REPORTS

OF

CASES IN LAW AND EQUITY

DETERMINED BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

By JOSEPH WHITMAN SPAULDING,
REPORTER TO THE STATE.

MAINE REPORTS,

VOLUME LXXI.

PORTLAND, MAINE :
DRESSER, McLELLAN & COMPANY.
AUGUSTA:
CHARLES E. NASH.
1881.

CHARLES E. NASH, PRINTER, AUGUSTA.

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.

Judges of the Superior Courts.

HON. PERCIVAL BONNEY, CUMBERLAND COUNTY.
HON. WM. PENN WHITEHOUSE, KENNEBEC COUNTY.

ATTORNEY GENERAL.

HON. HENRY B. CLEAVES.

TABLE

OF CASES REPORTED.

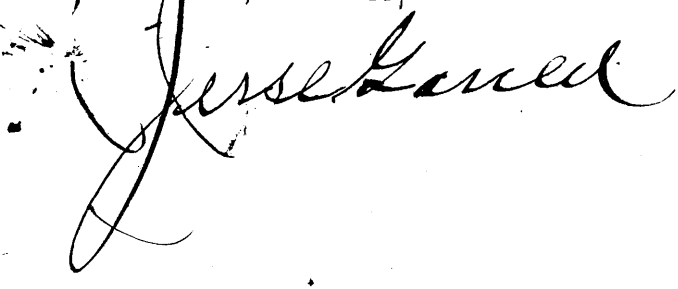

TABLE OF CASES

CITED BY THE COURT.

CASES

IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

JOHN K. AMES and others *vs.* CHARLES W. VOSE and another.

Washington. Opinion July 30, 1879.

Agreement. New trial.

When parties agree upon a surveyor, to scale logs, they will, in the absence of fraud or mathematical mistake, be bound by his scale.

ON EXCEPTIONS AND MOTION to set aside the verdict.

ASSUMPSIT for hauling and driving 899,252 feet spruce and pine logs, winter of 1875, at $4.50, $4046.63.

Plea, general issue, and an account in set off amounting to $3026.69.

At the trial the plaintiff testified that at the time of making the contract with the defendants for this lumbering operation, it was agreed that Elisha C. Chase should be the scaler, and he was to decide what logs were to be hauled, and the plaintiffs were to land the logs so that he could count them and scale them.

The following scale bill was in the case:

"East Machias, April 29, 1875. Schedule of logs hauled by

Smith & Gardner, from township No. 24, into Machias river, winter 1874–5:

4383 spruce logs, - - -	479,570 feet,	m'k'd
1256 pine " - - -	159,234 "	
1652 rotten pine logs, - -	260,448 "	T I V
7291	899,252	

E. C. CHASE."

The verdict was for plaintiff for $1140.97.

George Walker, for the plaintiffs.

J. A. Milliken, for the defendants, contended that the verdict should be set aside. While the general principle stated by the presiding judge, that parties agreeing upon a scaler are concluded by his action, in the absence of fraud or mistake, is unquestionably correct, there are peculiarities in this contract that materially modify the application of that principle to this case.

WALTON, J. Assumpsit to recover compensation for hauling and driving logs. The jury returned a verdict for the plaintiffs for $1140.97. The defendants claim a new trial, first, for misdirection of the presiding judge, secondly, upon the ground that the verdict is against evidence, and, thirdly, for newly discovered evidence. The misdirection complained of was a statement of the familiar and well settled rule of law that, when the parties have agreed upon a surveyor to scale logs, they will, in the absence of fraud or mathematical mistake, be bound by his scale. The ruling was correct. The court is of opinion that the verdict is not against evidence; certainly not so clearly against evidence as to justify setting it aside. The newly discovered evidence is the statement of a teamster that he counted the logs daily, and that the whole number was 7206. The scaler made them 7291 — eighty-five logs more than the teamster. No reason is perceived why this evidence, by the use of due diligence, might not have been discovered before the trial as well as after.

Exceptions and motions overruled.
Judgment on the verdict.

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

FRANCES HILTON *vs.* ALONZO F. ADAMS.

Somerset. Opinion November 29, 1879.

Innkeeper. Cattle.

An innholder receiving cattle, driven on the road, to keep over night, is responsible, as such, for the safety of the place provided for them.

In the absence of any notice to the contrary from an innkeeper, at the time of receiving cattle to keep over night, the jury were warranted in finding, that it was to him, as such innkeeper, that the property was delivered.

ON MOTION to set aside the verdict.

This was an action on the case against an innkeeper for not safely keeping the plaintiff's cow, and by reason of the negligence of the defendant the cow was cast, hooked and died. Plea was general issue.

At the trial there was evidence tending to show that plaintiff's husband was driving the cow, which was injured, and other cattle from a place above Moose River to Moscow, and put up at the defendant's inn at Jackmantown for the night in June, 1876. The cattle were put into the yard with the defendant's cows for the night. The next morning the injured cow was found cast under the barn, in the basement, the doors to which, leading from the yard, were open; and after a few days she was killed because of her injuries.

The verdict was for plaintiff for $39.20, and the defendant moved to set it aside as against evidence and the weight of evidence and the law and evidence.

O. R. Bacheller, for the plaintiff.

J. J. Parlin, for the defendant, contended that the verdict was against the law and evidence, and cited: R. S., c. 27, § 5; 2 Parsons on Contracts, 154; *Hawley* v. *Smith*, 25 Wend. 642; *Albin* v. *Presby*, 8 N. H. 408; *Healey* v. *Gray*, 68 Maine, 489.

SYMONDS, J. There is testimony in the case, from which it was clearly competent for the jury to find that the defendant was the keeper of a common inn. His own statement, on this point, is much more like an admission, than a denial. *Commonwealth* v. *Wetherbee*, 101 Mass. 214.

It was fairly within the province of the jury to determine, under proper instructions, whether the cattle, one of which was injured, were, or were not, *infra hospitium;* and whether there was, or was not, any interference, or assumption of responsibility, on the part of plaintiff's agent, or any negligence on his part, such as to relieve defendant from liability as innholder. The jury have settled these questions under instructions to which no exceptions are taken. There is no sufficient reason for saying that the facts were otherwise than the jury found, or for disturbing the verdict as against evidence.

Unless limited by statute, or unless the circumstances are such as to relieve the innkeeper at common law, his liability extends to the safe keeping of all the goods and property of the guest, that are received within the protection of the inn. Default is to be imputed to him wherever there is a loss, not arising from the plaintiff's negligence, the act of God, or the public enemies; and the cases make no distinction, in this respect, between the loss of the goods of a guest, and injury to them, while *infra hospitium;* 1 Chitty on Contracts, 675; *Shaw* v. *Berry*, 31 Maine, 478, 486.

The liability is not confined strictly to those goods which pertain to the guest as a traveler. It extends to all the movable goods and money of the guest placed within the inn. *Berkshire Woolen Co.* v. *Proctor*, 7 Cush. 417, 426.

We see no reason why, under the circumstances of this case, an innholder, receiving cattle driven on the road as these were, is not responsible, as such, for the safety of the place provided for them. In the absence of any notice to the contrary from the defendant at the time, the jury were warranted in finding it was to him as an innkeeper that the property was delivered. Such a finding was not against the evidence in the present case.

There is nothing to indicate that the keeping of the cattle was intended to be gratuitous; or that in this respect they were received on any other terms than those on which the plaintiff's agent was entertained; namely, for pay. Whether the total amount paid included a charge for keeping the cattle, or whether after the injury the defendant saw fit to make no charge, is of no importance. There was no release of the plaintiff's claim.

That the defendant assumed the liability of an innholder for the safe keeping of the cattle, that one was injured by his fault, in allowing them to be put in an unsafe place, and that plaintiff's agent did not assume the risk in this respect, are points settled by the verdict. Nor can we say it is against law or evidence.

Motion for new trial overruled.
Judgment on the verdict.

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

CHARLES B. WILLIAMS *vs.* JESSE GILMAN.

Kennebec. Opinion February 5, 1880.

Veterinary Surgeon, — contracts of. Declaration. Testimony.

In an action to recover damages caused by the alleged negligence and unskillfulness of a veterinary surgeon in gelding a colt; *Held*, that instructions to the jury, that it was the duty of the defendant to give the colt such continued further attention, after the operation, as the necessity of the case required, in the absence of special agreement or reasonable notice to the contrary, were correct, though the declaration only alleged a want of care and skill with reference to the operation itself.

The defendant having testified, on cross examination and without objection, that two colts gelded by him at about the same time and manner as the colt belonging to the plaintiff was gelded, had died; *Held*, it was erroneous to exclude inquiry on the part of the defendant's counsel as to the cause of their death.

A party cannot introduce testimony of collateral facts, which might prejudice, and then object to an explanation of them.

ON EXCEPTIONS from the superior court, Kennebec county.

Writ was dated October 1, 1877. Verdict was for plaintiff, and the defendant alleged exceptions.

The exceptions allege the following to have been a part of the testimony at the trial and the ruling of the court thereon:

Jesse Gilman, the defendant. *Cross interrogatories.*

Question.—Did you alter a colt for Melvin Gordon about that time? *Answer.*—Yes, sir, I did. *Question.*—Did he die? *Answer.*—He did. *Question.*—Did you alter one for Elbridge Allen the same day you altered the other one for Gordon?

Answer.—Yes, sir. *Question.*—You altered him the same as you altered that horse, didn't you? *Answer.*—Yes, the same way.

Redirect. Question.—You were inquired of in relation to some colts that you altered of other parties? *Answer.*—Yes sir, Gordon and Allen. *Question.*—You said they died? *Answer.*—Yes, sir. *Question.*—What did they die of? [Objected to and excluded.] *Question.*—Whether they had disease on them at that time, and if so, what was it? [Objected to and excluded.]

Daniel C. Robinson, for the plaintiff, claimed that the questions of counsel on the redirect examination of defendant, being seasonably objected to, were properly excluded, and contended that the rule referred to by counsel as laid down in *State* v. *Sargent*, 32 Maine, 429, is not applicable to this case, for the reason that the testimony called out on cross examination, which counsel desired explained, was itself irrelevant and would have been excluded if objected to when offered.

Bean & Bean, for the defendant.

SYMONDS, J. This is an action to recover the damages caused by the alleged negligence and unskillfulness of the defendant, a veterinary surgeon, in gelding a colt belonging to the plaintiff.

We think the instructions to the jury in regard to the duty of the defendant to give continued attention to the colt after the operation, in the absence of a special agreement or reasonable notice to the contrary, were correct. It is true, the declaration only alleges a want of care and skill, on the part of the defendant, with reference to the operation itself; but an allegation of negligence in this respect we think would be sustained by proof that the defendant failed to use such appliances or to prescribe such treatment as to one who exercised reasonable skill and care in his calling were obviously necessary to preserve the colt from injury resulting from the operation. Without some order from the plaintiff to the contrary, or some notice from defendant or agreement of parties, limiting the defendant's liability and specifying to what extent his services were to be required and rendered, it was a part of the duty of such a practitioner, incident

to the performance of the operation itself, to direct what should be done to prevent the injurious results that might naturally follow, and to give his personal attention to such matters, so far as they fell within the ordinary scope of a veterinary surgeon's calling. Proof that he failed in these respects would sustain the allegation that he was guilty of negligence in his conduct with reference to the operation which he had been employed to perform.

There is no report of evidence, and nothing to show that the questions to certain witnesses who testified as experts, were objectionable. We assume that the hypothesis contained in the questions were framed with reference to the testimony, and were such as to enable the jury to get the opinions of the experts upon the issues of facts on which they were to pass. Nothing appears to the contrary.

We approach now the single point on which we think the learned judge, before whom the case was tried, erred in his ruling. While the defendant was on cross examination, in answer to direct questions and without objection, he testified that two colts, gelded by him, one on the same day, and the other at about the same time, and in the same manner as the colt belonging to the plaintiff was gelded, had died.

This testimony, called out by the plaintiff, could have had no other object or effect, than to prove, or tend to prove, the general unfaithfulness or unskillfulness of the defendant in his employment or occupation as a veterinary surgeon.

When, on redirect examination, the defendant was asked, of what disease these colts died, and whether they had disease upon them at that time, or not, the questions were excluded.

We think this was erroneous. If the jury were to have with them as a part of the evidence, the defendant's statement that two colts, gelded by him at about the same time and in the same way, had died, the witness had a right to say whether they died of disease, or as the result of the operation. If the testimony be called purely collateral, it was not for the plaintiff to call out collateral facts, which might prejudice, and then object to an explanation of them. "The rule that testimony collateral to the issue, cannot be contradicted, does not apply to testimony introduced by the opposite party, but is confined to testimony

introduced by cross examination of an opponent's witness, or otherwise, by the party which proposes to contradict it." *State* v. *Sargent*, 32 Maine, 431. Nor do we think such a piece of testimony can properly be treated as merely collateral, because it bears upon the general conduct of the defendant in the same respect as that in which, in a special instance, it is under investigation. It could not be, therefore, a matter resting wholly in the discretion of the presiding justice. It was the legal right of defendant to explain such damaging facts.

Exceptions sustained.

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

NAHUM MORRILL, Administrator of the Estate of JOSHUA ROBINSON, deceased, *vs.* JOSHUA ROBINSON, Junior.

Androscoggin. Opinion February 11, 1880.

Deed. Consideration. Parol testimony, Estoppel.

In the absence of fraud, there being no ambiguity or uncertainty in the terms of the deed itself, verbal admissions of the defendant, like other parol testimony, are inadmissible to modify or vary its legal effect.

The grantor and his representatives, in the absence of fraud, are estopped by the consideration clause in the deed from alleging that it was executed without consideration.

ON REPORT.

The facts appear in the opinion.

Nahum Morrill, for the plaintiff, contended that if the deed offered in evidence by the defendant was made for the particular purpose of taking the place of an old deed of anterior date to the mortgage, upon which the action was based, it would be fraudulent to use it to defeat and discharge the mortgage. Kerr, Fraud & Mistake, 276, 388; *Brainard* v. *Brainard*, 15 Conn. 585; 3 Blackstone (Shars.), 431; 1 Story's Eq. 12th ed. 37; *Bright, Ex'r*, v. *Eynon*, 1 Burr. 399; *Sawyer* v. *Burke*, 12 Pet. 11; *U. S.* v. *Spaulding*, 2 Mes. 476; 3 Bac. Abr. Title, Fraud; *Jones* v. *Emery*, 40 N. H. 348; *Hoitt* v. *Holcomb*, 23 N. H. 535; 2 Greenl. Ev. § 246; *Somes* v. *Skinner*, 16 Mass.

348; *Bliss* v. *Thompson*, 4 Mass. 488; *Seymour* v. *Hoadley*, 9 Conn. 420; *McDonald* v. *Trafton*, 15 Maine, 225; *Boyce, Ex'r, v. Grundy*, 3 Pet. 310; *Prentiss* v. *Russ*, 16 Maine, 30; *Reservoir Co.* v. *Chase*, 14 Conn. 132; *Holbrook* v. *Burt*, 22 Pick. 546; *Dobell* v. *Stevens*, 3 B. & C. 623; *Hotsen* v. *Browne*, 9 C. B. 442.

Parol evidence may be received to contradict and explain a written instrument. *Jones* v. *Emery*, *supra*; *Brainard* v. *Brainard*, 15 Conn. 575; *Goodwin* v. *Hubbard*, 15 Mass. 219; 1 Chitty Contr. (11th Am. ed.) 159, 160; *Johnson* v. *Miles*, 14 Wend. 195; *Russell* v. *Rogers*, 15 Wend. 351 *Holley* v. *Young*, 66 Maine, 520; *Bollinger* v. *Eckhart*, 16 Serg. & R. 424; *Cooling* v. *Noyes*, 6 D. & E. 264: *Armstrong* v. *Hobbs*, 1 Coxe, 178; *Colburn* v. *Mathews*, 2 Rich. 386; *Swift* v. *Hawkins*, 1 Dall. 17.

The acknowledgment of payment in a deed is open to unlimited explanation in every direction. *Farrar* v. *Smith*, 64 Maine, 74; *Goodspeed* v. *Fuller*, 46 Maine, 141; *Emmons* v. *Littlefield*, 13 Maine, 233.

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

SYMONDS, J. This is a writ of entry, alleging that Joshua Robinson, senior, the plaintiff's intestate, within twenty years last past, was seized of about twenty acres of land in Auburn, in fee and in mortgage, and that the defendant has thereof disseized him.

The plaintiff introduces the mortgage under which he claims as administrator, dated April 14, and recorded April 23, 1866.

Besides the general issue, the defendant, in a brief statement, pleads title in fee in himself and offers in evidence a deed of warranty from Joshua Robinson, senior, dated March 28, and recorded April 4, 1877.

The deed and mortgage are correct in form, and their delivery is not denied.

The plaintiff attacks the warranty deed to the defendant on the ground of fraud, and for the purpose of defeating its operation as a later deed, discharging the mortgage, offers the following testimony:—"That, on or about March 26, 1877, the defendant applied to a scrivener to go to his house to make a

deed from the deceased, who was the defendant's father, to him; and at that time said he had a deed of the premises, but it was good for nothing; he at that time exhibited the deed to the scrivener, who read it and advised the defendant that it was a good and valid deed. The defendant then said that there was no stamp on it, and that he rather pay for a new deed than to be at the expense of having that one stamped; that, on March 28, 1877, he, the scrivener, when to the defendant's house, where he found the deceased who was then sick; that deceased told him in presence of the defendant, that he wanted to give the defendant a new deed of the premises described in the writ, because the old one was good for nothing; that he made the deed, the deceased signed and acknowledged it, the defendant paid him for his services, and he then went away. The plaintiff further offered to prove that when said deed was made and delivered, no money was paid by the defendant to the deceased, as a consideration for said conveyance, and that no reference was made to the aforesaid mortgage, and, further, that the defendant subsequently admitted that the deed offered by him in evidence was made to take the place of the old deed and to confirm it and that he had destroyed the old deed."

It would certainly be going very far to hold that here is evidence of fraud, to defeat a deed. It would be to give an undue weight to the circumstances disclosed, and to treat a suspicion as proof. The testimony offered does not contain a single statement of the son to the father. Whether there had been a conversation between them on this subject, and what was its tenor, if one occurred, are questions to which there is no reply, except by inference. The only remark of the father, which appears, is the direction to the scrivener to write a new deed, which he wanted to give to the defendant, because the old deed was good for nothing. This old deed is not produced, nor its contents proved, and whether it was in fact good or not, we only know from the opinion of the scrivener;—unless we are to assume its validity, from the fact that the only complaint which the demandant offered to prove on the part of the defendant in regard to it was the absence of a stamp.

To treat the deed as fraudulently procured, upon this evidence, would be to act upon a suspicion, without proof.

Without fraud, and without ambiguity or uncertainty in the terms of the deed itself, verbal admissions of the defendant, like other parol testimony, were inadmissible to modify or vary its legal effect, and the plaintiff, representing the intestate, is estopped to deny a consideration for the deed.

Judgment for the defendant.

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

JOHN F. CAMERON *vs.* DANIEL TYLER.

Waldo. Opinion February 13, 1880.

Interlocutory Orders. Exceptions. Amendment. Capias.

Exceptions to mere interlocutory orders, like the overruling of a defendant's motion to dismiss, and the allowance of an amendment to the plaintiff's writ, while they must be filed at the term when the proceedings complained of are had, should remain in the court where the action is pending, until it is ready for final disposition, and be brought to the law court, if at all, with such exceptions as may arise at the trial, or when the case is in such a position that an adjudication upon them is necessary for a final determination of the rights of the parties. Otherwise they are liable to be regarded as prematurely presented and to be dismissed.

