the step-father had resided in Troy only three years before emancipation. If he was a member, then the supplies were indirect pauper supplies to the step-father and interrupted his residence.

The pauper was emancipated. *Monroe* v. *Jackson*, 55 Maine, 59. The mother's conduct in relation to her duties toward him was inconsistent with any further performance of them. A voluntary act of the parent may emancipate. *Lowell* v. *Newport*, 66 Maine, 78. It must be inconsistent with further performance of parental duties. The will is immaterial. If a parent do a voluntary act inconsistent with the further performance of parental duties towards his child, such an act gives rise to the duty of the parent to emancipate the child, and the law proceeds as if the parent had performed that duty—implies the parent's consent to emancipation.

If a father turns his minor son out upon the world to gain his

own livelihood, it is the duty of the father to emancipate the son, and the law proceeds as if he had—implies the consent.

The question is the mother's right to custody and earnings of her child after her second marriage.

The marriage of the mother was an absolute gift to the husband of the goods, chattels and personal estate actually or beneficially possessed or which might come to her during the coverture. 8 Mass. 99. 13 Mass. 384. 17 Maine, 29. *Prescott* v. *Brown*, 23 Maine, 305.

The mother could not be the natural guardian after her marriage. R. S., c. 67, § 3.

If the pauper, after mother's marriage, resided in step-father's family, the latter was entitled to the former's earnings. Step-father could not compel such residence, or continue it, but might terminate it. *Freto* v. *Brown*, 4 Mass. 672. 6 Mass. 273, 675. *Worcester* v. *Marchant*, 14 Pick. 510. 5 Barb. 122. 16 Gray, *supra*.

Neither in 1840, while the pauper was at work in Massachusetts, nor in the fall of 1840, when the pauper was sick and supported by Troy; nor in 1841, after the separation of Pratt and his wife, was the pauper a member of his step-father's family—each respectively sustaining the relation to the other of father and minor child.

By the voluntary act of marriage with Charles Pratt, the mother had no longer any control of her own actions, and she had made it impossible to discharge any parental duties toward her children, and she was no longer entitled to the services of the pauper, and it was her duty to emancipate the pauper. The pauper was not a member of his step-father's family in 1840, nor 1841, nor did the step-father perform any of the obligations of father toward him. It was the duty of the step-father to consent to the mother's emancipation of the pauper, and the emancipation of the pauper by the mother, with the consent of the step-father, was implied. *St. George* v. *Deer Isle*, 3 Maine, 390, is directly in point.

In the case at bar, the mother of the pauper had no legal right to the service of her minor son, nor control of his person; nor

had the step-father, Charles Pratt, unless the pauper was living in his family. *Monroe* v. *Jackson*, *supra*.

VIRGIN, J. The father of the pauper whose settlement is in controversy, died, some years prior to 1839, in the defendant town without having gained any settlement in this state.

The pauper, Eliphaz Keizer, was born January 10, 1822, and resided with his mother, Polly Keizer, on a small place owned by her, in the defendant town, where she had her settlement until January 29, 1839, when she was married to one Pratt whose settlement was then in Palermo; and thereupon, Pratt went to live with his wife, upon her place, and continued to reside there for several years—the precise length of his residence there being one of the facts in dispute.

The plaintiffs contended, and the jury, by a special verdict, found that, Pratt gained a new settlement in the defendant town by having his home there five successive years, at least, prior to January 9, 1843, (when the pauper became of age) without receiving, directly or indirectly, supplies as a pauper.

In December, 1840, more than two years before the pauper attained his majority, he fell sick and went to his uncle's, in Troy, where he was furnished certain supplies by that town.

The defendants contended: (1) That if the pauper, when he received the supplies, was not a member of his step-father's (Pratt's) family, then he was emancipated, and could no longer follow any new settlement which his mother might acquire by her husband's continuous residence in Troy; and (2) But if he was a member of his step-father's family, then the supplies were indirect supplies to the step-father, and that therefore the step-father had no home in Troy for five successive years before the pauper became of age without indirectly receiving supplies as a pauper.

The jury, by a special verdict, found that the pauper was not emancipated by his mother after her marriage to Pratt; and the presiding justice instructed the jury that the marriage itself did not emancipate the pauper, and that the settlement of the pauper was not affected by his receipt of the supplies.

The defendant's counsel admit in their argument that the pauper was not a member of Pratt's family in the fall of 1840 when

he was sick and supported by Troy, and that Pratt performed none of the obligations of a father towards him. This admission acknowledges the soundness of the instruction that the settlement of the pauper was not affected by the supplies furnished by the defendants in 1840; for never having assumed the care and support of the pauper, he did not stand *in loco parentis*. *Freto* v. *Brown*, 4 Mass. 675. *Comm.* v. *Hamilton*, 6 Mass. 273, 275. *Worcester* v. *Marchant*, 14 Pick. 510. *Mulhern* v. *McDavitt*, 16 Gray, 405. And not being bound to support, the supplies furnished to the pauper, while he was sick at his uncle's, were not indirect pauper supplies to Pratt. *Greene* v. *Buckfield*, 3 Maine, 136. *Dixmont* v. *Biddeford*, 3 Maine, 205. *Hallowell* v. *Saco*, 5 Maine, 143. *Raymond* v. *Harrison*, 11 Maine, 190.

The only remaining question raised by the defendants, at the argument, is—Did the marriage of Polly Keizer to Pratt, *per se*, emancipate her son Eliphaz.

The statute which governs this point provided:

(1) A married woman shall always follow and have the settlement of her husband, if he have any within this state.

(2) Legitimate children shall follow and have the settlement of their father, if he have any within this state, until they gain a settlement of their own; but if he have none, they shall in like manner follow and have the settlement of their mother, if she have any. R. S., 1840, c. 32, § 1.

It was early contended that, the first clause of the second provision above quoted, literally construed, gave a son a settlement acquired by his father at any period of the son's life, even after the latter had attained his majority, left his father, married a wife and become the father of a family of his own—provided that the son had not gained a settlement of his own. But the court said that while the language admitted such a construction, such could not have been the intention of the legislature; that "wives and children may have derivative settlemen ts, because the husband and the father have the legal control of their persons and the right to their services; the wife cannot be separated from the husband, or minor children from the father; but when the father ceases to have any control over his children or any right to their service, it

is not easy to devise any good reason why they should not be considered as emancipated, and as no longer having a derivative settlement with the father on his acquiring a new settlement. And when the reason ceases, the law founded on that reason ceases. That upon the father's gaining a new settlement, a child of full age, although voluntarily living with him, does not have the new settlement with his father, but his former settlement remains." *Springfield* v. *Wilbraham*, 4 Mass. 493. This case was cited by this court in deciding a similar case. *Hampden* v. *Brewer*, 24 Maine, 281.

As an illustration of this principle it has been held that where a minor daughter became lawfully married, she thereby went out of the control of her parents and was emancipated, and hence could no longer follow their settlement subsequently acquired. *Charlestown* v. *Boston*, 13 Mass. 472. "This is analogous," said the court, "to the doctrine of emancipation in the English books, and according to the principles settled in *Springfield* v. *Wilbraham;* and her continuing to reside in the house of her mother does not affect the case, for this must have been voluntary on her part and with the consent of her husband; and the mother no longer retained any control over the person, or any right to the services of the daughter. . . Children are no longer children so as to take a new settlement acquired by their parents when capable of gaining one for themselves, if they are separated from their parents by marriage or other legal emancipation." This case is followed by *Shirley* v. *Lancaster*, 6 Allen, 31, and the reasoning in *Springfield* v. *Wilbraham*, approved.

But the original doctrine of emancipation founded upon majority is not universally applied; for a person who has become twenty-one years of age is not thereby emancipated when, by reason of mental imbecility, he is compelled still to remain dependent upon his parents for guidance and support. *Upton* v. *Northbridge*, 15 Mass. 237. *Wiscasset* v. *Waldoborough*, 3 Maine, 388. *Monroe* v. *Jackson*, 55 Maine, 55 and cases.

When, in 1822, the second clause of the second provision hereinbefore recited came up for construction, the court decided that legitimate children, under age, having the settlement of their

mother, follow a new settlement acquired by the mother although it be derived by a subsequent marriage. *Plymouth* v. *Freetown*, 1 Pick. 197. In 1826, the same question came before this court in *Parsonsfield* v. *Kennebunkport*, 4 Maine, 47. Counsel for the defendant town in that case contended that the statute should not be construed literally, but that the principles enunciated in *Springfield* v. *Wilbraham*, should be applied, and that the provision did not apply to a settlement of the mother derived by marriage, but to one acquired in some way consistent with her right to control the persons of her minor children. But the court followed *Plymouth* v. *Freetown*, and denied the application of *Springfield* v. *Wilbraham*, although they declined to decide whether the marriage of the mother *ipso facto* emancipated her minor children.

Again the question arose and was decided the same way in *Great Barrington* v. *Tyringham*, 18 Pick. 264. In that case the minor had the settlement of his mother in another state where he was learning a trade. It was held that he followed the new settlement of his mother acquired by a second marriage in Massachusetts, although he never resided there. Bishop, for the defendants, contended that the pauper did not follow the settlement acquired by her subsequent marriage, "inasmuch as his mother was absolved from all obligations to support him by the marriage," and cited *Springfield* v. *Wilbraham*. But Shaw, C. J., while he approved of the "limitations of the generality of the words of the statute," as decided in *Springfield* v. *Wilbraham*, said this case was not "within the principle of *Springfield* v. *Wilbraham*."

We know of no case in this state or in Massachusetts which decides that the marriage of the mother is the emancipation of her minor child by a former marriage. But there are several wherein it is held that the marriage of a mother does not emancipate her illegitimate child. *Fayette* v. *Leeds*, 10 Maine, 409. Sprague, counsel for the plaintiffs, argued that the same reasons assigned for the contrary doctrine "would apply to the case of a widow with children by a former husband, in which case no one would contend that on the second marriage they thereby became entirely emancipated."

So where a minor child is separated from his parents by being bound to service until twenty-one years of age by the overseers of the town wherein he has his settlement, he is not thereby emancipated although the parental and filial relations are suspended permanently. *Sanford* v. *Lebanon*, 31 Maine, 128. *Oldtown* v. *Falmouth*, 40 Maine, 106.

If the marriage of the mother, *ipso facto*, emancipated her child, then the receiving of the child into the step-father's family would not affect the emancipation, any more than the continuance of a child to reside with his father after his majority; or a married minor daughter continuing to reside with her mother. *Charlestown* v. *Boston*, 13 Mass. 469. This proposition would militate with well settled principles concerning the relation between step-father and step-son when the latter is received into the former's family.

Moreover this precise question has been decided by this court and is *res adjudicata*. In *Dennysville* v. *Trescott*, 30 Maine, 470, the court say: "The parental relation subsisting between her (the mother) and her children is not entirely changed by the second marriage. Why should the law require in a case like this that the children should follow the mother's settlement, unless she had some duties to discharge in relation to them and that it would be an act of inhumanity to separate them? . . They cluster around her and the law presumes she will not be unmindful of their welfare."

We cannot say that the verdict is against the weight of evidence so as to warrant us in setting it aside.

Motion and exceptions overruled.

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

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

Waldo. Opinion February 27, 1880.

Bet. Forfeiture. Stakeholder.

In an action against a stakeholder by the maker of a bet upon an election after notice to the stakeholder not to pay over to the winner, it is no defense that, after the commencement of the action, the stakeholder has paid it over to the mayor of the city where the plaintiff resides upon his claim that it is forfeited to the city, when no suit is brought to enforce the forfeiture against the maker of the wager.

A suit to enforce a forfeiture against the maker of a wager must be brought within one year after the forfeiture is incurred; and the stakeholder can be liable only as his trustee.

Unless such action is seasonably brought and the money adjudged forfeited therein, it still belongs to the maker of the bet, and he may recover it from the stakeholder from whom he demanded it while it was yet in his hands.

ON REPORT.

ASSUMPSIT to recover $200 which the plaintiff alleged he bet with one Howes that Tilden would be elected president of the U. S. in 1876.

The plaintiff testified in substance that he made the bet on election day and deposited the money in the hands of the defendant; that on the following fourth day of March he demanded the money of the defendant, who refused to deliver it up; and that he forbade him paying over to Howes.

On the part of the defense there was testimony tending to show that on November 6, 1877, N. F. Houston, mayor of Belfast where the plaintiff resides, went with the city solicitor to the defendant and demanded the money of him, and notified him that he should proceed legally against the parties; that Woodcock delivered the money to the mayor, whereupon the mayor gave to the defendant the following receipt:

"$200. BELFAST, Nov. 6th, 1877.

Received of M. P. Woodcock, two hundred dollars. The same being money forfeited to the city of Belfast under section 69 of chapter 4 of the Revised Statutes of Maine. Said money having been deposited with said Woodcock on Tuesday the seventh day

of November, A. D. 1876, by Abner G. Gilmore, as a bet or wager on the result of the presidential election of that year. And this is to certify that having received the evidence required by section 7th of chapter 4th of the Revised Statutes before named, that I did, as mayor of the city of Belfast, on Saturday the third day of November, inst., demand of said Woodcock the sum of money deposited with him as before named, under the penalty of a suit at law to recover the same should he refuse to comply with the demand and to avoid the commencement of such suit, the said money has this day been paid to me, for which payment the said Woodcock is to be held harmless should said money be decided by the said S. J. Court of this state not to belong to the city of Belfast as before named.

N. F. HOUSTON, mayor."

Upon the testimony, the law court were to enter a nonsuit or default.

W. H. McLellan, for the plaintiff.

Thompson & Dunton, for the defendant.

BARROWS, J. This case has once before been before the court: see Maine R., vol. 69, p. 118; and it comes now upon a report showing substantially the same facts which then appeared, with the following addition. After the ruling of the judge at *nisi prius* nonsuiting the plaintiff in the present action, which ruling was considered and found to be erroneous at the former hearing in this court, the mayor of Belfast where the plaintiff resides went and demanded the money of the defendant, stating that he understood the money was in defendant's hands as a wager on the election, and that he should take legal steps to obtain it. Upon a second demand made by the mayor accompanied by Mr. Jewett the city solicitor, the defendant appears to have paid over the money taking the mayor's receipt setting forth the facts and agreeing to hold the defendant harmless should it be ultimately decided that the money did not belong to the city, and the money eventually went into the city treasury.

We do not think this amounts to a defense. The money did not belong to the city until it was adjudged forfeited in a suit brought against the maker of the bet.

By R. S., c. 4, § 70, the mayor of the city or treasurer of the town entitled to the forfeited money is directed to sue for and recover it; and this suit must of necessity be against the party wagering the money, and must be brought according to the provisions of chap. 81, § 90, within a year or it cannot be maintained.

The statute contemplates an adjudication in a suit thus brought to which the person making the bet shall be a party in order to complete the forfeiture and deprive the person of the money to which he would be otherwise entitled as his own.

The stakeholder would not be liable in a suit brought by the mayor of the city or the treasurer of the town unless seasonably summoned as trustee of him who is subject to the penalty and forfeiture.

Whether the city could have enforced the forfeiture by a suit brought after the plaintiff had reclaimed his money from the stakeholder, but within a year from the time when the forfeiture was incurred is not the question here.

No such suit was ever brought.

As remarked in the previous opinion the stakeholder cannot avail himself of the plaintiff's liability to the city, a liability which was not duly and legally enforced, as a defense to this suit. It is suggested in argument that there is no sufficient proof of a demand of the money before the commencement of this action. The plaintiff, though he does not give the words used, testifies that he demanded the money and defendant does not deny that he so understood it.

Defendant defaulted.

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

County of Penobscot *vs.* City of Bangor.

Penobscot. Opinion January 23, 1880.

Jury and attending officer—expenses of.

The county of Penobscot, and not the city of Bangor, should bear the expenses of a jury and attending officer, when a jury is summoned by county commissioners to determine the damages sustained by land owners from flowage caused by the dam across Penobscot river erected by the city for its water works.

Facts agreed.

Petition of the county attorney of Penobscot county, for and in behalf of said county alleging that, in the year 1877, a large number of petitions, (most of them by the city of Bangor, a few by the land owners) were presented to the county commissioners of said county, pursuant to c. 168, special laws of 1875, as amended by c. 260, special laws of 1876, praying said commissioners to determine the damage, if any, which the land owners had suffered by flowage or otherwise, in consequence of the dam which Bangor had before that time built across the Penobscot river between that city and Brewer. The commissioners notified and heard the parties, and adjudicated upon the several cases. Certain of these land owners claimed to be aggrieved by the commissioners' estimate of their damages, and, within the time allowed by law, severally petitioned the commissioners for redress. Thereupon a jury was duly summoned, a person appointed to preside, and, by consent of parties, after notice and view of the premises, the parties in a certain number of the cases were fully heard at Bangor, in September and October, A. D. 1878, by this one jury. The jury agreed upon and rendered verdicts in all said cases, giving damages to the land owners against Bangor, and endorsed and delivered their verdicts to the officer having charge of them, and he returned all said verdicts to the supreme judicial court at Bangor, at the next term thereof, to wit: some of them to the October term, 1878, and the rest to the January term next following, stating in his return upon the warrant for the jury, his own travel and attendance, and that of each juror. The jury were paid November 8,

1878, the sum of $415.96 ; and the officer, for his services under said warrant and at the trials before said jury, was paid, November 4, 1878, the sum of $108.80, out of the county treasury, upon an order of said supreme judicial court on said warrant. Said supreme judicial court, at the two terms aforesaid, received said verdicts and the reports and certificates of the person appointed to preside at the views and hearings, and in twelve of the cases confirmed said verdicts.

In two cases, the verdicts were received, but not confirmed, and are still pending in said supreme judicial court. Certain other cases were marked "law" and are also now pending.

The clerk of said supreme judicial court, in all cases where the verdict was confirmed and no motions filed to set them aside, certified said verdicts with the final adjudication of the court thereon, to said commissioners at their next meeting after such adjudication, and the commissioners have recorded the same. That the supreme judicial court, their attention not being called to the matter, did not apportion among these cases, in whole or in part, the expenses of the jury or the attending officer, or in any manner tax or allow said expenses in the costs in said cases, nor has the clerk, in his certificates to the commissioners in these cases or any of them, included as a part of the costs or in any manner whatever in writing, made mention to the commissioners of the costs of the jury and attending officer. That to the end that the county may not lose what it has paid the jury and attending officer, the petition prays the court to equitably apportion the same among the several cases heard by the jury and tax and allow the same in the costs ; and that the clerk of the court be directed to amend his said certificate in these cases to the commissioners accordingly, in the matter of costs, or make and transmit new and corrected ones to the commissioners, and that the court will make such other and further orders and decrees in the premises, and give the county such other and further relief as may seem to them meet.

It was agreed that upon the above facts, the only question presented to the court is whether the city of Bangor is liable for the jury fees and officer's fees in the cases tried.

Jasper Hutchings, (county attorney) for the petitioners, cited

Stats. 1841, c. 118, § 2. 1835, c. 168, § 1. *N. H. & N. Co.* v. *North Hampton*, 102 Mass. 125, and cases there cited.

R. S., 1841, 1857, 1871, change the phraseology of the law in regard to costs in this class of cases, but make in reality no change in what constitutes legal taxable costs. R. S., 1841, §§ 9, 19, 21. R. S., 1857, §§ 9, 13. R. S., 1871, §§ 9, 13.

What costs are those to be equitably apportioned by § 9, if not the costs of the jury and attending officer? The land owners, in all these cases are the prevailing party. *Abbott* v. *Penobscot County*, 52 Maine, 584. *B. & P. R. R. Co.* v. *Chamberlain*, 60 Maine, 285. *Goodwin* v. *B. & M. R. R.*, 63 Maine, 363. R. S., c. 18, § 13. The city of Bangor is the real party in interest here, and not the land owners.

T. W. Vose, (city solicitor) for the respondents.

PETERS, J. We think the county should bear the expenses in question. It is fairly a county bill. The theory of our laws is that the county furnishes a tribunal for the trial of jury causes. A town way when laid out is as much for the use of all the public as for the use of the town; county and town roads are equally public roads. The only difference is in the manner of laying them out. *Denham* v. *Co. Commissioners*, 108 Mass. 202. It does not seem reasonable for towns to pay such burdensome expenses when all ordinary litigations however trifling or unnecessary may be carried on in our courts at the expense of the counties. Railroads even are not now subjected to such a liability. Appeals in railroad cases for land damages may be taken to the courts instead of before sheriffs' juries. Laws 1873, c. 95. Bangor, in this matter, stands as a town would in laying out a town way. There is a doubt and uncertainty as to the meaning and application of the clause in the statute relied on by the county. Such an unusual liability should not be construed as falling upon the towns and cities, unless the legislative intent to that end is expressed in clear and unmistakable terms.

Petition denied.

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

WILLIAM KNIGHT *vs.* INHABITANTS OF FORT FAIRFIELD.

Aroostook. Opinion January 23, 1880.

Pauper liability. Presumption. Case agreed.

A town which provides a place for the support of its poor is not liable to an inhabitant who, after request upon the overseers for removal, assists one of its paupers at his own (such inhabitant's) house if the pauper, when turned from such person's doors, is reasonably able to proceed to the place provided for him.

The presumption is that the pauper is not thus able, when he is a boy ten years old, and the distance to travel in the winter season is five and a half miles.

In a case agreed, the point cannot be taken for the first time at the argument that the declaration should have been special rather than upon an account annexed; to be available, the point should have been reserved in making up the case.

FACTS AGREED.

Assumpsit upon an account annexed for "boarding Joseph Willett (pauper) from January 1, 1875, to May 1, 1875, $48.00" and "interest to date of writ $7.76."—$55.76.

The writ also contains the common money count for $60, with specification, or bill of particulars, that "this (money) count is founded wholly upon the matters alleged in the preceding count." Date of writ, January 13, 1878. "The following statement of facts is agreed upon, and said action is hereby referred to the decision and finding of the court. 1st. Said Willett was chargeable upon said town as a pauper when maintained by said plaintiff. 2d. Said town was properly and seasonably notified by said plaintiff to provide for said Willett or remove him. 3d. Fred Thurlough, of said Fort Fairfield, was the proper and legal agent of said town to provide for, maintain, remove or manage said Willett. 4th. If the town is liable at all, it is liable for the board of said Willett from January 1, 1876, to May 1, 1876—16 weeks at $1.50 per week, and costs of court. 5th. When notified by said plaintiff to remove said Willett, and provide for him elsewhere, said Thurlough replied to said plaintiff "send the boy to me; I will take care of him, or find a place for him." The plaintiff said, "no, I would not carry him there for fifty dollars."

84 - 722

Said plaintiff did not send the boy as required, but kept him. Said boy was then well, ten years of age or thereabouts, and the distance from the plaintiff's to Thurlough's about five and one half miles. The question presented being whether under the circumstances said defendant town, or their agent Thurlough, was by law obliged to go and remove the boy, or whether the plaintiff should have required the boy to leave his house, or, if he remained, should have maintained him at his own charge and expense."

J. B. Trafton, for the plaintiff.

N. Fessenden, for the defendant.

PETERS, J. The town of Fort Fairfield was under legal obligation to support the boy. He was at the house of the plaintiff. It was the duty of the agent to remove him. The plaintiff was under no obligation to do so. Nor had the plaintiff a right to succor the boy at the town's expense, unless there was a necessity for it. Whether there was such necessity or not depended upon whether the boy was reasonably able, if turned from the plaintiff's doors, to safely proceed to the residence of the agent. It was in an Aroostook January; the boy was ten years old; the distance between houses was five and a half miles. The point on which the case turns may be one more of fact than of law. Much might depend upon the mental and physical capacity of the boy, his experience and education, his temperament and force of will. Judging the matter, however, upon the rules of law that regulate other questions dependent upon age, we think that the plaintiff was justified in harboring the boy, and that the defendants are liable for his support. An infant cannot choose a guardian until he is fourteen years old; is not by the common law considered as arriving at the age of discretion or puberty till fourteen; cannot commit crime under seven; is presumed, *prima facie*, not to be capable of crime under fourteen, though he may be; a female under ten is incapable of consenting to an offense upon her person; and at no age is an infant bound by his contracts, unless to supply him with necessaries. See *Lamson* v. *Newburyport*, 14 Allen, 30.

The defendants question the correctness of plaintiff's declaring on an account annexed. The point is taken too late. If relied upon, it should have been reserved in the case agreed. It cannot be taken for the first time at the argument. *Crocker* v. *Gilbert*, 9 Cush. 131. *Brettun* v. *Fox*, 100 Mass. 234. *Moore* v. *Philbrick*, 32 Maine, 102.

Defendants defaulted.

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

JULIA E. CROSS, complainant in bastardy, *vs.* JOSEPH W. CLEMENT.

Waldo. Opinion January 23, 1880.

Bastardy. Award. Docket entries. Practice.

Where an award of referees in a case of bastardy has been in an irregular form returned to court and accepted, and the case dropped from the docket, it may after the lapse of several terms, upon motion and due notice, be restored to the docket and recommitted to the referees.

ON EXCEPTIONS.

The bastardy complaint was entered in the supreme judicial court held for this county, at the January term, 1877; the respondent had given bond as provided by statute, and at the January term of said court, 1877, said case was referred by agreement of parties, to James D. Lamson, J. C. Whitney and F. W. Banan, as referees, under a rule of court, and after giving proper notice required by law, said referees, at the time and place specified in said notice, heard the parties, their witnesses and arguments of counsel, and at the October term of said court, 1877, returned their report to said court, which rule of court and report of said referees were offered and placed on file on the 10th day of said term, and on the 11th day of said term, the said respondent was surrendered by his bail, and said bail was discharged, and afterwards, on the 11th day of said term, said referees' report was accepted.

The rule of court to the referees was in the ordinary form, and

the report awarded "that the said Julia E. Cross recover of the said Joseph W. Clement, the sum of two hundred and three dollars and costs of reference, taxed at sixteen dollars, (meaning reference fees and rent of hall) and no costs allowed to either party. The above award to be paid as follows: sixty dollars to be paid for the benefit of the said Julia E. Cross, thirty of which shall be paid down, and thirty in one year. The balance of said award to be paid for the support of the child, in manner following—twenty-six dollars in six months, and twenty-six dollars in every subsequent six months until said award is paid."

At the April term of said court, 1879, said complainant, by her counsel, moved the court to bring said action forward on the docket, and strike off the acceptance, and re-commit said report to said referees, which motion was granted by said court; to which ruling of said court, the respondent alleged exceptions. The motion was in writing, and entered upon this term's docket, and notice thereon accepted by respondent's counsel.

J. Williamson, for the complainant.

Thompson & Dunton, for the defendant, contended:

I. By the 21st rule of court, all objections to any report offered to the court for acceptance shall be made in writing, and no others will be considered. *Hall* v. *Decker*, 51 Maine, 31. *Mabury* v. *Morse*, 43 Maine, 176.

II. By the rule of court the complaint was referred without any conditions or limitations. This transferred all the authority of the court to the referees, and they were made the judges of the law and the fact, and no suggestion having been made that they were actuated by any improper motives, their award being accepted, becomes final and this court cannot inquire into their doings. *Hall* v. *Decker*, 51 Maine, 31. *Mabury* v. *Morse*, 43 Maine, 176. *Hagar* v. *Mutual M. Ins. Co.*, 53 Maine, 502. *Mitchell* v. *Dockray*, 63 Maine, 82. *Portland Mfg. Co.* v. *Fox*, 18 Maine, 117. *Sweeney* v. *Miller*, 34 Maine, 388.

III. Whenever the law is submitted to referees selected by the parties, they are left to the decision of the judges of their own selection, and the court will permit their decision to prevail,

though the referees may have decided contrary to law. *Portland Mfg. Co.* v. *Fox*, 18 Maine, 117, and cases there cited.

IV. When the report of the referees in this case was accepted, without objection, the judgment became final until set aside by due course of law. When the court, accepting said report, adjourned there was no such action pending as the one in question; it had passed to judgment. *Hall* v. *Decker*, *supra*. *Mabury* v. *Morse*, *supra*. *Hagar* v. *M. M. Ins. Co.*, *supra*. *Mitchell* v. *Dockray*, *supra*. *Sweeney* v. *Miller*, *supra*.

PETERS, J. An award of referees in a case of bastardy was returned to court in an irregular form and accepted, and the case was dropped from the docket, nothing more then being done about it. After the lapse of several terms of court, upon motion and due notice thereon, the case was ordered to be restored to the docket and re-committed to the referees. No person but the parties could be affected by this proceeding. Bail had been discharged. Nor had judgment been fully made up. No order of affiliation had been passed, and no bond for the support of the child given or applied for. In that condition of things, the case might well have remained upon the docket until finally disposed of; unripe fruit lingering on the tree beyond its season. *West* v. *Jordan*, 62 Maine, 484. *Lothrop* v. *Page*, 26 Maine, 119. *Riley* v. *Farnsworth*, 116 Mass. 223.

Exceptions overruled.

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

JOEL REED *vs.* ARCHIBALD REED and Louis H. Bickford, trustee, and Daniel Johnson, claimant.

Lincoln. Opinion February 5, 1880.

Bill of sale. Title. Trustee. Exceptions.

The title of property remaining in the possession of the vendor will not pass by bill of sale to the vendee as against an attaching creditor, when there is no delivery, actual, constructive or symbolical.

The unauthorized recording of a bill of sale is not notice.

The decision of a justice presiding, to whom a cause is referred, is final as to the facts.

It is final as to the law, unless the right of exceptions is specially reserved.

To sustain exceptions it must affirmatively appear that the rulings to which exceptions are taken are erroneous.

On exceptions, by the claimant to the rulings of the court charging the trustee.

The controversy was between the plaintiff and claimant (R. S., c. 86, § 32,) and was submitted to the presiding justice without the intervention of a jury, the principal defendant having no apparent interest. The disclosure of the trustee shows that he was owing $89.90 for hay which he bought of the principal defendant; that neither at the time of bargaining for the hay, nor at the time of its delivery, did he (defendant) disclose to the trustee that he was acting in the sale for any one else, or as agent of another; that after the writ was served upon the trustee, both the principal defendant and claimant notified him that part of the hay sold belonged to said Johnson.

Johnson claimed under a bill of sale, absolute in form, from the principal defendant to him, dated July 31, 1877, and recorded in the town clerk's office, August 1, 1877. The writ is dated November 7, 1877, and was served upon the trustee November 8, 1877.

Other facts in the opinion.

J. W. Spaulding & F. J. Buker, for the plaintiff.

G. B. Sawyer, for the claimant, cited *Dalton* v. *Dalton*, 48 Maine, 42. 1 Greenl. Ev. § 275. *Harper* v. *Ross*, 10 Allen, 332. *Bassett* v. *Percival*, 5 Id. 345. Addison Cont. §§ 568, 569, 570, 558, 559, 1059. *Merry* v. *Lynch*, 68 Maine, 94. *Holbrook* v. *Baker*, 5 Id. 309. *Ludwig* v. *Fuller*, 17 Id. 162. *Haskell* v. *Greeley*, 3 Id. 425.

Appleton, C. J. The trustee, in his answer, states that he bought a quantity of hay of the defendant, for which he is still owing, and that neither at the time of its purchase, nor when it was delivered and removed, was he advised that any one had any title to the same except the defendant.

Daniel Johnson intervenes, claiming the hay as his by virtue of

a bill of sale, dated July 31, 1877, which was recorded the next day. This was before the service of the plaintiff's writ on the trustee, November 8, 1877.

When the bill of sale was given, it was before the defendant had finished haying. There was no weighing of the hay then, nor at any subsequent time, nor was there any delivery of the same. The bill of sale purported to be of twelve tons, a part of which the defendant sold the trustee, and the remainder he fed out to his own cattle. No money was paid for the hay. No credit was ever given the defendant on the books of the claimant, nor was any amount indorsed on the notes which the latter held against the former.

There was no actual, constructive nor symbolical delivery of the hay to Johnson, the claimant. The recording of the deed or bill of sale, does not amount to notice. The law is well settled that without delivery the title does not pass as against an attaching creditor. *McKee* v. *Garcelon*, 60 Maine, 165. *Burge* v. *Cone*, 6 Allen, 412.

To avoid the effect of a want of delivery of the hay the claimant offered testimony to show that the plaintiff had notice of his title, thus, as he contends, bringing his case within the decision in *Ludwig* v. *Fuller*, 17 Maine, 162. It was there held, that the want of delivery furnishes no defense to an attaching officer, if the creditor had notice of such sale before the attachment.

The plaintiff admits that he was informed that Johnson had the hay, that is, he contends, that Reed was hauling the hay to him, but nothing was said that he had a bill of sale of the same, or that he owned it.

The case finds that the issue between the plaintiff and claimant was "submitted to the court without the intervention of a jury," and that there was no reservation of any right to except to the rulings of the presiding justice, who determined that the claimant was not entitled to the funds in the trustee's hands and accordingly charged him in accordance with his disclosure for $89.98. His conclusion is final both as to law and fact.

No exceptions lie to the rulings of the presiding justice in matters of law when an action is submitted to him, unless there is an

express reservation of the right to except. R. S., 1871, c. 77, § 19. *Roxbury* v. *Huston*, 39 Maine, 312. *Dunn* v. *Hutchinson*, 39 Maine, 367. *Mason* v. *Currier*, 43 Maine, 355. His conclusion as to the matters of fact in issue is equally final and binding on the parties. *Curtis* v. *Downs*, 56 Maine, 24. *Randall* v. *Kehlor*, 60 Maine, 37. *Kneeland* v. *Webb*, 68 Maine, 540.

The same rule applies when questions of law and fact arise on the allegations filed by a claimant in a trustee disclosure. By R. S., c. 86, § 30, "any question of fact, arising upon such additional allegation, may, by consent, be decided by the court, or submitted to a jury in such manner as the court directs." Here the case was submitted to the court. No right to except is reserved. The case is not on report or exceptions. The determination of the presiding judge is final as to law and fact.

It is apparent that the presiding justice must have either found that no notice was given the plaintiff of the sale to the defendant or that the same was collusive and fraudulent. Either finding would defeat the claimant's title. He saw and heard the witnesses and could best determine the credit to be given to each, and his conclusion was that the trustee should be charged.

To sustain exceptions, it must affirmatively appear that the rulings to which exceptions have been taken are erroneous. The claimant has failed to show any error whatever on the part of the justice presiding.

Exceptions overruled.
Trustee charged for $89.98.

WALTON, BARROWS, DANFORTH and PETERS, JJ., concurred.
LIBBEY, J., concurred in result.

SALLY HANSON, executrix, appellant, *vs.* EDWIN HANSON and others.

York. Opinion February 5, 1880.

Will—construction of. Payment of debts.

The rule is well settled that, while a testator, if his intent in this respect is clearly manifest from the will, may apply his real estate first to the payment of debts; in the absence of express words or a manifest intention in the will to that effect, the law will first appropriate the personalty to that purpose.

ON REPORT.

Appeal from the decree of the judge of probate of York county dismissing the petition of Sally Hanson, executrix of the last will and testament of William B. Hanson, late of Lyman, in said county, deceased, testate, for license to sell and convey certain real estate of said testator for the payment of debts and legacies, and expenses of administration to a certain amount.

The true construction of said will is in issue. If, under the provisions of the will, the personal property is subject to the payment of testator's debts, the decree aforesaid is to be affirmed—otherwise, said petition is to be granted, and such further order made thereon as law and justice require.

The will was executed April 28, 1873, and probated on the first Tuesday of September, 1876, and the testator makes the following disposition of his estate.

"I. I order all of my just debts and funeral expenses to be paid by my hereinafter named executor.

II. To Israel Hanson of Lyman, Sarah D. Hanson of Charlestown, Mass., Joseph Warren Hanson of said Lyman, Edwin Hanson, state of Virginia, Alvira Smith of Kennebunkport, wife of John Smith, Ruth Foss of Biddeford, wife of Artemas Foss, and Ann Hanson of Biddeford, single woman, all being my children, I give and bequeath to them one dollar each, to be paid in one year after my decease, by my hereinafter named executor.

III. To my beloved wife, Sally Hanson, I give, bequeath and devise all of my oak and pine timber to have and to hold, etc. I also give, bequeath and devise the remaining portion of my estate,

to wit, my homestead farm, with the buildings thereon standing, and all my real and personal estate and mixed, of every name and nature, of whatever the same may consist, and wherever the same may be found, to have and to hold, to her, the said Sally Hanson, during her natural life.

IV. I do hereby nominate and appoint the said Sally Hanson to be the executor," etc.

On November 6, 1877, the testatrix petitioned for license to sell a portion of the real estate for the payment of debts, legacies and expenses of administration, on the ground that the personal estate was insufficient therefor. Her petition was refused and denied, "it not appearing that the personal estate is insufficient to pay said debts, legacies and expenses of administration."

Whereupon an appeal was duly made, alleging the following reasons:

I. Because a sale of some portion of the real estate of said deceased is necessary to pay debts, legacies and expenses of said administration, amounting to the sum of four hundred and twenty-five dollars.

II. Because said testator, by his last will and testament, bequeathed to Sally Hanson, during her natural life, his entire personal estate, and said estate should not, therefore, be applied to the payment of said debts, legacies and expenses of administration.

III. Because, by said testator's last will and testament, the use and income of the personal estate of said deceased was bequeathed to said Sally Hanson during her lifetime, and by the refusal and denial of the aforesaid petition the personal estate must necessarily be applied to pay the aforesaid debts, legacies and expenses, and thereby the intention of said testator would be utterly defeated in this regard.

IV. Because said executrix, in her said petition, asks license to sell certain undevised real estate of said testator, William B. Hanson, for the payment of said debts, legacies and expenses, and such undevised real estate should be held to respond to the payment thereof.

V. Because, in order to give full effect to the will of said testa-

tor, and especially to the third clause thereof, a sale of some portion of the undevised real estate of said deceased is absolutely necessary for the payment of said debts, legacies and expenses of sale and administration amounting to the sum of four hundred twenty-five dollars.

Burbank & Derby, for the plaintiff.

It is conceded that the amount of the personalty is sufficient; but this petitioner maintains that the entire personal estate is bequeathed to her use for life, and therefore should not be held to discharge these liabilities.

The single issue for the court is, whether the testator's personal estate thus bequeathed, or his undevised realty, shall be taken to meet these debts and expenses.

I. A testator may, by manifest intention or express words, exempt his personal property from the payment of his debts. *Fenwick* v. *Chapman*, 9 Pet. 472. *Quimby* v. *Frost*, 61 Maine, 77.

This petitioner claims that her testator clearly and unmistakably manifested such an intent.

He gave her the use of all his personal estate during her lifetime. Its use for any other purpose would absolutely defeat his will.

He also gave her the realty during her life. Both bequest and devise are consistent with our construction of the testator's intent; and this is especially apparent upon examination of the kinds of property inventoried.

II. But, further, the will and inventory disclose undevised real estate, a portion of which the petitioner asks license to sell; and, consequently, to grant her petition there exists no necessity of discriminating between personal and real estate, nor of rejecting any call in the will.

Goodwin & Lunt, for the defendants.

SYMONDS, J. This is an appeal from the probate court, in York county, dismissing the petition of the executrix for license to sell certain real estate of her testator, in order to pay debts, legacies and expenses of administration.

According to the terms on which, by agreement of counsel, the

case is submitted for decision, if, under the provisions of the will, the personal property is first subject to the paym ent of debts, the decree, from which the appeal is taken, is to be affirmed. Otherwise, the petition is to be granted, with such further order as law and justice require.

The question is, then, what in view of the provisions of the will is the rule of law with reference to the sale of the personalty to discharge debts of the estate.

The will directs that the debts shall be paid, but does not designate the fund out of which the payment shall be made. After bequests of one dollar each to the testator's children, and of all his oak and pine timber to his wife, the will bequeaths and devises the remaining portion of his estate, viz: his homestead farm with the buildings thereon and all his estate, real, personal and mixed, to his wife during her life. The personal property, mentioned in this residuary clause, is conceded to be sufficient to pay the debts of the estate.

The rule is well settled that, while a testator, if his intent in this respect is clearly manifest from the will, may apply his real estate first to the payment of debts, in the absence of express words or a manifest intention in the will to that effect, the law will first appropriate the personalty to that purpose.

By this will, it is only the real and personal estate, remaining after the payment of debts and the legacies to the children, that is given to the widow during her life. The bequest and the devise to the wife are given in the same sentence and on the same terms; the one as fully as the other. She takes each subject to the legal liability arising from the claims of creditors. It is true, as claimed, that to sell the personal estate will de prive her of the use of it, while to sell the reversion of the real property would preserve to her the benefit of her life estate therein. But there is nothing in the will which enables us to say, that the declared intent of the testator appropriates this reversion to paying debts. After giving so large a part of his property to his wife, it can scarcely be said to be intrinsically more probable that he intended to make the debts a charge upon the reversion, than that a legacy to her proportionally so large was intended to be subject to their

payment. With legacies of only one dollar each to the children, with a bequest to the wife of all the timber, and the use during life of all remaining real and personal property, it is not in itself more probable, than the contrary would be, that the testator intended the debts should be paid out of the interest of the children, as heirs, in the reversion of the real estate.

And if a certain probability in favor of this proposition arises from the nature of the personal assets, from the character of the articles of which the personalty consists, it is enough to say, without weighing probabilities too nicely, that the intent to make the debts a charge upon the real estate is neither directly nor indirectly expressed in the will; and, this intent not appearing, the rule holds. The personal estate must first be used for that purpose.

It is said that if the undevised reversion of the real estate should be first sold, no provision of the will would fail of effect. The widow would then have the use of the real and personal property during life, and the others mentioned in the will would receive all that it undertakes to give them.

This is true. To sell the reversion does not diminish the rights of the children, as beneficiaries under the will. It only impairs to a greater or less extent the interest of those who at the termination of the life estate shall be the heirs of the testator.

Neither the reversion of the real estate, nor what remains of the personalty at the widow's decease, is disposed of by the will.

But the conclusion does not follow that it was these, or either of them, which the testator intended should be sold to pay debts. The legacy, under the residuary clause, was not specific, but general. "The devise of the residue of the real estate, after the happening of a contingency or after certain objects have been accomplished by the disposition or appropriation of portions of it, is not specific, but general." *Bradford* v. *Haynes*, 20 Maine, 108. *Calkins* v. *Calkins*, 1 Redf. Sur. Rep. 337.

There is nothing in the gift of such residue of the estate to the wife for life to indicate an intention to exonerate the personalty from the payment of debts, for which it is the primary fund; to be used for that purpose even before the descended real estate,

unless an intent to the contrary appears in the will. *Livingston* v. *Newkirk*, 3 Johns. Ch. 312. 2 Red. on Wills, 867, 868.

The considerations, from the general tenor and spirit of the will, which led the court to a different result in *Quimby* v. *Frost*, 61 Maine, 77, are not present with the same force in this case.

Under the residuary clause, we think the widow took only an estate for life in the residue, after payment of debts and the legacies to the children, and that the petition to sell even an undevised interest in the realty, before the personal property, to pay debts, was rightly dismissed, for the reasons stated in the decree of the probate court.

Decree of the probate court affirmed.

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

In re GEORGE MARSON, appellant from the court of insolvency.

Kennebec. Opinion February 5, 1880.

When a petition in insolvency has been served and placed on the files of the court and the proceedings have been subsequently dismissed, such petition cannot be withdrawn from the files, and re-issued and made the basis of subsequent proceedings.

Heath & Wilson, for the appellant.

G. J. Moody, for the petitioner.

APPLETON, C. J. This is an appeal from the court of insolvency.

It appears that the creditors of George Marson duly filed in the court of insolvency their several petitions, dated December 13, 1878, under the provisions of c. 74, of the acts of 1878, § 15; that the judge of insolvency determined that the allegations therein were true; that he issued his warrant to the sheriff as messenger as provided by § 14; that the same was duly served and placed on file and that after all this was done these proceedings were dismissed and new proceedings instituted by withdrawing the petitions and other papers from the files of court and,

after altering respectively the dates of the same, re-issuing and serving the same.

The objection taken is that these papers having once been in the custody of the court, and belonging to a cause pending, and having accomplished their purpose could not be withdrawn and re-issued in a new proceeding, having the same end in view.

The petitions of the several creditors had once constituted the basis of judicial action. They had accomplished their purpose. A warrant had been issued and served. The papers were on file and should remain there. Undoubtedly petitions, or warrants may be amended. But this is not the case of an amendment. It is the institution of a new process. There is a new petition, a new judgment of court followed by a new warrant and service thereon.

In *Lyford* v. *Bryant*, 38 N. H., 89, a writ was quashed on motion for a defect apparent on its face. "It is said," observes Bell, J., in delivering the opinion of the court, "that the cause for quashing the writ was, that it was drawn upon a blank, which had been before used for the commencement of another action which had been entered in court. Beyond doubt, such a blank, having been once so used, has performed its office and it has ceased to be capable of use to draw a valid writ upon afterwards. The uniform practice has been to quash writs so drawn at once and there seems to us no doubt of its propriety."

So, in *Parsons* v. *Shorey*, 48 N. H., 556, it was held that a writ, which had been served by attaching the defendant's real estate, though no service had been made on him could not be used to commence a new action of later date between the same parties. In *Gardner* v. *Webber*, 16 Pick., 251, and in *Parkman* v. *Crosby*, 16 Pick., 297, it was held that when real estate had been attached from time to time on a writ, the return day being altered from time to time, but the writ had not been returned nor a summons left with the defendant until after the last attachment, that these proceedings did not vitiate the writ. But in neither of these cases had there been a previous service on the defendant, or an entry of the action. No case can be found where it has been held that a writ which has been served and entered in

court could, upon the disposition of that action by nonsuit, the entry of neither party, or its dismissal, be used again as a valid blank by withdrawing it from the files of the court, by changing the date, and the return day, and inserting new parties, or retaining the old ones. Here the papers had accomplished the purpose of their existence. They were on file as part of the records of the court. Each party had a right to require that they should there remain. They could not properly be withdrawn. The alterations and erasures, if permitted, would leave matter for future doubt and speculation. The register and the judge are entitled to their several fees for their respective official acts. To allow such a practice, as in the case under consideration, "would tend to give the process and files of the court an unseemly and slovenly appearance," and deprive the officers of the court of their legal fees. *Parsons* v. *Shorey*, 48 N. H. 556.

Exceptions sustained.

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

JOSEPH DYAR & others, in equity *vs.* FARMINGTON VILLAGE CORPORATION & others.

Franklin. Opinion April —, 1878.

Taxation. Railroads. Village Corporation. Legislative powers.

A tax, assessed for public purposes, cannot constitutionally be imposed upon a portion only of the real estate of a town, leaving the remainder exempt.

A legislative act, authorizing a village corporation to levy a local tax upon the real estate of its municipality for public purposes—thus imposing a local tax for general and public purposes upon the real estate of one part of a town, leaving the other part untaxed—transcends the power of the legislature, and is unconstitutional and void.

The constitutional provision, requiring that "all taxes upon real estate, assessed by authority of this state, shall be apportioned and assessed equally, according to the just value thereof," cannot be evaded by first creating the territory to be taxed into a territorial corporation for a local purpose, and not separated from the rest of the town, nor relieved from any portion of the taxes to which it was liable in common with all the other real estate of the

59 Me 217

town. So long as such territory remains a component part of the town, and liable to taxation for all purposes for which the remainder of the town is taxed, it cannot be separately taxed for public purposes.

Taxation in aid of railroads is taxation for a public purpose, and on this ground alone its constitutionality is sustainable. Taxation, for local purposes such as the building of drains, sewers, and the like, should be assessed upon the property thereby benefited, and in proportion to the benefits thereby conferred. For the first, the assessment is to be on the basis of valuation; for the latter, on the basis of benefits conferred.

BILL IN EQUITY.

The petitioners allege that they are inhabitants of the town of Farmington, and residents in that part of said town included within the limits of the "Farmington Village corporation," and owners of property therein subject to taxation for certain specified purposes set forth in the act of incorporation, approved February 24, 1860, to which act they refer and produce in court. That by an act of the legislature of the state of Maine, passed February 1, 1870, the Androscoggin railroad company were authorized to extend their railroad from some point on the westerly side of Sandy river, in said Farmington, to some point within the limits of the said Farmington Village corporation, in said town.

That the legislature, by an act approved February 1, 1870, authorized said Farmington Village corporation, by a two-thirds vote of the legal voters of said corporation, at a meeting duly called for that purpose, to raise by tax or loan such sums of money as said corporation may deem expedient, not exceeding the sum of thirty-five thousand dollars, and appropriate the same in such manner and on such terms as said corporation may determine, to aid in the extension of the railroad now operated by the Androscoggin railroad company, within or near the limits of said Village corporation, and empowered and authorized it to make such contracts with said railroad company for the purpose aforesaid, and to raise money by tax or loan to carry such purpose into effect; and the assessors and treasurer may be authorized by vote to issue the scrip of said corporation, not exceeding the sum of thirty-five thousand dollars, payable in such number of years as said corporation may determine. That at a meeting of the Farmington Village corporation held on the twenty-fifth day of February, 1870, it was voted "to aid in the extension of the rail-

road operated by the Androscoggin railroad company, and to raise by loan the sum of thirty-five thousand dollars and appropriate the same, or so much thereof as shall be necessary to procure said extension, and that Francis G. Butler, Hannibal Belcher and Samuel Belcher, be authorized and directed for and in behalf of the corporation, to contract with said railroad company for said extension, its future operation and maintenance, and for the erection of all suitable buildings in such manner and upon such terms as they shall deem equitable and for the interests of the corporation, and to apply so much of the loan herein provided for as may be required to carry said contract into full effect;" and at the same time it was voted by said Village corporation, "to authorize and direct the assessors and treasurer to issue the scrip of the corporation in the manner provided by law, to an amount not exceeding the sum of thirty-five thousand dollars; the principal of said scrip to be made payable as follows: Fifteen thousand dollars in ten years, five thousand dollars in fifteen years, five thousand dollars in twenty years, five thousand dollars in twenty-five years, and five thousand dollars in thirty years from the first day of July, 1870, with interest semi-annually from said July 1, 1870." It was further voted at said meeting of said Farmington Village corporation, "that the assessors and treasurer (thereof) be authorized and directed to deliver said scrip to said Francis G. Butler, Hannibal Belcher and Samuel Belcher, in such sums and parcels as they may require, taking their receipts therefor, and that the said Butler, H. Belcher and S. Belcher, be authorized and directed to sell and dispose of the same for the purpose of fulfilling any contract or contracts they may make with said railroad company."

That they are informed and believe that the said Francis G. Butler, Hannibal Belcher and Samuel Belcher, in behalf of the said Village corporation, without authority of law, entered into a contract on the fifteenth day of April, 1870, on the part of said corporation, with Oliver Moses, president of the Androscoggin railroad company, to deliver to said company the scrip of said corporation to the amount of fifteen thousand dollars, payable in ten years from July 1, 1870, with semi-annual interest coupons, as

a loan to said company, the interest and principal to be paid by said company as they become due, and to be secured to said Village corporation by a mortgage of the aforesaid extension part of said railroad by said company. And the said F. G. Butler, H. Belcher and S. Belcher, further agreed on the part and in behalf of said Farmington Village corporation, with said company, to pay it fifteen thousand dollars in addition to said loan for the extension of said railroad—one-fourth part to be paid when one-fourth part of the work should be completed, one-fourth part when one-half the work should be completed, one-fourth part when three-fourths of the work should be completed, and one-fourth part when the whole of the work should be completed.

That said Butler and Belchers further agreed, on the part of said corporation, to pay the land damages for the location and for the necessary depot buildings and grounds, not exceeding four acres of land. Thereby, in effect, contracting and agreeing on the part of said Village corporation, without authority of law, to give to said railroad corporation the sum of fifteen thousand dollars, and to pay land damages to a large amount, not yet fully ascertained, without any adequate consideration inuring to the benefit of said corporation, and without any promise or agreement on the part of said railroad corporation to refund the same or any part thereof.

The petitioners represent that they feel aggrieved by the acts and doings before stated, inasmuch as they have reason to believe and do believe, that it is the intention of the said F. G. Butler, H. Belcher and S. Belcher to receive, and of Nathan C. Goodenow, Benjamin Goodwin and L. Gustavus Voter, assessors of said Village corporation, and Joseph A. Linscott, treasurer, and their successors in office, to issue the scrip of said corporation to the amount of thirty-five thousand dollars, for the purposes herein before stated, in violation of the constitution of the state, in violation of the rights of individuals to hold and enjoy their property, without the same being subject to taxation, seizure and sale, without the consent of the individual, except for such purposes as the constitution and general laws of this state authorize,—which acts done and contemplated are without authority of law.

They pray that an injunction may issue enjoining said Farmington Village corporation, and particularly said Nathan C. Goodenow, Benjamin Goodwin and L. Gustavus Voter, assessors of said corporation, and Joseph A. Linscott, treasurer of said corporation, from signing and issuing any scrip or securities of said corporation for the purposes aforesaid, and said F. G. Butler, Hannibal Belcher and Samuel Belcher from negotiating any of the scrip or securities of said corporation, or any part thereof, issued or to be issued, for the purposes aforesaid, and from carrying out the provisions of the contract entered into by them on the part of the said corporation, on the fifteenth day of April, 1870. And that the said Androscoggin railroad company, the president and directors thereof, and the Maine Central railroad company, the president and directors thereof, lessee of said Androscoggin railroad company, be enjoined from enforcing, or attempting to enforce, against said corporation the contract entered into on the part of said corporation by the said F. G. Butler, H. Belcher and Samuel Belcher, on the said fifteenth day of April, 1870,—said contract being without authority of law, inequitable and unjust to individuals, and more particularly to your petitioners, as they most conscientiously believe, etc.

The bill is dated August 8, 1872, and filed in clerk's office August 12, 1872.

The answer, made September term, 1872, is that all the acts done or proposed to be done by these defendants, including all votes passed and meetings held, are in strict conformity to the powers and authority conferred upon them by the legislature of this state; that they have acted and propose to act only under the provisions of law; they refer to chapters 291 and 292 of special laws of 1870, and chapter 392 of special laws of 1860, and other laws.