A capias writ may be amended, changing its form to capias or attachment, in the discretion of the presiding judge, with or without terms, and exceptions do not lie to the exercise of such discretion.

ON EXCEPTIONS.

TRESPASS. The writ was dated October 1, 1878. The command in the writ was to arrest the defendant, and it was not framed to attach the goods and estate of the defendant, and for want thereof to take the body, &c. The defendant filed a motion to dismiss the action because of the defect in the writ. The presiding judge allowed the plaintiff to amend his writ, changing it from a capias to a capias or attachment, and overruled the motion to dismiss.

No arguments were presented to the law court.

N. A. Turner, for the plaintiff.

Wm. H. Fogler, for the defendant.

BARROWS, J. The defendant takes exceptions to the overruling of his motion to dismiss, and to the allowance of an amendment of the plaintiff's writ, and, without any further proceedings to put the case in condition for final disposition, brings his exceptions to the law court, asking us to pass upon questions which may never be even in his own estimation of any importance to him.

Exceptions to interlocutory orders and rulings, while they must be filed at the term when the proceedings complained of are had, should remain in the court where the action is pending, until it is ready for final disposition, and come here, if at all, at the same time with other exceptions raised at the trial, if any, or when the case is in such a position that an adjudication upon them is necessary for a final determination of the rights of the parties. Otherwise they are liable to be regarded as prematurely presented, and to be dismissed. *Daggett* v. *Chase*, 29 Maine, 356; *Witherel* v. *Randall*, 30 Maine, 168; *Abbott* v. *Knowlton*, 31 Maine, 77.

The case shows that the action was one in which an arrest was allowable under R. S., c. 113, § 1; and there was no foundation for the motion to dismiss except the alleged want of form in the writ.

If an amendment be regarded as needful, so as to put the writ in the form spoken of in R. S., c. 81, § 2, it was amendable under c. 82, § 9, in the discretion of the presiding judge; and with or without terms. *Bolster* v. *China*, 67 Maine, 551. To this exercise of the judge's discretionary power, exceptions do not lie. *Clapp* v. *Balch*, 3 Maine, 219; *Cummings* v. *Buckfield, B. R. R.* 35 Maine, 478; *Achorn* v. *Matthews*, 38 Maine, 173.

Exceptions overruled.

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

IRA WEYMOUTH, Surviving Partner, *vs.* PENOBSCOT LOG DRIVING COMPANY.

Penobscot. Opinion February 13, 1880.

Penobscot Log Driving Company, is a corporation. Construction of Charter. Negligence of Agents. Corporations. Third persons.

An organization under a charter, which provides, that certain persons named, with their associates and successors "are hereby made and constituted a body politic and corporate" and as such "may sue and be sued, prosecute and defend to final judgment and execution," "and may hold real and personal estate not exceeding fifty thousand dollars at any one time, and may grant and vote money," and "have all the powers and privileges, and be subject to all the liabilities incident to corporations of a similar nature," constitutes a corporation which would be liable to any person suffering damages through a negligent performance of any of its duties.

Where the charter for a log driving company provides, that the "company may drive all logs and other timber" in a certain stream, the word "may" is to be construed as permissive and not imperative. But when the company accepts the privilege thus conferred of driving "*all* the logs," &c., it assumes a duty commensurate with the privilege conferred. By this acceptance it has the exclusive right to drive all the logs, and the duty to drive results.

Whether the agents of a corporation have been negligent in performing their duties, is a question for the jury.

A person, not a member of a corporation, is not bound by the provisions of any vote it may have passed, or any contract it may have made, to which he is not a party.

ON EXCEPTIONS AND MOTION to set aside the verdict.

An action on the case to recover damages of the defendant corporation for carelessly and negligently preventing the plaintiffs from seasonably delivering 751,290 feet of spruce logs, and 48,780 feet of pine logs, cut and hauled by them in the winter of 1872–3, on landings on the steam between Caribou lake and Chesuncook lake, at the outlet of Chesuncook lake, in consequence of which 600,000 feet of the plaintiff's logs were not driven to market in the year 1873, but were left behind in an exposed position, where many were lost, and there was a great shrinkage in quantity and quality.

The writ is dated December 8, 1877.

Plea, general issue.

The verdict was for plaintiff for $1496.51, and the defendants move to set the same aside as against law, and against evidence and the weight of evidence. The defendants also allege

exceptions to refusals of the presiding judge to give certain requested instructions.

The following are the provisions of the charter of the defendant corporation referred to in the argument of counsel and opinion of the court.

"An act to incorporate the Penobscot Log Driving Company: Section 1. That Ira Wadleigh, Samuel P. Strickland, Hastings Strickland, Isaac Farrar, William Emerson, Amos M. Roberts, Leonard Jones, Franklin Adams, James Jenkins, Aaron Babb and Cyrus S. Clark, their associates and successors, be, and they are hereby made and constituted a body politic and corporate, by the name and style of the Penobscot Log Driving Company, and by that name may sue and be sued, prosecute and defend, to final judgment and execution, both in law and in equity; and may make and adopt all necessary regulations and by-laws not repugnant to the constitution and laws of this State and may adopt a common seal, and the same may alter, break and renew at pleasure; and may hold real and personal estate not exceeding the sum of fifty thousand dollars at any one time and may grant and vote money; and said company may drive all logs and other timber that may be in the west branch of Penobscot river between the Chesuncook dam and the east branch to any place at or above the Penobscot boom, where logs are usually rafted, at as early a period as practicable. And said company may for the purpose aforesaid clear out and improve the navigation of the river between the points aforesaid, remove obstructions, break jams and erect booms where the same may be lawfully done, and shall have all the powers and privileges and be subject to all the liabilities incident to corporations of a similar nature."

"Section 3. Every owner of logs or other timber which may be in said west branch between said Chesuncook dam and said east branch or which may come therein during the season of driving and intended to be driven down said west branch, shall on or before the fifteenth day of May in that year, file with the clerk a statement in writing, signed by such owner or owners, his or their authorized agent, of all such logs or timber, the number of feet, board measure, of all such logs or timber, and the marks thereon, and the directors or one of them shall require such owner or owners or agents presenting such statement to

make oath that the same is, in his or their judgment and belief, true, which oath the directors or either of them are hereby empowered to administer. And if any owner shall neglect or refuse to file a statement in the manner herein prescribed, the directors may assess such delinquent or delinquents for his or their proportion of such expenses, such sum or sums, as may be by the directors considered just and equitable. And the directors shall give public notice of the time and place of making such assessments by publishing the same in some newspaper printed in Bangor, two weeks in succession, the last publication to be before making such assessments. And any assessment or assessments when the owner or owners of any mark of logs or other timber is unknown to the directors, may be set to the mark upon such logs or other timber. And the clerk shall keep a record of all assessments and of all expenses upon which such assessments are based, which shall at all times be open to all persons interested."

"Section 4. Said directors are hereby authorized to make the assessment contemplated in the last preceding section, in anticipation of the actual cost and expenses of driving, and in any sum not exceeding for each thousand feet, board measure, the sum of sixty-two and one half cents, and so in proportion to the distance which any logs or other timber is to be or may be driven between said Chesuncook dam and the places of destination, to be determined by said directors. And if after said logs or other timber shall have been driven as aforesaid and all expenses actually ascertained, it shall be found that said assessment shall be more than sufficient to pay said expenses, then the balance so remaining shall be refunded to the said owner or owners in proportion to the said sum to them respectively assessed." Approved August 10, 1846.

An act additional, approved July 31, 1849: "Section 1. The Penobscot Log Driving Company may drive all logs and lumber between the head of Chesuncook lake and the east branch, instead of between the Chesuncook dam and the east branch, and with all the powers, rights and privileges, and under the same conditions, limitations and restrictions, as is provided in the act to which this is additional; and may assess according to the provisions of said act, a sum not exceeding twenty-five

cents for each thousand feet, board measure, in addition to the sum of sixty-two and one half cents, as provided for in the fourth section of said act, for the purpose of paying the expenses of driving said logs and lumber across said lake."

An act to amend, approved April 20, 1854: "Section 1. The Penobscot Log Driving Company, are hereby authorized to make an assessment for the purposes required in said charter of the sum of eighty cents for every thousand feet of lumber driven by said company, instead of sixty-two and a half cents as is provided in said charter."

An act additional, approved April 9, 1856: "Section 1. The powers granted to the said company are hereby enlarged and extended so as to include within the chartered limits thereof the boom and piers, now in process of being erected at the head of Chesuncook lake, which are to become the property of said company, and all the expenses of erecting and completing the same, are to be assumed and borne by said company."

"Section 2. The company may assess a toll pursuant to the provisions of their charter, not exceeding one dollar for every thousand feet, board measure, of logs driven under the provisions of said act; and all acts and parts of acts providing for any different rate of toll are hereby repealed, except that they shall remain in force as to all tolls heretofore assessed and remaining uncollected."

"Section 3. The directors may authorize the treasurer to give the company notes for the amount necessary to be raised to pay the expenses of erecting said boom and piers for such sums and payable at such times as they direct. Provided, this act shall be accepted by the said company at a meeting called for that purpose."

An act additional, approved March 21, 1864: "Section 2. Said company shall be under no obligation to drive any logs coming into the Chesuncook lake at any other point than from the main west branch unless seasonably delivered to them at the head or outlet of said lake."

An act additional, approved February 24, 1865: "Section 1. The Penobscot Log Driving Company may assess a toll not exceeding two dollars per thousand feet, board measure, on all logs and lumber of the respective owners, which may be driven

by them, sufficient to cover all expenses, and such other sums as may be necessary for the purposes of the company, and all acts and parts of acts inconsistent with this act are hereby repealed."

A copy of votes passed at the annual meeting of the Penobscot Log Driving Company, held February 11, 1873:

"Voted. That the directors be authorized and directed to employ a suitable person for agent on the drive."

"Voted. That it shall be the duty of the person employed as agent on the drive, to determine when and where logs may be left on said drive; and whoever drives the logs in said drive the ensuing season shall be under the direction of said agent; and for all logs left without the consent of said agent, a reasonable damage therefor the directors shall collect of the party making said drive, said agent to keep an account of all logs left."

Contract of Henry Davis to drive the West Branch in 1873:

"Bangor, February 18th, 1873.

Memorandum of agreement between the Penobscot Log Driving Company, of the one part, and Henry Davis, as principal, and George W. Pickering and George C. Pickering, as sureties, on the other."

* * * * *

"Said Weed, [A. B. Weed] or other person satisfactory to Davis, to be selected by the directors, is to accompany the drive and may act as clerk of the drive; he shall decide when the drive shall leave Chesuncook dam, and he is to follow the drive and see that it is faithfully performed. He shall also decide what logs may be left in the drive, and his decision shall be binding, he to keep account thereof, and all others shall be driven. His wages to be paid one-half by each party, but to be boarded by Davis."

* * * * *

That contract was on the day of its date transferred by Henry Davis to John Ross.

There was evidence tending to show that A. B. Weed was the person agreed upon as agent and clerk as provided by the vote and contract, and that he acted as such.

Defendant's counsel requested the presiding justice to instruct the jury as follows:

"1. The corporation is not by their charter under any legal obligation to drive the logs; but the charter gives them the power to drive, and for all such logs as they do drive the corporation is to be paid."

"2. If the plaintiff did not file with the clerk the notice required by section three of their charter he cannot maintain this suit."

"3. If the parties having charge of the drive under the company, acted with integrity and good faith in what they did in making the drive, and in concluding upon the best and proper time for starting, the company is justified in what they did, and would not in that case be liable to plaintiff."

"4. The decision of Mr. Weed, as the party agreed upon for starting the drive, under the contract and vote, (one or both,) if honestly made, was binding on the plaintiff, and justified the company in leaving as they did."

Wm. H. McCrillis and *John Varney*, for the plaintiff, upon the question of the liabilities of the defendants under their charter, depending upon the construction of the word *may* in section one, "may drive all logs," &c., cited: Bouvier's Law Dictionary—word, May; Angell & Ames on Corporations, 10th ed. 114; *Fowler* v. *Larkins*, 77 Ill. 271; Potter's Dwarris on Statutes, 220, note 27; *People* v. *Otsego County Supervisors*, 51 N. Y. 401. "The word *may* in a statute means *must* whenever third persons or the public have an interest in having the act done which is authorized by such permissive language."

I. *A. W. Paine*, for the defendant, claimed that the act of incorporation formed a mutual company, and not a stock company, and that no liability was incurred or intended to be imposed upon the company to drive all logs, &c., and cited: R. S., c. 42, § 6; 15 Mass. 205; 11 N. Y. 601; 1 Blatch. 359; 68 Maine, 414; 7 N. Y. 99; 14 Pet. 178; 16 How. 261; 2 Paine, 584; Dwarris on Statutes.

If the duty was mandatory there would be some clause recognizing it as in the case of railroads; R. S., c. 51; common

carriers, c. 52; telegraph companies, c. 53; aqueducts, c. 54; mills, c. 57; toll bridges, c. 50; corporations, c. 46 & 48; banks, c. 47; hawkers, c. 44; fish and fisheries, c. 40; division fences, c. 22; pounds, c. 23; paupers, c. 24; ferries, c. 20; law of the road, c. 19; ways, c. 18.

This case differs from those where *may* has been construed *shall* as in *State* v. *Sweetsir*, 53 Maine, 440; *Milford* v. *Orono*, 50 Maine, 533, and cases cited; 1 Pet. 64; 1 Hill, 545; 61 Maine, 506; 5 Cow. 193; 39 N. H. 435; 42 N. H. 102; 61 Maine, 494. In this connection counsel also cited: *Phelps* v. *Hawley*, 52 N. Y. 23; *People* v. *Supervisors*, 51 N. Y. 401; 3 Hill, 612; 4 Wall. 435; 5 Wall. 708.

II. The positive requirements of section three of the charter, that the owner of logs to be driven shall file with the clerk a statement, is a condition precedent to any liability on the part of the company to drive. *R. R. Co.* v. *Brewer*, 67 Maine, 295; *Veazie* v. *Bangor*, 51 Maine, 509, and 53 Maine, 50; *Johnson* v. *Ins. Co.* 112 Mass. 49; *Prentiss* v. *Parks*, 65 Maine, 559. And there was no waiver of that requirement in this case. *Pratt* v. *Chase*, 122 Mass. 262; 47 Maine, 298.

III. If the company is compelled to drive all the logs seasonably delivered they have the right to rely upon their own best judgment, honestly exercised, as to the time for starting the drive, and not the judgment of a jury afterwards impanneled to try their case. If the defendant's agent acted honestly in fixing upon the time for starting, the plaintiff and all others must abide. 3 How. 83; 7 How. 89–130; 10 Met. 108; 120 Mass. 565; 51 N. H. 128; 37 Conn. 365; 49 Pa. St. 151; 44 Mo. 491; 17 Ohio, 402; 36 Cal. 208; 3 Allen, 170; 1 Hilliard Torts, 108; 11 M. & W. 755; 1 Pars. Contr. 54–5, 73; 6 Met. 13–26; *Larrabee* v. *Sewall*, 66 Maine, 376.

IV. The plaintiff, by offering his logs to be driven by a hired contractor, is bound by the rules adopted for governing the drive as expressed both in the vote and in the contract.

Counsel further argued in support of the motion to set aside the verdict.

DANFORTH, J. It is contended that this action is not maintainable, and the court was requested to instruct the jury that, "The corporation is not by their charter under any legal obligation to drive the logs; but the charter gives them the power to drive, and for all such logs as they do drive, the corporation is to be paid."

It is claimed that this instruction is required by a fair construction of the terms of the charter.

It is unquestionably true, that when any doubt exists as to the meaning of any language used, it is to be interpreted in the light afforded by the connection in which it is used, the several provisions bearing upon the same subject matter, the general purpose to be accomplished, as well as the manner in which it is to be accomplished.

It is also true that when the terms of an act are free from obscurity, leaving no doubt as to the meaning of the legislature, no construction is allowed to give the law a different meaning, whatever may be the reasons therefor.

The first ground taken in support of the request, is that the defendant company is a "mutual association combined together for mutual benefit to aid each other in the accomplishment of a given object in which all are equally interested," and the inference drawn is, that each is equally responsible for the doings of all. This view is endeavored to be sustained by the alleged facts that "it is not a stock company, has no capital, no power to do anything for others than its own members, no permanent stockholders, no stock, and no provision for raising money to pay any charges or expenses except the expense of driving."

If these suggestions are found to be apparent from the provisions of the charter, they, or a portion of them, will be entitled to great weight, and might perhaps be considered conclusive. The most important of them are not so found. It may be that the charter was obtained for the mutual benefit of the log owners. Nevertheless, by its express terms it constitutes its members a corporation with all the rights, liabilities and individuality attached to corporations of a similar nature. The first section provides that certain persons named, with their associates and successors,

"are hereby made and constituted a body politic and corporate," and as such it may sue and be sued, prosecute and defend, may hold real and personal estate, not exceeding fifty thousand dollars at any one time, and may grant and vote money. Thus the charter gives all the attributes of a corporation and none of a simple association. It may not have stock, and if not, it can have no stockholders. But that is not necessary to a corporation and does not constitute an element in any approved definition of it. If it has no stock, it may have a capital, and though it may assess only a certain amount upon the logs driven, the charter does not preclude money from being raised in other ways. Nor is the amount which may be assessed upon the logs driven, limited to the expense of driving. The amendment of 1865 provides for a toll, not exceeding a certain amount, upon the logs driven "sufficient to cover all expenses, and such other sums as may be necessary for the purposes of the company."

Nor do we find any provision "that it may not do anything for others than its own members." By the charter it may drive all the logs and other timber to be driven down the west branch of the Penobscot river, while all owners of such logs may not be members of the company. It does not appear whether the first corporators were such owners or otherwise. In the charter we find no provision prescribing the qualification of the members. The by-laws provide, not that the member shall be an owner of logs to be driven, but he must be an "owner of timber lands or engaged in a particular lumbering operation on the west branch of the Penobscot river, or its tributaries," and can then be a member only on application and receiving a majority of the votes of the members present. Hence the company may be acting for others, not members, while its members may not own a single log in the drive.

There is then no ground upon which this defendant can be held to be a mutual association, acting as a partnership for the benefit of its own members only, each bound by the acts of the others, but it must be held as a corporation acting as such, for the benefit of its own members, perhaps, but also for such other owners of logs as may not choose to become members, or may not possess the required qualification of "being a land owner, or a practical

operator," or may not be able to get the requisite number of votes to make them such. It is a significant fact that in this case it does not appear that the plaintiff is a member of the defendant company, and until that does appear he cannot be subjected to the liabilities of one.

The fact that there is no specific provision for raising money to meet such a liability, as is here claimed, is immaterial. It cannot affect the plaintiff's right to a judgment. The liability of the log owners to be assessed, and its limits, are fixed by law, as also the purposes to which such assessments may be applied. Any recovery against the defendant will not change that law in the slightest degree. No assessment hereafter made can be increased to meet any contingency not contemplated by the charter, and if the plaintiff, after having obtained judgment, is unable to find means wherewith to satisfy it in accordance with the law, he will simply be in the condition of many other judgment creditors before him who have paid largely for that which affords them no benefit.