That the contract entered into between the Farmington Village corporation and the Androscoggin railroad company; that the signing and issuing of all bonds or scrip by the officers of said Farmington Village corporation and delivery of the same to Francis G. Butler, Hannibal Belcher and Samuel Belcher, the committee of said corporation; that the negotiation and sale of

said bonds or scrip by said committee have all been done agreeably to the directions and instructions of the legal voters of said Farmington Village corporation, at a legal meeting thereof, called for the express purpose of considering and acting upon said questions and matters; That the said meeting was attended by nearly all the legal voters of said Farmington Village corporation, all the questions and matters acted upon were fully discussed and understood, and the votes giving the directions and instructions above named were nearly unanimous, more than two-thirds of the legal voters in said Farmington Village corporation voting therefor, some of the complainants in the complaint now pending voting with the majority.

That all the acts done, or proposed to be done, by the said officers and committee of said corporation, have been done, and are proposed to be done, in strict conformity with the votes of said corporation at a legal meeting thereof called for the purpose, and that in nothing have they transcended, or do they propose to transcend the authority and instructions given them by the said Farmington Village corporation.

That, of the thirty-five thousand dollars in bonds or scrip authorized by said Farmington Village corporation, at the meeting aforesaid, to be signed and issued, &c., twenty thousand dollars have been issued and negotiated; that the balance of fifteen thousand dollars authorized to be issued and loaned to the Androscoggin railroad company has not been and will not be issued, said railroad company not desiring the loan.

That the sum of fifteen thousand dollars has been paid to the Androscoggin railroad company; a portion of the land damages paid, and the balance soon to be adjusted; and it is believed the bonds or scrip issued are adequate to pay them; the said scrip or bonds having been already negotiated for that purpose; that the Androscoggin railroad company have extended their railroad into the precincts of said Farmington Village corporation, have therein made convenient depot grounds, put up commodious depots, commenced running their trains to their depots in said corporation by the time agreed upon, and have continued so to maintain their road and run their trains from said date hitherto.

That the contract entered into between the Farmington Village corporation and the Androscoggin railroad company was executed on the fifteenth day of April, A. D. 1870; that the sum to be paid by the Farmington Village corporation to the company is wholly paid, and the land damage, amounting to less than five thousand dollars, mostly paid; that said railroad company by the terms of their contract are to maintain their road and run their trains into said Farmington Village corporation in the future; that the contract is nearly completed between the parties, except that part of it which binds the said railroad company to maintain their road and run their trains to said corporation limits in the future; that the extension of the road and running of trains into its limits has increased the business and enhanced the value of the property in said Farmington Village corporation, has promoted the comfort and convenience of all its inhabitants and gives them promise of future prosperity and success.

That but for the contract entered into between the said Farmington Village corporation and said Androscoggin railroad company, and the paying to said railroad company the sum of fifteen thousand dollars and the land damages as specified in said contract the said railroad company would not have extended their railroad nor performed any of the acts to be by them performed as stipulated in said contract; that the said contract is very favorable to the said Farmington Village corporation; that said corporation could not afford to release said railroad company from its promise and contract to maintain its road and run its cars to their new depots for a much larger sum than said corporation has already paid, and agreed to pay. And so said defendants say that no gift has been made by said Farmington Village corporation to said railroad company, nor was any gift promised by the terms of said contract; but on the contrary said Farmington Village corporation have received and are receiving full and adequate compensation and payment for all moneys or other things by them paid or to be paid under the provisions of said contract, etc.

C. J. Talbot & H. L. Whitcomb, for the plaintiffs.

S. Belcher, for Farmington Village corporation, in an elaborate

brief of much research, cited, *Morse* v. *Water Power*, 42 Maine, 119. *Miller* v. *Whittier*, 33 Id. 521. *Brewer* v. *Springfield*, 97 Mass. 152. 1 Story Eq. Juris. § 33. *Lord* v. *Charlestown*, 99 Mass. 208. *Miller* v. *Geardy*, 13 Mich. 540. *Jones* v. *Newark*, 3 Stockton, Ct. 452. Kerr Inj. 6, 7, 339, note. Dillon Munic. Corp. 401, 402, §§ 415-116. *Talcott* v. *Township of Pine Grove*, 1 Bench & Bar. (N. S.) 1872. *Olcott* v. *Fond du Lac Co.*, Legal News, May 17, 1873. *Bank* v. *Augusta*, 49 Maine, 507. *Dixfield* v. *Newton*, 41 Id. 221. *Peabody* v. *Flint*, 6 Allen, 57. *Johnson* v. *Thorndike*, 56 Maine, 32. Stat. 1864, c. 239, § 1. 2 Kent Com. § 275. *Ex parte* Gulf R. R., 6 Am. 725, and cases. Dillon Corp. § 1041, and cases. *Stewart* v. *Polk Co.*, 1 Am. 238. 10 Wis. 351.

WALTON, J. This is a bill in equity asking the court to enjoin the Farmington Village corporation from the assessment of a tax to pay in part for an extension of the Androscoggin railroad. We think the injunction prayed for should be granted.

One portion of the real estate of a town cannot be burdened with a tax from which the remainder is exempt. We use the word tax in its legal sense, meaning an assessment for a public purpose. Assessments for local improvements, such as drains and sewers and the like, are not, properly speaking, taxes. Of such assessments we shall speak hereafter. We now confine ourselves to taxes proper, meaning assessments for public purposes. And we repeat, that in this state such a tax cannot be constitutionally imposed upon a portion only of the real estate of a town, leaving the remainder exempt. So held in *Brewer Brick Company* v. *Brewer*, 62 Maine, 62. It was there decided that to exempt any portion of the real estate of a town from taxation would violate that provision of our constitution which declares that all taxes upon real estate shall be apportioned and assessed equally, according to its just value. Art. 9, § 8. In that case the portion to be exempted was specified, while in this the portion to be taxed is specified. But this difference is unimportant. It cannot be material whether the exempt or the non-exempt portion is the one mentioned. The result is the same. One portion is taxed and the other is exempt. Or, to speak with entire exactness,

one portion has an additional tax placed upon it from which the remainder is exempt. And it is this result—this inequality of taxation—that renders the proceeding unconstitutional. It is upon this ground that the decision referred to rests. And the decision in the case cited was affirmed in *Farnsworth Company* v. *Lisbon*, 62 Maine, 451.

If five lots of land—and the Farmington Village corporation consists of no more—may be burdened with a tax from which the remainder of the real estate of the town is exempt, no reason is perceived why one lot, or a less quantity even, may not be burdened in the same way. And if a small tax may be laid upon it, of course a large one may. There can be no limit to the amount. And if the legislature may authorize the imposition of such a tax, provided a majority or two-thirds of the legal voters residing upon the territory consent, it may do so without such consent. Such consent, if it ought, in justice, to bind those who vote yes, should not affect those who vote no, and especially the women and children and non-residents, who have no right to vote at all. The constitution does not place their property at the disposal of their neighbors. The question is one of power, not how the power shall be exercised. If such a tax may be imposed to build a railroad, of course a like tax may be imposed to build an ordinary highway or bridge, or for any other public purpose. We then have this result, that for a public purpose any one parcel of real estate, or any number of parcels, may, at the will of the legislature, be selected and burdened with a tax, to the extent of its entire value, from which the adjoining real estate in the same town is wholly exempt. Does our bill of rights, and especially that clause of the constitution which declares that all taxes upon real estate, assessed by authority of this state, shall be apportioned and assessed equally, according to the just value thereof, allow of such a result? We think not. The conclusion shows that the premises must be wrong.

We attach no importance to the fact that in this case the territory to be taxed was first created into a tertitorial corporation. It was not thereby separated from the town of Farmington, nor relieved from any portion of the taxes to which it was liable in

common with all the other real estate of the town. If the proposed tax is assessed, it will be a tax in addition to all other public taxes. The constitutional provision requiring equality cannot be evaded by first declaring the territory, on which an additional tax is to be laid, a corporation. If it could be thus evaded the provision would be absolutely valueless. Such an act of incorporation could always be passed. The objection to such a tax lies deeper than to the ways or means or agencies by which it is to be imposed. It rests upon the want of constitutional power in the legislature, through any agencies, or by any means, to create such an inequality of taxation. Such a power would be the full equivalent of a power to confiscate. Private property would no longer be under the protection of the constitution; it could only be held at the pleasure of the legislature. Such a power is denied to the legislature, even in states where no constitutional limitation upon the taxing power exists.

"There is no case to be found in this state, nor, as I believe, after a very thorough search, in any other—with limitations in the constitution or without them—in which it has been held that a legislature, by virtue merely of its general powers, can levy, or authorize a municipality to levy, a local tax for general purposes. . . . It matters not whether an assessment upon an individual, or a class of individuals, for a general, and not a mere local, purpose, be regarded as an act of confiscation, a judicial sentence or rescript, or a taking of private property for public use without compensation; in any aspect, it transcends the power of the legislature, and is void." Per Sharswood, J., in *Hammett* v. *Philadelphia*, 65 Pa. St. 146.

"A legislative act, authorizing the building of a public bridge, and directing the expenses to be assessed on A, B and C, such persons not being in any way peculiarly benefited by such structure, would not be an act of taxation, but a condemnation of so much of the money of the persons designated to a public use." Chief Justice Beasley, in *Tidewater Co.* v. *Carter*, 3 C. E. Green, 518.

"It would be wholly beyond the scope of legislative power to authorize a municipality to levy a local tax for general purposes.

. . . A law which would attempt to make one person, or a given number of persons, under the guise of local assessments, pay a general revenue for the public at large, would not be an exercise of the taxing power, but an act of confiscation." Wagner, J., in *McCormick* v. *Patchin*, 53 Mo. 33.

Similar expressions in condemnation of the attempts which have been made from time to time to impose local taxes for a public purpose, could be multiplied almost indefinitely; and in some of the cases much stronger expressions are used; but we forbear to quote them; for, after all, the strength of an argument must depend, not upon the number of times it is repeated, nor upon the violence of the language used, but upon the soundness of the reasoning employed.

The result of all the cases is that, a local tax (by which term is meant a tax assessed upon a community or a territory which is less than that on which the general assessment for other public purposes are made) cannot be made for a public purpose; because, as already stated, such a power would be the full equivalent of a power to confiscate; which, in this country, is nowhere conceded to the legislature, not even in those states where there are no constitutional limitations upon the taxing power. *A fortiori*, such a power cannot exist, where, as in this state, there is an express limitation upon the taxing power of the legislature, intended to guard against the possibility of such oppressive legislation.

And we wish again to repeat, that no importance should be attached to the fact that the community or territory to be taxed is first created into a territorial corporation for some local purpose; as, for instance, in this case, to provide the means of extinguishing fires and establishing a local police. So long as it remains a component part of the town, and remains liable to taxation for all purposes for which the remainder of the town is taxed, it cannot be separately taxed for another public purpose, and we are not now speaking of assessments for local purposes. Such an act of incorporation relates only to the means—it does not affect the end. The objection is to the end; to the inequality of taxation for public purposes thereby produced, not to the machinery by which it is accomplished.

Nor must such special taxation be confounded with a distribution of the public burdens. Such a distribution has always existed. County expenses are distributed among the several counties; town expenses among the several towns; and a portion of the expenses of our public schools among the several school districts. But there are no exemptions. All are burdened alike and by the same public laws. And, although such a distribution creates temporary inequalities of taxation, these differences ultimately adjust themselves, and that degree of equality which the constitution contemplates is obtained. Not so, when, by an act of special legislation, a tax for one of these purposes, or any other public purpose, is laid upon a portion only of the territory of a town, leaving the remainder wholly exempt. As well might a school district, after being taxed in common with all the rest of the town for highway purposes, have a special tax laid upon it to open some new highway, or to build an expensive bridge; or, after being taxed in common with all the rest of the town for the support of paupers, have the additional burden of supporting some particular pauper placed upon it. The constitution will not allow of such special taxation—the taxation of selected and limited portions of territory for a public purpose.

We now come to the inquiry whether this tax can be supported as an assessment for a local improvement. Very clearly it cannot. And for two reasons, either of which would, alone, be sufficient to defeat it.

I. It is taxation in aid of a railroad, and it has been judicially determined again and again that such taxation is for a public purpose. It is only on the ground that the purpose is public that the constitutionality of the legislation in aid of railroads has been or can be sustained. Such is the doctrine of all the well considered cases. It is said that railroads are no more than improved highways; that the burden of building and supporting highways always rested upon towns; that it is one of the purposes for which they are created; that to allow or require them to aid in the construction of railroads places no new burden upon them; that it is one of the public burdens already existing, and becomes more onerous only because the community has become more

exacting, and requires that these improved facilities for inter-communication shall be more generally enjoyed. It is therefore a sufficient answer to the inquiry whether this tax cannot be supported as an assessment for a local improvement, to say that the purpose for which it is to be assessed is public, not local, within the meaning of the law; that no tax in aid of a railroad has ever been justified or sustained upon the ground that it is an assessment for a local improvement. The courts have had much difficulty in their efforts to discriminate between local and public works, and the dividing line is but ill-defined. But all agree that taxation in aid of railroads must be justified as taxation for a public purpose or it cannot be justified at all.

II. Another fatal objection is this: Reason as well as authority dictates that taxation for local purposes, such as the building of drains and sewers and the like, should be assessed upon the property thereby benefited, and in proportion to the benefits thereby conferred upon it. This question was very fully considered in *Hammett* v. *Philadelphia*, 65 Penn. St. 146; Am. Law Reg. for July, 1869, 411; and it is there stated as the result of all the authorities that assessments for local improvements can only be constitutional when imposed for improvements clearly conferring special benefits upon the property assessed, and to the extent of those benefits; that an assessment upon an individual for a local improvement which is not grounded upon and measured by the extent of his particular benefit, would be clearly unconstitutional and void. To hold otherwise would sanction the doctrine that one man may be made to pay another's debt—to pay for improvements, not upon his own estate, but upon another's. As well might A be compelled to pay for B's house, as for a drain, or other local improvement, alone beneficial to it.

If this tax is assessed, it must, by the terms of the act authorizing it, be assessed upon the basis of valuation, and not upon the basis of benefits conferred. It will be laid upon all the taxable property within the limits of the village corporation, whether the extension of the railroad was beneficial to it or not. Neither the act authorizing the tax, nor the act creating the village corporation, provides for any other mode of assessment. On the contrary

the latter act requires all taxes assessed by authority of the village corporation, to be assessed in the same manner as is by law provided for the assessment of town taxes; which, as every one knows, is upon the basis of value, and not upon the basis of benefits conferred. Such an assessment, if made for a local improvement, would be clearly unconstitutional and void.

We do not mean to question the authority of the legislature to confer upon towns and cities the right to use the coercive power of taxation to raise money to build railroads. In this state the question is *res judicata*, and further discussion of it would not be profitable. But it may not be out of place to say that the constitutionality, as well as the expediency, of such an exercise of the taxing power, has always met with a vigorous opposition. The reasoning by which its constitutionality is maintained is not satisfactory to some of the best judicial minds of the country. In several of the states it has been rejected altogether. Unfriendly competition, wasteful expenditures of money, and an amount of municipal indebtedness that must end in repudiation or the most oppressive taxation have been the result. And, as was well remarked by Mr. Justice Barrows, in his reply to the legislature, 58 Maine, 612, "the fact that one step of doubtful propriety has been taken is never a good reason for taking another in the same direction; but rather, on the contrary, it should induce us to pause and revert to fixed principles."

Nor do we mean to say that for public purposes the state may not be divided into districts and the public burdens distributed among them. Nor do we mean to say that for local purposes these public districts may not be again divided and separately assessed for local improvements. What we mean to say is that one public district cannot be created within another, nor be allowed to overlap another, so that for the same public purpose, or for any other public purpose, one portion of the real estate is taxed twice, while the remainder is taxed only once; that local assessments for local improvements cannot be laid upon the basis of valuation alone, without regard to benefits. This tax, if viewed as an assessment for a public purpose (as it undoubtedly is) violates the first rule; if viewed as an assessment for a local

improvement, it violates the second. We think it is therefore clear, that it cannot be constitutionally assessed, and that the injunction prayed for must be granted.

Injunction granted, as prayed for.

LIBBEY, J., having been of counsel in the case, took no part in the decision. DICKERSON, J., had the opinion in his possession for examination at the time of his death, and it is not known whether he concurred or not. APPLETON, C. J., VIRGIN and PETERS, JJ., concurred.

JAMES S. JORDAN *vs.* CALVIN RECORD.

Androscoggin. Opinion May 29, 1879.*

Writ of Entry. Fee and Fee-Simple. Estate. Declaration.

The word "fee" without any adjunct or limitation describes the same quantity of estate as the term "fee simple." When the plaintiff in a real action demands possession of a parcel of land with the buildings thereon, giving a proper description by metes and bounds, and duly alleging that he was seized thereof in his demesne as of fee and in mortgage within twenty years last past, and was disseized by the defendant, his declaration is not bad on demurrer under the statute requiring him to "set forth the estate he claims in the premises whether in fee simple, fee tail, for life, or for years."

ON EXCEPTIONS.

WRIT OF ENTRY. The only question raised was the sufficiency of the following declaration: "Wherein the plaintiff demands against the said Calvin Record the possession of the following described real estate situate in Auburn in said county of Androscoggin and bounded and described as follows, to wit: a certain lot or parcel of land and the buildings thereon standing, bounded on the north by Academy street, in said Auburn; on the east by the Fuller lot (formerly Stephen Rowe lot); on the south and westerly side by a ravine owned by James Woodbury. Whereupon the plaintiff says that the said Calvin Record, being seized of the demanded premises in his demesne as of fee, on the twen-

*Came into hands of the reporter July 23, 1880.

tieth day of March, in the year of our Lord one thousand eight hundred and sixty-eight, at Auburn aforesaid, by his deed of bargain and sale and of mortgage, of that date, duly acknowledged, registered and in court to be produced, for a valuable consideration therein expressed, conveyed the demanded premises to the plaintiff to hold the same to him and his heirs in fee and in mortgage; by force whereof the plaintiff became seized of the demanded premises in his demesne as of fee and in mortgage within twenty years last past, and ought now to be in quiet possession thereof; but the said Calvin Record hath since unjustly entered and holds the plaintiff out, and hath disseized the plaintiff of said premises within twenty years last past; to the damage," etc.

In answer, the defendant filed a demurrer, assigning as cause, "that the plaintiff hath not in, or by, his said declaration, 'set forth the estate he claims in the premises, whether in fee simple, or fee tail,' as required by the statute, nor whether the alleged deed conveyed an estate in fee simple, or fee tail and in mortgage."

The presiding justice overruled the demurrer, adjudged the declaration good, and the defendant alleged exceptions.

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

C. Record, for the defendant, cited R. S., c. 104, § 3. *Wyman* v. *Brown*, 50 Maine, 139.

This is not mere matter of form, but of substance; otherwise, the statute would not have required the plaintiff to set forth in his declaration the precise nature and extent of his claim in the estate he demands possession of. The statute requires him to "set forth the estate which the plaintiff claims in the premises, whether in fee simple, fee tail, for life, or for years." It is just that the plaintiff should have judgment for no greater estate than his deed entitles him to, and this should be accurately set forth in his declaration.

Barrows, J. The defendant seeks to sustain his demurrer by a distinction too subtle to be admitted. It is true the statute requires the demandant to "set forth the estate he claims in the premises, whether in fee simple, fee tail, for life or for years;" and failing to do this his declaration would be fatally defective.

But the terms "fee" and "fee simple" are used indifferently by the best law-writers to express the same quantity of estate.

Thus, 2 Blackstone Com. 104-106: "Tenant in fee simple (or, as he is frequently styled, tenant in fee) is he that hath lands, tenements, or hereditaments, to hold to him and his heirs forever, generally, absolutely and simply; without mentioning what heirs, but referring that to his own pleasure, or to the disposition of the law. . . . And hence it is that, in the most solemn acts of law, we express the strongest and highest estate that any subject can have, by these words: 'he is seized thereof in his demesne as of fee.'"

"A fee, therefore, in general, signifies an estate of inheritance; being the highest and most extensive interest that a man can have in a feud; and when the term is used simply, without any other adjunct or has the adjunct of simple annexed to it (as a fee, or a fee simple), it is used in contradistinction to a fee conditional at the common law, or a fee tail by the statute;" etc., etc.

"Where the term 'simple' is applied, it means no more than 'fee' when standing by itself, as understood in respect to modern estates." Washburn R. E., 1st ed. 51.

And so are all the precedents of declarations. American Precedents, ed. 1802, p. 292, *et seq.* Oliver's Precedents, 4th ed. 806-811.

Exceptions overruled.

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

CLARISSA E. THAYER *vs.* PROVIDENCE WASHINGTON INSURANCE COMPANY.

Penobscot. Opinion February 9, 1880.

Insurance. Representation. Risk. Evidence.

Where there has been an erroneous statement of the value of the buildings insured to the agent of the insurance company by the agent of the party insured in procuring the policy, under our existing statutes the question is, not whether the insurers regarded that matter as material to the risk, or

were induced thereby to take the risk, but whether the jury are satisfied that the difference between the property as represented and as it really existed contributed to the loss or materially increased the risk.

Nor will the vacating of a building or any change in its use or occupation affect the policy, unless the risk is thereby materially increased; and that is for the jury to determine.

In such a case the evidence of men experienced in insurance business is not competent to show that insurance companies generally would not insure unoccupied buildings on account of the increased risk, or that a risk is regarded as greater or less according as the amount of the insurance is to the whole value of the property insured.

If the jury find, in a case where there has been an erroneous statement as to the value of the property insured, that the difference between the property as represented and as it really existed contributed to the loss or materially increased the risk, it will avoid the policy although they may not find that the representation was originally made with fraudulent intent.

The insurance company cannot offer in evidence the report of their own agent made to themselves to show that they were induced thereby to take the risk, or that there was an over valuation, or for any other purpose.

It is for the jury, upon all the evidence before them, to say whether the vacating of the building materially increased the risk; and if it did, it is not for the court to say, as matter of law, that the policy would not be avoided by its becoming vacant during the life of the policy when there is a stipulation in the policy that it shall be null and void if the insured allowed it to become vacant and unoccupied.

On exceptions and motion to set aside the verdict as against evidence.

Action to recover upon a policy of fire insurance, on the plaintiff's buildings, issued by the defendant company, October 6, 1877. Plea general issue.

The plaintiff introduced the policy declared upon, and it was admitted by the defendant that proper and seasonable proof of loss was made by the plaintiff, and that she owned the property.

Among the prohibitions and conditions stated in the policy, whereby it should become void, was the following: "If an application, survey, plan or description of the property herein insured is referred to in this policy, the same shall be considered a part of this contract and a warranty by the assured; and if the assured shall make any false representation as to the character, situation or occupancy of the property, or the interest of the assured in the same; or conceal any fact material to the risk, either in a written application or otherwise; or shall have, or hereafter make

any other insurance on the property herein insured, or any part thereof, without notice to and consent of this company in writing hereon; or if during the existence of this policy or any renewal thereof, the risk shall be increased by any means whatever with the knowledge of the assured, without the assent of this company endorsed hereon; or shall cause the property herein described to be insured for more than its value; or shall allow the building herein insured to become vacant and unoccupied; . . . then in every such case this policy shall be null and void."

Clarissa E. Thayer, (plaintiff,) testified: That she owned the insured property; that it was mortgaged for about $500; $200 to Mr. Dorr, and $300 to Capt. Hawley; that she built the house in 1853, and partly finished it afterwards.

Subject to objection, plaintiff testified that she regarded the property worth at the date of the policy $3000; had not offered it for sale; also that she thought she had received $185 for one year's rent during the past five years.

On cross-examination, she testified that the policy was sent to her at Winterport. The application therefor was made for her at the office of the company in Bangor by a friend of hers, who then resided in Frankfort; that she didn't remember of making a written application; requested her friend who made the application to get $3000 insurance on the property; desired a policy for the full amount of its value; did not know what her friend represented the property as worth to the agent in Bangor. It may have been a week from the time he went to Bangor before she received the policy; that he didn't state to her what he represented it to be worth to the agent. Mr. Taylor, the agent of the company, had never seen or examined the property to her knowledge.

At the time the fire occurred, on the night of the 2d of January, 1878, the premises were unoccupied.

The last tenants in the building were Capt. Babbage, who occupied a portion of the building as a dwelling-house, and her son who occupied a portion, for the manufacture of vests. The former vacated the building November 23, 1877, and the latter, December 14, 1877.

That she was in the house on the 2d day of January, 1878, ten or fifteen minutes; had a woman there cleaning the house for a tenant whom she expected to go in the next day; that there was one stove set up in the rear room in the third story of the building. It was the only stove in the building. It was a coal stove. There was a coal fire in it when she was in the house on the 2d of January.

That while she was there she directed the woman to leave a good fire to dry off the room as the tenant's wife was in ill-health; that she was not in the house when the woman left in the afternoon. She left about dark, and came and told her; that she resided in the building two houses off from the building burned. The fire was about eleven o'clock at night; that she gave no notice of the unoccupancy of the building to the company, or its agent, not expecting it to remain so any time.

Testimony, on part of both plaintiff and defendant, was introduced as to value of the insured property, and cost to rebuild.

Charles H. Taylor, called by the defendants, testified: Reside in Bangor; and am and was in October, 1877, the agent of defendant company. Have been in the insurance business six years.

On or before the 6th day of October, 1877, E. P. Treat, of Frankfort, came to my office in Bangor, and said he had two risks for Mrs. Thayer, plaintiff, one of which was the property covered by this policy.

I asked Mr. Treat as to the value of the property, its size, exposure, ownership, etc. Treat said the value of the buildings insured in this policy was about $5000. He wished $3000 on it. I gave him $2500. This policy of $1250, and another in the Manhattan Company, for the same amount; there were not written applications.

Witness here testified, subject to objection, that on the day he wrote the policy, he made, what is called in the business, his daily report of the risk, and forwarded the same to the home office of the company, in Providence, in the regular and usual course of business. Said report was then produced, shown the witness, and by him identified, which, subject to objection, was admitted as evidence.

The witness further testified, subject to objection, that two-thirds of the whole value of insurable property was the extreme amount for which he was allowed to write a policy; that in writing this policy he relied upon the representation made to him by Treat, that the buildings were worth about $5000, and that he was induced by said representation to do so.

Francis M. Sabine, called by the defendant, testified: That he resided in Bangor, and for upwards of forty years; that he was the manager of the Bangor Mutual Insurance Company, and had been for many years, and had been during that time acquainted generally with the manner in which insurance companies do their business.

Witness then testified, subject to objection, that insurance companies generally would not insure unoccupied buildings on account of the increased risk; that a risk was regarded as greater or less according as the amount of insurance is to whole value of the property insured.

At the trial the defendant requested the presiding judge to instruct the jury:

That if the plaintiff, or her agent, Treat, in procuring the policy, so misrepresented and over valued the property insured, as to materially increase the risk, such misrepresentation, if relied upon by the defendant, in writing the policy, would invalidate the policy.

The instruction was refused, and the presiding judge instructed the jury, that any misrepresentation of value made by the plaintiff, or her agent, in order to invalidate the policy, must have been such as to materially increase the risk, and have been fraudulently made.

The presiding judge, as to the buildings being vacated without notice to the defendants after the policy was written, and remaining so till the loss occurred, instructed the jury as follows:

That, if the tenants in the buildings had left, and other tenants were being sought for, (the buildings meanwhile remaining vacant,) the policy would remain in force and cover the property during such vacancy of the buildings, without notice to the defendants of the vacancy.

The verdict was for the plaintiff for $1103. Other facts in the opinion.

Wilson & Woodard, for the plaintiff, cited Stats. 1861, c. 34. 1862, c. 115. R. S. c. 49, §§ 18, 19, 20. *Emery* v. *Piscataquis F. & M. I. Co.*, 52 Maine, 322. *Cannel* v. *Phenix I. Co.*, 59 Maine, 582. *Bellatty* v. *Thomaston M. F. I. Co.*, 61 Maine, 414.

J. Varney, for the defendant.

BARROWS, J. A failure in the haste of a *nisi prius* trial to recognize the exact character of the change in the law of insurance (as heretofore laid down in numerous cases,) which has been wrought by our statutes, will make a new trial necessary here, though it is probable that upon the same testimony the verdict would have been the same had the jury been left to pass upon the precise questions which the statutes make the vital ones for their determination.

One of the defenses relied on was an over-statement of the value of the insured premises to defendants' agent by plaintiff's agent in procuring the policy; but this, the statute declares, "shall not prevent his recovering on his policy unless the jury find that the difference between the property as described and as it really existed contributed to the loss or materially increased the risk." These are the only inquiries which are pertinent where the defense is an alleged erroneous statement of value. And while it is not easy to imagine any set of circumstances where the difference between the over-statement and the correct valuation could contribute to the loss or materially increase the risk unless the over-statement was fraudulently made, still, the question is made by the statute a question for the jury, and not for the court. Materially increasing the risk means here increasing the hazard of loss, and has nothing to do with inducing the insurance company to enter into the contract.

The defendants' counsel in his request for instructions on this point, and the presiding judge in the instruction given, both seem to have had in their minds the effect under the statute of a misrepresentation of the title or interest of the insured which the

statute says shall not prevent his recovering on his policy to the extent of his insurable interest unless material or fraudulent. These are inquiries which would have been pertinent here if defendant had made any question as to the effect of two small mortgages upon the property, but it was expressly admitted that "plaintiff owned the property insured." Misrepresentations as to title, although classed with those as to value in one clause, are made the subject of another provision the effect of which will have to be determined when there is a question as to such misrepresentations. But no such question is made here.

Defendants' counsel combined and confounded in his request for instructions a material increase of the risk (an increased hazard of loss) with an inducement which might be supposed to have operated on the defendants in writing the policy. But under our statute the law does not trouble itself to inquire as to the effect of an overvaluation in inducing the defendants to write the policy. The inquiry is only whether it contributed to the loss or materially increased the risk. The defendants cannot complain of the refusal. They introduced into their request an element which has no pertinency to the inquiry and would tend to lead the jury to suppose that although the difference between the property as represented and as it actually existed did not contribute to the loss nor materially increase the hazard of loss, yet if it was material in the judgment of the insurer and induced him to take the risk, that was tantamount to a material increase of the risk and would avoid the policy. This was not so, and no such idea should be conveyed to the jury, directly or indirectly.

But while the presiding judge was right in refusing to instruct as requested, he seems to have gone so far as to prohibit the jury from finding that the overvaluation contributed to the loss or materially increased the risk, unless they also found that the misrepresentation was fraudulently made.

If this was the only objection to the instructions it might perhaps be worth while to consider whether upon the testimony here presented the defendants were injured by the ruling; whether upon a different one, presenting the issue defined by the statute, they could have expected a different result, especially as the errors

seem to have originated with allowing the defendants to put in testimony which ought not to have been received against the plaintiff's objection, as we shall have occasion hereafter to observe.

But the other defense was that at the time of the fire the buildings were unoccupied and that this fact, which was conceded, avoided the policy which contained a stipulation to that effect.

Now, as to this, the statute says that 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 from occupancy to disuse of a building insured is a change in the use and occupation within the meaning of this provision. *Cannell* v. *Phœnix Ins. Co.*, 59 Maine, 582. The defendant had a right to have the jury determine whether the fact that the premises had ceased to be occupied had materially increased the risk, but the instructions given took this question away from the jury and affirmed the right of the plaintiff to recover notwithstanding the stipulation in the policy if the building had been vacated by tenants and other tenants were being sought for. The instruction is colorably supported by *Gamwell* v. *Merch. & Farm. M. F. Ins. Co.*, 12 Cush. 167. But it does not appear that the policy there contained the same direct and specific stipulation as to the effect of vacating the premises; and, if it did, the decision would still be obsolete under a statute provision like ours, and herein it resembles the greater part of those cited in the elaborate argument of defendants' counsel—good authorities doubtless for the doctrines for which he contends, in the absence of such statutory provisions, but not available to counteract those provisions.

The inquiry is not now whether the insurers regard the difference in the property as represented and as it really exists as material to the risk, or whether they were induced by the erroneous representation to enter into the contract. The statute presupposes that their local agents will do their fair duty in ascertaining the value and situation of the property, and refuses to allow them to set up an erroneous statement of this sort as a valid defense unless the jury find it contributed to the loss or materially increased the risk.

This is sufficient to dispose of the motion to set aside the verdict as against evidence. There is no testimony which was legally admissible which would imperatively require the jury to find that the difference between the property as represented and as existing contributed to the loss or materially increased the risk.

The defendants were permitted to put in the daily report of their own agent which had no legitimate bearing on these or any other question arising in the case and should have been rejected. If this report could be regarded as the application for insurance, the statute would make it conclusive against the defendants upon the question of value, for it was written by their agent whose name was borne on the policy. R. S., c. 49, § 18.

As it cannot be technically so regarded there is no purpose for which the defendants could offer it that it can legitimately subserve.

The testimony of Sabine as an expert in insurance business was also incompetent. This has been settled by repeated decisions in this state and elsewhere. In *Malloy* v. *Mohawk Valley Ins. Co.*, 5 Gray, 545, Bigelow, J., says that "the ruling of the court rejecting the evidence of certain officers and agents of insurance companies in Boston, offered as experts to prove that the failure of the applicant and his men or any one else to occupy the said building for lodging increased the risk and was material thereto, was clearly right." The case is direct to the point as stated in the syllabus that the evidence of experts is not competent to show that the risk of fire is greater in unoccupied buildings.

See also *Jefferson Ins. Co.* v. *Cotheal*, 7 Wend. 73. *Joyce* v. *Maine Ins. Co.*, 45 Maine, 168. *Cannell* v. *Phœnix Ins. Co.*, 59 Maine, 582. *State* v. *Watson*, 65 Maine, 74, 76, 77.

We have, then, the simple facts that the plaintiff, a woman, estimating the value of her buildings at $3000 asked a friend to get insurance on them to that amount; that the man who did the errand, and who may have answered the insurance agent's question upon a rough estimation of the value from the outside appearance, stated their value at $5000 and got $2500 insurance; that their actual value was not more than $2200 or $2300.

Under the circumstances, when the over-insurance was so small

and the amount of insurance obtained was less than the value as estimated by the owner, we cannot say that it is conclusively demonstrated that the overvaluation contributed to the loss or materially increased the risk. It was for the jury to say, and but for the misdirection which may have prevented their passing upon it with the clear understanding that it was a vital question for them to decide, no new trial would be necessary.

Upon the exceptions as made up and allowed, the entry must be,

Exceptions sustained.

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

SCOTTISH COMMERCIAL INSURANCE COMPANY *vs.* O. B. PLUMMER & another.

Cumberland. Opinion February 11, 1880.

Bond. Lex loci. R. S., c. 49, § 50. License. Agency. Presumption.

In an action upon a bond, wherein is the stipulation that "it is to be construed as to the liabilities of the obligor thereunder in the same manner, to all intents and purposes, as if it had been made in the state of New York," when no points in which the laws of said state are shown to differ from those of Maine in regard to the legal effect of the bond, its construction will be determined with reference to the laws of this state.

Under R. S., c. 49, § 50, the requirement of an annual license does not reduce the agency to an annual tenure. A new appointment is not required at the expiration of the license ; in order to renew the license, a certificate that the agency still continues is all that in this respect is necessary.

The period of the obligor's liability not being limited by the terms of the bond, otherwise than by the duration of the agency, nor by anything in the nature of the position held by the agent, and the default therein having occurred within the time during which he was the duly appointed agent of the plaintiffs, they, *prima facie*, have a right to resort to this remedy upon the bond.

When the agreed statement is silent about the license required by R. S., c. 49, § 49, the court will not presume that either the insurance company or the agent acted without one.

Nothing appearing to the contrary, the presumption is in favor of the legality of contracts, and the legal action of the contracting parties.

ON FACTS AGREED.

Action of debt on bond given by defendants as follows:

"Know all men by these presents, that we, O. B. Plummer and M. P. C. Withers, of Bangor, Maine, are held and firmly bound unto the Scottish Commercial Insurance company of Glasgow, Scotland, in the sum of one thousand dollars lawful money of the United States of America, to be paid to the said the Scottish Commercial Insurance company, for which payment well and truly to be made we bind our heirs, executors and administrators firmly by these presents. Sealed with our seals, dated at Bangor the 10th day of August, one thousand eight hundred and seventy-four. The condition of this obligation is such, that if the above bounden O. B. Plummer shall faithfully perform his duties as agent of the said the Scottish Commercial Insurance company for Bangor, Maine, and shall duly and punctually pay over to the said the Scottish Commercial Insurance company, or its managers in New York, the premiums and moneys collected by him for insurance of risks taken by the said the Scottish Commercial Insurance company, then the above obligation to be void, otherwise to remain in full force and virtue. It being understood and this obligation is received by the said company upon the express condition that it is to be construed as to the liabilities of the obligor thereunder in the same manner to all intents and purposes as if it had been made in the state of New York."

The writ is dated December 17, 1878. Plea, *non est factum*, with brief statement that defendants have well and truly kept and performed everything in the condition of said supposed writing obligatory mentioned on their part to be performed and kept, according to the legal effect and intention of said condition.

It was agreed that said bond was duly executed by the defendants and delivered to the plaintiff company at the time of the date thereof.

That at the time of such execution and delivery the defendant Plummer was a duly appointed agent of the plaintiff company and so continued until September 5, 1877, but was never appointed or re-appointed as such agent on or after August 10, 1875.

That after the giving of said bond, and before the first day of

August, 1877, but after August 10th, 1876, said defendant Plummer as such agent collected premiums and moneys belonging to said company to the amount of $180.38, which he has not paid to said company, although demand was made therefor on September 5, 1877.

Upon these facts the law court is to render judgment according to law.

S. C. Andrews & A. F. Moulton, for the plaintiffs.

A. Sanborn, for the defendants, contended, I. That the plaintiff company is a foreign insurance company, and are prohibited from transacting insurance business in this state without license therefor from the insurance commissioner, and that the case shows no such license. R. S., c. 49, § 49.

That the bond, being given for the transaction of insurance business in Maine, and in contravention of this statute, was void.

II. The case does not find that Plummer was licensed to act as such agent; and without such license, his acts as such agent were not only forbidden by law, but made a criminal offense. R. S., c. 50, § 49.

His license for 1874 expired on the last day of June, 1875, by statute limitation. He then ceased to be agent; there is no pretense that if he had been licensed for 1874 his license was renewed, that he got a new license for 1875, or any subsequent year. The bond was dated August 15, 1874, and given under the license of 1874, and necessarily expired with the license. Counsel referred to R. S., c. 3, § 10; c. 86, § 43; c. 80, § 1. In all these cases the bond ceases when the bond ends.

III. The alleged breach of the bond did not occur till after August 10, 1876, and however his liability to plaintiff for money so collected in another form of action, he cannot be held liable in this action on the bond, because the bond had previously expired.

IV. The agreed statement of facts do not show what the laws of New York are, or that they differ from those of this state. The bond being made in this state must be construed by the laws thereof.

SYMONDS, J. The bond, dated August 10, 1874, on which this

action of debt is brought, was given by the defendants for the fidelity of one of them as the plaintiffs' agent, and for the prompt payment by him of all premiums and other moneys collected by him for insurance.

It contains a stipulation that the laws of New York are to control in determining the liabilities of the obligors, as if the bond had been made in that state. This stipulation, however, ceases to be of any practical value in deciding the case, from the fact that in the agreed statement on which it is submitted no points of difference are shown between the laws of Maine and of New York as to the legal effect of such an obligation. In its construction, therefore, the court must proceed according to the laws of this state, of which judicial notice is taken. *McKenzie* v. *Wardwell*, 61 Maine, 136.

The period during which the appointment of the agent, and the liability of the obligors for his fidelity, should continue, was not stated in the bond. Such a position is not an office for which there is a stated term of service, nor is any legal limitation shown, at which the agency was to cease, or expire, without a new appointment. The bond, therefore, was for the faithfulness of the agent, while he should continue to act in that capacity, till he should resign, or his authority be revoked, or till some act was done, or proceeding had, by which the obligors were relieved from further liability for his conduct. There is nothing to indicate that an annual appointment was expected or required.

The case shows that when the bond was delivered, the defendant, Plummer, was the duly appointed agent of the plaintiff company, and so continued till September 5, 1877. It does not state that he was ever re-appointed after giving the bond, but contains the negative statement that there was no appointment or re-appointment either on or after August 10, 1875.

Between August 10, 1876, and August 1, 1877, the agent collected moneys of the company amounting to $180.38, which were demanded of him on September 5, 1877, but have never been paid; and for the payment of them the security of his bond is sought in this action.

The period of the defendants' liability not being limited by the

terms of the bond—otherwise than by the duration of the agency —nor by anything in the nature of the position held by the agent, and the default having occurred during the time within which he was the duly appointed agent of the company, it would seem the plaintiffs were in position to claim resort to their remedy upon the bond.

But it is against our laws—R. S., c. 49, §§ 49, 50—for a foreign insurance company to do business, or for a person to act as agent of such company, in this state, without procuring an annual license therefor; and the agreed statement shows nothing about a license for the company or for the agent.

The effect of this, it is claimed, is two-fold.

I. That the requirement of an annual license reduces the agency to an annual tenure and that the bond, therefore, by implication covers only the first year, and expires with it.

II. That if this limitation does not defeat the obligation as to the default in 1876 and 1877, still, as no license is shown, the bond appears to have been given for an illegal purpose, to secure the plaintiffs against loss in the transaction of an unlawful business; and that they, therefore, are without remedy upon it.

As to the first point, it is enough to say that, to obtain a new license under the statute, a new appointment of the agent is not necessary. When the annual license expires, in order to renew it, a certificate that the agency continues, not a new appointment, is required of the company. There can be nothing in this to limit the agency to one year.

The claim that, upon the agreed statement of facts, the court should hold the bond void for illegality proceeds upon a misapprehension as to where the burden of proof falls in that respect. It is for one who asserts the illegality of a contract, and would release himself from its obligation on that ground, to make the facts which support the claim appear in proof. Because the statement is silent on the subject, the court will not assume that either the company or the agent acted without license, and therefore illegally. Where nothing appears to the contrary, the presumption is in favor of the legality of contracts and the legal action of contracting parties. *Farnum* v. *Bartlett*, 52 Maine, 574.

Upon the agreed facts there is neither proof nor presumption that the business in which the agent was engaged was an illegal one, and nothing to deprive the plaintiffs of the security which they had taken against his default.

Judgment for plaintiffs. Execution to issue for $180.38, *and interest from September* 5, 1877.

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

HANNAH M. SMALLEY, appellant from decree of judge of probate *vs.* BART K. SMALLEY.

Knox. Opinion February 14, 1880.

Will. Witness. Interest—beneficially.

An heir at law, who is disinherited, is a competent witness in support of the will, by which he is disinherited.

So, when though a legatee, his legacy is conceded to be less than his interest in the estate as heir.

One receiving a trivial legacy under a will, by which he is deprived of a larger estate as heir, is not to be regarded as beneficially interested under the same, so that he cannot be an attesting witness thereto.

FACTS AGREED.

Appeal from a decree of the judge of probate for the county of Knox, disallowing the will of Archelaus Smalley, late of St. George in said county.

The will, omitting the formal parts, is as follows:

"I give and bequeath unto my beloved wife, Hannah M. and to each of my children equally alike, namely, Tobias Smalley, Eli F., Isaac K., Archelaus, Jr., and Shepherd A. Smalley, all my real and personal estate."

"I also give unto each of my children, namely, to the heir of Keturah Marshall, Mary Wilson, Henry Smalley, John H. Smalley, Bart K. Smalley, Sarah S. Shaw, Thomas G. Smalley, Joanna Pierson, and Aaron H. Smalley, one dollar each."

"I give unto my children, Achsa Jane, Amelia A. and Lizzietta Smalley, one cow each when they are married."

"I also appoint my son, Aaron H. Smalley of St. George, my executor of this, my will, to settle my said estate and to pay all my just debts."

The will is dated May 1, 1871, and the attesting witnesses are Robert Long, Bart K. Smalley, and Orson H. Seavy.

At a probate court held in said county, third Tuesday of March 1879, said will having been presented for probate, it was ordered by the judge of probate that it should not be approved and allowed, as it was not executed in accordance with the provisions of R. S., but that the same be declared null and void.

Whereupon the said Hannah M. Smalley gave notice that she claimed an appeal from said decree, and for the following reasons:

1. Because the said will was improperly and illegally disapproved and disallowed, and declared to be null and void.

2. Because said will was duly executed in accordance with the provisions of the statutes of Maine, and the decision of said court in that respect was not according to the fact.

3. Because the said Archelaus Smalley, on the first day of May, A. D. 1871, then being in full life and of sound mind and of the age of twenty-one years, duly made and signed said writing testamentary, and the same was subscribed in his presence by three credible attesting witnesses, not beneficially interested under said will.

4. Because said will ought, in law and in fact, to be approved, allowed and established as the last will and testament of said Archelaus Smalley.

This appeal was seasonably claimed and a bond filed by the appellant, and approved by the judge of probate, as required by the statute.

The said Bart K. Smalley appeared in the probate court and contested the due execution of said will.

Said Bart K. Smalley is a son and heir at law of the said Archelaus Smalley, and also a legatee under the will, as therein appears.

The will is contested upon the ground that said Bart K. Smalley was not a competent witness to the will.

Said Archelaus Smalley left an estate of about one hundred and seventy-five acres of land with a dwelling house and other buildings thereon, and personal property sufficient to pay his debts. His real estate is valued at $1,000, and situate in St. George.

The said Archelaus Smalley left at his decease the following children:

Tobias Smalley, Eli F. Smalley, Isaac K. Smalley, Archelaus Smalley, Jr., Shepard A. Smalley, Achsa Jane Smalley, Amelia A. Smalley, Lizzietta Smalley, Henry Smalley, John H. Smalley, Bart K. Smalley, Sarah S. Shaw, Thomas G. Smalley, Joanna Pierson, Aaron H. Smalley, and Mary Wilson the daughter of a deceased daughter.

The case is submitted to the law court. If the said Bart K. Smalley was a competent witness to the will, the decree of the judge of probate is to be reversed and a decree entered approving the will. If he was not a competent witness the decree of the judge of probate is to be affirmed.

A. P. Gould, for the appellant.

D. N. Mortland, for the appellee, cited R. S., c. 74, §§ 1, 9. *Jones* v. *Tibbetts*, 57 Maine, 572. 4 Stark. Ev. 745. R. S., c. 82, § 84. 1 Greenl. Ev. 435. *Scott* v. *McLellan*, 2 Maine, 205. *Hawes* v. *Humphrey*, 9 Pick. 350.

APPLETON, C. J. This is an appeal from a decree of the judge of probate disallowing the will of Archelaus Smalley.

Bart K. Smalley, a son of the testator and a legatee under the will to the amount of one dollar, was an attesting witness to the same. It is conceded that had there been no will his interest as heir at law would have been greater than that under the provisions of the will.

The will is contested on the ground that he was not a competent attesting witness.

The statute relating to the attestation of wills has undergone various verbal changes in the different revisions of the statutes.

By the statute of 1821, c. 38, § 2, a will to be valid must "be

attested and subscribed in the presence of the testator by three credible witnesses."

In the revision of 1857, c. 74, § 1, a will to be valid must be subscribed "by three disinterested and credible attesting witnesses."

In 1859, by c. 120, section first of c. 74 was amended by striking out the words "disinterested and" and adding thereto "not beneficially interested under the provisions of the will."

In the revision of 1871, c. 74, § 1, the words "the provisions of" were stricken out so that now a will is required to be witnessed "by three credible attesting witnesses not beneficially interested under said will."

By a series of decisions in England and in this country it has been determined that the word "credible" was used as the equivalent of "competent" so that the question in such case is whether the attesting witness was a competent witness. *Warren* v. *Baxter*, 48 Maine, 193. *Hawes* v. *Humphrey*, 9 Pick. 361. *Haven* v. *Howard*, 23 Pick. 10. *Carlton* v. *Carlton*, 40 N. H. 14.

Now in this case Bart K. Smalley is not interested to sustain the will but rather to defeat it. When a witness is produced to testify against his interest, the rule that interest disqualifies does not apply. 1 Greenl. Ev. § 410. A legatee, one of several heirs at law of a testator, the validity of whose will is in question, may be called as a witness in support of a will, when his interest is manifestly adverse to that of the party calling him. *Clark* v. *Vorce*, 19 Wend. 232. So, in *Sparhawk* v. *Sparhawk*, 10 Allen, 155, an heir at law, who is disinherited by the will is a competent witness in its support. It is against his interest to support the will and whether entirely or partially disinherited, the same rule must apply so long as it is his interest to defeat the will.

So if it stand indifferent to the witnesses, whether the will, under which they are legatees, and to which they are witnesses, be valid or not, the witnesses, though legatees, are "credible." 10 Bac. Abr. 525 of Wills D. When an attesting witness would take the same interest under a former will to which he was not a witness, as under a later will, he stands indifferent in point of

interest and is a good witness to prove the latter will. 3 Stark. Ev. 1692.

It is apparent that Bart K. Smalley, before any change of the statute of 1821, was a credible, that is a competent witness, because his interest would be adverse to the will.

When the word "disinterested" was inserted in the statute, as opposed to interested, the result perhaps might be to exclude an attesting witness whose interest it was to defeat the will.

But whether so or not, when that word was stricken out and the attesting witness was required to be one not "beneficially interested" under the will, the obvious intention was to exclude those, who were to receive a benefit under the will, not those, who were pecuniarily losers by its provisions. "The reason why a legatee is not a witness for a will being because he is presumed to be partial in swearing for his own interest;" that reason ceases to exist when his interest is dissevered by such will. *Oxenden* v. *Penrise*, 2 Salk. 691.

One who is neither interested to defeat or sustain the will, may well be deemed disinterested. An heir at law, who is disinherited in whole or in part is not disinterested in the result, for he has an interest to defeat the will. Hence he is not disinterested in the result.

The change of language was to remedy or rather prevent such conclusion. The witness beneficially interested under the will was one gaining by and under its provisions. But an attesting witness who is called to establish a will by which he is divested of his inheritance can hardly be regarded as "beneficially interested" by it and so interested to maintain it. One losing an estate by a will under which he is a legatee for a cent or a dollar cannot in any ordinary use of language be considered as a gainer—or "beneficially interested," unless a loss is determined to be a gain. As is well remarked by Bigelow, C. J. in *Sparhawk* v. *Sparhawk*, referring to *Haven* v. *Hilliard*, 23 Pick. 10, where it was said to be held that a witness might be incompetent when his interest was adverse to the validity of the will; "certainly so far as it seems to support the proposition that an heir at law, who is disinherited in part or in whole by will, is incompetent as an attesting witness,

the case is contrary to well established principles, and must be overruled."

Undoubtedly, the object in giving this trivial legacy was to guard against the witness taking a portion of the estate under the provisions of § 9 by which a child omitted in the will may have its share of the estate, unless such omission was intentional or such child had had its due proportion of the estate during the life of the testator.

The decree of the judge of probate is reversed, and a decree is to be entered that the will be affirmed.

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

APPENDIX.

NO. 1.

NAHUM T. HILL, relator in petition for mandamus, *vs.* EDWARD H. GOVE, Secretary of State.

ANDREW R. G. SMITH, *vs.* Same.

This case was heard at *nisi prius* only, and consequently not strictly in place here; but on account of its novelty, importance, and the great interest manifested during its procedure; from the soundness and salutary effect of the opinion, it is deemed worthy of preservation by insertion here—especially as the volume will lose nothing thereby, having otherwise its full and usual number of pages. I regret that it is impracticable to give even an abstract of the elaborate briefs of the learned counse who appeared in the case. REPORTER.

To the Honorable Justices of the Supreme Judicial Court of Maine, now held at Fryeburg, in and for the county of Oxford, on the first Tuesday of December, 1879.

Andrew R. G. Smith, of Whitefield, in the county of Lincoln, relator, in behalf of the state of Maine, respectfully represents and informs this honorable court that at the last annual September election he was a candidate for election to the senate of Maine for the 59th legislature, from the district and county of Lincoln; that he received a plurality of all the votes cast for senator at said election in said district, as will fully appear by the official returns made to the office of the secretary of state from the several cities, towns and plantations in said district; that he is fairly elected to said office, and entitled to a certificate of such election from the governor and council; that he is informed and believes, and has good reason to believe that said governor and council reject some of the returns that are in favor of your relator, and issue a certificate of election to a person who received only a minority of the votes cast and returned, and thus deprive your relator of the office to which he was fairly elected, by reason of

some slight errors, defects or informalities in said returns, which he has a legal right to correct by virtue of the statutes of the state, and could correct, if he could ascertain what those defects, errors or informalities are, by an examination of said returns.

Your relator further shows and informs this honorable court, that on the seventeenth day of November, 1879, the governor and council passed a vote that the returns were opened on that day, and that the twenty days allowed by statute in which to make an application in writing to them for the correction of any errors, defects or informalities in said returns, or to show that the returns, and the records of the towns from which they came do not agree and to show which are correct, would begin to run from that day; and on the same day the committee on the part of said council appointed to open and tabulate said returns, made a report to the governor and council and submitted said returns and the tabulation thereof as a part of their report, and that report was duly accepted by the council, and by the governor approved and spread upon the records of the governor and council, and thereby said report, record and returns became public property and open to your relator as a citizen and a senator claiming his election.

And your relator further shows and informs this honorable court, that on the second day of December, 1879, he made a request, in writing to said secretary of state, Edward H. Gove, who is the legal custodian of said official returns, to permit him or his counsel to examine the returns from said district in the office of said secretary of state, or in his presence, in order to ascertain what errors, defects or informalities, or discrepancies between the returns and the records, if any, might exist, and in order that he might prepare the application in writing required by the statute, and state therein the errors alleged as the statute requires him to do, and for all other purposes contemplated by the constitution; but said secretary of state refused to allow such an examination, or any examination, and still persists in refusing, thereby depriving your relator of his legal rights to see and examine a public record of this state, and of all means of correcting said discrepancies, errors, defects and informalities in said returns, if any should be found, and of his legal right to make such correction,

or to make the application for that purpose, and state the errors alleged, as the law requires him to do.