It is further contended that the action cannot be maintained, because, while the defendant under its charter has the right to drive all the logs to be driven, the obligation to do so is not imposed upon it. In other words, by the provision of the charter, it is left optional with the company to drive such as it may choose to do.

The language is, "and said company *may* drive all logs and other timber that may be in the west branch of the Penobscot river," &c., and it is contended that the word "may" must be construed as permissive and not as imperative. If any argument were needed to show that such is its proper construction, it would seem that the able and exhaustive discussion of this point by the counsel, would leave no room for doubt. The charter was granted as a privilege and not for the purpose of imposing an obligation, and when granted it has no binding effect until accepted by those for whom it was intended. But when accepted it becomes of binding force and must be taken with all its conditions and burdens, as well as its privileges. It cannot be accepted in part, but must be taken as a whole.

In this case the charter conferred the privilege of driving, not a part, not such a portion as the company might choose, but "all" the logs to be driven. This right having been accepted by the company, it became a vested and also an exclusive right. It is therefore taken not only from all other corporations, but excludes the owner as well. If this exclusion was beyond the power of the legislature, it is not for this defendant to complain, for the right has been given to and accepted by it. By its acceptance and exclusion of the owner from the privilege, in justice and in law it assumed an obligation corresponding to, and commensurate with its privilege. It accepted the right to drive *all* the logs, and that acceptance was an undertaking to drive them *all*, or to use reasonable skill and diligence to accomplish that object. This duty is not one imposed by the charter, certainly not by that alone, but is the result of the defendant's own act; it is its own undertaking; virtually a contract on its part, to accomplish that which it was authorized to do.

R. S., c. 42, § 6, referred to by the defendant's counsel, is certainly a very good illustration of the law applicable to this case. There the person whose logs become so intermixed with those of another, as not conveniently to be separated for the purpose of being floated to market, "may drive all the timber with which his own is so intermixed," and "shall be entitled to a reasonable compensation therefor." This clearly is a privilege conferred, a permission given and not an obligation imposed. Hence it is optional with the owner, whether to drive the logs so intermixed or otherwise. But having elected to drive them, he, as the defendant in the case at bar, becomes a bailee for him, and is clearly subject to such care and skill as legally attaches to such a position. True the defendant does not become bailee unless the logs were seasonably delivered, as required by the amended charter, and hence the principal question tried by the jury was, whether they were so delivered. Upon such delivery, the defendant in this case, as the owner in the case referred to, becomes liable to the duties of bailee, not by virtue of the statute alone, but by the assumption of rights conferred.

2. The court was requested to instruct the jury that, "If the plaintiff did not file with the clerk the notice required by section three of the charter, he cannot maintain this suit." This was refused and hence no question of waiver arises. Whether there was a waiver would be a question for the jury and not for the court. The instruction given, held this notice unnecessary, and thereby took this question from the jury; if, therefore, the notice referred to, is a condition precedent to the obligation of the defendant to drive, the exceptions must be sustained, otherwise not. The notice referred to, was required by the act, unconditionally, and was to contain a description of the logs with the quantity. There is no declaration distinctly stating the purpose for which it was to be filed, but it is found in the section providing for the assessments necessary to pay the expenses, and such assessments were to be laid upon the quantity so returned. It is also provided in the same section, that if the notice, or "statement" as it is called in the charter, is not filed, the directors may assess such delinquent in such sum as they may deem "just and equitable." This is the only penalty prescribed for a neglect in this respect, and this provision seems to contemplate very clearly that the lumber is still to be driven, and that the object of the written statement is rather for the protection of the log owner in the matter of assessments.

Nor does the priority of time assist the defendant's construction. It is true that when mutual acts are to be done by the parties to a contract, and the one is a consideration of the other, and one is to be performed first, that fact is often of great assistance in ascertaining whether it is not a condition precedent. Here the time of filing the statement is fixed, the time of starting is not, but it is to be at as early a period as practicable. Thus in the charter the two periods are independent of each other, and we find in it nothing whatever, to show that one was necessarily to be earlier than the other. The one is certain and definite, the other uncertain and indefinite, depending largely upon the state of the season, and the contingencies of the weather, as bearing upon the practicability of collecting the lumber together and getting it down the river.

The result is, we find nothing in the charter which tends to show that the filing of the statement was intended to be a condition precedent to the obligation to drive, but rather that it was inserted for the sole purpose of regulating the assessment, and since that has been changed by the amendment of 1864, the provision is of little or no practical benefit, if not in fact repealed.

3. This request is substantially, that if those having charge of the drive, acted with integrity and good faith in what they did in making the drive, and in concluding upon the time of starting, the company would not be liable to the plaintiff.

This is undoubtedly correct as far as it goes. It correctly contemplates that in making the drive, the defendant acted as an agent of the log owners. As the corporation must necessarily do its work through agents, it would be responsible for such agents. Integrity and good faith are indispensable requisites for an agent, but skill and diligence are equally so. The testimony in this case shows that a considerable amount of skill, as well as experience, was necessary to a successful drive where these logs were to be driven. This skill and experience, it appears, were equally necessary in determining when to start, as in managing the drive after it was started. The skill required according to the authorities cited by counsel, is reasonable skill, "which is such as is ordinarily possessed, and exercised by persons of common capacity, engaged in the same business or employment; and ordinary diligence, which is that degree of diligence, which persons of common prudence are accustomed to use about their own affairs." *Mechanics* v. *Merchants Bank*, 6 Met. 26. Both these elements were ignored in the request and supplied, so far as necessary, by the instructions. The defendant, therefore, has no cause of complaint.

4. "The decision of Mr. Weed, as the party agreed upon for starting the drive, under the contract and vote, (one or both,) if honestly made, was binding on the plaintiff, and justified the company in leaving as they did." Such was the fourth request for instructions, and if the case shew the facts to be as assumed in the request, it might have been proper to have given it. But

such is not the case. The contract referred to, is that made by the defendant with Ross, for driving the logs, and under that contract, the parties to it would undoubtedly be bound by the judgment of Weed, as to the time of starting, "if honestly made." But the plaintiff is no party to that contract, and therefore is not bound by its terms. So, too, as to the vote. If that can be fairly construed as authorizing Weed to decide upon the proper time for starting, as perhaps it may be, possibly it may be binding upon all the members of the company. But as before stated, the case no where shows that the plaintiff is a member, and therefore he cannot be holden by its votes. On the other hand, both by the vote and contract, Weed is made the agent of the company, and it must therefore be held responsible for the discharge of his duties, not only with honesty, but with ordinary skill and diligence, as before stated.

5. Upon this point the instruction was, "that if the judgment of Weed was passed—if it was an honest judgment—if he was a competent person to judge, and judged in view of what appeared, and what might be probable from past experience, in relation to the subject matter, the testimony is, of course, important testimony; how far it would affect you, to bind these parties, is entirely for your decision, in view of all the testimony and circumstances in the case." The important question presented to the jury was, whether the logs had been seasonably delivered, and this was treated as depending upon the fact as to whether the starting of the drive had been delayed as long as it should have been. The presiding justice had before instructed the jury that "the delivery must be seasonable, not only in view of the situation of things as they actually existed, but seasonable considering the exigencies and liabilities, as they would at the time appear to exist to the mind of a prudent and competent person acting reasonably." Bearing in mind the fact that the allegation in the writ, upon which the action is founded, is that of negligence in starting the drive too soon, and thus preventing a seasonable delivery of the plaintiff's logs, the latter instruction would seem to be not only correct law, but peculiarly applicable to the case, and is that contended for in the argument. The

other instruction which is excepted to, is not inconsistent with this. It does not, as claimed, substitute the after judgment of the jury to the prior judgment of those in charge as to the time of starting. This would be objectionable. Those in charge had the responsibility. They must judge as "competent and prudent men," acting reasonably, aided only by the knowledge gained from past experience, as to the probable future, and without that knowledge gained from subsequent developments which a jury might have, and this in fact was all that was required. But whether this judgment was exercised, or whether in failing to do so, the agents were guilty of negligence, was, as it always must be, a question of fact for the jury, and this was precisely the question submitted. Weed might have been an honest and competent man, and yet might have been negligent in the exercise of his judgment. If in such case his judgment, even honestly made up, is to be conclusive, then he is the judge in his own case. Such law shuts out from the jury the very question to be submitted to them.

The instruction does not take from the jury the evidence to be derived from the agent's judgment, but permits them to consider it and hold it conclusive if they please, but requires them to take with it all the testimony and circumstances of the case. Surely it is not for the defendant to complain of this.

In examining the testimony under the motion, we find it somewhat conflicting. The witnesses were before the jury and they were the judges of the credibility and weight to be given to each. We are not able to say that the jury were biased or acted corruptly.

Motion and exceptions overruled.

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

MILLS PATTERSON *vs.* PENOBSCOT LOG DRIVING COMPANY.

Penobscot. Opinion February 13, 1880.

Penobscot Log Driving Company, — Construction of Charter. Negligence. Agents.

Where the charter of a log driving company provides, that the company is "under no obligation to drive any logs coming into the Chesuncook lake at any other point than from the main west branch unless seasonably delivered to it at the head or outlet of said lake," the seasonable delivery of logs thus situated at the head or outlet of that lake, is made a condition precedent to any obligation on the part of the company to drive them. When seasonably delivered, the company would be bound to drive them, wherever its main drive might be. If, however, the main drive was started at the proper time with reference to success in getting it into the boom, as well as in reference to the interests of those having logs above, intending to have them driven, a delivery after such starting would not be in season.

Where the charter of a log driving company provides that the logs shall be driven at as early a period as practicable, the proper time for starting is left to be decided by those having the drive in charge, and in this respect the duty of the company is performed by hiring men of reasonable skill, who, in forming their judgment, shall exercise such skill in good faith, and execute it with reasonable diligence.

ON REPORT.

An action on the case to recover damages of the defendant corporation, for carelessly and negligently preventing the plaintiff from seasonably delivering 1,500,000 feet of logs, cut and hauled by him in the winter of 1876–7, on landings near Caribou lake, at the head or outlet of Chesuncook lake; and for leaving the Chesuncook lake with their main drive, before the plaintiff could make a seasonable delivery of his logs into such lake, in consequence of which the plaintiff's logs were delayed one year in reaching market, and thereby greatly depreciated in value.

The writ was dated July 18, 1877.

After the testimony for the plaintiff was presented, the case was reported to the full court with the agreement that if the action could be sustained, it was to stand for trial; otherwise, plaintiff nonsuit.

A copy of defendant's charter may be seen in the report of the preceding case of *Weymouth* v. *same defendants.*

The facts appear in the opinion.

Wm. H. McCrillis and *John Varney*, for the plaintiff.

A. W. Paine, for the defendant.

DANFORTH, J. The defendant, under its charter, as amended by the act of March 21, 1864, is "under no obligation to drive any logs coming into the Chesuncook lake, at any other point than from the main west branch, unless seasonably delivered to it at the head or outlet of said lake."

It appears that in May, 1877, the plaintiff was then owner of logs answering the description referred to in the act, and for the failure of the defendant to drive them, he claims damage. The writ contains no allegation of the seasonable delivery of the logs. On the other hand, it appears both by the allegations in the writ, as well as by the evidence in the case, that they were not so delivered. There was then no performance of the condition to be performed by the plaintiff to entitle him to have his logs driven. Seasonable delivery, is expressly made a condition precedent to the defendant's obligation, and until that is done, there is no provision of the charter which imposes any obligation upon the company in reference to logs situated as these were.

But while this common principle of law is conceded, it is claimed that this case is not within its operation by means of the wrongful act of the defendant. The allegation in the writ upon which the claim for damages rests, in substance is, that the plaintiff had his logs on their passage, and in a condition, with the means he had provided, to be seasonably delivered, which the defendant well knew, yet "did carelessly and negligently prevent the plaintiff from so seasonably delivering his said logs to defendant, and have them driven with the west branch drive, by leaving said Chesuncook lake with its main drive, . . . before plaintiff could make such seasonable delivery of his logs into said lake, as he was able and intending to do, so that they might be driven to market."

There is no pretence that any interference on the part of the defendant with the plaintiff's logs caused the delay in the delivery,

but simply that there was not sufficient delay in starting the "main drive," from the foot of the lake.

There appears to be no provision in the charter to prevent the company starting its main drive at any time those in charge of it may deem proper. On the other hand it is required to drive the logs "at as early a period as practicable." The starting of the drive does not interfere with the plaintiff's delivering his logs at the place specified, and if so delivered seasonably, the defendant by the terms of its charter would be bound to drive them wherever its "main drive" might be. If it had left before the proper time and was thus put to an additional expense in driving logs afterwards, but seasonably delivered, itself must bear the loss. The log owner having complied with the precedent condition, is entitled to have his logs driven.

It is, however, assumed that the defendant, after leaving with the main drive, would decline to receive logs subsequently delivered, whether seasonably, or otherwise, and therefore, the plaintiff was not bound to do a work entirely useless. But we cannot assume that any party will be guilty of a violation of a legal duty, without proof, and in this case, there is no evidence to show that such a delivery would have been unavailing.

It may however, be and probably is, true, that from some knowledge, peculiar to men engaged in lumbering on that river, the plaintiff knew that after the main drive had started, the defendant would refuse to take his logs, and a delivery of them at the place required, would be useless, and place them as claimed, in greater danger of loss. It is difficult to perceive how this could change the plain provisions of the charter, and if it could, the plaintiff must fail upon the facts.

There is no evidence of a waiver of delivery, either as to time, or place. The defendant's agents, declined to make any promises of or give the plaintiff any encouragement that he might expect a delay, or that his logs would be taken at any other place than that specified in the charter.

Nor is there any evidence to authorize the conclusion that the logs would have been delivered at any specified time. They had been delayed by ice, head winds, and to some extent, by want

of water. Their future progress must largely depend upon the same contingencies, and what the result might be, human sagacity was not sufficient to foretell; and if the seasonable delivery were prevented by these contingencies, the log owner, and not the company, must be the sufferer. It is, then, uncertain at the least, whether the failure of delivery was not caused by adverse circumstances, over which the company had no control, and for which it was in no degree, responsible, rather than from the too early starting of the main drive.

There is also an entire lack of evidence to show that the starting of the main drive was too early.

The allegation is, that this starting before the arrival of the plaintiff's logs, was careless and negligent. The burden of proof is upon the plaintiff, and the only evidence upon this point is that the main drive did start before the arrival of the plaintiff's logs. Still it might not have been before the law required it. The charter says the logs shall be driven "at as early a period as practicable." There is no proof that the "main drive" was started before it was practicable to run it through to its destination, or that it encountered any obstacle in its progress, which would have been avoided by a later start.

But if the phrase "as early a period as practicable" refers as well to the practicability of getting the logs to the starting point, as to driving them below, the result is not changed. It cannot refer exclusively, to collecting the logs, but must as well refer to success in driving them down the river. The defendant would not be justified in hazarding a failure to get a large quantity of logs to market by delaying the starting beyond the period dictated by the exercise of reasonable skill and prudence, for the uncertain, or even certain, arrival of a much smaller quantity. The duty of defendant is owing not to one alone, but to all the log owners interested in the drive, and must be discharged with reference to the interests of all. The delivery of the logs, in order to be seasonable, must be so in reference to the requirements and hazards of driving the logs below. If not in season for success in driving, the delivery would clearly be unavailing. What that period is, must depend upon that state of things which is caused by the weather, and must vary with the varying seasons.

Hence, the charter has left it indefinite, and to be decided by the judgment of the men in charge. In this respect, the duty of the defendant is performed by placing men in charge, who by their capacity and experience in such matters, are competent for the purpose, and in the exercise of their employment, act in good faith, using reasonable skill and prudence in the formation of their judgment and diligence in executing it. The plaintiff, recognizing this principle of law, alleges as the foundation of his action, negligence in the defendant, in not waiting for his logs. This negligence can only be shown, by evidence of a failure in the competence, skill, or good faith of its servants, and none is found which tends to sustain such a charge. No negligence in the exercise of the required judgment is shown, nor does it appear, even by the light of subsequent developments, that the drive was not delayed to the latest period consistent with safety.

The plaintiff's failure to have his logs driven, appears to have been caused by adverse winds, ice, and want of water, rather than by any negligence on the part of the defendant.

Plaintiff nonsuit.

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

FARMINGTON SAVINGS BANK *vs.* CHARLES W. FALL.

York. Opinion February 16, 1880.

Promissory note. Indorsement. Variance. Savings Banks. R. S., c. 47, § 91.

The writ declared upon a note payable to the order of C. B. Mahan, Agent, and indorsed by C. B. Mahan, Agent, to the plaintiff, and the indorsement upon the note was "Granite Agricultural Works, C. B. Mahan, Agent;" *Held*, that the indorsement is the indorsement of C. B. Mahan, Agent, the payee of the note, as alleged in the declaration, and is not vitiated by the needless reference to the company for which he was agent, and that there is no variance, and the note was properly received in evidence.

The statute, prohibiting savings banks from loaning money on the security of names alone, is directory to the trustees, and designed for the protection of the depositors, and will not prevent a bank from enforcing payment of a promissory note whether the purchase was or was not in conformity with its provisions.

ON EXCEPTIONS.

The writ was dated November 5, 1875, and contained the following declaration:

"In a plea of the case, for that the said defendant, at said Berwick, on the nineteenth day of March, A. D., 1875, by his promissory note of that date, by him subscribed, for value received, promised to pay to the order of one C. B. Mahan, agent, the sum of one hundred and sixty-one dollars in seven months then next, now past, meaning with interest thereafter as the plaintiff avers, at the Great Falls National Bank, at Somersworth, in said county of Stratford, and the said C. B. Mahan, agent, as aforesaid, thereafterwards, on the same day, by his indorsement of said note, in writing, under his hand as agent, aforesaid, for value received, ordered the contents of said note, then due and unpaid, to be paid to the plaintiff, according to the tenor thereof; of all which the said defendant then and there had notice and thereby became liable, and in consideration thereof

then and there promised to pay the plaintiff the contents of said note according to the tenor thereof. Yet," &c.

(Note.)

"Berwick, Mar. 19th, 1875.

$161.00.

Seven months after date I promise to pay to the order of C. B. Mahan, Ag't, one hundred and sixty-one dollars, at the Great Falls National Bank, Somersworth, N. H.

Value received. CHARLES W. FALL.

No. 2. Oct. 10—22. Due Nov. 19th, 1875."

(Indorsement.)

"Waiving demand and notice.

Granite Agricultural Words. C. B. Mahan, Agent."

John F. Cloutman, president of the savings bank, testified:

Question.—What was the transaction in regard to this note?

Answer.—The transaction we had when the notes were discounted, was, they were brought to our bank and that, with other notes was discounted in our savings bank.

Question.—What was the rate of discount?

Answer.—Six per cent.

Question.—State the trade fully.

Answer.—He [Mr. Wiggin] stated if we would discount those notes at six per cent. he would leave fifty per cent. of the amount as collateral, with us, till the notes were all paid. This note was then discounted.

Thomas F. Cook, treasurer of the bank, testified:

Question.—State what the transaction was in regard to discounting this note?

Answer.—Mr. Wiggin, who was acting at that time as financial agent of the Granite Agricultural Works, came into the bank one day with Mr. Cloutman. He had been to see Mr. Cloutman, first, and presented some notes, among which, was this one, for discount. The arrangement had been substantially made, and I discounted them.

Question.—How much money was paid him for the notes?

Answer.—Some twenty-five or twenty-six hundred dollars I think.