Wherefore your relator prays that a writ of mandamus may issue from this honorable court to said Edward H. Gove, of Augusta, in the county of Kennebec, secretary of state, and the legal custodian of said returns, commanding him to permit your relator by himself and his counsel, or either, to have immediate access to said returns, and to examine the same at a suitable time and place and in a suitable manner for the purpose of exercising the rights, and complying with the requirements provided by the laws as hereinbefore set forth, and that a rule of court may issue to said respondent, commanding him to appear before said court, at Fryeburg, in the county of Oxford, on the 9th day of December, 1879, being the seventh day of said December term, and show cause, if any he has why the prayer of said petitioner should not be granted, and a writ of mandamus issue as prayed for.

(Sworn to, and signed,) ANDREW R. G. SMITH.

SUPREME JUDICIAL COURT,—OXFORD COUNTY,—

December Term, 1879.

Ordered, That notice of this petition be given to Edward H. Gove, of Augusta, in the county of Kennebec, by giving him in hand a true and attested copy of this petition and order of notice two days before the 9th day of December, 1879, that he may appear at the supreme judicial court, now in session at Fryeburg in and for the county of Oxford, and show cause, if any he has, why the prayer of said petition should not be granted and a writ of mandamus issue as prayed for.

(Signed,) WM. WIRT VIRGIN,
Justice Sup. Jud. Court.

ANDREW R. G. SMITH, relator in petition for mandamus, *vs.*
EDWARD H. GOVE, secretary of state.

I, Andrew R. G. Smith, of Whitefield, in the county of Lincoln, on oath depose and say:

That I am the relator in Andrew R. G. Smith, petitioner for mandamus against Edward H. Gove, secretary of state, that I am informed and believe that I was duly elected senator to the 59th legislature of Maine from the district and county of Lincoln, and

as such am entitled to a proper certificate of election; that I have reason to apprehend, and do apprehend that such certificate of election will be denied me by the governor and council, on the ground of some slight errors, defects or informalities in the official returns, which by the laws of this state I have the right to correct by the record; that I desire to make application for that purpose to the governor and council, and specify the nature of the errors, if any, within the twenty days limited by statute, and to that end on the second day of December, 1879, I made application in writing to the secretary of state to be allowed to examine the returns from said Lincoln county, in his office, or in his presence; that he refused to show me any returns or allow me access to any, and I did not see, and never have seen any of said returns, but have been denied access to them up to this day.

(Sworn to and signed,) ANDREW R. G. SMITH.

ANSWER. The respondent above named respectfully protests against any further proceedings by this honorable court upon the foregoing petition, because, as he says, in respect to all the matters set forth therein, so far as he has any connection therewith, by the constitution and laws of this state, he is merely the political and confidential agent and servant of the governor and council of the state, and organ of executive will, and has no volition or power to act independently thereof; and he therefore respectfully submits that he ought not to be held to answer said petition.

Without waiving his protest aforesaid, the respondent for answer says:

I. That he has no knowledge, information or belief whether the petitioner was a candidate, and fairly elected to the senate of the state, or whether the same appears by the official returns from the several cities and towns in the district and county of Lincoln as he alleges in said petition.

II. That he admits that on the 17th day of November, 1879, the committee on the part of the council appointed to receive the returns on file in the office of secretary of state, and proceed to open and tabulate the same as soon as convenient in accordance with the vote passed by the council, October 30, 1879, as follows, viz:

IN COUNCIL,
Thursday, Oct. 30, 1879.

On motion of councillor Chase, councillors Foster and Brown were added to the committee on elections, and said committee was instructed to receive the returns on file in the office of secretary of state, and proceed to open and tabulate the same as soon as convenient.

ATTEST:

P. A. SAWYER, *Deputy Secretary of State.*

made a report as follows, viz:

STATE OF MAINE, COUNCIL CHAMBER,
Augusta, Nov. 17, 1879.

The committee on election returns, to whom were committed the election returns at the last session of the council respectfully report, that on the 31st day of October they received from the secretary of state the election returns for senators and representatives to the legislature and county officers, and they proceeded to open the same and tabulate them, and now submit the *tabulation* of said returns.

And the committee recommend that the twenty days spoken of in chapter 212, of the laws of 1877, be considered as commencing at the date of this report.

Respectfully submitted,

E. C. MOODY, *Chairman.*

IN COUNCIL, Nov. 17, 1879.

Read and accepted by the council, and by the governor approved.

ATTEST:

P. A. SAWYER, *Deputy Secretary of State.*

which was accepted by the governor and council; and he says that he has no knowledge of any vote passed by the governor and council respecting the same on the 17th day of November, but admits that on the 22d day of November, 1879, an order was passed relating to the same, as follows, viz:

IN COUNCIL,
November 22, 1879.

Ordered, That the secretary give public notice that the governor and council will be in session from December 1st to 13th, for the

purpose of examining the official returns of votes for candidates for senators, representatives and county officers.

Candidates claiming irregularities or other causes presumed to vitiate their election will have reasonable opportunity to be heard either personally or by duly authorized counsel.

Read and accepted by the council, and by the governor approved.

ATTEST:

P. A. SAWYER, *Deputy Secretary of State.*

III. That the respondent has no knowledge, information or belief that said committee has at any time made a report to the governor and council, submitting said returns to them, and he says that the only report of which he has knowledge is the one before set forth, in which the tabulation of said returns by the committee only was submitted; and he denies that by virtue of said report, or in any other method said returns have been spread upon the records of the governor and council, and thereby became public property and open to the petitioner, otherwise than by the order or permission of the governor and council in the exercise of their discretion, on application duly made to them.

IV. That, he admits that on the second day of December, 1879, the petitioner made a request to him in writing, as follows, viz:

To the Honorable Secretary of State of Maine:

The undersigned respectfully represents that he was a candidate for the senate of Maine at the last annual September election from the district and county of Lincoln. That as such he has an interest in the official returns of votes cast in the several cities, towns and plantations in said district, and forwarded to the office of secretary of state, and fearing that there may be defects and informalities in the same that can be corrected according to the laws of the state, requests that he may have an opportunity, immediately, in the office of secretary of state, or in his presence, to examine said returns by himself or counsel, for the purpose of correcting any defects or informalities that may be found therein—as is his right under the laws of this state—and for all other purposes contemplated by the constitution.

ANDREW R. G. SMITH.

Augusta, Maine, Dec. 1, 1879.

But he denies that he was at that time, is now or ever since the said second day of December has been the legal custodian of said official returns; and he further denies that he refused to allow such an examination as was requested by the petitioner, or any examination, and that he still persists in so refusing, or that he has deprived the petitioner of any supposed legal right which he may have to see and examine said returns; and he says that upon the making of said application to him, he informed the petitioner that the returns set forth in his request were not in the respondent's possession, and that he had no authority or control over them, and that if the petitioner desired to see them he must make his application to the governor and council in whose possession they were.

V. And the respondent further answering says, that on the thirty-first day of October, 1879, he delivered the returns in the petition mentioned, to the committee of the executive council, in accordance with the requirements of the vote of the council hereinbefore set forth, dated October 30, 1879; that said returns were then sealed, the seals thereof never having been broken since they were received at the office of secretary of state; and that since he delivered said returns to said committee, no one of them has ever been in the custody, or possession, or under the authority or control of the respondent, and that he has never had it in his power to exhibit said returns or any part of them to the petitioner or any other person.

Wherefore the respondent prays that he may be hence dismissed and for his costs.

(Sworn to and signed,) E. H. GOVE.

O. D. Baker, for the petitioners.

A. P. Gould, for the respondents.

OPINION OF VIRGIN, J. The conclusion is clear that under the statutes at present existing, the relators, having the interest set forth in the petitions, might legally claim a reasonable opportunity to inspect the official returns of votes from the several cities, towns and plantations in their respective districts. They had a legal right, under reasonable regulations, to see them, after they were opened for examination by the governor and council. Upon the constitutionality in all respects of the statutes, touching this ques-

tion, the court does not undertake in the present proceeding, to pass; but is of the opinion and rules that under the constitution itself, independently of the statutes, the same right of inspection by the relators exists.

The court further holds that the respondent, as secretary of state, is the legal custodian of these official returns, as of other records of the state, responsible for their safe keeping and bound to exhibit them at all proper times to those whose interest is such as to justify an examination by them.

But while it is not doubted that the right of public inspection exists to the extent indicated, and may be asserted and enforced against the respondent if he without cause refuse to exhibit them upon demand therefor properly made, it is one of the requirements of the constitution that the governor and council shall examine all these returns within a comparatively limited period and shall issue summons to such persons as shall appear to be elected. The duty to examine them necessarily includes the right of possession of them for such time as is required to complete the examination. The respondent could not lawfully assert against the governor and council such a right of possession as in their judgment would be inconsistent with the performance of the duty devolved upon them by the constitution. When then, the right of public inspection comes in collision with the necessary possession of the returns by the executive body appointed to examine them, the respondent cannot be in fault if the former yields and the latter prevails.

Upon the question whether at any particular time while the governor and council are engaged in examining the returns, or under the circumstances then existing, it is reasonable for them to be open to the inspection of others or not, the court will not undertake to pass. It would be impracticable for the court, by process directed to the respondent to attempt to control the action of the governor and council in this respect. Nor is it a matter over which the court exercises a superintending authority.

While engaged in examining the returns, the governor and council act in an executive capacity; upon the responsibility of their official station and the sanctity of their official oaths. They are the final depositories of trust and power from the people in regard to it. What limitations upon the rights of others the per-

formance of their own duties necessarily imposes, they must determine. It has long been the established law of the state that, in any matter intrusted to them, the discretion of the court cannot be substituted for theirs; that their action, within the sphere of their executive duty in affairs submitted to their own judgment, cannot be controlled by judicial process. They are in these respects a co-ordinate branch of the government, over which this court does not preside.

If a mandate were to issue, directing the respondent to exhibit the returns to the relators, there must still be a reservation in the decree itself of the right of the governor and council to hold them exclusively whenever the fulfilment of a constitutional obligation on their part imperatively demands it. The mandate, therefore, if issued, would in terms recognize their responsible discretion in the premises.

From the answer in the cause, it appears that, when the relators demanded of the respondent the production of the returns they were in the possession of the governor and council, the time for their examination not having expired. The law accorded to the relators the right to see the returns, whenever an opportunity could be afforded them consistently with the performance of the duty devolved upon the executive department; but it left the governor and council acting under the obligations and responsibilities of their high office, the final judges of what the discharge of their own duty necessarily required; and whether, at any particular time, or under any special circumstances, there was in fact a necessity to detain them from the relators, whose right to see them whenever it did not unreasonably interfere with the performance of the official duty on the part of the governor and council, was clear.

Petition dismissed.
Writ denied.

APPENDIX.

NO. 2.

QUESTIONS SUBMITTED BY GOVERNOR GARCELON,

December 31, 1879,

WITH THE ANSWERS OF THE JUSTICES OF THE SUPREME JUDICIAL COURT THERETO.

To the Honorable Alonzo Garcelon, Governor of Maine:

BANGOR, January 3, 1880.

The undersigned, Justices of the Supreme Judicial Court, have the honor to submit the following answers to the questions proposed:

QUESTION 1. When the governor and council decide that there is no return from a city, on which representatives can be summoned to attend and take their seats in the legislature, is it their duty to order a new election; or is it competent for the house of representatives, if it shall appear that there was an election of such representatives in fact, to admit them to seats, though no return thereof was made and delivered into the office of secretary of state?

ANSWER. No authority is given to the governor and council, when there is no return, to order a new election. When the seat of a representative has been vacated by death, resignation or otherwise, provision is made by revised statutes, chap. 4, secs. 38, 44, 47, for the filling of existing vacancies. By these provisions whenever the municipal officers, therein mentioned, by any means have knowledge of the death of a representative-elect, or of a vacancy caused in any other way, it is their duty to order a new election. If it appears to the house of representatives that there was an election of representatives in fact, they should admit them

to their seats, though no return thereof was made to the secretary of state. The representative is not to be deprived of his rights because municipal officers have neglected their duty.

QUESTION 2. Is it competent for the governor and council to allow the substitution of other evidence in place of "the returned copies of such lists," as are provided for in article 4, part first, section 5, of the constitution, to enable them to determine what persons "*appear to be elected*" representatives to the legislature "by a plurality of all the votes *returned?*"

ANSWER. This refers to the substitution authorized by the act of 1877, chap. 212. The constitution calls for a return that is regular in essential forms, and which truly represents the facts to be described by it. But much of the constitutional requirement is directory merely. It does not aim at depriving the people of their right of suffrage or their right of representation for formal errors, but aims at avoiding such a result. Where the constitutional requirement has not been fully, or has been defectively, executed by town officers, it is in aid of the constitutional provision to supply the omission or deficiency as nearly and as correctly as may be. Such is the purpose of the statute. It is competent for the governor and council to allow an erroneous return, or one that is informal or defective, to be aided and corrected by an attested copy of the record, as by statute provided. The object of the constitutional provisions respecting elections is to furnish as many safeguards as may be against a failure, either through fraud or mistake, correctly to ascertain and declare the will of the people as expressed in the choice of their officers and legislators. Hence the requirement that not only shall the returns be made on the spot, in open town meeting, but a record of the vote shall be made at the same time and authenticated in like manner. If, by accident or willful neglect, there is an error or omission in the return, what can be safer than to refer to the duplicate statement made in the record to correct it? This the statute of 1877, chapter 212, allows to be done. And while the language is permissive, it falls within the well known legal rule, that when public rights are concerned it shall be construed as mandatory—a command clothed in the language of courtesy, so clothed because it could not be doubted

that high and honorable officials would unhesitatingly avail themselves of all lawful means to declare the result of an election according to the actual fact, in obedience to the fundamental principles of popular government. The governor and council are bound by the statute. It is mandatory upon them. It imposes a duty to the public that must be performed. Whether the act referred to contravenes the constitution in allowing oral evidence to be received to show the intention of voters in casting their votes is a question raised by another part of the statute, which we are not now called upon to consider. If unconstitutional in the latter respect, that would not affect the constitutionality of the other separate and independent provisions.

Question 3. Is a return, signed by less than a majority of the selectmen of a town, or the aldermen of a city, valid within the requirements of the same section?

Answer. To this question we answer that, while a town may legally elect as many as seven selectmen, the well known practice is to elect only three, and in such cases a return, to be valid must be signed by a majority of them; because by no possibility can a less number constitute a legal quorum. But the rule is otherwise with respect to the aldermen of cities. Most of our cities are required by law to have as many as seven aldermen, and none of them, we believe, have less than five. To constitute a quorum it is only necessary to have a majority of the whole number present, and when such a quorum is present a majority of the quorum may do business. Supposing the number to be seven, four would constitute a legal quorum; and three, being a majority of that quorum, could legally act, although the fourth should refuse to join them, or should oppose their action. Consequently, if a return from a city, having five or seven aldermen, is signed by three of them, it may be a valid and legal return, because only four may have been present, and, in such a case, (three being a majority of those present,) could legally act, although the fourth should oppose their action and refuse to join them. When such a return is laid before the governor and council they cannot know, and they have no right to assume that the return is not valid. It is the duty of the aldermen to be in session and examine the ward

returns, compare and declare the votes, and of the clerk to make a record thereof. From that record, a certified copy of which is returned, the law presumes that a quorum of the aldermen was present. The law with respect to quorums and majorities is correctly stated in 5 Dane's Abridgement, 150, and 1 Dillon's Municipal Corporations, sections 216 and 217. In the latter work it is said that bodies composed of a definite number act by majorities of those present, provided those present constitute a majority of the whole number. Or, to use Mr. Dane's illustration: If the body consists of twelve councilm en, seven is the least number that can constitute a valid meeting, though four of the seven may act, —that is, a majority of the whole must be present to constitute a legal quorum, but a majority of the quorum may act,—and so far as we are aware, the law is so stated in substance by all ancient and modern authorities. The rule applicable to such cases is similar to that which applies to our house of representatives. The whole number of representatives established by law is one hundred and fifty-one. A majority, (that is, seventy-six members) constitute a quorum to do business. If there is actually that number present, and a majority of them (that is thirty-nine members) vote in the affirmative, a valid law can thereby be enacted or other business transacted. If less than seventy-six members are present, then no legal business can be done, except to adjourn, or compel the attendance of absent members. This is familiar law and illustrates the principle applicable to the aldermen of cities, and shows how and why a return, signed by less than a majority of the whole number, may be, and so far as the governor and council are concerned, is conclusively presumed to be valid. They have no right to go behind the return.

Question 4. Is a return by the aldermen of a city, which does not give the number of votes cast for each person voted for as a member of the legislature, and does not show what persons were voted for as such members, in any one of the several wards of such city, a valid return within the requirements of the same section?

Answer. We are not sure that we comprehend the full scope of this question. Our answer will meet all of its proposed purposes. It is immaterial whether the aldermen returned to the

governor and council the detailed vote of each ward separately, or whether they returned the result of all the votes of all the wards for each candidate together. Either mode is a satisfactory way of reaching the same result. Substance only is sought for in such matters. Nor is it a material matter that, instead of returning all the names of persons voted for, there is a return of votes as "scattering," provided that, however such votes may be added or subtracted, some candidate or set of candidates appear to be chosen by a plurality of the votes thrown. The governor and council cannot officially know, nor have they the right to ascertain, that the votes returned as "scattering" were not actual ballots, with the word *scattering* written thereon. Nor is the election of candidates to be chosen by a plurality of votes to be defeated because the whole number of votes or ballots may be stated erroneously, or not stated at all. The constitution contains no such requirement, and the statutory provision requiring it, is entirely unimportant and inapplicable to cases where a plurality of votes elects. It is a well settled rule of construction, that where the general terms of a statute embrace several subjects, but are found to be practicably applicable to some of the subjects and not to others, it is to be construed as embracing those subjects only to which it is practicably applicable.

QUESTION 5. Are returns from towns or cities, which are not attested by the town or city clerk, valid within the same section?

ANSWER. Returns from towns and cities which are not attested by the town, plantation or city clerk are not valid. The attestation of the clerk is a pre-requisite to any action of the governor and council in counting votes. 68 Maine, 588. If, however, the clerk should be absent, a clerk *pro tempore* may be chosen, or a deputy clerk may be appointed, under the statute of 1872, chap. 17, and the amendment thereof, by the act of 1874, chap. 159, and the returns of such clerk *pro tempore* or deputy clerk, are to have the same force and effect as if signed by the clerk.

QUESTION 6. Have the governor and council a right to reject returns of the election of members of the legislature, required by the same section, from the officers of towns, which were not made, signed or sealed up, in open town meeting?

ANSWER. The governor and council must act upon the returns forwarded to the secretary of state. If they purport to be made signed and sealed up in open plantation or town meeting, they constitute the basis of the action of the canvassing board. No provision is found in the constitution or in any statute of this state, by virtue of which they would be authorized to receive evidence to negative the facts therein set forth. They, therefore, have no such power. The statement of the municipal officers is in that respect conclusive.

QUESTION 7. Is the return of two persons, purporting to be the selectmen of a town, valid and sufficient evidence of the vote of the town, when it appears that there were at the time of the meeting, at which the election was had, but two selectmen of that town?

ANSWER. When a majority of the selectmen are absent from a meeting for election purposes, or being present "neglect or refuse to act as such, and to do all the duties required of them, the voters at such meeting may choose so many selectmen *pro tem.* as are necessary to complete the number competent to do the duties," R. S., chap. 4, sec. 20. In case of the death or the removal of all the selectmen, two would be sufficient and competent to act. The inquiry is, "if the return would be valid when there should be but two selectmen at the time of the meeting at which the election was had." If the other selectmen had deceased prior to the meeting, the survivors might act, and their action would be legal. But the canvassing board are to be governed by the returns. Evidence would not be admissible to prove the fact that there were but two selectmen of the town. The governor and council cannot officially know that there are only two.

QUESTION 8. Can a person who is not a citizen of the United States at the time, be legally elected or constituted a selectman of a town?

ANSWER. A person not a citizen may be elected or constituted a selectman, so that his official acts bind the town, and are valid so far as affects the public—such an one would be an officer *de facto* and clothed with apparent right. His acts would bind the

town. *Dane* v. *Derby*, 54 Maine, 95: "An officer *de facto* is one who comes into office by color of a legal appointment or election. His acts in that capacity are as valid so far as the public is concerned as the acts of an officer *de jure*. His title cannot be inquired into collaterally." The *People* v. *Cook*, 4 Selden, 89: "The precise definition of an officer *de facto*," observes Biglow, Chief Justice, in *Fitchburg R. R. Company* v. *Grand Junction and Depot Company*, 1 Allen, 557, "is one who comes in by the forms of law and acts under a commission or election apparently valid, but in consequence of some illegality, incapacity, or want of qualification, is incapable of holding the office." Indeed there is an entire unanimity of opinion on this subject in all the states of the Union where this question has arisen, as well as in the courts of the United States. But the fact of alienage is not allowed to be proved. This was determined in the Frenchville case, 64 Maine, 589, where it was shown that the clerk was an alien who could neither read nor write the English language, and where almost every conceivable irregularity existed, yet evidence outside of the returns was held inadmissible. Nor would such fact have any effect, if it appeared in and by the return itself.

Question 9. If a ballot has a distinguishing mark, in the judgment of the governor and council, such as would make it illegal under the statutes, have they authority to disregard it in their ascertainment of what persons appear to be elected, where it appears by the official return of the officers of the town that such vote was received by the selectmen subject to the objection, and its legality referred to the governor and council for decision?

Answer. The presiding officers are to determine whether the ballot offered has a distinguishing mark or figure, so that, if rejected, the voter may procure a ballot if he chooses, to which no exception can be taken. But if the ballots have distinguishing marks or figures, it is no part of the duty of the officers of the town to make any report in reference thereto. They should reject the ballot, if offered, when it is within the prohibition of the statute. The statute prohibits the rejection of the ballot, "after it is received into the ballot box." It is then to be counted. The

governor and council have nothing to do with the question. Their duty is to count the votes, regardless of the fact improperly set forth in the return. They are nowhere constituted a tribunal with judicial authority to determine what shall constitute a distinguishing mark or figure, nor can they legally refuse "to open and count the votes returned." 54 Maine, 602. When the ballot has been once received in the ballot box, neither the selectmen nor the governor and council can refuse to count it.

QUESTION 10. If the names of persons appear in the return, without any number of votes being stated or carried out against them, either in words or figures, is it the duty of the governor and council to treat those persons as having the same number of votes as another person received for the same office, and whose name is placed first in the return, if they find *dots* under the figures or words set against such other person's name.

ANSWER. If the ditto marks or "dots" are placed under the figures or words of the first candidate's vote, the return should be counted. Where it appears by the letters or figures in the first line, and by ditto marks or by dots in the following lines, that the same class of candidates received the same vote, there can be no ground for rejection. The word ditto and its abbreviation "do" and the dots or marks that stand for the word ditto are of common use, and have a perfectly well defined meaning, known to persons generally. That meaning should not be disregarded. We answer the question in the affirmative.

QUESTION 11. Have the governor and council the legal right to decide what kind of evidence they will receive, and what the mode of proceeding before them shall be to enable them to determine the genuineness of returns required by the article and section of the constitution above mentioned?

ANSWER. We assume that the "genuineness of the return" referred to relates either to the signatures of the officers signing, or to alterations of the return. The governor and council have no power to reject the returns on either ground, unless an objection in writing is presented to them setting forth that the signatures of such officers (or some one of them) are not genuine, or that the return has been altered after it was signed. Then

notice thereof should be given to all persons interested, and when adjudicating upon the facts, the governor and council should be governed in the admission of evidence by the established rules of evidence in accordance with the law of this state. The witnesses should be duly sworn that they may be punishable for the crime of perjury, if they willfully and corruptly testify falsely. The governor and council have no right to reject the return for such cause, without giving the parties interested therein, a fair opportunity to be heard. The genuineness of the return in these particulars is to be presumed, and this presumption remains until overcome by evidence produced as before said.

QUESTION 12. If the governor and council have before them two lists of votes returned from the same town, differing materially from each other in the number of votes returned as cast for the same persons, but identical in all other respects, both having been duly received at the secretary's office, and they have no evidence to enable them to determine which is the true and genuine return, are they required to treat either of them as valid?

ANSWER. When two lists of votes are returned to the office of the secretary of state by the clerk of any city, town, or plantation, and both are duly certified, the return first received at the office of the secretary must be the basis of the action of the governor and council. If defective, or not a true copy of the record, it can be corrected, or the defects supplied only in accordance with the provisions of the statutes relating thereto.

This government rests upon the great constitutional axiom "that all power is inherent in the people." "It is a government of the people, by the people and for the people;" and if administered in the spirit of its founders "it shall not perish from the earth." Its constitution was formed, to use the apt expression of one whose memory is embalmed in the hearts of his countrymen, "by plain people," and "plain people" must administer it. The ballot is the pride, as well as the protection, of all. It is the truest indication of the popular will. The official returns required from the municipal officers of the several

plantations, towns and cities, are and will be made by "plain people," and made, too, in the hurry and bustle and excitement of an election. They are not required to be written with the scrupulous nicety of a writing master, or with the technical accuracy of a plea in abatement. The sentences may be ungrammatical, the spelling may deviate from the recognized standard; but returns are not to be set at naught because the penmanship may be poor, the language ungrammatical, or the spelling erroneous. It is enough if the returns can be understood, and if understood, full effect should be given to their natural and obvious meaning. They are not to be strangled by idle technicalities, nor is their meaning to be distorted by carping and captious criticism. When that meaning is ascertained there should be no hesitation in giving to it full effect. The language of Mr. Justice Morton in Strong, petitioner, 20 Pick. 484, is peculiarly appropriate to the subjects under discussion. "What," he asks, "shall be the consequence of an omission by the selectmen or town clerk to perform any of these (their) prescribed duties and upon whom shall it fall? For a willful neglect of duty the officers would undoubtedly be liable to punishment. But shall the whole town be disfranchised by reason of the fraud or negligence of their officers? This would be punishing the innocent for the fraud of the guilty; it would be more just and more consonant to the genius and spirit of our institutions, to inflict severe penalties upon the misconduct, intentional or accidental, of the officers; but to receive the votes whenever they can be ascertained with reasonable certainty. If no return, or an imperfect one, be received, let it be supplied or corrected by the original record, if any there be." The returns should be received with favor and construed with liberality, for, he adds, "from the men that usually are, and of necessity, must be employed to make them, great formality and nicety cannot be expected, and should not be required." The general principle, which governs, is, that while there should be a strict compliance with the provisions of a statute, yet when they are merely directory, such strict compliance is not essential to the validity of proceedings under such statute, unless they are declared to be therein. This is specially applica-

ble when the rights of the public or of third persons are concerned. The dominant rule is to give such a construction to the official acts of municipal officers as will best comport with the meaning and intention of the parties, as derived from a fair and honest interpretation of the language used, and to sustain rather than to defeat the will of the people, and thus disfranchise the citizen.

JOHN APPLETON,
CHARLES W. WALTON,
WM. G. BARROWS,
CHARLES DANFORTH,
JOHN A. PETERS,
ARTEMAS LIBBEY,
JOSEPH W. SYMONDS.

STATEMENT AND QUESTIONS SUBMITTED

January 12, 1880,

WITH THE ANSWERS OF THE JUSTICES OF THE SUPREME JUDICIAL COURT THERETO.