Question.—Do you remember how much the notes amounted to, which were left at that time?

Answer.—I think about thirty-three hundred dollars of notes of this kind.

Question.—What other notes were left?

Answer.—Two notes, one thousand dollars each, signed by the Granite Agricultural Works, and indorsed by John Clark, of Lebanon, I think. At the time this note was presented at our bank for discount, it was then in the condition in which it now is, excepting my indorsement on the back.

Question.—Have those Granite Agricultural Works notes ever been paid?

Answer.—No. The bank has never received any money on them.

Question.—How much of these (farmers') notes has been received?

Answer.—I think about eleven hundred dollars, leaving a balance of between fourteen and fifteen hundred dollars, due of the money we advanced.

The verdict was for plaintiff for $182.74; and the jury specially found as follows, in answer to the interrogatory:

Question.—"Was the inception of this note fraudulent?"

Answer.—"Yes."

Wells & Burleigh, for the plaintiff.

William J. Copeland, for the defendant, cited: *Billings* v. *Collins*, 44 Maine, 271; *Nutter* v. *Stover*, 48 Maine, 163; *Perrin* v. *Noyes*, 39 Maine, 384. The plaintiff was not an innocent indorsee,—the purchase of the note was in violation of law, R. S., c. 47, § 91. In the absence of proof the presumption is, that the statute of New Hampshire is the same; *McKenzie* v. *Wardwell*, 61 Maine, 136; see *Fowler* v. *Scully*, 72 Pa. St. 456; *Franklin Co.* v. *Lewiston Inst. for Savings*, 68 Maine, 43. The payee is joint owner with plaintiff. That interest opens the defence where it was payable. 11 N. H. 66; 16 N. H. 39; 15 N. H. 579; 17 N. H. 116; *Stickney* v. *Jordan*, 58 N. H. 106. There was a variance. *Mellen* v. *Moore*, 68 Maine, 390.

BARROWS, J. The defendant made the note upon which he is here sued, at Berwick, in this State, setting forth therein that it was for value received, and payable in seven months after date

to the order of C. B. Mahan, agent, at the Great Falls National Bank, Somersworth, New Hampshire. The note is so described in the plaintiff's declaration, in which it is further averred that the said C. B. Mahan, agent, on the day of the date, duly indorsed it, and thereby for value received, ordered the contents thereof, to be paid to the plaintiff, &c. The indorsement runs thus:

"Waiving demand and notice.

Granite Agricultural Works. C. B. Mahan, Agent."

I. Defendant objected to the reception of the note in evidence, claiming that the note and indorsement varied from the allegations in the writ, and that the note offered was not indorsed by the payee.

His objection was overruled—rightly, we think; for whether the peculiar form of the indorsement was adopted in order to transfer some supposed interest, equitable or otherwise, which the Granite Agricultural Works might have in the note, or only to indicate that C. B. Mahan, was the agent of that company, it is none the less the indorsement of "C. B. Mahan, Agent," who was the payee of the note; and that indorsement was placed there with a design to transfer the property in the note to the indorsees. The party supposed to be beneficially interested, was named when the note was indorsed, but omitting as surplusage all such reference to the party perhaps interested, but not named in the note as payee, the payee's indorsement still remains, and, being so designed, is sufficient to transfer the property in the note, whether he was acting as the agent of the Granite Agricultural Works or any other party beneficially interested in the transaction. The act is to be deemed the act of him who might lawfully do it, and is not vitiated by the needless reference to the party for whose benefit it was done.

II. Defendant claimed that a nonsuit should be ordered on the ground that savings banks are prohibited by law from the purchase of such notes. He relied on R. S., c. 47, § 91, which, after directing that "the trustees shall see to the proper and safe investment of the deposits and funds of the institution, in the manner they regard perfectly safe," adds, "but no loan shall be made on security of names alone."

And, inasmuch as there was no evidence as to what the law of New Hampshire, where this contract was to be performed, is in this respect, he insists that the presumption is that it is the same as that of this State. But assuming that the law of New Hampshire is like ours, which is but a direction to the trustees, designed for the benefit and security of depositors, it is not to be so construed as to defeat its own purpose, and enable the makers of negotiable paper to set up defences, to which they would not be otherwise entitled. The reasons for thus holding, are adverted to in *Roberts* v. *Lane*, 64 Maine, 108; which is not distinguishable in principle from the present case, although it was not the same statutory prohibition which was there invoked to invalidate the transfer of the note. But it was necessary in that case, for Roberts, who took the note from the bank long after it was due, and with notice that it would be contested on the ground of fraud in its inception, to establish the proposition that he was entitled to the rights of a *bona fide* indorsee for value without notice; and it was held, that the bank had such rights, and could transfer them to Roberts, notwithstanding the fact that the bank took the note in face of the statute prohibition against discounting paper without at least two responsible names thereon. Unless the bank could have maintained an action on the note without being subject to a defence which might have been set up as between the original parties, it could transfer no such right to Roberts.

That "a national bank which purchases a promissory note from an indorsee, may maintain an action thereon in its own name against a prior party thereto, without regard to the question whether the purchase was one which it was authorized by law to make" was determined in *National Pemberton Bank* v. *Porter*, 125 Mass. 333, and the doctrine maintained by an abundance of forcible reasoning and authority. It is true that the Massachusetts court, in that case, had no occasion to consider whether such prior party was thereby let in as against the bank, to any equitable defence which he might assert, had the suit been in the name of the original payee, and in this respect the case last referred to does not go so far as *Roberts* v. *Lane;* but it is, nevertheless, directly in point to justify the refusal of the

presiding judge to order a nonsuit in the case at bar; the defendant's motion for the nonsuit being based upon the position that the plaintiff savings bank was prohibited by law from the purchase of such notes.

III. Upon the testimony of the president and treasurer of the savings bank, defendant contended that the savings bank was not such a holder for value, as would preclude the defendant from setting up any defence which might be available as between the original parties. This proposition his counsel seeks to maintain here on two grounds—first, because he says the plaintiff, having become possessed of the note in violation of the before mentioned statutory prohibition, cannot be regarded as an innocent indorsee; second, because he says the testimony shows that the bank holds the notes as collateral security, and by the law of New Hampshire where the contract was to be performed, such holders are not relieved from the equities between the original parties.

The first branch of this argument, is, in effect, as we have already seen, substantially disposed of by the case of *Roberts* v. *Lane*, *ubi supra*.

The defence of fraud in the inception of the note, ought to have availed the defendant there, if it can here. Leaving out of sight all considerations of the ill effect, in a mercantile point of view, of placing undue restrictions upon the transfer of negotiable paper beyond what good faith and fair dealing require, we think that the well settled doctrine of the law, that where one of two innocent parties must suffer for the misdoings of a fraudulent third, the loss must fall upon him whose act originally enabled the wrong doer to occasion it, ought to be decisive in favor of the plaintiffs. The defendant issued his negotiable promissory note, payable on time, and thereby enabled the party, with whom he dealt to get the money of the depositors in this savings bank, or its officers. Its officers had no notice of any equities between the party with whom they dealt and the maker of the note. They discounted the note in good faith, before it fell due, using the money of their depositors. Shall the depositors lose it? The numerous cases establishing the doctrine just adverted to, would seem to forbid it. If it be said that the

officers who took the note, must make the loss good to the savings bank, the condition of the defendant is no better. It was his giving his negotiable promissory note to the party with whom he dealt, that enabled that party to possess himself of money, which became, to all intents and purposes, the money of the officers, if they are liable to refund to the bank. There is no statutory inhibition of the purchase of negotiable notes by the officers as individuals, and it could not be said that the purchase would not enure to the benefit of the officers personally, if they are personally held liable to account to their bank for the money.

The source of the trouble, is the defendant's act in putting his promise to pay, in the form of a negotiable note, into the hands of one who was invested by him with the apparent legal right to dispose of it to any *bona fide* purchaser. As between the maker of the note and such purchaser, if loss must accrue to either, it should fall on the maker.

Touching the second ground upon which the defendant claims to be let in to his defence, we think a careful examination of the testimony reported, shows that the transfer of this note, and others of its class, was absolute, and not as collateral, to the notes of the Granite Agricultural Works, and that the case falls under the rule laid down in *Bank of Woodstock* v. *Kent*, 15 N. H. 579, where PARKER, C. J., remarks: "It was not necessary that they should have parted with their money on the credit of this alone to entitle them to the ordinary rights of indorsees, who have purchased before the note became due. It is sufficient that they became the owners of it."

Exceptions overruled.

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

JOHN WINSLOW JONES *vs.* NEW ENGLAND AND NOVA SCOTIA STEAMSHIP COMPANY.

Cumberland. Opinion February 16, 1880.

Exceptions. Common Carriers.

Exceptions to an entire charge in general terms cannot be sustained, unless the whole is found incorrect, nor when such charge embraces in substance, part of the instructions requested by the excepting party.

The refusal to instruct the jury, "That the mere fact of delivery of the goods to the defendant corporation for transportation, raised a presumption that such delivery was made and the goods received for immediate transportation," &c., is justified, when it cannot be gathered from the case that there was any such "mere fact of delivery of the goods" in evidence, unaccompanied by proof of verbal communication between the agents of the parties, and of the contract they entered into, the true character and terms of which were really the subjects of the controversy between the parties.

ON EXCEPTIONS.

This was an action of the case to recover damage for loss of goods, which plaintiff alleges in his writ was caused by the defendant's negligence as a common carrier.

At the trial the plaintiff requested the following instructions:

"1st. That the mere fact of delivery of the goods to defendant corporation for transportation, raised a presumption that such delivery was made and goods received for immediate transportation, and the liability of common carrier attached, unless modified by special agreement."

"2d. That the bill of lading offered in this case is not sufficient to exempt defendant corporation from its common law liability as a common carrier, because it (the bill of lading) assumes to exempt from liability from loss by fire, whether resulting from accident or the negligence of defendant corporation."

"3d. That the non delivery of the salmon is *prima facie* evidence of negligence upon the part of defendant corporation."

"4th. That the burden is upon defendant corporation to show that the loss of goods occurred by some cause other than its own negligence."

"5th. That the loss of the goods is *prima facie* evidence of negligence."

"6th. That if the flour was delivered for transportation upon the next steamer which was to sail from defendant's wharf, such delivery was a delivery for *immediate* transportation, and the defendant would be liable as a common carrier."

"7th. The burden to show that the loss did not occur by defendant's negligence is on defendant."

"8th. That defendant is not excused from liability for loss of the salmon, unless the jury shall find that the plaintiff, at the time of the delivery in Halifax, accepted the bill of lading offered in evidence, without objection."

"9th. That in the absence of any agreement in writing, signed by the consignee, limiting the liability of a common carrier, or evidence of the acceptance of a bill of lading so limiting the liability, without objection, a common carrier is liable for loss of goods delivered and received for carriage."

"10th. That the bill of lading offered in this case, and the evidence offered relative thereto, and relative to the delivery and acceptance of the salmon by defendant in Halifax, does not exempt defendant for loss of the salmon."

The exceptions, after reciting the requested instructions and the entire charge of the judge, adds, "to all which rulings and instructions, and refusals to instruct, the said plaintiff excepts, and prays that his exceptions may be allowed."

C. P. Mattocks, for the plaintiff, claimed, that where a steamboat company has one steamer making weekly trips, and merchandise is left at the steamer's wharf, after the steamer has sailed, to be transported on the next trip, and the merchandise is received for this purpose and not for storage merely, the liability is that of common carrier, and the company would be liable to make good damage to such merchandise by fire after the return of the steamer, but before it was put on board.

The refusal of the presiding judge to give the first requested instruction, left the burden upon the plaintiff to show a special contract that the goods were delivered to, and received by the defendant corporation as a common carrier, instead of compelling

a common carrier to prove that goods received by him, in the ordinary course of business, were not received by him as a common carrier.

It is only when goods are subject to further orders of the shipper, that the limited liability of warehouseman attaches. *Barron et al.* v. *Eldredge et als.* 100 Mass. 458; *O'Neil* v. *N. Y. Cen. R. R. Co.* 60 N. Y. 138.

Generally the liability as common carrier attaches the moment the carrier receives the goods into his warehouse, or upon his dock or wharf. *Clarke* v. *Needles*, 25 Pa. St. 338; *Ladue* v. *Griffith*, 25 N. Y. 364; Story on Bailments, § 532; *Moses* v. *B. & M. R. R. Co.* 4 Foster, 71; *Blossom* v. *Griffin*, 3 Kernan, 569; Story on Bailments, § 536; *Fitchburg & W. R. R. Co.* v. *Hanna et al.* 6 Gray, 541; *Merriam* v. *H. & N. H. R. R. Co.* 20 Conn. 354; *Wilson* v. *G. T. Ry.* 57 Maine, 138.

Strout & Holmes, for the defendant.

BARROWS, J. The exceptions set out the entire charge of the presiding judge as taken by the stenographer, and thereupon say, "to all which rulings and instructions . . . the said plaintiff excepts," &c. So far as any of the instructions given are concerned, the wholesale character of the exception would be of itself a sufficient reason for overruling it, if any of the instructions are found correct; *MacIntosh* v. *Bartlett*, 67 Maine, 130; *Harriman* v. *Sanger*, *Id.* 442; *Crosby* v. *Maine Central R. R. Co.* 69 Maine, 418. A large part of the charge is as favorable to the plaintiff as the rules of law will permit. The instructions thus excepted to in gross, include in substance at least, four of the ten instructions requested by the plaintiff,—the third, fourth, fifth and seventh. Plaintiff's counsel very properly concedes that it must be regarded as established by the verdict under the instructions given, that the loss of the salmon did not result from the negligence of the defendants, and hence under the bill of lading, presented by the plaintiff, defendants are not liable for it; and this disposes of four out of the six remaining requests, viz: the second, eighth, ninth and tenth.

The sixth request was that the jury should be instructed that "if the flour was delivered for transportation upon the next

steamer, which was to sail from defendant's wharf, such delivery was a delivery for immediate transportation, and the defendant would be liable as a common carrier." It is apparent that this calls for an authoritative decision as upon a question of law, of what seems to have been the principally controverted vital question of fact in the case. Plaintiff's counsel does not insist upon his exception to the refusal to give it.

He bases his claim to a new trial upon the refusal to give the instruction stated in his first request, and to instructions which he construes as laying it down as a rule of law, that if defendant's steamer made but one trip a week, and the plaintiff, knowing this fact, should leave goods at defendant's wharf at any time before the steamer had returned to this port and had discharged her inbrought cargo, and before she was in a condition to receive any articles of the outgoing cargo, such delivery of goods would be a delivery for storage, and not for immediate transportation; and defendant corporation would be liable as warehousemen only, that is in case of negligence, and not as an insurer as a common carrier.

But if any question upon the instructions except that already alluded to, were open to the plaintiff upon his general exceptions to the charge, it would only be necessary to remark, that, in order to reach this construction, the plaintiff's counsel omits and ignores an essential element in the instruction as actually given, to the effect that this result would follow, if "it was then left with the understanding that it remained there on storage until the vessel was in condition to receive another cargo." The presiding judge repeatedly called the attention of the jury to the inquiry: What was the agreement or understanding of the parties upon which the flour was left? and he concludes thus: "In other words, I mean to have you understand that the agreement of the parties, their understanding of the purpose for which the flour was left, is to govern."

There is no report of the evidence upon which these instructions were based, but the case indicates that there was conflicting evidence on the questions of delivery and acceptance of the goods, and the terms of such acceptance, and that the character and purpose of such acceptance (if there was one), were

carefully left by the presiding judge to be determined by the jury from the evidence. This condition of things seems to make the first requested instruction (as to the effect of the mere fact of delivery of the goods to defendant corporation for transportation, in raising a presumption that such delivery and reception were for the purpose of immediate transportation), needless and immaterial, as there is nothing tending to show that there was any such "mere fact of delivery" in evidence, unaccompanied by testimony as to the terms and conditions upon which it was made and accepted. It does not appear that there was any written contract between these parties, touching the purpose or terms upon which the flour was received by the defendant corporation, and it was for the jury to determine what understanding was reached by the respective agents of the parties in the course of their verbal communications.

The case does not appear to have been one of mere tacit delivery and reception, which would make the plaintiff's requested instruction appropriate. We see no reason to doubt that the jury passed upon the case with a full understanding that they must determine, from the evidence, whether the agreement between the parties, acting by their respective agents, was that the flour was received by the defendants as common carriers for transportation, or as warehousemen for storage until the time when their steamer should be in readiness to receive it on board; nor that they failed to understand from the charge, that the defendants would be liable as common carriers for the flour, received by them, to be transported over their route for hire, although not placed on board, unless,—to use the language of the judge in the charge,—"it was then left with the understanding that it remained there on storage until the vessel was in condition to receive another cargo."

This is entirely consistent with the doctrine of *Fitchburg & Worcester R. R. Co.* v. *Hanna et al.* 6 Gray, 539, cited by plaintiff's counsel, where MERRICK, J., correctly remarks (p. 542): "When goods are brought and delivered to a party for transportation, he can determine for himself in what relation he will receive them. If he is a common carrier, he is certainly required by law, to take and transport goods, tendered to him

for that purpose. But he is to have a reasonable opportunity to make the necessary preliminary preparations for that service; and he can therefore, if he choose so to protect himself, whenever it is necessary and proper that he should have some intermediate time for preparation before proceeding on the voyage or journey, receive the goods and keep them during such intervening period as a warehouseman, and not as a common carrier." It cannot be doubted that it was competent for the defendants to contract to receive this flour, delivered the day after their boat had left and six days before it would again leave on its regular trip,—not as common carriers for immediate transportation,—but as warehousemen, until the boat should be in condition to receive cargo; and the jury seem to have found that such was the contract and understanding of the parties.

Exceptions overruled.

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

EZEKIEL WARE *vs.* LLEWELLYN W. LITHGOW.

Kennebec. Opinion February 16, 1880.

Declaration. Covenant broken. Demurrer.

When the declaration does not allege an eviction of the plaintiff by the defendant's grantee, nor the taking of anything from the premises leased, an action on the covenant for quiet enjoyment cannot be maintained.

ON EXCEPTIONS.

WRIT is dated July 21, 1874.

The defendant filed a general demurrer to the declaration, which was joined. The presiding judge sustained the demurrer and adjudged the declaration bad, and the plaintiff alleged exceptions.

Declaration. — "In a plea of covenant broken, for that whereas, heretofore on the seventeenth day of March, A^d. D., 1865, at said Augusta, by a certain indenture then and there made between the said plaintiff of the one part and the said defendant of the other part, one part of which indenture, sealed with the seal of the said defendant the plaintiff now brings into court, the date whereof is the day and year aforesaid, the defendant did lease, demise, and let unto the plaintiff a certain parcel of land situate in said Augusta on the east side of the river and bounded northerly by land formerly owned by the late Samuel Patterson, deceased, easterly by the lot owned by Mrs. Mercy Kittridge, southerly by the Belfast road leading over Malta Hill, so called, and westerly by lots sold off as aforesaid and by the soap factory lot, and by Bangor street, for the term of three years, from the first day of April, A. D., 1865, with the privilege of extending the lease five years, reserving the right to take and occupy, or to sell any portion of said premises on certain terms therein stated; that on the twenty-fourth day of June, A. D., 1870, said lease was duly and formally extended for the term of five years, from the seventeenth day of March, A. D., 1870. Now the plaintiff avers that the said defendant, in the year 1866, leased a portion of said premises, to one Brann, at a rent of

fifteen dollars a year; and another piece of about an acre and three-fourths in the fall of 1870, to one J. B. Wendall, at a rent of sixty dollars a year, and the following year, about a half an acre more to the same man, and in 1871 another portion, to one Wilson, at a rent of thirty-five dollars a year, and has continued to receive the said several rents to the present time, and has, the present season, sold the grass off from the remainder of the land described in the plaintiff's lease; also leased about an acre to one Folsom, all in violation of the defendant's said lease, and so the said defendant, his covenant aforesaid hath not kept, but hath broken the same. To the damage of the said plaintiff (as he says) the sum of six hundred dollars which shall then and there be made to appear, with other due damages."

S. Lancaster, for the plaintiff.

But a single point is raised by the general demurrer, viz: Will this form of action lie for the causes set forth in the writ? *Dexter* v. *Manley*, 4 Cush. 14, seems to cover the whole ground. Counsel also cited: Taylor's Landlord and Tenant, 3rd. ed. § § 305, 313; 2 Greenl. Ev. 2d. ed. § 243. Defendant is sued only for the subsequent leasing and consequent eviction.

G. C. Vose and *E. W. Whitehouse*, for the defendant, cited: *Boothby* v. *Hathaway*, 20 Maine, 251; *Stafford* v. *Annis*, 7 Maine, 168; *Hardy* v. *Nelson*, 27 Maine, 525; *Reed* v. *Pierce*, 36 Maine, 455; *Waldron* v. *McCarty*, 3 John. 471; *Webb* v. *Alexander*, 7 Wend. 281; *Kelley* v. *Dutch*, 2 Hill. 105; *Kerr* v. *Shaw*, 13 John. 236; *Trustees of Newbury* v. *Gelatian*, 4 Cow. 340; 2 Chitty's Pl. 16 ed. 201; and cases there referred to. *Ellis* v. *Welch*, 6 Mass. 246; *Farris* v. *Smith*, 11 Rich. (S. C.) 80; *Knapp* v. *Marlboro*, 34 Vt. 235.

APPLETON, C. J. This is an action of covenant broken, for the breach of the covenant for quiet enjoyment. The defendant filed a general demurrer to the declaration which was joined. The presiding justice sustained the demurrer and adjudged the declaration bad.

The declaration sets forth that "the defendant did lease, demise and let unto" the plaintiff, a certain parcel of land situate in said Augusta, &c.

The word "demise" in a lease, implies a covenant for quiet enjoyment. This word imports a covenant that the lessor had authority to make a valid lease of the premises. *Grannis* v. *Clark*, 8 Cow. 36; and a covenant for the quiet enjoyment of the premises leased. *Barney* v. *Keith*, 4 Wend. 502; *Crouch* v. *Fowle*, 9 N. H. 219. Though the covenant be an implied one, it may be stated according to its legal effect, *Dexter* v. *Manley*, 4 Cush. 14.

The declaration is fatally defective in not setting forth any breach of the covenant for quiet enjoyment. The allegations are, that the defendant leased portions of the premises to certain persons, and sold to another the grass on the remainder. It is nowhere stated that his lessees have entered on the premises leased, or interfered with the plaintiff's quiet enjoyment of the same, or that the vendee of the grass has cut or carried away any. No eviction is alleged. No tortious interference with any of the plaintiff's rights is disclosed. Every allegation in the writ may be true, and the plaintiff may have been in the quiet enjoyment of the premises leased.

Exceptions overruled.

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

JANE A. BROWN *vs.* AMHERST WHITMORE, ADMINISTRATOR OF THE ESTATE OF JOSIAH LUNT.

Cumberland. Opinion February 16, 1880.

Error — when not a bar. R. S., c. 71, § 22. Pleadings. Judgments — what, on plene administravit.

When a judgment on a suit against a *non compos* has been reversed for error, because no guardian had been appointed, such reversal constitutes no bar to a new suit on the note after a guardian has been appointed.

By R. S., c. 71, § 22, it is the duty of the administrator to sell the real estate of his intestate when fraudulently conveyed.

When there is the plea of *plene administravit*, and the plaintiff confesses the plea, or pleads *plene administravit prœter*, there may be judgment in his behalf for the debt or damage, to be levied, as to the whole or part, of the goods of the intestate, which shall afterwards come into the hands of the administrator to be administered.

On a plea of no assets the plaintiff may pray judgment of assets, when they shall come into the hands of the administrator.

ON REPORT.

Upon so much of the evidence as is legally admissible, the full court are to render such judgment as the law and the evidence warrant.

The facts appear in the opinion.

H. Orr, for the plaintiff, cited: R. S., c. 71, § 22; c. 76, § 44; *Rollins* v. *Mooers*, 25 Maine, 192; *Mechanics Bank* v. *Hallowell*, 52 Maine, 545.

Weston Thompson, for the defendant.

The common law effect of *plene administravit* is to cast on the plaintiff the burden of showing personal assets wherefrom she might be paid. By that law real estate cannot be reached in a suit against an administrator; 2 Greenl. Ev. 346, 347. This case does not show any personal assets of defendant's intestate.

If Lunt left real estate, that fact will not aid the plaintiff. R. S., c. 76, § 44, does not say that plaintiff upon showing real estate may obtain judgment. The statute does not change the common law rule, that plaintiff must show personal assets to obtain judgment.

APPLETON, C. J. On February 18th, 1856, Josiah Lunt was appointed the guardian of Jane A. Lunt, the plaintiff, then a minor, and subsequently received five hundred and seventy-five dollars and three cents, belonging to her, for which he never accounted.

On the 24th of March, 1859, Lunt conveyed the farm on which he then and afterwards lived, to his daughter Eliza, for a recited consideration of $1500, taking at the same time her note duly attested for $700, payable in six years.

The plaintiff became of age in July, 1871, and married Roscoe Brown, her husband, on May 25th, 1875.

Josiah Lunt, the plaintiff's grandfather, died in August, 1875, and the defendant was appointed the administrator on his estate.

The present suit, for money had and received, was commenced May 27th, 1878.

The defendant pleads that the said Lunt never promised,—that he has fully administered,—and that the estate was duly represented insolvent, but no commissioners have been appointed.

The defendant has settled his final account in the probate office, and it appears that there was not more than sufficient to pay the claims specially preferred by R. S., c. 66, § 1; unless the administrator is bound to account for the real estate conveyed by his intestate, to his daughter Eliza, on March 24th, 1859, or for the attested note given at that time.

The plaintiff's husband testified that Josiah Lunt gave the note to him for his wife, and that he gave it to her. If so, whether the note was a gift or turned out in payment of what he owed, it ceased to be a part of the estate of Lunt to be administered upon by the defendant.

The plaintiff sued Eliza Lunt upon her note, obtained judgment, and levied upon the real estate conveyed to her, by her father, in 1859. This judgment was reversed on error, on the ground that Eliza was *non compos*, and had no guardian to protect her rights; but this reversal does not prevent the plaintiff's recovery on the note in a suit in which due notice is given to the guardian.

It is true, the plaintiff offered the note to the defendant which he declined to accept. But if the statement of her hus-

band be true, that the defendant's intestate gave the note to her, — whether as a gift, or in settlement and discharge of her claim, it cannot become a part of the estate of defendant's intestate by any act of the donee. If she chose to give her property to the administrator that would not make it assets of the estate, nor was he bound to accept it as such.

If the note was wrongfully abstracted, it would remain a part of the estate of Lunt, but it is not for the plaintiff to set up that claim in contradiction of the evidence she has offered. There is, then, no proof whatever, of any personal estate upon which the defendant should have administered, but upon which he has not.

The real estate conveyed in 1859 by the defendant's intestate, to his daughter, is claimed to have been in fraud of the plaintiff's rights, and the circumstances attending the conveyance, tend to show that such was its purpose. But, if so, the estate is not shown to have been in the possession, or under the control of the defendant as any portion of the assets of the estate of his intestate.

It is a matter of inference rather than of proof, that the note was given as part consideration for the land of the defendant's intestate, conveyed on that day to the maker. If so, its enforcement and collection might well be deemed a waiver of any right to avoid the conveyance as fraudulent. If not enforced, the plaintiff would be at full liberty to contest the validity of the conveyance.

If the consideration of the note was something other than the land, the note will cease to be of any importance in the determination of this case.

R. S., c. 71, § 22, provides that the lands of a deceased, fraudulently conveyed, may be sold for the payment of debts; and if the conveyance in question be fraudulent, it would seem that the defendant would be liable on his bond, if being notified and aware of the fraud, he should refuse to make the sale which it is his duty to make. In case of a sale, the proceeds would be assets in his hands to be administered upon. It is for the defendant to make such sale.

The amount due is in controversy under the plea of *non assumpsit*. The replication of the plaintiff to the plea of *plene administravit* is not stated. But if he confess it "or plead *plene administravit præter*, there shall be judgment in his favor for the debt or damages, &c., to be levied, as to the whole or part of the goods of the intestate, which shall afterwards come to the hands of the defendant to be administered. Such judgment is called a judgment of assets *quando acciderint;* but the execution cannot be had until the defendant shall have the goods of the deceased, when the plaintiff may either sue out *scire facias* or bring an action of debt on the judgment, suggesting a *devastavit*." Toller on Executors, 470; *Hindsley* v. *Russell*, 12 East. 232. 1 Chitty Pl. 548–558. On a plea of no assets, the plaintiff may pray judgment of assets *quando acciderint*. *Wilson* v. *Hurst's Ex'r*, 1 Pet. 442, n.

The defendant to be defaulted, to be heard in damages. Execution to issue on scire facias against the goods of the intestate, when shown to have come to the hands of the defendant.

WALTON, PETERS, LIBBEY and SYMONDS, JJ., concurred.

JANE R. BARKER *vs.* JOHN W. OSBORNE, and W. G. OSBORNE, TRUSTEE.

Cumberland. Opinion February 24, 1880.

Trustee. Prior creditors. Disclosure — requires detailed and particular statements.

When property has been conveyed by the principal defendant to the alleged trustee, and not purchased by the trustee, any balance of the same, in the hands of the trustee, over and above the amount the defendant owed him, would be held by him without consideration, and would be attachable by prior creditors.

Where, by the disclosure of an alleged trustee, it appears, that at one time prior to the service of the writ upon him, he held funds of the principal defendant, which would be attachable in that suit, the burden is upon the trustee to show, that, prior to the service, he had expended such funds for the defendant's benefit, and this cannot be done by doubtful, indefinite and sweeping statements, with an omission of details and particulars.

ON EXCEPTIONS.

The facts appear in the opinion.

Webb & Haskell, for the plaintiff, cited: R. S., c. 86, § § 79, 4, 63; *Kelley* v. *Weymouth*, 68 Maine, 198; *Moore* v. *Towle*, 38 Maine, 133; *Page* v. *Smith*, 25 Maine, 264; *Thompson* v. *Pennell*, 67 Maine, 161.

W. H. Vinton, for the defendant.

This is a question on the disclosure of the trustee, upon which no question of law has arisen. It is not properly before the law court.

R. S., c. 86, § 29. The disclosure is to be taken as true until the contrary is proved. No allegations nor proof to the contrary is in the case.

The disclosure shows that the defendant sold and transferred to this trustee, the note and mortgage named, and it became absolutely the property of the trustee, for better or for worse.

Were it otherwise, the trustee has helped the defendant since, to more than the amount of any interest he had in the note.

PETERS, J. The judge at *nisi prius* ruled, as a matter of law, that the trustee should be discharged. That, upon exceptions, brings the whole record before this court.

From the disclosure, it appears that in May, 1876, a $12,000 mortgage, running to Bion Bradbury in trust for the defendant, was assigned to this trustee to hold as Bradbury had held it. If the matter stood in that condition now, this trustee attachment would not hold. In such case the remedy would be, either to put the defendant upon a poor debtor's disclosure, or to proceed by a bill in equity for the collection of the debt. See c. 101, laws of 1876.

But that relation of parties has been changed. On September 13, 1876, the defendant released to the trustee all his interest in the mortgage. By this transaction the trustee obtained a property worth, presumably $12,000, and the defendant at that time was owing this trustee not much more than half that amount. The trustee would like to consider the transaction, as part of the note being a payment to him and the other part a gift. But his disclosure is replete with statement that satisfies us that the sale of the note to the trustee was in fact for the purpose, not only of paying the trustee his debt, but to deposit and have in the trustee's hands means for the defendant's future support. We are to decide the question upon the facts disclosed, and not upon the unwarrantable inferences that are by the trustee based upon those facts. The arrangement, as we feel forced to construe it, would be a valid and even commendable affair perhaps, as between the parties themselves, and would be otherwise as to existing creditors. It seems the debtor had no property other than the note, and that he is considerably indebted to different parties. The plaintiff's claim antedates the transactions of 1876.

The trustee over and over again asserts that he is the absolute owner of the note, and he cannot very well go back upon this declaration. His counsel claims it to be so. Our conclusion is that the purchase should stand and enure to the trustee's benefit, excepting, so far as the law requires a modification of its terms, in order to preserve the rights of prior creditors. Any balance in the trustee's hands which he had over and above the amount the defendant owed him, would be held by him without consideration, attachable by prior creditors. To this point the authorities are clear. *Fales* v. *Reynolds*, 14 Maine, 89; *Fletcher* v. *Clarke*, 29 Maine, 485; *Brunswick Bank* v. *Sewall*, 34 Maine, 202;

Hapgood v. *Fisher*, *Ibid.* 407; *Thompson* v *Pennell*, 67 Maine, 159; *Whitney* v. *Kelley*, *Ibid.* 377.

In September, 1876, there were about five thousand dollars in the trustee's hands, exceeding all sums then due to him. On December 4, 1878, this process was served, being a suit to recover a note of $1000 and some interest accrued thereon. The trustee, since September, 1876, has paid out no money to the defendant's creditors, but has supported him during the time. The trustee gives no items of expenses and advances since September, 1876, though asked to do so. Doubtful, indefinite and sweeping statements do not satisfactorily supply the omission of details and particulars. The burden is upon the trustee to show, in order to relieve himself from liability, that within a period of about twenty-six months, the sum of five thousand dollars has been absorbed for the defendant's benefit. Reckoning upon the most liberal basis in favor of the trustee, there must have been in his hands, at the date of attachment, more than the amount sued for in the pending suit.

Exceptions sustained. Trustee charged for an amount that will be equivalent to that of the judgment, to be recovered by plaintiff for debt and costs, and officer's fees on the execution.

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

MARIA J. WENTWORTH *vs.* ARTHUR F. WENTWORTH.

York. Opinion February 24, 1880.

Death—presumption from absence. Dower. Witness—competency of. R. S., c. 82, § 87.

If a person leaves his usual home and usual place of residence for temporary purposes, and is not heard of or known to be living for the term of seven years, by those persons who would naturally have heard from him during the time had he been alive, the presumption is that he is dead. The rule does not confine the intelligence to any particular class of persons; it may be persons in or out of the family.

A failure to hear from an absent person for seven years, who was known to have had a fixed place of residence abroad, would not be sufficient to raise a presumption of his death, unless due inquiry had been made at such place without getting tidings of him.

The demandant in a writ of dower is a competent witness in her own behalf, although the tenant holds the estate by inheritance from his father, the demandant's late husband. The son is not "made a party as an heir of a deceased party," but is a party because the tenant of the estate.

Where an agreement between husband and wife made before marriage, is set up as a bar to her right to recover dower in his estate by the heirs of the deceased husband, and the widow seeks to avoid the agreement as obtained from her by her husband's fraud, his declarations that the agreement was void or invalid or good for nothing, and like expressions, are admissible in connection with other evidence, as tending to show the alleged fraud.

ON EXCEPTIONS, AND MOTION to set aside the verdict.

Action of dower.

The writ was dated September 4, 1877.

The verdict was for demandant.

The defendant introduced in evidence a paper, signed, executed and acknowledged, February 4, 1867, by the plaintiff and her deceased husband, Asa Wentworth, prior to and in contemplation of their marriage, by which they apparently intended "to bar each other of all rights, title and interest, which we might otherwise have in each other's estate, by reason of the aforesaid marriage." And the court admitted testimony, on the part of the plaintiff, of the declarations of Asa Wentworth in relation to that paper.

All the other material facts appear in the opinion.

R. P. Tapley, for the plaintiff, cited: 1 Greenl. Ev. § § 41, 189, 190; *Newman, Adm'r*, v. *Jenkins*, 10 Pick. 515; 2 Wharton, Ev. § § 1274, 1276, 1277, 1156, 1157, 1163; *White* v. *Mann*, 26 Maine, 370; *Glidden* v. *Dunlap*, 28 Maine, 379; *Lawrence* v. *Chase*, 54 Maine, 196; R. S. c. 82, § 87, and c. 103, § 17; *Dennen* v. *Haskell*, 45 Maine, 430; *Whitney* v. *Cottle*, 30 Maine, 31; *Hovey* v. *Hobson*, 55 Maine, 256; *Hatch* v. *Dennis*, 10 Maine, 244; *Shirley* v. *Todd*, 9 Maine, 83; *Mackintosh* v. *Bartlett*, 67 Maine, 130; *Harriman* v. *Sanger*, 67 Maine, 442; *Bacheller* v. *Pinkham*, 68 Maine, 253; *Darby* v. *Hayford*, 56 Maine, 246.

Copeland, Burbank & Derby, for the defendant.

I. The facts related by demandant are not sufficient to raise the legal presumption of death of her first husband. There should have been evidence of search, and inquiry, and inability to find out the facts, together with the proof of the lapse of time, to raise the presumption of death. The case discloses nothing of the kind. 19 Car. 2, c. 6; Hubbach's Ev. of Succession, 170, 171; Best on Presumptions, 191; *McCarter* v. *Camel*, 1 Barb. c. 462; *Doe* v. *Andrews*, 15 Ad. & El. 760, n. s.; *Doe* v. *Deakin*, 4 Barn. & Ald. 433; 2 Scribner on Dower, 212; 2 Greenl. Ev. 278; *Stinchfield* v. *Emerson*, 52 Maine, 465; *Loring* v. *Steineman*, 1 Met. 211.

II. The plaintiff was incompetent as a witness under R. S., c. 82, § 87, as the respondent was made a party as heir of Asa Wentworth. *Cary* v. *Herrin*, 59 Maine, 361; 1 Wharton Ev. § 466; *Ayres* v. *Ayres*, 11 Gray, 130; *Smith* v. *Smith*, 1 Allen, 231; *Farrelly* v. *Ladd*, 10 Allen, 127.

III. The declarations of Asa Wentworth, deceased, as to the validity of an instrument, made years after its execution were inadmissible. 1 Greenl. Ev. § 441; Starkie Ev. 176. New trial. *Stover* v. *Poole*, 67 Maine, 220.

PETERS, J. The jury found, that the former husband of the demandant was deceased at the time of her second marriage. The defendant contends that the evidence was insufficient to warrant the finding. The first marriage was in 1852, the other in 1867. In 1853, the first husband left Massachusetts for

California. There is no evidence that he had in mind any definite place of abode or of business in the latter state. Since the year 1853, his wife has never heard from or had any account of him.