Immediately after the annual election of September 8, 1879, copies of the lists of votes cast in the several towns and plantations for various state and county officers, duly attested by the selectmen of towns and assessors of plantations, and by either the town clerk, deputy clerk, or clerk *pro tem*, and like copies of lists of votes given in the several wards of the cities, duly attested by the mayor, city clerk, and a majority of a legal quorum of the aldermen present, were duly returned and delivered into the office of the secretary of state, thirty days before the first Wednesday of January, 1880. The governor and council opened these returns November 17, 1879. Application in proper form was made by parties interested for inspection of said returns for the purpose of discovering and correcting any defects or errors therein, but in a large majority of cases such inspection was refused by the governor and council, or granted so late and in such manner as to be of no avail for the correction of errors. Senators and representatives

elect made application to the governor and council within twenty days after the returns were opened, stating the error alleged, and gave due notice thereof to persons to be affected by such correction, or requested the same to be given, and offered to correct any error found therein by the record, or by substituting for such returns if defective, duly attested copies of the record in such case as provided by statute, and by offering such other evidence as is authorized by chapter 212 of the laws of 1877, but the governor and council refused to receive such evidence or to correct any error in said returns or to receive a duly attested copy of the record to be substituted for any return defective by reason of any informality. Under these circumstances the governor and council proceeded to examine the returns with the following results:

The return from the city of Portland was duly signed and showed upon its face all the facts necessary to constitute a legal election. It showed the whole number of ballots given, and that Moses M. Butler, Almon A. Strout, Reuel S. Maxcey, Samuel A. True and Nathan E. Redlon each received over six hundred and forty votes plurality over each of the candidates opposed to them. The only defect alleged in said return was that it contained the words and figures—"Scattering, one hundred and forty-three, 143," but this number if added or subtracted or disregarded would still leave each of the candidates above named a large majority of all the votes cast as above stated. The governor and council rejected said return, and refused to summon the five representatives above named who were elected, and appeared to be elected by a plurality of all the votes returned, to attend and take their seats, and refused to report their names and residences to the secretary of state to be included in the certified roll to be furnished by him to the clerk of the preceding house of representatives as required by law. Subsequently to the making of said return, Moses M. Butler, one of said representatives elect, died, and in pursuance of the provisions of chapter 4, §§ 38, 44 and 47 of the revised statutes, a new election was ordered by the municipal officers of the city of Portland, and at such election Byron D. Verrill was elected by a majority of over one thousand votes over all others, and a proper return was made to the office of the

secretary of state; but no summons was ever issued to said Verrill, and the governor and council refused to report his name to the secretary of state for the purpose above stated. In the city of Lewiston, Liberty H. Hutchinson, Isaac N. Parker and Silas W. Cook were elected by a clear majority of all the votes cast. In the city of Saco, George Parcher, in the city of Rockland, Jonathan S. Willoughby and Theodore E. Simonton, in the city of Bath, Guy C. Goss, were in like manner duly elected representatives. In each of these four cases the returns were in due form and signed by the mayor, city clerk, and three aldermen. The governor and council in each of the above cases refused to issue summonses and to report the names and residences of said elected representatives to the secretary of state to be included in the certified roll. In the Webster, Lisbon and Durham class, William H. Thomas appeared by the returns to be elected by a majority of eighty-three votes. The returns from said towns were without defect and were duly signed by all the selectmen of each town. Upon rumor that the governor and council refused to issue a summons to the persons elected because it was alleged that the names of the selectmen signed upon the returns from the towns of Lisbon and Webster were signed by one person in each town, all of said selectmen appeared before the governor and council and made oath that the signatures were genuine. In this district another ground taken was, that it appeared from extrinsic and *ex parte* evidence that either the return was not signed and sealed, or the record not made up in open town meeting. The governor and council refused to issue a summons to said William H. Thomas, or report his name to be entered on said certified roll, but did issue a summons to Samuel H. Beal, a person who was not elected and did not appear to be elected by said returns.

In the classed towns of which Stoneham is one, A. F. Andrews was duly elected by a plurality of all the votes cast. There was no defect upon the face of the returns, but the governor and council rejected the return from Stoneham without notice to any party, upon *ex parte* affidavit that such return was not made in open town meeting, and refused to issue a summons to said Andrews or report his name to be placed upon the certified roll required

by law, but did issue a summons to Osgood N. Bradbury, who did not appear to have received a plurality of votes cast and who was not elected as matter of fact. In the classed towns and plantations, of which the town of Gouldsboro was one, Oliver P. Bragdon was duly elected by a plurality of all the votes cast. The return of Gouldsboro was read by the governor and council as containing the name of Oliver B. Bragdon, although upon inspection of the return it shows that the name written therein was in fact Oliver P. Bragdon, and the summons was refused to said Oliver P. Bragdon and was issued to James Flye, although it appeared upon the face of the return that he did not receive a plurality of the votes cast.

In the class composed of the several towns and plantations of which the town of Weston is one, Frank C. Nickerson was elected by a plurality of the votes cast; but the governor and council rejected forty-three votes, appearing by the return of one of said towns to be thrown for Frank Nickerson, and refused to receive a certified copy of the record which showed said votes to be thrown for said Frank C. Nickerson, or correct said return thereby; and refused to issue the summons required by law, and to report his name and residence to be entered on the certified roll above named, but issued a summons to John H. Brown; although had the certified copy of the record been received, and the returns corrected thereby, said Nickerson would have appeared to have been elected.

In the Cherryfield district Henry C. Baker was elected by receiving a plurality of the votes cast, and it so appeared on the face of the returns which were regular in form; but the governor and council rejected the return from the town of Cherryfield, because it was alleged that one of the selectmen signing said return was an alien, and refused to issue a summons to said Baker, and did issue a summons to Lincoln H. Leighton, who did not appear by the returns to be elected, and who was not in fact elected.

In the Farmington district Cyrus A. Thomas received a plurality of all the votes cast, and it so appeared upon the face of the returns; the whole number of ballots in the return of Farmington was 842; the number of votes for Thomas was 437; the number of votes for Lewis Voter was 401; the sum total of these votes is

838; the returns from the Farmington class were in due form. In this district another ground taken was that it appeared from extrinsic and *ex parte* evidence that either the return was not signed and sealed, or the record not made up in open town meeting. The governor and council rejected the return from Farmington, and refused to issue a summons to Cyrus A. Thomas, and did issue a summons to Lewis Voter. Voter returned the summons with a letter resigning and declining to act.

The town of Skowhegan gave H. S. Steward 595 votes, and Daniel Snow 302 votes. The return from the town was regular in form, but appended thereto was a protest that the form of the ballots cast for said Steward, and received by the selectmen into the ballot box, constituted in itself a distinguishing mark. The governor and council refused to issue a summons to said Steward, and did issue a summons to Daniel Snow.

In the Ashland district John Burnham received a majority of all the votes cast; in the return for Ashland his name was spelled John Burnam; the opposing candidate was Alfred Cushman; the return from Merrill Plantation contained the name of Alford Cushman; the number of votes in the Ashland and Merrill returns was such, that if the Ashland vote had been counted for John Burnham, and the Merrill return for Alfred Cushman, or both, had been rejected, John Burnham would have appeared to have been elected. The governor and council issued a summons to Alfred Cushman, and refused to issue it to John Burnham.

In the Jay district John R. Eaton received a plurality of all the votes cast, and it so appeared by the returns which were perfect in form. It was alleged that the return from the town of Jay was not signed and sealed in open town meeting, though on its face it purported to have been. The governor and council refused to issue a summons to John R. Eaton, but did issue one to James O. White.

In the Newcastle district the return from Newcastle shows that the votes were thrown for E. K. Hall, they being in fact thrown for Edward K. Hall, as appears by the record, attested copies of which were offered in evidence before the governor and council, but which were by them refused. Had this correction been made,

Edward K. Hall would have appeared by the face of the returns to have been elected; but the governor and council refused to issue a summons to Edward K. Hall, but did issue a summons to James W. Clark.

In the New Sharon district David M. Norton received a clear plurality of all the votes cast, and it so appeared on the face of the returns, which were in due form. It was alleged that the three signatures of the three selectmen of the town of New Sharon were in one hand writing. Without evidence, and without notice to any person interested, the governor and council rejected the return from this town, and refused to issue a summons to David M. Norton, but did issue a summons to George W. Johnson.

In the Fairfield district A. B. Cole received a plurality of all the votes cast, and it so appears by the returns, which were perfect in form; a second return was made from the town of Fairfield upon a recount, and was marked "amended return." By counting either return A. B. Cole had a clear majority of at least 55 votes; but the governor and council rejected both returns, refused to issue a summons to A. B. Cole, and did issue a summons to Harper Allen.

In the Searsport district Robert French received a plurality of all the votes cast, as appeared by the returns which were regular in form. It was alleged that the return from Searsport, when it reached the office of the secretary of state, was unsealed or not properly sealed. The governor and council rejected this return, refused to issue a summons to Robert French, and did issue a summons to Joshua E. Jordan.

In the Lebanon district Isaac Hanscom received a plurality of all the votes cast, and it so appeared by the returns, which were correct in form, with the exception that the town clerk of Lebanon did not sign the return from that town. Attested copies of the record of the town of Lebanon were offered to be substituted for said return for the purpose of amending the same, but the governor and council refused to receive said attested copies. Had said attested copies been received it would have appeared by the returns as amended that Isaac Hanscom received a plurality of all the votes cast, but the governor and council refused to issue a

summons to Isaac Hanscom, but issued a summons to Stephen D. Lord.

In the Robbinston district Robert M. Loring received a plurality of all the votes cast; but the vote of Robbinston was returned for Robert Loring, instead of Robert M. Loring; the record had the same error, but the ballots had been preserved, and were all for Robert M. Loring. Proof of this fact was offered to the governor and council, but they refused to receive such evidence, refused to issue a summons to Robert M. Loring, but did issue a summons to James M. Leighton.

In the Danforth and Vanceboro district, Charles A. Rolfe received a plurality of all the votes cast, and it so appeared on the face of the returns, which were regular in form. The return of the town of Vanceboro was signed by the town clerk *pro tempore*. This return was rejected by the governor and council, because signed by a clerk *pro tempore*; they refused to issue a summons to Charles A. Rolfe, but did issue a summons to Aaron H. Woodcock.

In the Exeter-Garland district George S. Hill received a plurality of all the votes cast; the returns were in due form. The Garland return gave the name of George S. Hill in full, and also the name of Francis W. Hill, the opposing candidate in full. The return from Exeter gave the names of G. S. Hill and F. W. Hill. The record of the vote in the town of Exeter bore the names of George S. Hill and Francis W. Hill. A certified copy of the record was proffered to the governor and council, which they refused to receive. Had such certified copy been received and the return amended in accordance with the fact, George S. Hill would have appeared by the returns to have been elected. The governor and council refused to issue a summons to George S. Hill, but did issue a summons to F. W. Hill.

The facts relating to certain seats in the senate are as follows:— In Cumberland county, Joseph A. Locke, Andrew Hawes, Henry C. Brewer, and David Duran received a clear majority of all the votes cast, as appears by the returns which were regular in form.

The facts in regard to the city of Portland were the same as already stated, except that the returns showed 34 votes tabulated

as scattering. The return from Otisfield omitted to state the whole number of ballots. In the return from Westbrook the vote was given in full, both in letters and figures, opposite the name of Joseph A. Locke, but opposite the names of Andrew Hawes, Henry C. Brewer and David Duran ditto marks were used, both under the letters and figures. The returns of Portland, Westbrook and Otisfield were rejected by the governor and council; they refused to issue summonses to Andrew Hawes, Henry C. Brewer and David Duran, and did issue summonses to Daniel W. True, Edward A. Gibbs and William R. Field.

In Franklin county George R. Fernald received a plurality of all the votes cast, and it so appeared by the returns, which were regular in form. The governor and council rejected the returns from Farmington, Jay and New Sharon, the facts in regard to which have been hereinbefore stated; refused to issue a summons to George R. Fernald, and did issue a summons to Rodolphus P. Thompson.

In Washington county Alden Bradford and Austin Harris received a plurality of all the votes cast, as appears by the returns, which are regular and in due form. The governor and council rejected the returns from the towns of Vanceboro and Cherryfield, the facts concerning which have already been stated, refused to issue a summons to Alden Bradford, and did issue a summons to James R. Talbot.

In Lincoln county, Andrew R. G. Smith received a plurality of all the votes cast; the returns were regular in form. In the returns from two towns the name of Andrew R. C. Smith was returned instead of Andrew R. G. Smith. The records of both towns gave the name of Andrew R. G. Smith. Certified copies of such records were proffered to the governor and council in order to correct said returns thereby. Had said certified copies been received, it would have appeared by the returns as amended that said Andrew R. G. Smith was duly elected; but the governor and council refused to receive said copies, or to correct said returns thereby, or to issue a summons to Andrew R. G. Smith, but did issue a summons to Isaac T. Hobson.

In York county Charles P. Emery, Joseph W. Dearborn and

George H. Wakefield received a plurality of all the votes cast. Charles P. Emery received a summons. In the case of each of the others, one of the initials was given incorrectly in the return of one town, but if the vote of the city of Saco had been counted each would have appeared by the returns to be elected. But the governor and council rejected the Saco returns, the facts concerning which have been heretofore stated, refused to issue summonses to Joseph W. Dearborn and George H. Wakefield, and did issue summonses to Ira S. Libby and John Q. Dennett.

In all the cases, senatorial or representative, where returns were rejected on extrinsic evidence that they were not signed and sealed or the records not made up in open town meeting, it does not appear on the returns themselves, but does appear by certificate of the selectmen on the back of the official envelopes enclosing said returns, that said returns were signed and sealed, and the records made up in open town meeting.

On the thirty-first day of December, A. D. 1879, the governor required the opinion of the justices of the supreme judicial court upon certain questions submitted by him, and by the opinion of said justices in reply thereto, it appeared that the objections and alleged defects in the returns hereinbefore stated were without foundation in law. The governor and council were requested in all these cases, to recall the summonses, which by the opinion of the court appeared to have been improperly issued, and to report the names and places of residence of the persons legally elected to both branches of the legislature to the secretary of state, to be entered upon the certified roll as required by law, but this they refused to do.

A certified roll was furnished by the secretary of state to the clerk of the preceding house of representatives, containing the names of one hundred and twenty-two persons properly summoned as representatives elect, and seventeen persons heretofore enumerated, viz: Lewis Voter, Daniel Snow, Alfred Cushman, James O. White, Leonard H. Beal, Osgood N. Bradbury, George W. Johnson, Lincoln H. Leighton, Aaron W. Woodcock, Harper Allen, Joshua E. Jordan, F. W. Hill, James W. Clark, James Flye, John H. Brown, James M. Leighton and Stephen D. Lord,

and no more, no names of representatives for the five cities above enumerated appearing on said roll.

On the first Wednesday of January, 1880, the assistant clerk of the preceding house of representatives, the clerk of said preceding house being present, proceeded to call the names on the certified roll above described, whereupon one hundred and thirty-five persons answered to their names. Attention was then called by one of the persons, so responding, to the vacancies appearing upon the reading of said roll.

A motion was then made that the representatives from said five cities, appearing by the returns from said cities to have been actually elected, should be permitted to participate in the organization of the house. The assistant clerk refused to put the motion, and refused to entertain an appeal. Motion was then made that a committee be raised to inform the governor and council that a quorum was present and ready to take the oath. Upon that question a call for the yeas and nays was demanded and it was so taken, and there were seventy-three voted in the affirmative and none in the negative. Attention was then called to the fact that no quorum was present. Motion was then made to adjourn, which said assistant clerk refused to entertain or put, and the same was put by the mover and declared carried. Thereupon a number of the members left the hall. The governor and council appeared to administer the oath. One of the members summoned called the attention of the governor to the fact that no quorum had voted to qualify, but the governor declined to notice this act on the part of the number summoned. Thereupon the governor proceeded to administer the oath.

After the rolls containing the oath were signed, the governor announced that seventy-six persons summoned had subscribed the oath, among whom were the persons previously enumerated by name as appearing on said roll, except Lewis Voter and Daniel Snow.

The announcement of the governor that seventy-six persons had subscribed the oath was doubted by a member who had subscribed the oath, and a repeated demand was made that this announcement should be verified by reading the names of those

who had subscribed, but the assistant clerk declined so to do. Protest was made against the administration of the oath before it was administered. Thereupon an election of speaker was attempted, and John C. Talbot received seventy-two votes, no other votes being thrown.

On the next day sixty members summoned, and whose names appeared on the certified roll, applied to James D. Lamson, who claimed to be president of the senate, to be qualified, and he refused in writing to administer to them the oath required by law.

The facts connected with the alleged organization of the senate on the first Wednesday of January, 1880, are as follows:—A certified roll was furnished by the secretary of state to the secretary of the preceding senate, on which were the names of twenty-three persons properly summoned, and who appeared to be elected as shown on the face of the returns, together with the names of Daniel W. True, Edward A. Gibbs and William R. Field, of Cumberland county, Rodolphus P. Thompson, of Franklin county, James R. Talbot, of Washington county, Isaac T. Hobson, of Lincoln county, Ira S. Libby and John Q. Dennett, of York county, and at 10 o'clock in the forenoon, on said day, said secretary of the preceding senate called the names on the roll and each one responded.

Thereupon one of the members, properly summoned, called attention to the fact that the names above enumerated on the roll had been substituted for the names of Andrew Hawes, Henry C. Brewer and David Duran, of Cumberland county, George R. Fernald, of Franklin county, Alden Bradford, of Washington county, Andrew R. G. Smith, of Lincoln county, Jeremiah W. Dearborn and George H. Wakefield, of York county, who appeared by the returns to be elected, and moved that their names be substituted on the roll for those first above enumerated. The secretary refused to entertain the motion; the oath was then administered by the governor and council; the motion was immediately thereafter renewed, and the secretary again refused to entertain the motion; an appeal was then taken to the senate; the secretary refused to put the question; protest was then made

that unless the substitution moved was made, eleven members properly summoned, and having a plurality of the senatorial votes in their respective counties, would refuse to participate in the organization of the senate. No attention having been paid to this protest, said eleven members did not participate in the further proceedings. The remaining twenty persons proceeded to vote for president of the senate, and James D. Lamson received twenty ballots, which were cast by twelve members properly summoned, and by the eight persons first above enumerated.

Public protest was immediately made by a member duly summoned against the election of James D. Lamson as president of the senate, because he had received the votes of but twelve persons lawfully summoned.

The remainder of the officers of the senate were elected in the same manner, and by the same persons as the president.

On the 12th day of January, 1880, the persons claiming to be the legally elected members of the legislature, but having present less than seventy-six in number, attempted to meet in joint convention for the purpose of witnessing the administration of oaths to James D. Lamson, to qualify him to exercise the office of governor, together with twenty members of the senate, only twelve of whom appeared to be elected by the returns. On the same day sixty-two members of the house, to whom James D. Lamson, claiming to be president of the senate, had refused to administer the oath, and who were properly summoned, together with John R. Eaton, William H. Thomas, A. F. Andrews, David M. Norton, Henry C. Baker, Charles A. Rolfe, A. B. Cole and Robert French, Cyrus A. Thomas, Hiram A. Steward and John Burnam previously mentioned, together with the representatives of the cities of Portland, Lewiston, Saco, Rockland and Bath, met in the hall of representatives and organized by the choice of speaker, clerk and other officers, after being qualified by taking the oaths prescribed by the constitution, before William M. Stratton, clerk of the courts for Kennebec county, and authorized by *dedimus potestatem* to administer oaths according to law. The speaker received eighty-two votes; the clerk received eighty votes; the assistant clerk received eighty-one votes. After organizing, the

following members, Isaac Hanscom of Lebanon, Edward K. Hall of Newcastle, Robert M. Loring of Robbinston district, George S. Hill of Exeter, Frank C. Nickerson of Linneus, and Oliver P. Bragdon of Gouldsboro district, were admitted by resolution to act as members *prima facie* of said house of representatives. On the same day in the senate chamber, eleven members properly summoned, together with Andrew Hawes, David Duran, Henry C. Brewer of Cumberland county, Jeremiah W. Dearborn, George H. Wakefield of York county, George R. Fernald of Franklin county, Alden Bradford of Washington county, the facts concerning whose election have been hereinbefore stated, met together, and were called to order by Jeremiah Dingley, a senator elect from Androscoggin county, on whose motion Austin Harris, senator elect from Washington county, was chosen to preside as chairman and Charles W. Tilden was chosen secretary *pro tem.* Upon resolution, Andrew R. G. Smith of Lincoln county, was admitted *prima facie* to a seat.

Upon motion, the members elect present proceeded to make a permanent organization by the election of president, secretary, and other officers. Joseph A. Locke, of Cumberland, was chosen president, receiving eighteen votes, and Charles W. Tilden was chosen secretary, receiving nineteen votes. The members were qualified, before election of officers, by taking the oaths prescribed by the constitution, before William M. Stratton, clerk of courts for Kennebec county, and authorized by *dedimus potestatem* to administer oaths. In the organization of both branches of the legislature, the names of all the members elect, who appear by the uncorrrected returns to be elected, were placed upon a roll and were called before proceeding to organize the same, as herein last mentioned.

On the foregoing statement the following questions are submitted:

BANGOR, January 16, 1880.

The undersigned, justices of the supreme judicial court, have the honor to submit the following answers to the interrogatories proposed and based upon the accompanying statement of facts:

QUESTION 1. Have the governor and council a right under the

constitution to summon a person to attend and take a seat in the senate, or house of representatives, who by the official returns under the decision of the court, does not appear to be elected, but defeated or not voted for; or would such summons be merely void as exceeding the power of the governor and council under the constitution.

ANSWER. An election has been had by the electors of this state. The rights of the several persons voted for, depend upon the votes cast. The result should be truly determined in accordance with the constitution and laws of the state. It was the duty of the governor and council thus to declare it. Any declaration of the vote not thus ascertained and declared is unauthorized and void. The governor and council examined the returns and undertook to declare the result as appeared by the returns. Various questions involving the true construction of the constitution and statutes relating thereto arose, and the governor, by virtue of his constitutional prerogative, called upon this court for its opinion upon the questions propounded. By the provisions of the constitution the court was required to expound and construe the provisions of the constitution and statutes involved. It gave full answers to those questions. The opinion of the court was thus obtained in one of the modes provided in the constitution for an authoritative determination of "important questions of law." The law thus determined is the conclusive guide of the governor and council in the performance of their ministerial duties. Any action on their part in determining the vote as it appears by the returns in violation of the provisions of the constitution and law thus declared is an usurpation of authority, and must be held void. It only remains to apply those principles to the subjects embraced in the questions propounded.

The governor and council have no right to summon a person to attend and take his seat in the senate or house of representatives, who by the returns before them, was not voted for, or being voted for was defeated. To summons one for whom no votes had been cast would be a deliberate violation of official duty. To summon those whom the returns show were not elected would be equally such violation. Either would be intruders without right into a

legislative body. The summons thus given would be void, as in excess of any powers conferred by the constitution. Grant this power, and the right of the people to elect their officers is at an end.

QUESTION 2. Has the holder of any such summons a right to take part in the organization, or subsequent proceedings of either house, to the exclusion of the members rightfully elected, as shown by said returns under the decision of the court; or does such right rest in said last named member to the exclusion of the member summoned from the same district?

QUESTION 3. If summonses were issued, under the facts recited in the statement herewith submitted, to Lewis Voter of Farmington district, Daniel Snow of Skowhegan district, Alfred Cushman of Ashland district, James O. White of Jay district, Leonard H. Beal of Lisbon district, Osgood N. Bradbury of Stoneham district, George W. Johnson of New Sharon district, Lincoln H. Leighton of Cherryfield district, Aaron H. Woodcock of Vanceboro district, Harper Allen of Fairfield district, Joshua E. Jordan of Searsport district, would such summonses give either of the above-named persons a right to take part in the organization, or subsequent proceedings of the house; or would such right rest in Cyrus A. Thomas of Farmington district, Hiram S. Stewart of Skowhegan district, John Burnham of Ashland district, John R. Eaton of Jay district, William H. Thomas of Lisbon district, A. F. Andrews of Stoneham district, David M. Norton of New Sharon district, Henry C. Baker of Cherryfield district, Charles A. Rolf of Vanceboro district, A. B. Cole of Fairfield district, Robert French of Searsport district, to the exclusion of the persons summoned from the same district?

QUESTION 4. If summonses were issued under the facts recited in the statement herewith submitted, to Daniel W. True, Edward A. Gibbs, William R. Field of Cumberland county, Rodolphus P. Thompson of Franklin county, James R. Talbot of Washington county, John Q. Dennett and Ira S. Libby of York county, would such summonses give either of the above named persons a right to take part in the organization or subsequent proceedings of the senate; or would such right rest in Andrew Hawes, David Duran,

and Henry C. Brewer of Cumberland county, George R. Fernald of Franklin county, Alden Bradford of Washington county, George H. Wakefield and J. W. Dearborn of York county, to the exclusion of the person summoned from the same district?

ANSWER. The second, third and fourth questions may be answered together. The answer to the first question covers much of the ground embraced by these questions. Holders of summonses which are void for the reason that the governor and council have failed to correctly perform the constitutional obligation resting upon them, have no right to take a part in the organization or in any subsequent proceedings of the house to which they are wrongfully certificated. They are not in fact members. But the members rightfully elected, as shown by the official returns, and the opinion of the court upon the propositions heretofore by the governor presented to the court, are entitled to appear and act in the organization of the houses to which they belong, unless the house and senate, in judging of the election and qualification of members shall determine to the contrary.

A member without a summons, who appears to claim his seat, is *prima facie* entitled to equal consideration with a member who has a summons issued in violation of law.

He is not to be deprived of the position belonging to him, on account of the dereliction of those whose duty it was to have given him the usual summons. The absence of that evidence may be supplied by other evidence of membership. The house and senate have the same right to consider and determine whether, in the first instance, such persons appear to have been elected, and finally, whether they were in fact elected, as they have of any and all the persons who appear for the purpose of composing their respective bodies.

Under the facts recited in the statements submitted to us, we are of the opinion that Lewis Voter and associates, first named in question three, were not entitled to act, and that Cyrus A. Thomas and associates lastly named in the question were entitled to act in the house as members, and that Daniel W. True, and those first named in question four were not entitled to act, and that Andrew Hawes and others with him named were entitled to act as

members of the senate. In neither case did the senate or house itself act upon the question of their membership. Both the senate and house, (meaning the bodies assembled to be organized as such,) were debarred from any action thereon, by the conduct of the presiding secretary and clerk. The assumption of such officers, that no question should be entertained relative to the rights of persons whose names are not upon the rolls furnished by the secretary of state, but who were claimants of seats, was unwarrantable. The statute of 1869, embodied in the revised statutes, chapter 2, section 25, cannot preclude either the senate or house from amending and completing the rolls of membership, according to the facts. Each house has the constitutional right to organize itself.

The form provided for aid and convenience in effecting the organization does not confer upon a temporarily presiding officer such conclusive power.