The rule of law is, that, upon a person's leaving his usual home and place of residence, for temporary purposes, and not being heard of, or known to be living, for the term of seven years, the presumption is that he is not alive. It must appear that he has not been heard of by those persons who would naturally have heard from him during the time had he been alive. The rule, however, does not confine the intelligence to any particular class of persons. It may be to persons in or out of the family. The mere failure to hear from an absent person for seven years, who was known to have had a fixed place of residence abroad, would not be sufficient to raise the presumption of his death, unless due inquiry had been made at such place without getting tidings of him. *Loring* v. *Steineman*, 1 Met. 211; *Flynn* v. *Coffee*, 12 Allen, 133; *Doe* v. *Jesson*, 6 East. 80; *Doe* v. *Deakin*, 4 Barn. & Ald. 433; *Doe* v. *Andrews*, 15 Ad. & Ell. (n. s.) 760; Bac. Abr. Evidence, H. & cases; 2 Greenl. Ev. § 278, & notes; *White* v. *Mann*, 26 Maine, 361; *Stevens* v. *McNamara*, 36 Maine, 178; *Kidder* v. *Blaisdell*, 45 Maine, 467; *Stinchfield* v. *Emerson*, 52 Maine, 465. See *Lessee of Scott* v. *Hatliffe*, 5 Pet. 81.

The defendant contends that inquiry and search should have been instituted by the wife, to have rendered her testimony satisfactory. A wife deserted by her husband, if she has an affection for him, and nothing appears to the contrary here, is always upon the inquiry for him until hope gives way to despair. And it may well be believed that the husband, if alive, would have returned to her. He must have known where her domicile was. Under the circumstances, we think more active and diligent inquiry would have been fruitless. There is really more evidence in this case to show the missing husband, if ever alive, to have been dead, than there is to show that such a person ever existed.

A point is taken, though untenable we think, that the demandant should have been debarred from testifying, the tenant holding the estate as an heir of the demandant's husband. The

statute (§ 87, c. 82, R. S.,) provides that the living party shall not testify, where the other party is an executor or administrator, "or made a party as an heir of a deceased party." The statutory inhibition applies only in cases where the heir is made a party *because* he is an heir, and where the ancestor would have been the party were he alive. It was intended to reach cases where real estate is represented in court, by heirs, as personal estate is by executors or administrators; as where, in a real action, heirs come in to prosecute or defend a suit, instead of their ancestor who dies *pendente lite;* or where heirs commence proceedings to redeem a mortgage running to the ancestors (*Cary* v. *Herrin*, 59 Maine, 361); or where the proceeding is against heirs to recover land, which, in the lifetime of the ancestor, was held in trust for another person. (*Simmons* v. *Moulton*, 27 Maine, 496). Here the defendant is not sued because an heir. He would have been sued, if a grantee of his father. He is sued only because he is the tenant of the estate. Nor would the ancestor, if alive, be situated as he is. In such case there could be no claim or action. The case of *Nash* v. *Reed*, 46 Maine, 168, virtually decides the point against the defendant in this case; and the same doctrine is held in the case of *Flynn* v. *Coffee*, 12 Allen, 133, before cited. In the latter case the court say: "In suing to recover her dower, there is no party to the contract or cause of action who is dead, within the meaning of the statute, so as to preclude her from testifying. It is only upon the death of her husband, and not in his life, that her right of action accrues."

The husband's declarations were properly admitted, to show that he fraudulently obtained the agreement about dower. They were admitted and could be used for no other purpose. That question opened a wide field for testimony.

Motion and exceptions overruled.

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

DAVID GOLDER and another *vs.* HENRY FLETCHER.

Kennebec. Opinion March 6, 1880.

Stat. 1878, c. 67. R. S., c. 113, § 50. Poor debtor.

A special action on the case for a false disclosure cannot be maintained against a poor debtor disclosing under the provisions of the stat. 1878, c. 67, "to provide additional remedies for the enforcement of judgments."

ON EXCEPTIONS from superior court, Kennebec county, certified to the chief justice by virtue of stat. 1878, c. 10, § 7, January 22, 1880.

Action on the case to recover damages for injuries sustained on account of false swearing of the defendant before a commissioner appointed by the court under c. 67, stat. 1878, "An act to provide additional remedies for the enforcement of judgments."

The writ was dated January 30, 1879, and entered at the April term. Defendant filed a general demurrer which was sustained by the presiding justice of the superior court.

Daniel C. Robinson, for the plaintiff.

There is no wrong without a remedy. It was that maxim that occasioned the enactment, 13 Edw. I, c. 24. When the declaration discloses an injury, cognizable by law, though there be no precedent, the common law will judge according to the law of nature and the public good. Injury from the perjury of a witness is cognizable by law. R. S., c. 122, § 1; 2 C. B. 342; 3 Burr. 1771; 1 Bingh. 339; 1 Maine, 324; Broom's Legal Maxims, 193–195. It did not require the interposition of the legislature to provide a remedy. Chase's Blackstone, 678; *Parley* v. *Freeman*, 3 T. R. 51; Com. Dig. Action on the Case for Deceits; Broom's Leg. Max. 785.

Heath & Wilson, for the defendant.

APPLETON, C. J. This is an action against the defendant, a poor debtor, for a false disclosure under the provisions of the act of 1878, c. 67, "to provide additional remedies for the enforcement of judgments."

The statute, under which the proceedings in question have been had, neither expressly nor impliedly, gives a right of action

for a false disclosure. A remedy of this description has its foundation only in some statute by which it is given. *Dyer* v. *Burnham*, 41 Maine, 89.

An action for a false disclosure is provided by R. S., c. 113, § 50. The right of action does not exist at common law. *Dyer* v. *Burnham*. It is given only when the proceedings are by and under c. 113. It is "when a debtor *herein* authorized or required to disclose on oath, willfully discloses falsely, withholds or suppresses the truth," that "the creditor of record or in interest may bring a special action on the case against him," &c.

The present defendant was neither authorized nor required to disclose under any of the provisions of c. 113. The procedure to enforce the disclosure was different. The disclosure was to be had before a different magistrate. By no possible construction can § 50 be held applicable to proceedings under the act of 1878, c. 67.

The party disclosing falsely under the last named act, is amenable to all the penalties imposed for perjury—but no action is given for a false disclosure.

Exceptions overruled.

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

AUGUSTUS L. PHILLIPS, by his Guardian, *vs.* GEORGE L. MOOR.

Penobscot. Opinion March 8, 1880.

Personal property. Sale. Delivery—when not required.

Where the acceptance, by the vender of an offer for a lot of hay, is absolute and unqualified, the expression of a hope by him, that the vendee will pay a greater sum for it when hauled, does not vary the contract.

If a purchaser would retract an offer made by him for hay, on the ground that his offer was not seasonably accepted, he should notify the seller promptly of his intention so to do; otherwise he must be regarded as having waived all objection to the acceptance on that ground.

Where the terms of sale of any specific piece of personal property are agreed on and the bargain is struck, and everything the seller has to do about it is complete, and he has authorized the buyer to take it, the contract of sale becomes absolute without actual payment or delivery, and the property is in the vendee, and the risk of loss by accident devolves upon him.

If M purchase hay pressed by himself, the defence that the hay was not pressed and branded as required by R. S., c. 38, § 52, is not open to him on an action of assumpsit for the price of the hay.

ON REPORT.

WRIT dated December 13, 1878. Assumpsit, on account annexed for hay.

Plea, general issue. "The case to be reported to the law court and a nonsuit or default to be entered as the court may order." The court to draw such inferences as a jury might.

The facts appear in the opinion.

A. L. Simpson, for the plaintiff.

Barker, Vose & Barker, for the defendant.

The correspondence in this case is not sufficient to take the case out of the operations of the Statute of Frauds. *Jenness* v. *Mt. Hope Iron Co.* 53 Maine, 22. The acceptance of the offer of defendant for the hay, was neither unconditional nor seasonable, *Ibid;* Benjamin on Sales, c. 3, § 39; 8 Allen, 56; *Eliason et als.* v. *Henshaw*, 4 Wheaton, 225; *Averill et al.* v. *Hedge*, 12 Conn. 424; *Taylor Renne*, 48 Barb. 615.

The burden is upon plaintiff to prove affirmatively, that the hay was properly pressed, as required by R. S., c. 38, § 52. *Buxton* v. *Hamblen*, 32 Maine, 448.

BARROWS, J. Negotiations by letter, looking to the purchase by the defendant of a quantity of hay in the plaintiff's barn, had resulted in the pressing of the hay by the defendant's men, to be paid for at a certain rate if the terms of sale could not be agreed on; and in written invitations from plaintiff's guardian to defendant, to make an offer for the hay, in one of which he says: "If the price is satisfactory I will write you on receipt of it;" and in the other: "If your offer is satisfactory I shall accept it; if not, I will send you the money for pressing." Friday, June 14th, defendant made an examination of the hay after it had been pressed, and wrote to plaintiff's guardian, same day . . . "Will give $9.50 per ton, for all but three tons, and for that I will give $5.00." Plaintiff's guardian lived in Carmel, 14 miles from Bangor where defendant lived, and there is a daily mail communication each way between the two places. The card containing defendant's offer was mailed at Bangor, June 15, and probably received by plaintiff in regular course, about nine o'clock, A. M., that day. The plaintiff does not deny this, though he says he does not always go to the office, and the mail is sometimes carried by. Receiving no better offer, and being offered less by another dealer, on Thursday, June 20th, he went to Bangor, and there, not meeting the defendant, sent him through the post office a card, in which he says he was in hopes defendant would have paid him $10.00 for the best quality: "But you can take the hay at your offer, and when you get it hauled in, if you can pay the $10.00 I would like to have you do it, if the hay proves good enough for the price." Defendant received this card that night or the next morning, made no reply, and Sunday morning the hay was burnt in the barn. Shortly after, when the parties met, the plaintiff claimed the price of the hay and defendant denied his liability, and asserted a claim for the pressing. Hence this suit.

The guardian's acceptance of the defendant's offer was absolute and unconditional. It is not in any legal sense qualified by the expression of his hopes, as to what the defendant would have done, or what he would like to have him do, if the hay when hauled proved good enough. Aside from all this, the defendant

was told that he could take the hay at his own offer. It seems to have been the intention and understanding of both the parties that the property should pass. The defendant does not deny what the guardian testifies he told him at their conference after the hay was burned,—that he had agreed with a man to haul the hay for sixty cents a ton. The guardian does not seem to have claimed any lien for the price, or to have expected payment until the hay should have been hauled by the defendant. But the defendant insists that the guardian's acceptance of his offer was not seasonable; that in the initiatory correspondence the guardian had in substance promised an immediate acceptance or rejection of such offer as he might make, and that the offer was not, in fact, accepted within a reasonable time.

If it be conceded that for want of a more prompt acceptance the defendant had the right to retract his offer, or to refuse to be bound by it when notified of its acceptance, still the defendant did not avail himself of such right. Two days elapsed before the fire after the defendant had actual notice that his offer was accepted, and he permitted the guardian to consider it sold, and made a bargain with a third party to haul it.

It is true that an offer, to be binding upon the party making it, must be accepted within a reasonable time. *Peru* v. *Turner*, 10 Maine, 185; but if the party to whom it is made, makes known his acceptance of it to the party making it, within any period which he could fairly have supposed to be reasonable, good faith requires the maker, if he intends to retract on account of the delay, to make known that intention promptly. If he does not, he must be regarded as waiving any objection to the acceptance as being too late.

The question here is,—In whom was the property in the hay at the time of its destruction?

It is true, as remarked by the court, in *Thompson* v. *Gould*, 20 Pick. 139, that—"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 vender, the property remaining vested in him at the time of its destruction;" *Tarling*

v. *Baxter*, 9 Dow. & Ryl. 276; *Hinde* v. *Whitehouse*, 7 East. 558; *Rugg* v. *Minett*, 11 East. 210.

But we think, that, under the circumstances here presented, the sale was completed, and the property vested in the vendee. The agreement was completed by the concurrent assent of both parties; *Adams* v. *Lindsell*, 1 Barn. & Ald. 681; *Mactier* v. *Frith*, 6 Wend. 103.

In *Dixon* v. *Yates*, 5 Barn, & Adol. 313, PARKE, J., remarks (E. C. L. R. vol. 27, p. 92,): "Where there is a sale of goods, generally no property in them passes till delivery, because until then the very goods sold are not ascertained; but when, by the contract itself the vender appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel, and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vender, and the assent of the vendee to take the specific chattel and to pay the price is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee."

The omission to distinguish between general contracts for the sale of goods of a certain kind and contracts for the sale of specific articles, will account for any seeming confusion in the decisions. Chancellor KENT, 2 Com. 492, states the doctrine thus: "When the terms of sale are agreed on and the bargain is struck, and everything that the seller has to do with the goods is complete, the contract of sale becomes absolute without actual payment or delivery, and the property and risk of accident to the goods vest in the buyer." That doctrine was expressly approved by this court in *Wing* v. *Clark*, 24 Maine, 366, 372, where its origin in the civil law is referred to. And this court went farther in *Waldron* v. *Chase*, 37 Maine, 414; and held that when the owner of a quantity of corn in bulk, sold a certain number of bushels therefrom and received his pay, and the vendee had taken away a part only, the property in the whole quantity sold, vested in the buyer, although it had not been measured and separated from the heap, and that it thenceforward remained in charge of the seller at the buyer's risk.

In the case at bar all the hay was sold. The quality had been ascertained by the defendant. The price was agreed on. The defendant had been told that he might take it and had nothing to do but to send the man whom he had engaged to haul it, and appropriate it to himself without any further act on the part of the seller.

It is suggested in argument, though the point was not made at the trial, where the facts could have been ascertained, that there is no proof that the hay was properly pressed and branded according to statute requirements; and the case of *Buxton* v. *Hamblen*, 32 Maine, 448, is cited as an authority, upon the strength of which the plaintiff should be nonsuited.

If the point were fairly open to the defendant in this stage of the case, it must still be said that the defendant himself undertook to do the pressing, and did it; and if he did not do it properly, he cannot take advantage of his own wrong.

Judgment for plaintiff.

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

BENEDICT LAPHAM *vs.* SAMUEL NORTON.

Waldo. Opinion March 8, 1880.

Water wheel. Fixture. Realty.

The water wheel and gearing put into a mill to be used permanently for operating said mill, become fixtures and pass with the mill.

A mill built upon land in possession of the builder under a verbal contract for its purchase becomes a part of the realty, and the same result follows though built for a third person with an understanding that such third person will take the premises upon certain conditions.

Though a person in possession under a verbal contract of purchase is a tenant at will, he is not liable for rent so long as he performs the terms of his contract, or they are waived by the vendor. And all improvements made while such contract is in force are made under the agreement of purchase and not as tenant. In such case the principles of law applicable to landlord and tenant in relation to improvements made, do not apply; but in the absence of any other agreement, they become a part of the freehold, as in the case of mortgager and mortgagee.

ON REPORT.

TRESPASS against the sheriff of Waldo county, for the acts of J. L. Norton, his deputy, February 3, 1876, in taking with force and arms, carrying away and converting to his own use, one water wheel and gear thereto belonging, consisting of two iron shafts, two beveled gears and two drums, all of the value of eight hundred dollars.

Writ was dated October 1, 1877. Plea, general issue, with brief statement denying property in the plaintiff, etc.

The full court to decide the case according to the legal rights of the parties, with power to draw inferences as a jury might.

The report shows, that in 1870, Franklin Treat went into the possession of a lot of land, on which was a mill privilege, owned by George A. Pierce, under a verbal agreement for its purchase. While so in possession, he had charge of building a mill thereon, and the plaintiff furnished the money and means to build the mill, among which were the wheel and gearing, the title to which is the only matter in controversy. In 1874, the mill was destroyed by fire, and this wheel and gearing were subsequently removed to the barn of Mrs. Robert Treat, where they were seized by the defendant's deputy, at the time stated in the writ, as the

property of Franklin Treat, on an execution in favor of George Pierce, and sold to George Pierce, and the proceeds applied in part satisfaction of that execution.

Franklin Treat, testified, that he bought the premises of George A. Pierce, by oral agreement, with the understanding from previous conversations with plaintiff, on the subject, that on certain conditions he would take the premises; that witness never made any payment nor gave any credit for the wheel and gearing, nor in any way acquired or claimed any property, right, title or interest in or to the same; that witness was in possession of the premises at the time of the fire and at the time of the removal of the wheel and gearing, which was done by him under the direction of the plaintiff, to Mrs. Treat's barn.

Wm. H. Fogler, for the plaintiff.

Treat's occupancy was permissive. Being in occupation under an agreement to purchase, he held as a tenant at will. 1 Washburn, R. P. 389; *Patterson* v. *Stoddard*, 47 Maine, 355; *Gould* v. *Thompson*, 4 Met. 224. The mill, having been built on Pierce's land by his permission, never became a part of the realty, but remained the personal property of the plaintiff. *Russell* v. *Richards*, 1 Fairf. 429; and 2 Fairf. 371; *Hilborne* v. *Brown*, 3 Fairf. 162; *Jewett* v. *Partridge*, *Id.* 243; *Tapley* v. *Smith*, 18 Maine, 15; *Fuller* v. *Tabor*, 39 Maine, 519. Even if the wheel and gearing were fixtures annexed to the freehold, the right of removal existed so long as the tenant remained in possession of the land. *Davis* v. *Buffum*, 51 Maine, 160; *Dingley* v. *Buffum*, 57 Maine, 381; *Sullivan* v. *Carberry*, 67 Maine, 531; *Chase* v. *Wingate*, 68 Maine, 206. Pierce asserted no claim to the property, and by permitting its removal, he is estopped from asserting title; and this defendant can assert no better title in Pierce than Pierce could in himself. Pierce's representative by seizing it as personal property of Treat, has recognized it as personal property.

N. H. Hubbard, for the defendant.

DANFORTH, J. The report in this case shows, that, in 1870, Franklin Treat went into the possession of a lot of land, on

which was a mill privilege, owned by George A. Pierce, under a verbal agreement for its purchase. While so in possession, he built a mill thereon, either for himself or the plaintiff. Treat testifies that he bought the premises of Pierce, with an understanding from previous conversations with the plaintiff, that on certain conditions he would take them. It further appears that the plaintiff furnished the materials for the mill, among which was the wheel and gearing, the title to which is the only matter in controversy.

That this wheel was a part of the mill, there can be no doubt. *Farrar* v. *Stackpole*, 6 Maine, 154. It was not only used in, but adapted to it. Without the wheel the mill was incomplete, and could not be used. "It is not the mere fastening that is so much to be regarded, as the nature of the thing, its adaptation to the uses and purposes for which and to which the building is erected or appropriated." *Pope* v. *Jackson*, 65 Maine, 165; *Blethen* v. Towle, 40 Maine, 310. It is entirely unlike those movable machines referred to in *Pope* v. *Jackson*, "whose number and permanency are contingent on the varying circumstances of business,—subject to its fluctuating conditions, and liable to be taken in or out, as exigencies may require." The wheel was in as a permanent fixture, necessary for any and all uses for which the mill was erected.

As the wheel and gearing were a necessary part of the mill, so the mill was attached to, and a part of the freehold, and not personal property, as claimed by the plaintiff. True, in a certain sense, it was built by the permission of the owner of the land. He undoubtedly knew that it was to be built, and quite probably had knowledge of its progress while in process of construction, and made no objection to its erection. Why should he object? The land was under a contract of sale. The vender supposed, and had a right to suppose, that the conditions of sale would be fulfilled and the title pass by deed. There was, therefore, no duty resting upon him to make any objection to the building, nor does he lose any rights by a neglect so to do. On the other hand, the purchaser, if he acted in good faith, must have contemplated the completion of his contract and have intended

the mill as an addition to, or an improvement upon the land. It was then, legally within the expectation of both parties, that the mill was to be a fixture upon, and a part of, the freehold; and this intention conclusively decides its character, — for whether a building shall be a fixture, or personal property, depends upon a contract between the parties; not necessarily an express one, but if not express, then one which may fairly be implied from the circumstances.