We have not failed to carefully consider the act of 1869, chapter 67, incorporated into R. S., chapter 2, § 25; and so far as it declares that "No person shall be allowed to vote or take part in the organization of either branch of the legislature as a member, unless his name appears upon the certified roll of that branch of the legislature in which he claims to act," we think it clearly repugnant to the constitution which declares that each house shall be the judge of the election and qualification of its own members. It aims to control the action of each within its constitutional power till after a full organization, with a majority determined and fixed by the governor and council.

By their action in granting certificates to men not appearing to be elected, or refusing to grant certificates to men clearly elected, they may constitute each house with a majority to suit their own purposes, thus strangling and overthrowing the popular will as honestly expressed by the ballot. The doctrine of that act gives to the executive department the power to rob the people of the legislature they have chosen, and force upon them one to serve its own purposes.

It poisons the very fountain of legislation, and tends to corrupt the legislative department of the government. It strikes a death blow at the heart of popular government and renders its founda-

tion and great bulwarks—the will of the people, as expressed by the ballot—a farce.

Each house has the same power, and is charged with the same duty, to declare the election of its own members and organize in any legitimate way as before the passage of that act.

QUESTION 5. Does the same rule apply, when the member summoned appears by the returns to be elected, only because of some error in the name or initials of the candidate not summoned when such error is correctible by law, under the decision of the court, and the official record states the name and initials correctly, under the facts of the Lincoln senatorial district, and the representative districts of Exeter, Newcastle, Gouldsboro', Weston and Robbinston, as recited in the statement herewith submitted; or when the member summoned appears by the returns to be elected, only by rejecting the returns of one town because unsigned by the town clerk, though a duly attested copy of the record of said town is seasonably offered as a substitute and rejected, under the facts as recited in the statement of the Lebanon district.

ANSWER. In the answers of January 3, 1880, this court held, that, in cases like those stated in this question, it is the duty of the governor and council to hear evidence and determine whether the record or return is correct, and, if they determine the record to be correct, to receive it or a duly certified copy of it, to correct the return, as is provided by chapter 212 of the acts of 1877.

But in such case they are required to determine an issue of fact, whether the record or return is correct, and, so far as their action is concerned, in determining that fact, we think their determination is conclusive, subject, of course, to be reversed by the house. If, however, they should refuse to hear evidence and determine the question, and should, by reason of such refusal, issue a summons to the candidate not elected, the case would fall under the rule above stated.

QUESTION 6. If the summons described in question 1 is void, and persons holding such summonses take part in the organization of either senate or house of representatives, and, without the votes of such persons, there are less than sixteen (16) members in the senate, and less than seventy-six (76) members in the

house, voting for and against any of the officers of the so-called senate or house, have such bodies any legal organization or officers?

ANSWER. If objection was made to the admissibility of the illegally summoned persons, as set forth in the statement presented to us, and the houses took no action thereon, then an organization of house or senate, in the manner described in this question, would be illegal and void.

The court expressed the opinion, on a former occasion, that the senate could organize with less than a quorum of members, (35 Maine, 563), where less than a quorum were elected, a condition of things that might happen when it required a majority of votes to elect senators—that decision met the necessities of that occasion. But the doctrine of that case cannot apply, when a quorum is in fact elected.

QUESTION 7. Without such legal organization in either house or senate, or without sixteen (16) members in the senate and seventy-six (76) members in the house, present and voting, on the given measure, can any valid law be enacted, any legal officer chosen or any business whatever be legally done, except to adjourn; and if any business, what business?

QUESTION 8. Without a legal organization formed, and legal officers chosen, by seventy-six (76) members, present and voting, in the house of representatives, and sixteen (16) members, present and voting, in the senate, can either house, compel the attendance of absent members?

ANSWER. Without a legal organization formed and legal officers chosen by seventy-six members, present and voting, in the house of representatives, and by sixteen members, present and voting, in the senate, upon the given measure, no officers can be chosen or law passed or business done, except to adjourn.

No less than seventy-six members can constitute a quorum of the house of representatives, nor can less than sixteen members, (now that a plurality elects,) constitute a quorum of the senate. Nor can either house, without a legal organization formed and without legal officers chosen, compel the attendance of absent members.

It is the house or senate when formed and organized that has

the power to compel such attendance, and it is not within the power of persons who are merely members elect to do so. The attendance may, under our constitution, be compelled by such penalties as each house may provide. Until a legal organization has been effected, there is no house to provide penalties for such purpose. Until a legal organization is completed, there is no officer in either house to issue a warrant against the absent member. No such power was committed, or intended to be committed, into the hands of persons not comprising and acting as an organized and completed house. It has frequently happened in our history, that legislative bodies have been delayed days, and sometimes weeks, without being able to complete an organization for the want of a quorum.

QUESTION 9. To make up the legal quorum required on any vote in either house, can the votes of any person be counted who though summoned, does not appear to be elected by the official returns under the constitution, and the decision of the court?

ANSWER. Not if the attention of the house is called to the fact that such persons are illegally summoned, and objection is seasonably made to the counting of such persons for the purpose of making up a quorum; and the house does not act upon the question of their admissibility.

By the constitution, art. 4, § 5, "the senate shall, on the first Wednesday of January, annually, determine who are elected by a plurality of votes to be senators in each district."

QUESTION 10. Can the governor and council legally administer the qualifying oath to the members elect of the house of representatives when, on a yea and nay vote, as shown by the record, only seventy-three (73) members, both sides inclusive, vote on the motion to request the attendance of the governor and council for that purpose?

QUESTION 11. Can a valid organization of the house be made under the revised statutes, chap. 2, § 23, when, under the facts as stated in question 10, a protest was entered, at the time, that no quorum was manifest on the yea and nay vote, and, notwithstanding that protest, the clerk refused to put a motion to adjourn, and the governor appeared and administered the oath.

QUESTION 12. Can the governor and council legally administer the qualifying oaths to the members elect of the senate, when only twenty (20) members, both sides inclusive, vote on the motion to request their presence for that purpose, and of that twenty (20), eight (8,) though summoned, did not appear to be elected by the official returns under the constitution and the decision of the court, and were not in fact elected?

ANSWER. These three questions, referring to the qualification of members by the administration of the required oath, may be answered together. By the constitution, the oath is to be taken and subscribed in the presence of the governor and council. By the statute, R. S., chap. 2, § 23, the clerk of the preceding house shall preside until the representatives elect "shall be qualified and elect a speaker; and, if no quorum appear, he shall preside, and the representatives elect present shall adjourn from day to day, until a quorum appear and are qualified, and a speaker is elected."

Thus, it will be seen that, while by the statute the clerk is to preside until a quorum shall appear and be qualified, it is not provided, either in the constitution or the statute, that a less number than a quorum shall not be qualified. Nor can the yea and nay vote on the motion to request the attendance of the governor and council, for the purpose of administering the oath, be deemed of any importance. If the governor and council had appeared, without a motion or a vote, their authority would have been the same. We therefore answer, that the qualifying oaths under the constitution or statute may be administered to the members elect of either branch in any numbers, though a quorum must appear and be qualified before proceeding to election of speaker; and if the whole number of votes for speaker is less than a quorum, and there is nothing upon the record to show that a quorum was present and acting, there would be no election.

QUESTION 13. At what date in the year eighteen hundred and eighty (1880), do the terms of office of the following state officers, elected in January, eighteen hundred and seventy-nine (1879) expire: the governor, the executive council, the secretary of state, the treasurer, the attorney general, and the adjutant general?

ANSWER. The governor's term of office, and also that of his

council, expired at midnight following the first Wednesday of January, 1880. The term of the other officers mentioned in this question will expire when their several successors are elected, as provided in the constitution.

QUESTION 14. When the terms of office of the governor and council have expired, or their offices are vacant, and there is neither governor nor council, can the members elect of the senate and house of representatives be legally qualified before a magistrate appointed and commissioned by the governor, with advice of the council, under a *dedimus potestatem*, by virtue of the revised statutes, chap. 2, §§ 85 and 86, or by any other provision of law?

QUESTION 24. When the terms of office of the governor and council have expired, and the acting president of the senate has refused to qualify the duly summoned members-elect, and the acting house of representatives—made up of sixty-two (62) members legally summoned, and fourteen (14) others summoned, but not in fact elected, and not appearing to be elected by the official returns, under the decision of the court—refuse to admit to seats the fourteen (14) members-elect, specified in question 19, or the nine (9) additional members-elect, specified in question 20, or any one of them, can the seventy-six (76) members specified by question nineteen, or the eighty-five (85) members specified by question twenty, after being called to order by one of their number, and a roll of the members-elect read as they appear by the official returns, be qualified before a dedimus justice, and thus constitute and organize a legal house of representatives?

QUESTION 25. When the terms of office of the governor and council have expired, and the acting senate—made up of twelve (12) members legally summoned, and eight (8) others summoned but not in fact elected, and not appearing to be elected, by the official returns under the decision of the court—refuse to admit to seats the seven (7) members who were in fact elected, and who appeared to be elected by the official returns and the decision of the court, can the (7) members thus denied seats, acting with eleven (11) members-elect duly summoned, after being called to order by one of their number, and a roll of the members-elect read as they appear by the official returns and the decision of the court, be qualified

before a dedimus justice and thus constitute and organize a legal senate?

ANSWER. To the 14th, 24th, and 25th questions proposed we answer as follows:

In the general provisions of the constitution, article 9, certain oaths or affirmations are prescribed for persons elected, appointed or commissioned to the offices therein mentioned. It appears that those before whom the prescribed oaths were to be administered refused to act, and that now there is no existing governor and council before whom they can be administered. The oath is prescribed. The terms are the essential. Its binding force depends upon its terms, not on the magistrate by whom it is administered.

If there is no governor and council, or, being a governor and council, they refuse to administer the oath to one representative or to all—for there can be a refusal to all equally as to one—what is the result?

Is anarchy to triumph? Can the government be destroyed or its action paralyzed because there is no governor and council, before whom the prescribed oath is to be taken? We think not. The prescribed oath, from the necessity of the case, may be taken before a magistrate authorized to administer oaths. The members must be sworn before they can act. It is by their action that a governor and council, thereafter, is to be settled and the government continued.

It cannot be presumed that the framers of the constitution had in contemplation that the oath had better not be administered at all, than administered by any other officer than the one designated therein. This is one of the most reliable tests by which to distinguish a directory from a mandatory provision. *State* v. *Smith*, 67 Maine, 328.

QUESTION 15. When the term of one governor has expired by law and no successor has been chosen, can the president of the senate become acting governor, if, at his election, twenty (20) votes only are cast for and against him, and those twenty (20) votes are made up as described in question 12?

ANSWER. Our reply to the fifteenth question is in the negative:

that one, whose only title to the presidency of the senate is by virtue of such an election, cannot become the acting governor, because he is not a legal president of the senate. If, of the twenty voting at such choice of president of the senate, eight did not appear to be elected by the official returns under the constitution and the decision of the court, and were not in fact elected, there was then no legal quorum, and could be no valid election of permanent officers, notwithstanding the eight had been summoned by the governor and council. Without a legal quorum, and with these eight participating in the proceedings to the exclusion of those rightfully elected in their places, there could be no valid election of president of the senate. To proceed with the organization of the senate without first determining and declaring its own membership, when attention was properly called to the fact that persons were present and acting without right, and that members were excluded, the secretary refusing to entertain a motion for the correction of the roll, and refusing to allow an appeal from his ruling, and the senate taking no action although protest was made, was illegal and void.

QUESTION 16. Can a legally chosen president of the senate become acting governor, until he has legally qualified as such, in addition to this qualification as president of the senate?

QUESTION 17. Can such qualifying oaths be legally administered by a president *pro tempore* of the senate, in joint convention of the senate and house of representatives, when less than seventy-six (76) members of the house are present or voting on the motion to proceed to joint convention?

ANSWER. Under the letter of the constitution, it is at least doubtful whether the president of the senate is required to take a new oath, before exercising the office of governo r, when that office has become vacant in the manner specified therein. The practice since the organization of the state, has, we beli eve, been uniform against requiring such new oath, and to such pr actical interpretation of the constitution, in the absence of express provision or manifest intention to the contrary, we think effect should be given. To the sixteenth question we reply, that a legally chosen president of the senate may become acting governor, without the adminis-

tration of any other qualifying oath than that which he has taken in his office of senator.

The answer to the sixteenth question renders a reply to the seventeenth unnecessary.

QUESTION 18. When twelve (12) persons are legally elected members of the house of representatives from the five cities of Portland, Lewiston, Rockland, Bath and Saco, and that fact unmistakably appears on the official returns and by the decision of the court, on the facts recited in the statement herewith submitted have those twelve (12) members elect a right to take part in the organization and all subsequent proceedings of the house, without a summons from the governor and council, no other persons holding summonses for the same seats?

ANSWER. To the eighteenth question we answer as follows:

It appears from the statement of facts, that the members from the five cities of Portland, Lewiston, Rockland, Bath and Saco were duly elected, as well as by the returns before the governor and council; that by law a summons should of right have been issued to them; that in fact no summons was issued; and that their names were not borne on the roll certified to the house as provided by R. S., c. 2, § 25. A motion was seasonably made that these members appearing by the returns before the house to have been duly elected should be permitted to participate in its organization, but the assistant clerk refused to put the motion and to entertain an appeal.

By the constitution the returns were before the house. By those returns the representatives above named appeared to be elected. Their seats were not contested. The governor and council could not, without a violation of their constitutional duty, neglect to issue to them a summons, nor the secretary of state to place their names on the certified roll, which it was his duty to furnish. The governor and council could not legally withhold their summonses from those appearing to be elected. They could not order a summons to issue to some appearing to be elected and withhold it from others. If they could, it would be in their power to select from the members appearing to be elected, those who should and those who should not take part in the organization of the house.

The section 25, R. S. chap. 2, restricts the vote to those whose names are borne on the certified roll. The restricting the vote to those *only* whose names are thus borne is at variance with the constitution, in so far as it restricts and limits the action of the house to those whom the governor and council may select, and not to those appearing to be chosen, and to those the house may determine to be members.

The twelve members had a right to act in the organization of the house. Their election was patent on inspection of the returns. The house in no way denied their right. The question whether their names should be added to the roll was not submitted to its determination. Upon the facts set forth, they appeared to be and were elected, and it is not to be presumed that the house, knowing such facts, would have prohibited their action if the clerk had permitted the question to be put.

These members had a right to take part in the organization of the house, until it should otherwise determine.

Question 19. Can a house of representatives legally organize or act under a certified roll containing one hundred and thirty-nine (139) names only, and giving no representation to the five cities of Portland, Rockland, Lewiston, Bath and Saco, under the facts as stated in question eighteen, (18) without admitting, at once, the twelve (12) members from said cities?

Answer. The house cannot legally organize or act under a certified roll of 139 names only, and giving no representations to the five cities named, provided the representatives from the cities appeared and claimed their seats, and the house took no action whatever upon the question of their right to participate in the organization, the clerk refusing to entertain a motion made for that purpose, and refusing to entertain an appeal from his ruling thereon.

Question 20. When persons are legally elected members of the house from the representative districts of Skowhegan and Farmington, and that fact unmistakably appears on the official returns and by the decision of the court, on the facts recited in the statement herewith submitted for those districts, have those members elect a right to take part in the organization, and all subsequent proceedings of the house, without a summons—the persons sum-

moned having returned their summonses, and declined to serve as representatives on the ground that they were not elected?

ANSWER. To question 20 we answer in the affirmative, unless the house has acted upon the question of their right to act as members and determine to the contrary.

QUESTION 21. Can eleven members, duly elected and summoned and seven other members, not summoned, "but appearing to be elected by a plurality of all the votes returned," under the requirements of the constitution and the decision of the court, constitute and organize a legal senate, provided said eighteen members each received, for senator, a plurality of all the votes cast, and the official records, as well as the official returns, show that fact?

QUESTION 22. Can sixty-two (62) duly summoned members-elect of the house of representatives, together with twelve (12) members elect not summoned from the cities of Portland, Lewiston, Bath, Saco and Rockland, and two (2) members-elect not summoned from the towns of Farmington and Skowhegan, constitute and organize a legal house of representatives, when the fourteen (14) members above enumerated were in fact elected, and that fact appears by the official returns, and by the decision of the court, no other persons holding summonses for the same seats?

ANSWER. It is the opinion of the court, that questions 21 and 22 may be conveniently answered together. Our answer is this: Circumstances may exist which will justify, and render legal, such an organization of the senate, and such an organization of the house. We think such organizations would be justified and rendered legal, by the existence of such circumstances as are recited in the statement of facts submitted to us; and that such organizations, effected under such circumstances, would constitute a legal legislature, competent to perform all the functions constitutionally belonging to that department of our government. Tumult and violence are not requisites to the due assertion of legal rights. They should be avoided whenever it is possible to do so. They can never be justified, except in cases of the extremest necessity. Such peaceful modes of organization are far preferable to a resort to violence.

No rights should be lost by those who seasonably assert them,

and appeal to the constitutional tribunals instead of resorting to force.

QUESTION 23. Can the seventy-six (76) members elect, enumerated in question 19, constitute and organize a legal house of representatives, together with nine (9) other members elect, who were in fact elected, and appear by the official returns, and by the decision of the court, to be elected, though the nine (9) seats aforesaid are claimed by other candidates who were summoned by the governor and council, but were not in fact elected, and do not appear to be elected by said official returns, under the decision of the court?

ANSWER. It will follow from the answers to questions twenty-one and twenty-two, that this question, for the reasons and upon the circumstances there referred to, must be answered also in the affirmative.

QUESTION 26. When a person receives a summons as a member of the house of representatives, and returns the same to the governor, before the assembling of the legislature, and resigns his seat, is it competent for him to recall and cancel that resignation, after the legislature has assembled and organized, or can he be compelled to attend as a member?

ANSWER. One who, under such circumstances, returns his summons and resigns his seat, thereby makes a vacancy in the house which is to assemble, which vacancy "may be filled by a new election," under the provisions of art. IV, part I, § 6 of the constitution. That the proper steps may be taken by the municipal officers to that end, it is necessary to regard such resignation as irrevocable. If, when once made, it could be recalled at will, the municipal officers could never know that the seat was vacated by resignation. One who has thus resigned cannot be compelled to attend as a member. He is no longer a member. The language of the court, touching the power of the house to compel the attendance of their members, in the constitutional opinion given in 35 Maine, 563, applies only to those who, without vacating their seats, absent themselves from the sessions of the body to which they were elected. It would be alike contrary to the spirit of our institutions, and detrimental to public policy, to hold that a man

might be compelled to accept an office of such a character. We therefore answer the question in the negative.

QUESTION 27. In case the official returns of the votes cast for governor should be lost, concealed, or inaccessible, by accident or fraud, is it competent to count the votes for governor, by using certified copies of the official record of the several cities, towns and plantations in the state?

ANSWER. In our recent answer to questions presented by the governor, we said, in substance, that one of the objects of the constitutional requirement of a record of the vote, to be made at the same time and authenticated in like manner with the return, was to guard against the possible result of mistake, accident, or fraud in the official returns of votes. When such returns of the vote for governor are lost, concealed, or inaccessible by accident or fraud, the result of the election may still be ascertained by using certified copies of the official records mentioned in the question. Neither the carelessness nor the turpitude of the officers charged with the making, or the custody, of the returns can be suffered to defeat the will of the people, as expressed in the election, so long as the legislature can ascertain it from the records thus made. True, the constitution provides that the secretary of state shall, on the first Wednesday of January, lay the lists before the senate and house of representatives, but this provision is directory, and a failure to comply with it cannot defeat the right of the legislature to ascertain and declare the result of the election.

When the framers of our constitution and our legislators have taken such pains to perpetuate the evidence of the votes cast, and to guard that evidence against the effect not only of accident, but of human fallibility or perfidy, it is not to be thrown away because the secretary of state fails, or is unable to comply with this direction. The constitution is to be construed, when practicable, in all its parts, not so as to thwart, but so as to advance its main object, the continuance and orderly conduct of government by the people. We answer the question in the affirmative.

The questions before us are attested in the usual mode, and purport to come from organized bodies.

They are of the utmost importance.

Our answers are entirely based on the assumption of the existence of the facts as therein set forth. We cannot decline an answer if we would. In a case like the present, the remark of Chief Justice Marshall, in *Cohens* v. *Virginia*, is peculiarly applicable. "It is most true," he says, "that this court will not take jurisdiction, if it should not, but it is equally true that it must take jurisdiction, if it should."

The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. With whatever doubts or whatever difficulties a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction, which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them.

JOHN APPLETON,
CHARLES W. WALTON,
WILLIAM G. BARROWS,
CHARLES DANFORTH,
JOHN A. PETERS,
ARTEMAS LIBBEY,
JOSEPH W. SYMONDS,

To JOSEPH A. LOCKE, *President of the Senate*,
and GEORGE E. WEEKS,
Speaker of the House of Representatives,
Augusta, Maine.

STATEMENT AND QUESTIONS SUBMITTED

January 24, 1880,

WITH THE ANSWERS OF THE JUSTICES OF THE SUPREME JUDICIAL COURT THERETO.

STATE OF MAINE.

HOUSE OF REPRESENTATIVES,
January 23, 1880.

The committee appointed to consider the question of a constitutional organization of the house, and the present condition of affairs, and which have been instructed to prepare and present to the house a statement of facts with questions appended thereto, to be presented to the judges of the supreme judicial court, have attended to their duty and ask leave to report:

From evidence produced before your committee, the committee find the following facts in regard to the acts of the governor and council, in relation to the returns of votes for members of the senate and house of representatives of the fifty-ninth legislature of Maine and the organization of the said legislature: On the 19th day of November, A. D. 1879, the governor and council commenced to open the returned copies of the lists of votes for senators and representatives to the fifty-ninth legislature, which were made and forwarded to the office of the secretary of state, by officers of the several cities, towns and plantations in this state, and were there found by the governor and council. The governor and council then proceeded to examine said returned copies of said lists of votes, for the purpose of ascertaining what persons thereby appeared to be elected to the senate and house of representatives, by a plurality of all the votes returned. After careful examination of the returns themselves, they entertained all evidence offered to them, in which it was proposed to show that the return from any town or city did not agree with the record of the vote of such town or city which was made up in open meeting, as the constitution requires, in the number of votes or names of the persons voted for.

They did not, after about November 25, 1879, exclude, or refuse to hear, or consider any such evidence, but held open sessions and gave all persons ample opportunity to present such records, and to be heard thereupon, except at such times as the governor and council were engaged in other official business, until the day on which they were required, by the constitution, to issue summonses to such persons as appeared to be elected by a plurality of all the votes returned, to attend and take their seats. They heard counsel in argument in all cases in dispute that arose during their examination of returns, where it was desired, at such times as were convenient for the governor and council; and in no instance was any party interested, or their counsel, precluded from a hearing, except for a few days after the governor and council commenced to open the returns, and before they had themselves sufficiently examined them to perceive upon what points doubts might arise, as to the correctness of the returns, and they declined all hearings until about the 25th of November, after which time their sessions were open, and all interested parties were freely heard; copies of the records, made up in open meetings as the constitution requires, were presented to them from a large number of the cities and towns of the state, all of which were carefully examined by the governor and council, and all testimony and argument offered concerning them heard and considered; and in each instance the governor and council considered and determined as an issue of fact, whether there was any difference between the record and return, and which was correct, and in no instance did they refuse to correct a return by a copy of a record of a town made in open town meeting, or by a copy of a record made by a city clerk in a meeting of the aldermen, as is required by the constitution. In several instances, where an original record was presented and found to agree with the returns, records were afterwards presented which had been made up by town and city clerks, long after the original records were made up, and in most instances after the returns had been opened by the governor and council and compared with the original record, and found to be in entire correspondence therewith. Such new records, not made in open meeting, the governor and council decided were not admissible to

correct returns, and they decided, as a matter of fact, in all such cases, that the original return and record were correct, and therefore in no instance did they correct the returns by a new or amended record. In some instances, oral evidence was offered to prove that the votes cast were not intended for the persons named in the returns and original records; in all such cases the governor and council found, as a matter of fact, that the original return was correct, and determined not to make any change upon the verbal evidence.

Twenty days before the first Wednesday in January, 1880, the governor and council issued summonses to such persons as appeared to be elected thereto by a plurality of all the votes returned, to attend and take their seats in the senate and house of representatives, as the constitution requires. In no instance was a summons issued to any person who was not voted for, or who was not elected by a plurality of all the votes returned, as appeared by the returns duly examined and adjudicated upon by the governor and council, as hereinafter set forth. The governor and council examined the returns from the cities of Portland, Rockland, Saco, Lewiston and Bath, and found, ascertained and determined, as a matter of fact, that said returns did not show that the aldermen of either of said cities, did, in the presence of the city clerk, open, examine and compare the copies from lists of votes given in the several wards of said cities, or that the city clerk of said cities made a record thereof, and that return thereof was made into the secretary of state's office, in the same manner as selectmen of towns are required to do. They also had before them the original records from the said several cities, and heard evidence and arguments respecting the same, from parties and counsel interested therein, claiming there was evidence of an election in said cities, and thereupon, considering the returns, the records, arguments and evidence, adjudicated thereupon, and found, as a matter of fact, that there was no sufficient evidence before them which would warrant the correction by them of the original returns, or which proved, to their satisfaction, that any persons were elected as representatives from said cities, and they therefore declared and reported vacancies in the same. In the

case of Portland, a record was made up by the city clerk, after the original return and original record had been examined by the governor and council, differing materially from the return and original record. But the governor and council decided that such evidence was incompetent to establish an election in said city. The governor and council made a report to the secretary of state in due form, of the names of persons who were elected senators and representatives to the legislature, as ascertained by them from the examinations of the returns, and to whom summonses had been issued; and the secretary of state furnished to the secretary of the preceding senate a certified roll, under the seal of the state, and the names and residences of senators elect, according to said report of the governor and council, from which it appeared that thirty-one senators were elected, and had been duly summoned. And the secretary of state, in like manner, furnished the clerk of the preceding house of representatives a certified roll, under the seal of the state, of the names and residences of the representatives elect, according to the said report of the governor and council, from which it appeared that one hundred and thirty-nine members were elected, and the said secretary also reported the vacancies in the said several cities, which were twelve in number, a copy of which said certified rolls are referred to as a part of this report.

On the first Wednesday of January, 1880, pursuant to the constitution and laws of the state, the members of the house of representatives elect, holding summonses from the governor and council, to attend and take their seats therein, duly issued as above set forth, and whose names appeared on the certified roll of members of the house, assembled in the hall of the house of representatives, to the number of one hundred and thirty-five members, and were called to order by W. E. Gibbs, the assistant clerk of the preceding house of representatives, (B. L. Staples, clerk of said preceding house being unable to act,) who presided until the members were qualified, and the speaker was elected. The said certified roll, from the secretary of state, of representatives elect, was called by said assistant clerk, and one hundred and thirty-five members responded to the call, and a quorum was found to be present. Seventy-six members of said house, whose names appeared upon said

roll, thereupon took and subscribed the oaths required by the constitution, before the governor and council, and the said seventy-six members all being present and taking part in said meeting, a ballot for speaker was then had, and John C. Talbot, having received seventy-two votes, was elected speaker, and upon further ballot being had, Wingate E. Gibbs, having received seventy-four votes, was elected clerk.