This principle is clearly stated in 1 Cruise, 46, quoted approvingly in *Fuller* v. *Tabor*, 39 Maine, 521–2. It is there laid down as the rule, "that things personal in their nature, but fitted and prepared to be used with real estate, and essential to its beneficial enjoyment, having been fixed to the realty, or used with it, and continuing to be so used, become parts of the land *accessione et destinatione*, and pass with it by deed of conveyance."

But it is an exception to this rule, "when the parties previous to the annexation of things to the freehold have mutually agreed, that they shall not become parts of the realty, but shall remain the property of the person annexing them, or may be removed by him."

The cases cited by plaintiff's counsel to sustain his position, are not in conflict with this view of the law. In each of them the consent to build was given with no expectation that the title to the land built upon, was to pass, or with the understanding express or clearly implied, that the erections were not to become fixtures, but were to be and remain the property of the person constructing them.

The only case which can be said in any degree to support the plaintiff's view, is that of *Pullen* v. *Bell*, 40 Maine, 314. But an examination of this case will show the support more apparent than real. No reason is given for the conclusion reached, no allusion to any facts upon which it is grounded, but simply the remark that the "principles of *Russell* v. *Richards et al.* 1 Fairf. 429, are applicable to the facts of this case." Looking at *Russell* v. *Richards*, we find the opinion, so far as relates to the question now in issue, equally short, but sufficient to show the ground upon which the conclusion rests; and it is, that the

"mill was built at the expense of Vance and Church, and by the permission of Vance, the father, who was the owner of the land;" and "the open and express disavowal by the father, of any interest in, or claim upon, the mill." No allusion is made to the fact that the contract for the sale of the land was oral, but it is put expressly upon the ground that the parties understood at the time, that the mill was to be and remain the personal property of the builders. If the same principle applies to the facts in *Pullen* v. *Bell*, it must be because the facts in the case were such as to lead to the same conclusion as to the intent of the parties in relation to the ownership of the house, and we think they do. There was in the latter case an agreement for the sale of the land, but as a part of that agreement, it was to be put in writing. This the seller refused or neglected to do. There was, then, a breach of the agreement on his part,—virtually an offer to surrender the contract, which the purchaser not only had a right to, but must of necessity accept. Further, the house was unfinished and not attached to the land. Thus the evidence seems sufficiently satisfactory that it was not in the contemplation of the parties that the house was to become a part of the real estate, nor does the law require such injustice to be done as to make it a part. The owner of the land had held out inducements for the building of the house, which, through his fault, had failed. It could not then be said consistently with his honesty, that he intended to avail himself of the improvements made. Thus neither of these cases nor any others to which our attention has been directed, are authorities for the plaintiff, or in any degree in conflict with the principles on which the defendant's claim rests.

Nor does the claim that Treat, or the plaintiff as tenant at will, had a right to remove these fixtures during the tenancy, have any better foundation. We have no occasion to contest the rule of law laid down in the argument upon this point, but it does not help the plaintiff. If Treat was a tenant, the plaintiff was not. If the fixture was made by Treat and he had a right to remove it, as tenant at will he had nothing which he could convey to the plaintiff. *Dingley* v. *Buffum*, 57 Maine, 381.

But there is no pretence that Treat made any assignment of his tenancy or of the fixture; but the claim is that at the

beginning it was put into the mill by, and has always remained the property of, the plaintiff. Not having been affixed by a tenant, the law of tenancy does not apply.

But if the plaintiff were in Treat's place he is in no better condition. In a certain sense Treat was a tenant at will. He was in by permission. He had no title to, or interest in, the land, except this possession, from which, under the provisions of law, he might be removed at the will of the owner. Still, he had no lease, verbal or otherwise. He went in under no promise, express or implied, to pay rent, but under a contract of purchase. If the conditions of that contract had been fulfilled, no obligation to pay rent would have resulted from his occupation. His liability to pay rent arises only from an implied promise resting upon his failure to comply with the terms of his contract. *Patterson* v. *Stoddard*, 47 Maine, 355; *Gould* v. *Thompson*, 4 Met. 224. It follows that while he was in possession under his contract of purchase,—that being in force either by payments of the price so far as it had become payable, or a waiver by the vendor of any failure of performance,—the relation of landlord and tenant did not exist between these parties. The mill having been built under this contract, was not built by a tenant, and the plaintiff, even if he had all of Treat's rights, cannot avail himself of the rights of a tenant making fixtures under his lease.

The principle applicable here is rather that which applies in the case of mortgager and mortgagee, in which it is well established that whatever improvements may be made, they go with the land.

Nor will the claim of estoppel avail the plaintiff. If the wheel had been removed with the knowledge and consent of Pierce, —of which there is no evidence,—that might have been entitled to some weight as testimony upon the question of title, but it lacks a necessary element to create an estoppel. It does not appear that the plaintiff parted with any right, or in any respect changed his condition as to property, in consequence of such consent.

As the plaintiff fails to show a title in himself, there must be

Judgment for defendant.

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

STATE *vs.* GEORGE BOWDEN.

York. Opinion March 15, 1880.

Objections to juror.

An objection to a juror, which if seasonably made would have been valid, will not avail after verdict without proof affirmatively that the objection was unknown to the party making it or his attorney at or before the trial.

When an objection to a juryman is known to the party or his counsel when the jury is being impanneled, it must be taken then or it will be deemed waived.

MOTION TO SET ASIDE THE VERDICT because of disqualification of a juror.

An indictment for perjury. Verdict, guilty. All the material facts appear in the opinion.

R. P. Tapley, and *H. H. Burbank*, for the State.

Ayer & Clifford, for the defendant.

APPLETON, C. J. The defendant having been indicted on the charge of perjury, on trial was found guilty.

After the verdict was rendered, a motion for a new trial was made on the ground that Joseph H. Penney, one of the jurors, by whom the cause was heard, had, prior to the trial, expressed opinions adverse to the character of the defendant, and indicative of great ill will and prejudice against him.

Assuming the evidence offered as abundantly sufficient to have required the rejection of the juror, had it been seasonably presented to the consideration of the court, the question occurs whether under the circumstances of the case as developed by the testimony, it affords any legal ground for setting aside the verdict.

The defendant was tried before a drawn jury. It appears that his counsel had handed the clerk the name of Penney to be challenged, if drawn; that after the right of challenge had been exhausted the name of Penney was drawn; that thereupon Mr. Ayer, one of the counsel in defence, stated to the presiding justice, that he did not want this man in the case;—that he had been talking about the case or had expressed an opinion; that the presiding justice replied, saying, "You may examine him; ask him any questions you wish;" that after consultation with

his associate counsel, Mr. Ayer stated to the court that he did not wish to examine him, that he might go on; that no questions were asked, and that the cause proceeded to trial with Penney as a member of the panel.

The counsel were appraised of the state of feeling of Penney, towards their client. They had ample opportunity to examine him. The court suggested that it should be done. If the juryman had answered truly, it would have been sufficient reason for excluding him from the panel. If he had answered falsely, and it had been ascertained subsequently, that he had so answered, it would have afforded ground for a new trial. The time for investigation was when the juror was sworn. Parties are not to lie by and speculate upon the chances of a verdict, and if unsuccessful, claim a new trial because a partial and prejudiced juror, and known so to be, was on the panel, when, if they had subjected him to examination or had disclosed their knowledge of existing facts, he would not have been permitted to sit on the cause. By proceeding to trial, the defendant must abide the result. *Tilton* v. *Kimball*, 52 Maine, 500; *Jameson* v. *Androscoggin R. R. Co.* 52 Maine, 412; *Fessenden* v. *Sager*, 53 Maine, 531; *State* v. *Fuller*, 34 Conn. 280; *Wassum* v. *Feeney*, 121 Mass. 93.

Before the party can claim a new trial for the causes here alleged, it must affirmatively appear that he and his counsel were ignorant of their existence, at or before the trial. Here there is no such proof. *Davis* v. *Allen*, 11 Pick. 466; *Tilton* v. *Kimball*, *supra*; *Russell* v. *Quinn*, 114 Mass. 103.

Motion overruled.

Judgment on the verdict.

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

FORDYCE B. PERKINS *vs.* ANSEL N. BOOTHBY and others.

York. Opinion March 9, 1880.

Agency. Liability of principal.

An agent, appointed by a company to have charge of a store, sell the goods, and from time to time make such purchases of goods as might be necessary in his judgment, subject to the general oversight of the directors, has no authority to give notes of the company in order to procure loans of money; and when notes in suit were thus given the plaintiff cannot recover.

When an agent without the authority or knowldge of his principal, borrows money and applies it to the payment and discharge of the legal liabilities of his principal, and the principal knowingly retains the benefit of such payment, the lender may recover therefor in an action against the principal for money had and received.

A principal cannot knowingly retain the benefit of money hired by his agent, in the name of the principal, and at the same time legally refuse to repay the loan upon the ground that the agent had no authority to borrow money.

THIS was an action of assumpsit upon five promissory notes. The first, dated November 8th, 1875, for $140, payable on demand with interest; second, dated February 3d, 1876, for $250, payable on demand with interest at seven per cent.; third, dated September 16th, 1876, for $145, payable on demand with interest; fourth, dated September 22d, 1876, for $900, payable on demand with interest; and fifth, dated January 17th, 1877, for $500, payable on demand with interest.

The action was referred, and the report of the referee makes a part of the case, and "is submitted to the full court to be acted upon with same powers as this court." The plaintiff was allowed to amend his writ by filing a count for money had and received.

Report of referee.—"YORK, ss. Pursuant to the foregoing rule, I, the referee therein named, having notified, met and fully heard the parties, and maturely considered their several allegations, and the evidence produced to support the same, am of opinion, and do report accordingly, that the defendants were a joint stock company, organized under a code of by-laws for buying and selling dry goods and groceries for a profit, and for

this purpose occupied a store. The directors annually chosen, as provided by the by-laws, had the general charge and control of the business, and in June, 1872, they appointed A. L. Cleaves an agent of the company, whose duty it was to have charge of the store, sell the goods, and from time to time make such purchases of goods as might be necessary in his judgment, subject to the general oversight of the directors. The agent usually purchased the goods upon the credit of the company, sometimes giving a company note therefor, which notes were recognized as binding, and were paid. He had no authority for hiring money upon the credit of the company, or giving the company notes therefor, unless implied from his agency. In a few instances he borrowed money of persons not members for the payment of debts previously contracted for the purchase of goods, for which he gave a company note. These notes, with two exceptions, were paid by the agent, and neither these notes nor the fact of hiring the money came to the knowledge of the directors. In these two exceptions the notes were not fully paid by the agent, and after the company ceased to do business they were presented to and paid by the person appointed to settle its affairs."

"In several instances the agent hired money of some of the directors and members to meet debts falling due for goods purchased, in some cases giving company notes, which loans he repaid without the knowledge of any except the lenders. At or about the dates of the notes in suit, this agent hired of the plaintiff through Silas Perkins, acting as plaintiff's agent, the several sums of money for which said notes are given. Four of the notes were signed and delivered by said Cleaves to the payee while he was acting as agent for the company. The fifth, that for $900, dated September 22, 1876, though signed before was not delivered by Cleaves until after he was discharged from his agency. In making these loans neither Silas Perkins nor his principal, the plaintiff, had any knowledge of any other loans of money obtained for the company by Cleaves, or of the notes given by him in their name, but relied upon his authority as agent. Neither the directors nor the company had any knowledge of these loans or the notes given for them until after they had ceased to do business, and then they repudiated both loans and notes."

"The money for which these notes were given was received by Mr. Cleaves, the company's agent, and by him appropriated to the payment of the debts of the company, contracted for goods previously purchased, but the directors had no knowledge of such loan or appropriation unless knowledge is implied from the fact that it was done by their agent."

"If upon the foregoing statement the plaintiff is entitled to recover upon the four notes only which were delivered by Cleaves during his agency, then he is entitled to judgment for the sum of eleven hundred eighty-three 76–100 dollars ($1183.76) debt; if upon all the notes he is entitled to judgment for twenty-two hundred six 46-100 dollars ($2206.46) debt, or if he is not entitled to recover upon either note and can recover for money received, upon this writ with such amendments as the court may allow, then he is entitled to the latter sum of twenty-two hundred six 46–100 dollars ($2206.46) debt, and in either case to costs of reference, taxed at forty-seven dollars and seventy-two cents ($47.72) and costs of court, to be taxed by the court."

"If the plaintiff is not entitled to recover as above, then judgment is to be entered for the defendants, with costs of reference, taxed at thirteen dollars and ninety-two cents ($13.92) and costs of court, to be taxed by the court.

CHARLES DANFORTH."

R. P. Tapley and *J. M. Goodwin*, for the plaintiff, cited: Story Agency, c. 5, § 45, c. 6, § § 84, 85, 87, 89, 92, 95, 104; 1 Bell's Com. Law, 478; 1 Addison Contr. § 56; *Houghton* v. *Nash*, 64 Maine, 477; 1 Addison Contr. 50; 3 *Ibid.* 513; U. S. Dig. Tit. Money Received, § § 5, 8, 11, and cases cited; *Mason* v. *Waite*, 17 Mass. 560; 2 Denio, 91; *Lewis* v. *Sawyer*, 44 Maine, 332; *Merchants' Bank* v. *State Bank*, 10 Wall. 604; Angell & Ames Corp. 599, 600.

H. Fairfield, for the defendant, cited: Story Agency, § 119, a; § 69 and note 2; 1 Pars. Notes & Bills, 107; 1 Pars. Contr. 49, 51, note h.; 9 Port. (Ala.) 428; 6 Blackf. (Ind.) 369; 10 Johns. (N. Y.) 114; *N. Y. Iron Mine Co. in Error* v. *First Nat. Bank of Negaunee*, opinion S. J. C. of Michigan, October,

1878, reported in Michigan Lawyer for October, 1878, p. 85. The plaintiff lays great stress upon the fact that this money was received by Cleaves and appropriated by him for the payment of goods, which went into our store. But this is not an equity matter, and the question is not, Who received the benefit of the money borrowed? but only, Was Cleaves authorized to borrow money? or, Was the plaintiff justified in believing he had that authority? The manner in which Cleaves appropriated the money, does not change the law of agency.

SYMONDS, J. Upon the facts found by the referee in this case, it must be held that the agent, Cleaves, had no authority to give the notes of the defendant company, in order to procure loans of money. As the notes in suit were given by the agent for that purpose, it would seem that the plaintiff cannot recover upon them.

But it appears by the report of the referee, that, "the money for which these notes were given was received by Mr. Cleaves, the company's agent, and by him appropriated to the payment of the debts of the company, contracted for goods previously purchased." The directors of the company had no knowledge of such loan and appropriation at the time they were made, but by the act of their agent in so applying moneys hired of the plaintiff, certain legal liabilities against the defendants have been discharged. The case presents the question, whether the defendants can knowingly retain the benefit of money so hired and used, and at the same time legally refuse to repay the loans.

In considering this question, it may properly be assumed from the statement of the case, that the agent had no more authority to hire money upon the credit of the company, than he had to effect such loans by issuing the notes of the company therefor;—that the defendants had no knowledge of the loans or the notes, until after they had ceased to do business as a joint stock company, when they repudiated both. Such repudiation, however, was apparently a declaration only, not an act. The appropriation by the agent of the loans to the payment of the debts of the company remained effective. The directors did nothing to defeat it. The debts were discharged. The acts

of the agent in hiring and in appropriating the money were beyond his authority and without the knowledge of the principals. The only ground of liability is the fact that the defendants, while in terms repudiating at once upon notice the unauthorized acts of their agents in their behalf, at the same time had received at the date of the writ, and, after knowledge of the facts, still retain the benefit of the loans so effected and used without authority, in the discharge of certain valid claims, which would now be in full force against them, except for the acts done by the agent in excess of his authority.

The duty of the agent was "to have charge of the store, sell the goods, and from time to time to make such purchases of goods as might be necessary in his judgment, subject to the general oversight of the directors." In the conduct of the business of the company, he assumed to hire money for them, and to pay their debts for goods that had been purchased. Notwithstanding debts of the company to the full amount of the loans have been discharged thereby, the defendants claim that the agent's want of authority relieves them from liability to the lender, and affords a defence, not only against the notes, but also against the claim to recover under the common counts as for money had and received.

Questions analogous to this have, perhaps, been most frequently considered in reference to the liabilities of corporations for the unauthorized acts of their agents. In *Merchants' Bank* v. *State Bank*, 10 Wallace, 604, it was held that if a cashier, without authority to buy coin in behalf of his bank, does so buy it and it goes into the funds of the bank, the bank is liable upon the principle of *quantum valebat*. "If the certificates and the gold actually went into the State Bank, then the bank was liable for money had and received, whatever may have been the defect in the authority of the cashier to make the purchase."

In the opinion of Mr. Justice HUNT, in *Mayor of Nashville* v. *Ray*, 19 Wallace, 484, the following language is used which is sufficiently intelligible without a statement of the case:— "It is a general rule, applicable to all persons and corporations, and is a dictate of plain honesty, that whoever knowing the facts of the case retains and uses money received by an agent for his

account, cannot repudiate the contract on which it is received. *Bissell* v. *Jeffersonville*, 24 Howard, 300; Sedgwick on Statutory and Constitutional Law, 90. Putting this transaction most strongly against the plaintiff, by assuming that this re-issue was not *ultra vires* merely, but was positively prohibited by law, the city is still responsible to the holder of the checks for the money it has received and still retains. Conceding the illegal contract to be void, or forbidden by the legislature, it is to be remembered that the prohibition is upon the city only, and not upon the person dealing with it; the illegality is on the part of the city, and not of the person receiving the checks. The contract may well be void as to the city, and its officers punishable for the offence of making it, and yet it may stand in favor of innocent persons not within the prohibition. Such was the decision in *Tracy* v. *Talmage*, 14 N. Y. 162; in *Curtis* v. *Leavitt*, 15 *Id.* 9; and in *The Oneida Bank* v. *The Ontario Bank*, 21 *Id.* 490. The latter case was briefly this: 'The general banking law of New York prohibited the issuance by a bank of a certificate of deposit payable on time. The cashier of the Ontario bank received $5000 in cash from one Perry, and delivered to him a certificate of deposit postdated about four weeks, for the purpose of raising funds for the bank. This draft Perry transferred to the Oneida bank, who brought suit upon it. It was held, assuming this draft to be void, that the party making the contract could reject the security, and recover the money or value which he advanced on receiving it. It was held further, that the right of action to recover this money passed to the Oneida bank upon the transfer of the certificate to them. The plaintiff recovered the money advanced to the bank upon the illegal certificate. Both of these principles were held with equal distinctness in *Tracy* v. *Talmage*, *supra*.'"

"They seem to me to be decisive of the right of the plaintiff to recover upon the checks, regarding them in their most unfavorable aspect, the amount of money advanced to, and yet held by the city."

The differences of opinion in the court, in this case, do not seem to have reference to the general application of the principles cited in this extract, but to a distinction in this respect in

favor of municipal corporations, the officers of which, some of the judges held, cannot, like the officers of a private corporation, create by their acts an estoppel against the corporation, its taxpayers or people, so as to render illegal issues of ordinary city drafts valid in the hands of holders for value; and cannot subject the city to liability for money illegally borrowed, the holders and the lenders in such case being affected with notice of the illegality.