Subsequently, on the same day, Stephen J. Young, member from Brunswick, whose name was entered upon said roll, was duly qualified and took his seat. The record of the proceedings of said house of representatives to, and including, said 12th day of January, is made part of this report, as is also said certified roll. During all said first Wednesday of January, there was an opportunity for all other members to qualify, but fifty-eight members neglected and refused to do so. Subsequently, on a later day, sixty members applied to the president of the senate, who had not then assumed to act as governor, to be qualified by him in presence of the council of the preceding year, no new council being elected, which the president of the senate declined to do, at that time, but afterwards, having assumed the duties of governor, namely, on the 12th day of January, notified them that he was prepared so to do, but the said sixty members neglected and refused to so qualify. Thereafter, in the night time of the same day, at six o'clock in the evening, the said sixty members and two others who had been duly qualified, together with twelve other persons holding no summonses to appear and take their seats and whose names were not on the certified roll, but who claimed to be elected, making seventy-four in all, met in the hall of representatives, without giving notice to the seventy-five other members already duly qualified, and who had participated in the organization on the first Wednesday, or giving them any opportunity to take part in the proceedings if they should so desire, although the election of sixty of said seventy-five members was undisputed, and who held summonses to appear and take their seats, and whose names were on said certified roll, and attempted to organize a house of representatives by choice of speaker, clerk and other officers. After being qualified, by taking the oaths prescribed by the constitution, before

Wm. M. Stratton, a clerk of courts for Kennebec county, and authorized by *dedimus potestatem* to administer the oaths required by law, eleven other persons holding no summonses, and whose names were not on said rolls, were then admitted as members of said body, and were qualified by said Stratton as above. After which, they proceeded to election of officers, as above set forth, and after attempting to transact some further business, said assembly then adjourned to Saturday, January 17th. On the said first Wednesday of January, 1880, all those said members of the senate elect, and who held summonses to appear and take their seats duly issued as before set forth, pursuant to the constitution and laws of the state, and whose names appeared in the roll which was certified by the secretary of state to the secretary of the preceding senate, as hereinbefore set forth, being thirty-one members, assembled in the senate chamber, and were called to order by Samuel W. Lane, secretary of the preceding senate, who presided during the organization of the senate, until the president was elected.

The said certified roll was called by said secretary, and said thirty-one members responded to call of their names, and the whole number of members composing that body was found to be present. All of the above members then took and subscribed the oaths required by the constitution, before the governor and council, and then, all being present, and taking part in said meeting, a ballot for president was had, and James D. Lamson having received twenty votes, was elected; and upon further ballot being had, Albert G. Andrews, having received nineteen votes, was elected secretary. The record of the proceedings of said senate to, and including, the 12th day of January, is made part of this report, also said certified roll of members of the senate. Subsequently, in the night time of the 12th day of January, commencing at six o'clock in the evening, eleven members of the senate who had been duly qualified as heretofore set forth, and taken their seats in the senate organized on the first Wednesday in January, and had acted and voted in said senate as members thereof, up to said 12th day of January, together with seven other persons who did not hold summonses to appear and take their seats, and whose names were not upon the certified roll, met in the senate chamber, with-

out giving notice to the twenty other members of the senate, already duly qualified, or giving them any opportunity to take part in their proceedings, if they should so desire, and attempted to organize a senate by choice of president and other officers.

After the last named seven men had been qualified by taking the oaths prescribed by the constitution, before W. M. Stratton, clerk of courts for Kennebec county, and authorized by *dedimus potestatem* to administer oaths according to law, and, after attempting to transact some further business, said assembly adjourned to Saturday, January 17.

In all that was done, as hereinbefore set forth by the governor and council, they acted in ascertainment and performance of their duty, under the constitution and laws, aided by a previous opinion of the judges. The opinion of the judges promulgated on the fifth day of January, 1880, was not received until long after the governor and council had completed their duties as herein set forth, and the certified rolls had been made out by the secretary of state, and forwarded to the secretary of the preceding senate, and clerk of the preceding house of representatives. The senate and house of representatives, in their organization and choice of president and speaker, on the first Wednesday of January, 1880, acted upon the rules of parliamentary law well established in this state, as they understand them, and relating to which reference is hereby made to the following extracts from the opinion of the judges, promulgated on the 5th day of January, only two days before said organization, namely:

"To constitute a quorum it is only necessary to have a majority of the whole number present, and when such a quorum is present, a majority of the quorum may do business. Supposing the number to be seven, four would constitute a legal quorum, and three being a majority of that quorum could legally act, although the fourth should refuse to join them, or should oppose their action. Consequently, if a return from a city having five or seven aldermen is signed by three of them, it may be a valid and legal return, because only four may have been present, and in such a case three (being a majority of those present) could legally act, although the fourth should oppose their action, and refuse to join them. The

law with respect to quorums and majorities is correctly stated in 5 Dane's Abridgement, 150, and 1 Dillon's Municipal Corporations, sections 216, 217. In the latter work it is said that bodies composed of a definite number act by majorities of those present, providing those present constitute a majority of the whole number, or, to use Mr. Dane's illustration, if the body consists of twelve councilmen, seven is the least number that can constitute a valid meeting, though four of the seven may act—that is, a majority of the whole must be present to constitute a legal quorum but a majority of the quorum may act—and, so far as we are aware, the law is so stated, in substance, by all ancient and modern authorities. The rule applicable in such cases is similar to that which applies to our house of representatives. The whole number of representatives established by law is 151. A majority (that is, seventy-six members) constitute a quorum to do business. If there is actually that number present and a majority of them (that is, thirty-nine members) vote in the affirmative, a valid law can thereby be enacted, or any business transacted."

Upon the foregoing statement of facts and copies of records and rolls, we submit the following questions to the justices of the supreme judicial court, and request answers thereto:

1. Was the organization of the senate and election of president and secretary thereof, on the first Wednesday of January, 1880, as set forth in the foregoing statement of facts, and as appears by the record thereof, legal and in accordance with the constitution and laws of the state?

2. Was the organization of the house of representatives, and election of a speaker and clerk thereof, on the first Wednesday of January, 1880, as set forth in the foregoing statement of facts, and as appears by the record thereof, legal and in accordance with the constitution and laws?

3. Were the bodies of the persons who held the meeting on the evening of the 12th day of January, as set forth in the foregoing statement of facts, competent, at that time, and under the circumstances stated, to organize a senate and house of representatives for the state of Maine, to constitute the fifty-ninth legislature, and were they legally organized as such, and do they constitute a legal legislature, under the constitution and laws of the state?

4. If the senate, organized on the first Wednesday in January, 1880, in the manner set forth in the foregoi ng statement of facts, was not legally organized, is that body a convention of the senators elect by or through which a senate may or must be organized, that body having adjourned from day to day from said first Wednesday of January to the present time?

5. If the house of representatives, on the first Wednesday of January, 1880, in the manner set forth in the foreg oing statement of facts, was not legally organized, is that body a convention of the members of the house of representatives elect, by or through which a house of representatives may or must be organized, that body having adjourned from day to day, from said first Wednesday of January to the present time?

All of which is respectfully submitted,

HENRY INGALLS, Chairman.
J. O. ROBINSON,
N. WILSON,
F. W. HILL.

JUSTICES' ANSWER TO THE QUESTIONS SUBMITTED.

BANGOR, January 17, 1880.

In response to the foregoing communication, the undersigned, justices of the supreme judicial court, have the honor to say that, while we cannot admit, even by implication, that the statement and questions now before us are presented by any legally organized legislative body, so as to require an opinion from us, under the constitutional provision of article 6, section 3, we feel that we should be omitting an important service, which the people of this beloved state, and the gentlemen who have presented these questions, presumably from an honest desire to know their duty as citizens in the premises, might fairly expect of us, if we failed to give some of the reasons which compel us to decline to entertain and respond to the aforesaid statement and questions based thereupon.

The solemn occasion is indeed here, in the unparalleled and ominous events in our public history, which have occurred within the last few months; but we are bound to declare that these ques-

tions are not presented by a legally constituted legislative body, for the following reasons briefly stated:

When different bodies of men, each claiming to be, and to exercise the functions of, the legislative department of the state appear, each asserting their title to be regarded as the law-givers for the people, it is the obvious duty of the judicial department, who must inevitably, at no distant day, be called to pass upon the validity of the laws that may be enacted by the respective claimants to legislative authority, to inquire and ascertain for themselves, with or without questions presented by the claimants, which of those bodies lawfully represents the people from whom they derive their power. There can be but one lawful legislature. The court must know, for itself, whose enactments it will recognize as laws of binding force, whose levies of taxes it will enforce when brought judicially before it, whose choice of a prosecuting officer before the court it will respect. In a thousand ways, it becomes essential that the court should forthwith ascertain, and take judicial cognizance of, the question, which is the true legislature?

The existence of certain facts, raising questions as to the powers and duties of the governor and council, in canvassing the votes for members of the senate and house of representatives, was necessarilly implied in the questions propounded by Governor Garcelon, and answered by this court under date of January 3. To put such questions, in the absence of facts requiring their solution, would be an abuse of the power of an executive to call for the opinion of the court upon questions of law, on solemn occasions. Those questions were fully answered, and, by the answers, it appeared that the acts and doings of the governor and council, in issuing certificates of election to certain men as senators, and members of the house of representatives, who did not appear to be elected, and declining to issue certificates and summonses to certain men who did appear to be elected, were in violation of their legal and constitutional obligations and duties.

We are bound to take judicial notice of the doings of the executive and legislative departments of the government, and, when called upon by proper authorities, to pass upon their validity. We are bound to take judicial notice of historical facts, matters of pub-

lic notoriety and interest transpiring in our midst. We can not accept a statement which asserts, as facts, matters that are in conflict with the record and with the historical facts that we are not at liberty to disregard. We cannot shut our eyes to the fact that the governor and council, then in office, disregarded the opinion of the court, given in answer to the governor's question, omitted to revoke the summonses illegally issued to men who did not appear to be elected, or to issue summonses to men who did appear to be elected. We know that the officers who presided in the conventions of the members elect of the senate and house, on the first Wednesday in January, recognized, as members of both those bodies men who were unlawfully introduced into them by the unconstitutional and illegal methods pursued by the governor and council, and refused to recognize men who appeared to be legally elected, and refused to permit any appeal, from their illegal decisions, to the bodies over which they were temporarily presiding. The report of the committee of the council and the action of the governor and council thereon, of which we must take judicial notice, show that men were thus admitted and excluded, upon grounds which this court declared, in their answer to Governor Garcelon's questions, to be untenable and illegal. It cannot be successfully claimed that there was ever a quorum in the house of representatives, which undertook to organize on the first Wednesday of January, without counting men who could only appear to be elected, because the late governor and council pursued modes which this court declared, in their answers to his questions, to be unconstitutional, illegal and void. These men were not, in fact, elected. They did not appear to be elected, by the returns canvassed in the manner in which the constitution and law, rightly interpreted, required the governor and council to canvass them.

We cannot recognize a house of representatives, to make a quorum in which the presence of these men was necessary, as a lawfully constituted body, or capable of performing any of the functions of a house of representatives, when due protest was made in behalf of those who were in fact elected by the people. In like manner, the presence, in the senate, of men claiming seats, to the exclusion of those whom a canvass legally conducted would show to be elected, and being recognized as members of the convention,

by the temporarily presiding officer, who, though protest against his illegal action was made on the spot, refused to permit an appeal from his decision to the convention of senators elect, vitiated the organization of that body. We have only to reaffirm the principles we asserted in our answers of January 16, 1880, upon those subjects, in coming to the result that the bodies propounding to us the foregoing questions, are not a legally organized house of representatives and senate, under the constitution of this state.

It remains to be considered, whether there is a legally organized legislature in existence, entitled to enact laws that must be binding upon the people and the courts of the state. The action of those controlling the proceedings, on the first Wednesday of January, 1880, has not been acqui esced in by a quorum of those appearing to have been elected to either house. It is a matter of history that, after unsuccessful resistance to the illegal action of the officers attempting to create the legislative organization on that day, a majority of the persons who appeared to be elected to the two houses formed an organization of themselves. They refrained from forming an independent organization, until the 12th day of January, hoping until then, to obtain their rights in some other way. They were forced into such a position by the illegal action of the minority of members, whose action they were not obliged to submit to, and which they could, in no other reasonable manner resist. The organizations, made on January 12th, were made by a majority of the members appearing to be elected, and having the *prima facie* right to seats. The point is raised by the statement, and questions submitted, that no legal organization could be formed on January 12th, because no notice of the intended action was given to the minority or non-attending members, so as to enable them to participate therein. The minority were not excluded. The organization was made in a public manner. The minority were at the time claiming to be, and are still claiming to be, the lawful legislature. It is not to be presumed that they would have abandoned that organization, at that time, had notice been given. We do not think that the want of notice invalidates the organization of January the 12th. There may be irregularities in the manner in which such organizations were formed, but the voice of the people is not on that account to be stifled, nor the true govern-

ment to fail to be maintained. No essential defects any where exist, but only such departure from ordinary forms as circumstances compelled. History can never fail to declare the vital fact that the organizations of January the 12th were formed by full quorums of persons appearing by the records and returns as duly elected members of either house.

It cannot be that such a construction must be given to the constitution of the state as will subvert the plain and obvious intention of its framers, or place it in the power of a few men to perpetuate their hold upon the offices in the gift of the people, in defiance of the will of the voters, constitutionally expressed and ascertained, because their own neglect of duty has made some departure from directory provisions and ordinary forms inevitable.

A legally organized legislature being now in existence, and exercising its constitutional functions, it follows that no convention of members-elect of either house can exist which can be treated as a nucleus for another organization. Two governments are claiming to be in existence, as valid and entitled to the obedience of the people. Both cannot rightfully exist at the same time; but one government can be recognized and obeyed. The responsibility and solemn duty are imposed upon us, to determine which is entitled to judicial recognition.

We therefore, after due deliberation and consideration of all matters involved, affirm and declare our judgment to be, that the senate whose presiding officer is the Hon. Joseph A. Locke, and the house of representatives whose presiding officer is the Hon. George E. Weeks, constitute the legal and constitutional legislature of the state.

(Signed,) JOHN APPLETON,
CHARLES W. WALTON,
WILLIAM G. BARROWS,
CHARLES DANFORTH,
JOHN A. PETERS,
ARTEMAS LIBBEY,
JOSEPH W. SYMONDS.

To A. G. Andrews, H. H. Cheever, Esq., Augusta, Maine.

NOTE.—The foregoing appendix (including statements, questions, and answers) is taken from the legislative document printed under order of the house under date of January 17-19-28, as certified by its clerk, Aramandal Smith. The manuscript did not come into hands of the reporter.

INDEX.

AMENDMENT.

1. Errors and deficiencies in court records are to be expected. R. S., c. 79, § 10, requires their correction. Third parties may be affected thereby, but they are presumed to know that if a clerk has made a mistake it may be corrected. *Bean* v. *Ayers*, 421.

2. The settled rule in this state is, that the court will allow an amendment of a mistake committed by a recording officer, when such amendment will be in the 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 record been originally in proper form. *Ib.*

ASSAULT.

See ASSAULT AND BATTERY. INDICTMENT, 1. WITNESS, 1.

ASSAULT AND BATTERY.

An action for assault and battery cannot be commenced by trustee process. *Woodworth* v. *Grenier*, 242.

See PRACTICE, (Law,) 31.

ASSIGNMENT.

K, a patentee for a certain improvement in car couplings, and having in view certain other improvements therein; and having invented certain improvements in car platforms and draw bars, and having in contemplation certain other improvements therein, entered into an indenture with the defendant, S and R, by which the defendant, S and R were each to pay one-third of all expenses incurred in securing before and thereafter letters patent on the inventions, or contemplated inventions, and in introducing the inventions into actual use; and whenever any part of the patents were sold to any persons other than the defendant, S and R, for actual use, then the expenses of sale and further introduction to be paid by all the parties *pro rata*. K also agreed to devote his time and inventive powers to perfecting all the patents, and, as soon as letters were obtained, to assign to the defendant, S and R an undivided one-sixth thereof to each. Subsequently K assigned a portion of his half to certain others, who with all others interested organized themselves into the plaintiff corporation under R. S., c. 48, §§ 18–20, for the purpose of manufacturing and selling the patented articles and licenses to make and use the same, all of the parties becoming stockholders therein. Thereafter, K assigned to the plaintiff company all his title and interest in his two patents for improvement in car couplings, therein agreeing to assign to the plaintiffs all future improvements by him made in the premises, and that the full benefit of the indenture first named should accrue to and become the property of the plaintiffs. Thereafterwards, the defendant, S and R assigned to the plaintiffs all their title and interest in the same patents, with an agreement that the full benefit of the indenture first named should accrue to and become the property of the plaintiffs. In an action by the plaintiffs to recover one-third of the expenses mentioned in the indenture between K and the defendant, S and R: *Held*, that K's assignment to the plaintiffs did not include his claim for such expenses incurred before the assignment; and that K's assignment and the assignment of the defendant, S and R extinguished the indenture.

Knowlton and P. & C. C. Co. v. *Cook*, 143.

See EVIDENCE, 3. SHIPPING, 5.

ASSUMPSIT.

1. An action of assumpsit on account annexed to the writ cannot be maintained by a wife against her husband while the connubial relation remains in full force. *Hobbs* v. *Hobbs*, 383.

BILL OF SALE.

See SALE, 1, 2.

BOND.

See BASTARDY, 1, 4. DOWER, 4. LICENSE, 2. PRACTICE, (LAW,) 25.

BOOM PRIVILEGES.

BOUNTY—EQUALIZATION OF.

See APPENDIX, No. 2, 560.

CONTRACT.

be in the 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 record been originally in proper form. *Ib.*

COVENANT.

See ACTION, 2.

CRIMINAL LAW.

See COMPLAINTS, EVIDENCE, 7, 13, 14. INDICTMENT. PRACTICE, (Law,) 31, 32, 33, 34.

CROPS.

See EXECUTOR, &c., 3.

DAMAGES.

1. For trespass committed willfully, wantonly or maliciously, the jury have the right, and are entitled, in making up their verdict to add to the actual damages, just such an amount as, in their sound discretion and good judgment, under all the circumstances, the defendant ought to pay (and the plaintiff receive) as punishment for the wrong doing. *Ames* v. *Hilton*, 36.

2. The common doctrine applicable to all cases is, that the damages recoverable shall be the natural and proximate consequence of the act complained of. Within this general definition other rules exist,—rules within a rule. *Thomes* v. *Dingley*, 100.

3. The ordinary measure of damages applying to warranty of personal property is the difference between the actual value of the articles sold and their value if they had been such as warranted. Additional damages, however, are sometimes recoverable, if specially declared for, and such as may reasonably be supposed to have been contemplated by both parties when the contract was made as a probable result of a breach of it. *Ib.*

4. The defendants, manufacturers and vendors of carriage springs, sold to the plaintiffs several sets of springs to be used by them in the construction of carriages, warranting them to be of the best of steel: *Held*, that the parties must be supposed to have intended a warranty that the articles were fit and suitable for the particular purpose for which they were ordered and sold, and that the defendants were liable to the plaintiffs for the necessary expenses of taking out of the carriages, in which they were placed, some of the springs, which proved defective, and inserting o thers in place of them; such damages, though special or consequential, not being regarded as uncertain, speculative or remote. *Ib.*

5. When the owner of a lot of land, with buildings thereon, agrees to convey it at a future day on payment of the purchase money by the purchaser, and

ESTOPPEL.

See FRAUDULENT CONVEYANCE, 3. PAUPER, 3, 4.

EVIDENCE.

EXCEPTIONS.

INSURANCE.

LAW AND FACT.

LEGISLATURE.

LEX LOCI.

LICENSE.

LIEN.

OWNERS.

See BOOM, &c. EVIDENCE, 10. PRACTICE, (Law,) 21.

PAROL GIFT.

See EASEMENT.

PARTNERSHIP.

1. C bargained for a grist mill and appurtenances, paid $1,000 down, and took a bond for a deed; made a verbal contract to sell it to D, and received $1,300 of him in part payment; D took the possession, laid out a considerable sum in repairs and improvements, and carried on the business a short time, when he and C made a verbal contract of copartnership in the grist mill business, and carried it on together at this grist mill for two years, neither of the parties claiming rent; the grist mill was taxed to the company, and one year's taxes were paid out of the company's funds, and payments were made on C's notes named in the bond for a deed which he held, by giving credit to the parties to whom the payments were made on the company's books. A dam tax of $75 was paid in the same manner. At the end of the two years C gave D notice that he was going to dissolve the copartnership; D proposed that it should be mutual, and that they should bid for choice of the mill property. C does not deny that he told D that he would shortly say what he would give or take, but he did not do this; yet a few days afterwards he took a deed of the mill property to himself, discharged the bond, excluded his copartner, mortgaged the mill property to secure some partnership debts, and some of his own and the balance remaining due of the purchase money, and brought this bill in equity to close the partnership affairs. The bill and answer both admit the existence of the partnership. It is satisfactorily proved that the verbal contract for the sale of the mill from C to D was abandoned by mutual consent when they went into partnership, and that the understanding between them was that the purchase of the mill property should be completed on partnership account, the sums previously paid and expended by the partners severally, toward the purchase or in the improvement of the mill property, to be regarded as so much contributed by them respectively to the partnership funds. *Held*, that there is nothing in the statute of frauds to prevent partnership equities from attaching to the grist mill property, and that it should stand charged, as between these parties, for the payment of partnership debts, and any balance that may be found due to either of the partners upon the final adjustment of the partnership accounts; the legal title not to be disturbed except as may be necessary for these purposes.

Collins v. *Decker*, 23.

2. A partner in the purchase and permitting of lands, who by agreement puts his personal services against the furnishing of capital by his copartner, has the right to charge against the partnership any sums necessarily expended by him for the personal services of others in and upon the common property. *Burleigh* v. *White*, 130.

PASSENGER.

PATENT.

PAUPER.

PAYMENT.

See CONTRACT, 9. ESTOPPEL, 1.

PRACTICE, (Law).

SETTLEMENT.

See ESTOPPEL, 1, 3. INSANE PERSON, 1. PAUPER, 13.

SET-OFF.

See EXECUTOR, &c., 5.

SEX.

See INDICTMENT, 2.

SHIPPING.

1. Under a contract by a common carrier for the carriage of goods by water, evidenced by a bill of lading in the usual form signed by the proper agent in the ordinary course of business, the owners of a vessel are responsible only for such goods as are embraced in the bill of lading and delivered on board the vessel, or into the actual custody of the master, or such as were so delivered as and for those embraced in the bill before the vessel sails.
Witzler v. *Collins*, 290.

2. Ordinarily the master has no authority to bind the owners by giving a receipt for goods at any other than the accustomed place of delivery. *Ib.*

3. There can be no constructive delivery of goods so as to bind the owners for their carriage except at such place, as where by constant practice and usage they have received property left for transportation. *Ib.*

4. A bill of lading is an instrument of a two-fold character. It is a receipt as to the quantity and quality of the goods to be carried and a contract as to their carriage. *Ib.*

5. As a receipt it is open to explanation or contradiction the same as other receipts. Its acknowledgment of the apparent condition of the goods, though strong proof of its truth, is no exception to the rule. An admission of that which is not true is not binding except when an estoppel. In this case the admission is not an estoppel because there has been no assignment of the bill of lading, nor has the plaintiff acquired any new rights or changed his position in consequence of it. *Ib.*

6. Where a judgment is recovered, for the earnings of a vessel, in the name of only one of several owners of the vessel, the presumption is that the other owners are entitled to their share of the proceeds thereof, after deducting the costs and expenses of collecting the same.
Call v. *Houdlette*, 308.

See LIEN, 3, 4, 5, 6, 7.

SHORE.

See BOOM, &c.

SOLDIER.

See BOUNTY, &c., 1, 2, 3, 4.

STAKEHOLDER.

See BETTING, &c., 1, 2, 3.

STATUTES CITED, EXPOUNDED, &c.

REVISED STATUTES.

STATUTE—CONSTRUCTION OF.

1. Statute 1876, c. 67, "to prevent the destruction of certain fish in the upper waters of the Penobscot river," is not repealed by the Stat. 1878, c. 75, § 28. *State* v. *Thompson*, 196.

2. The word "expect" in R. S. c. 86, § 1 is a misprint and should read "except." *Woodworth* v. *Grenier*, 242.

STUMPAGE.

SUPERIOR COURT.

The judge of the superior court rendered judgment for the defendant, whereupon the plaintiff alleged exceptions: *Held*, that the judge had no authority to reopen the case on its merits after receipt of the mandate of the supreme judicial court of "exceptions overruled." *Lunt* v. *Stimpson*, 250.

SURETY.

SURPLUS.

TAX.

1. It is only by a strict adherence to the mode prescribed by law that real estate can be conveyed for non-payment of taxes,—the same being for an inadequate consideration, and against the will of the land owner.
Whitmore v. *Learned*, 276.

2. A description of the premises in proceedings under a tax sale thus, "house and lot bought of David Harris," is imperfect and does not contain the intelligible description required by R. S., c. 6, § 159. *Ib.*

3. In order to authorize the sale of the whole parcel taxed, it must distinctly appear of record that the sale of the whole was required to pay the tax, interest and charges. *Ib.*

TROVER.

See EXECUTOR, &c., 2.

TRIAL JUSTICE.

Under R. S., c. 83, § 12, when a trial justice is unable to attend at the time and place at which a writ is returnable before him, and the action is thereupon continued by a justice of the peace and quorum to a day certain,—in order to give another trial justice, residing as specified in said section, jurisdiction to try said action at the time and place to which it was continued, it must appear of record that the inability of the justice named in the writ to attend had not been removed. *Inman* v. *Whiting*, 445.

TRUSTEE PROCESS.

1. Where one partner, without the knowledge or consent of his copartner, pays his own note to a private creditor out of the funds of the insolvent firm, such creditor knowing that the money belonged to the firm, the funds so received will be regarded as held by the private creditor in trust for the benefit of the firm, and may be attached in his hands upon a trustee process instituted against the firm by one of its creditors.

Johnson v. *Hersey*, 74.

2. To charge an alleged trustee by reason of any money due from him to the principal defendant, it must appear that, when the writ was served upon the trustee, the money was due absolutely and not contingently.

Webber v. *Doran*, 140.

3. Thus, where the principal defendant agreed to put into the basement of a court house furnaces which should heat the building to the satisfaction of the county commissioners, at a specified price, payable when completed, and thereupon put in two furnaces which had not been accepted when the writ was served upon the county; and within a reasonable time thereafterward the furnaces were rejected as insufficient, and a new contract was made for adding another for a specific sum together with the original sum and interest: *Held*, that the trustee be discharged. *Ib.*

4. An action for assault and battery cannot be commenced by trustee process.

Woodworth v. *Grenier*, 242.

See SCIRE FACIAS.

TRUST.

1. In equity, generally, when land is conveyed to one person on the payment of the consideration by another, a resulting trust will be presumed in favor of him who pays the consideration. *Stevens* v. *Stevens*, 92.

2. *Aliter*, when the purchase is made by a husband and the conveyance is to the wife. In such case the presumption is that it was intended for the benefit of the wife. *Ib.*

3. When a husband pays the consideration of a conveyance of land to his