"There seems to be no substantial reason whatever for not extending the principle here involved to all analogous cases. If liable in one case why should not a corporation be always liable to refund the money or property of a person which it has obtained improperly and without consideration, or if unable to return it, to pay for the benefit obtained thereby? To say that a corporation cannot sue or be sued upon an *ultra vires* arrangement is one thing. To say that it may retain the proceeds thereof, which have come into its possession without making any compensation whatever to the person from whom it has obtained them, is something very different, and savors very much of an inducement to fraud." Green's Brice's *Ultra Vires*, 618.

The question whether upon reason and authority the application of this principle should be extended to municipal corporations, or whether, on the contrary, the purposes for which such bodies are organized, the limited powers conferred upon them, as well as considerations of public policy and safety, may remove them from such liability, is one of great importance. It does not arise in this case.

The principle referred to in the last citation, and stated as a general one, applicable to persons and corporations, in the opinion of Mr. Justice HUNT, is decisive of the present case. It has received a wide and uniform recognition in the leading authorities. It is more or less directly recognized in *Chicago Building Society* v. *Crowell*, 65 Ills. 459, 460; *DeGroff* v. *American Linen Thread Co.* 21 N. Y. 124; *Bissell* v. *Michigan Southern & Northern Indiana R. Co.* 22 N. Y. 258; *Bradley* v. *Ballard*, 55 Ills. 417; *Steam Navigation Co.* v. *Weed et als.* 17 Barb.

378; *State Board of Agriculture* v. *Citizens R. Co.* 47 Ind. 407; (17 Am. R. 102,); *Dill* v. *Wareham*, 7 Met. 438; *White* v. *Franklin Bank*, 22 Pick. 181; *Atlas Bank* v. *Nahant Bank*, 3 Met. 581; *Railway Company* v. *McCarthy*, 6 Otto, 267; *Franklin Company* v. *Lewiston Savings Bank*, 68 Maine, 49; compare, also, *Concord* v. *Delaney et al.* 56 Maine, 201; and 58 Maine, 309; *Parish* v. *Wheeler*, 22 N. Y. 503.

The conclusion reached upon this branch of the case renders it unnecessary to consider in detail the question of the agent's authority, or whether the defendants were rendered liable by any recognition of his acts, as those of one who was authorized to bind them by notes so issued in their behalf.

According to the stipulation of the report, if the plaintiff can recover for money had and received by the defendants, he is entitled to recover the sum of $2206.46.

Judgment is to be entered for the plaintiff for the sum of $2206.46 with interest from the date when the report of the referee was made, as the debt; with costs of reference as taxed by the referee, and costs of court to be taxed at Nisi Prius.

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

W. A. L. RAWSON, Administrator, *vs.* MYRA H. KNIGHT, Administratrix.

Knox. Opinion March 15, 1880.

R. S., c. 87, § 11; stat. 1872, c. 85. Administrator. Pleading. Attorney. Estoppel.

The notice to and demand upon an administrator or executor required by R. S., c. 87, § 11, as amended by c. 85, of the acts of 1872, must be given to and made upon such executor or administrator personally.

An omission to give such notice and make the demand may be taken advantage of under a special plea or a brief statement under the general issue.

The reception of such notice and demand by an agent or attorney, is not incident to a general appointment or employment to assist in settling an estate; nor will such an appointment relieve claimants from any duty incumbent upon them by force of the statute.

Such notice and demand may be waived in whole or in part. If the written notice and demand is left with a person or at a place, designated by the person upon whom it should be served, under the provisions of the statute, such service would be sufficient by way of waiver or estoppel.

ON REPORT.

ACTION OF ASSUMPSIT for two five hundred dollar United States bonds. Writ is dated November 26, 1877.

Plea, general issue, with the following brief statement:

"And the defendant further says, by way of brief statement as matters of her defence, that the claim and demand, declared upon and described in the plaintiff's said writ, was not presented to her in writing and payment demanded at least thirty days before the said action was commenced."

At the trial, Jno. B. Stetson testified; examination by Mr. Gould:

Answer.—I called on Mr. Montgomery and he sent me to Mrs. Knight. I went to her and asked her for those bonds, and she said: "Go and see Mr. Montgomery." She said Mr. Montgomery was doing her business and he would attend to it. *Question.*—Did you employ me, or the firm of Gould & Moore, afterwards, to act for you? *Answer.*—Yes.

A. P. Gould, Esq., testified as follows: I was employed,—or our firm was employed—by Mrs. Stetson, through her son, who brought authority, and we took a retaining fee for the

prosecution of this suit, on the fifth of September, 1877. On the twenty-ninth day of the same month—twenty-ninth of September, 1877,—I went to Camden myself. Before going, my partner, Mr. Moore, drew the demand and notice on this claim, which notice I hold in my hand. This is in his hand writing, and he drew a duplicate of it. He took one and I took the other and we compared them by reading. I took both with me to Camden. I had some other business at Camden and I remained there some time. I was proceeding to go to Mrs. Knight's house, having learned where it was, to leave one of the duplicates, but before I started to go to the house I met Mr. Montgomery, and stated to him what I was about to do, and he stated to me that there was no need of me going to the house; that he would take the paper. He took the paper and this [in witness' hand] is a duplicate.

Notice.—"To Mrs. Myra H. Knight, administratrix upon the estate of Elbridge G. Knight: You will please to take notice that I have a claim against the estate of Elbridge G. Knight, for two five hundred dollar United States government bonds,—one five hundred dollar bond numbered 32,546, due in 1881; one five hundred dollar bond numbered 33,380, of the issue of 1867, with the coupons thereon from July 1, 1875. Said bonds were loaned in 1875, to said Knight by me and I hereby demand the return of the same to me forthwith or their value, and the value of the coupons thereon at the time of my said loan in cash.

Respectfully, yours,

HARRIET B. STETSON.

By Gould & Moore, her attorneys."

September 29, 1877."

Witness.—I made that minute on the duplicate after I got home, and charged for going to Camden and drawing the papers. The minute on the paper is as follows: "Copy left with Montgomery for Mrs. K., September twenty-ninth, 1877.

A. P. G."

If the notice (statutory,) either under the pleadings or otherwise, was sufficient, the case was to stand for trial; if not, a nonsuit to be entered.

A. P. Gould, for the plaintiff.

By the stat. 1872, c. 85, the notice is not specifically required to be given the administrator in person. R. S., c. 87, § 11, required the claim to be presented "to the administrator;" this was struck out by the statute of 1872, in order that the service might be good, if made upon an agent. Counsel claimed that the testimony established the agency of Montgomery, and that notice to him was equivalent to notice to the principal. R. S., c. 1, § 4, XXI; Story, Agency, § 140, and cases cited in note; *Astor* v. *Wells*, 4 Wheat. 466; *Gale* v. *Lewis*, 9 Q. B. 730 (58 E. C. L. R. 728,); 9 S. & M. 476; *Patterson* v. *Ins. Co.* 40 N. H. 375; *Williams* v. *Gitty*, 31 Pa. St. 461; *Owen* v. *Roberts*, 36 Wis. 258; *Whitehead* v. *Wells*, 29 Ark. 99; 2 Green, 420; 3 Story's R. 659; 10 N. Y. 178; 20 N. Y. 468.

The want of statute notice should have been pleaded in abatement. Counsel argued this proposition in another case.

J. H. Montgomery and *C. E. Littlefield*, for the defendant.

The statute makes the presentment and demand a material part of the case,—its foundation; and it is one of the facts to be proved under general issue. The want of it need not be pleaded in abatement. 1 Chitty Pl. 435; Stephen Pl. 48; *Brown, Adm'x*, v. *Nourse et als.* 55 Maine, 230; *Belmont* v. *Pittston*, 3 Maine, 453; *Stevens* v. *Adams*, 45 Maine, 611; *Nichols* v. *Perry*, 58 Maine, 29; *Hager* v. *Union Nat. Bank*, 63 Maine, 509; *Merrill* v. *Shattuck*, 55 Maine, 370; Gould Pl. c. VI, § 62.

The evidence only discloses that Montgomery was counsel for the defendant. It does not show any waiver of notice by defendant or that she ever had notice. *Merrill* v. *Shattuck*, *supra; Bridgton* v. *Bennett*, 23 Maine, 420; *Jewett* v. *Wadleigh*, 32 Maine, 110; *McKeen* v. *Gammon*, 33 Maine, 187; 1 Greenl. Ev. § 186, (13th ed.); *Veazie* v. *Rockland*, 68 Maine, 511.

DANFORTH, J. By R. S., c. 87, § 11, as amended by c. 85, of the acts of 1872, it is provided that—"No action against an executor or administrator . . . on a claim against the estate shall be maintained, . . . unless such claim is first presented in writing, and payment demanded at least thirty days before the action is commenced."

In this case, it is objected that the provisions of this statute have not been complied with; to which the plaintiff replies, claiming a compliance, or if not, that the defendant is too late, the objection should have been taken by a plea in abatement, and not by a brief statement under the general issue.

"The grounds for a plea in abatement are any matters of fact tending to impeach the correctness of the writ or declaration; *i. e.*, to show that they are improperly framed, without, at the same time, tending to deny the right of action itself." Stephen on Pleading, 47. "A plea in bar is distinguished from all pleas of the diliatory class, as impugning the right of action altogether, instead of merely tending to divert the proceedings to another jurisdiction, or suspend them, or abate the particular writ or declaration. It is, in short, a substantial and conclusive answer to the action;" *Ibid.* 51.

It is evident, that a plea proper to raise the objection under consideration, will come under the latter definition. The statute makes the presentment in writing and demand indispensable prerequisites to the maintenance of the action. They are elements in the cause of action to be alleged in the declaration and proved by the plaintiff, as much as any other fact necessary to a recovery. Hence, an omission in this respect, is as "substantial and conclusive an answer to the action, as a failure to prove any other fact involved in the case. A nearly or quite universal test of the necessity of resorting to a plea in abatement, is, that it presupposes and must give to the plaintiff a better writ. In this case no better writ can be given, for the simple reason that if the objection prevails it is fatal to the action.

This statute is of a comparatively recent date, and so far as we are aware, has not received a judicial construction; but others of a similar import have often been before the court, and have uniformly been construed in accordance with the views here expressed. In *Hathorn* v. *Calef*, 53 Maine, 471, the notice required to be given stockholders in a corporation of a want of attachable corporate property in order to hold them for the debts of the corporation, was recognized as a substantive part of the action against such stockholder, necessary to be alleged in the declaration and proved by the plaintiff under a plea in bar. In

Nichols v. *Perry*, 58 Maine, 29, the same principle was recognized without a question, in relation to the statute requiring notice from a mortgagee to an officer attaching the mortgaged property as that of the mortgager. The statute requiring a demand before commencing an action of dower, would seem to be exactly analogous to that under consideration, and under that it has long and uniformly been held that the demand must be alleged, and its omission is fatal under a demurrer, or if alleged, it must be proved under a proper plea in bar. Jackson on Real Actions, 316; *Luce* v. *Stubbs*, 35 Maine, 92; *Freeman* v. *Freeman*, 39 Maine, 426.

In the case at bar there is no allegation of presentment and demand in the declaration, but as no demurrer was filed, that defect is waived. There is, however, with the general issue, a brief statement filed, which is sufficient to require proof of a compliance on the part of the plaintiff, with the statute, or a waiver of such compliance by the defendant, and thus distinctly raises the principal question involved in this case, and that is, Whether the evidence reported is sufficient to authorize a jury to find the required presentment and demand or a waiver.

It is clear that a fair construction of the statute requires that the written claim shall be presented to, and the demand made of, the executor or administrator. True, this is not in terms required, but no other person is referred to, and the object of the demand is to give such information and such time for investigation, as shall enable intelligent action; and certainly we cannot expect action except from him upon whom alone rests the duty, as well as the responsibility. The service then to be made upon an individual, must necessarily be a personal service, for the statute authorizes no other. Sedgwick on the Construction of Statutory Law, 378.

It is undoubtedly true as a general rule, that what a person may do by himself, he may do by another, as his agent. But this rule is applicable only when there is something to be done and not merely to suffer. The executor or administrator in this matter is merely a recipient, and not the acting party. The demand is but the initiatory process of the action. Until that is done there is no occasion for an agent; no act for him to do but

simply to await action of the party making the claim. The very fact that the statute provides for the appointment of an agent, or attorney, upon whom a demand may be made, when the executor or administrator resides out of the State, is a clear intimation that no such appointment is contemplated when not so residing. Even if an agent or attorney were appointed to assist in settling an estate, the reception of such demand could not be an incident of such an agency, nor would such an appointment relieve claimants from any duty incumbent upon them by force of the statute.

Nor is the rule of law by which the principal is bound by a notice to an agent, applicable. That applies only when the notice is of some fact that will legally modify or control some act, which the agent had been authorized to do, as in *Astor* v. *Wells*, cited in the argument; or as in the illustration taken from Story's Agency, "When it arises from, or is at the time connected with, the subject matter of his agency," or is to be given to a corporation which can act only by agents.

In this case there was no act which an agent was performing or had performed to be modified by the notice and demand, for such was the beginning of, or foundation for a subsequent process, intended to induce future, and not to modify or control present action, and not that of a corporation, but of an individual, personally and officially responsible for his own doings. In *Freeman* v. *Freeman*, *supra*, the demand of dower, though made upon the premises, was held insufficient, because is did not appear affirmatively to have been made upon the proper person. In *Luce* v. *Stubbs*, *supra*, the demand, though left at the dwelling of the respondent, was held sufficient only when it appeared that it had been actually received by the person for whom it was intended; see also, *Burbank* v. *Day*, 12 Met. 557.

But while there is no authority for making the presentment to, and demand upon, an agent, it is clear, that, as in the matter of dower, the claimant may make the demand by an agent; and in this case, when the written claim was presented to the alleged attorney under a promise on his part to deliver it to the defendant, so far as this matter is involved, he became the agent of the plaintiff rather than that of the defendant. Hence, in this connec-

tion, the question would arise whether the defendant actually received the written claim not less than thirty days before the commencement of the action, and this may be proved, as in *Luce* v. *Stubbs*, by positive and direct testimony, or inferred from facts and circumstances shown by sufficient evidence. It appears from the report, that the writing was left with one, who, if not at the time the attorney of the defendant, subsequently became such, and who for some reason, does not appear as a witness, either to admit or deny the fulfillment of his promise. Here, then, is testimony bearing upon the fact of a demand, proper for the consideration of the jury, the force and effect of which they alone are the judges.

Independent of these considerations, another question may arise in this case for the jury,—that of estoppel or waiver. If a person having a demand against an estate, and proposing to lay the foundation of an action by a compliance with the provisions of the statute, were made reasonably to understand, either by the acts, or words, or both, of an executor or administrator, that the written claim might be left with a person, or at a place, designated, and acting upon such understanding he should so leave it, well settled principles of law, as well as of justice, would estop a denial of due service. The statute, though of a public nature, has for its object the protection of the rights of estates and individuals. Its provisions may therefore be waived by those for whose benefit it was passed, and who represent the interests involved. Sedgwick's Cons. of Statutory Law, 87; *Hingham & Quincy, B. & T. Cor.* v. *County of Norfolk*, 6 Allen, 356. Such waiver will be conclusively inferred unless the question is raised by the proper plea. *Ayer* v. *Spring*, 10 Mass. 83. It may be done before as well as after the commencement of the action, and whether it has been done, or whether the defendant is estopped to deny the proper demand raises a question for the jury which they may settle by any competent and sufficient evidence.

The result is that the pleadings in this case raise two questions of fact for the jury, upon which the report discloses some evidence, competent for their consideration, viz: Whether the

written claim and demand seasonably reached the defendant, and if not, whether there was an estoppel or waiver.

Action to stand for trial.

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

WILLIAM B. SUMNER *vs.* RICHARDSON LAKE DAM COMPANY.

Androscoggin. Opinion March 15, 1880.

Corporation. Eminent domain.

When the legislature, in the legitimate exercise of the right of eminent domain, has chartered a corporation with certain powers and privileges, the corporation in the exercise of its corporate rights, is not liable for consequential damages arising from such exercise, without fault or negligence on its part.

ON AGREED STATEMENT OF FACTS.

The case was submitted for the purpose of determining the rights of the defendant corporation, under its charter.

The material facts appear in the opinion.

Charter.—"An act to incorporate the Richardson Lake Dam Company. Be it enacted by the senate and house of representatives in legislature assembled, as follows:

"Section 1. That Leonard E. Dunn, E. S. Coe, and D. F. Leavitt, their associates, successors and assigns, be and hereby are constituted a body politic and corporate by the name of the Richardson Lake Dam Company, for the purpose of making such improvements on the Androscoggin river and its tributary waters, as will facilitate and render more convenient the drifting or driving of logs, masts, spars and other timber; by removing obstructions, building dams, wing dams, gates, piers, booms, and so forth; and by which name they may take and hold any estate, real, personal or mixed, to an amount not exceeding ten thousand dollars; and have and enjoy all the rights and privileges, and be subject to all the duties and liabilities incident to similar corporations under the laws of this State."

"Section 2. Said corporation shall have power to erect and maintain dams on the waters aforesaid, with suitable gates and sluiceways, for the passage of logs and lumber, with the right to clear and deepen the channels of said waters, and remove the obstructions therefrom; and to erect all necessary piers, booms, side booms, and works to increase the facilities for driving logs and lumber."

"Section 3. Said corporation is hereby empowered to take such lands as may be necessary for the sites of said dams, booms and sluices, and such materials as may be needed for the erecting and maintaining the same, and in case said corporation cannot agree with the owner or owners, as to the price, the amount to be paid for said land or materials, so taken, shall be referred to three disinterested persons, one of whom shall be chosen by each of the parties aforesaid, and the third by the two first, so chosen, the report of whom, or the majority of them, shall be final; and said corporation shall be liable for all damages by flowing, caused by said dams, to be ascertained and determined in the manner prescribed in chapter one hundred and twenty-six of the revised statutes."

* * * * * *

Approved, March 22, 1853.

M. T. Ludden, for the plaintiff.

The plaintiff asks compensation for damages sustained by despoiling of his meadow lands in Leeds, contiguous to Androscoggin river, by the unnatural flow of water caused by the defendant's dams. He has a right to the natural flow of the water. *Davis* v. *Fuller*, 12 Vt. 190; *Gerrish* v. *Newmarket*, 30 N. H. 478; and to compensation for damages sustained from an unnatural flow. *Tillotson* v. *Smith*, 32 N. H. 90; *Beally* v. *Shaw*, 6 East. 214; *Mason* v. *Hill*, 3 B. &. A. 303; *Ex parte Jennings*, 6 Cowan, 519; 2 Johns. c. 162; 46 N. H. 57; 35 N. H. 134; *Black* v. *Walcott*, 3 Mason, 508; *Watts* v. *Kinney*, 23 Wend. 484. Defendant's charter cannot bind a stranger to the act. Potter's Dwarris on Stat. 56; 1 Kent's Com. 427, 428; *Osborn* v. *Bank of U. S.* 9 Wheat. 738; Lieber's Political Ethics, Vol. 1, Book 1, c. 6. When a dam, erected under a

charter, upon a navigable river, impedes navigation, it is to that extent a nuisance. *Knox* v. *Chaloner*, 42 Maine, 155.

The charter has no provision for assessment of damages to land owners below the dams, and is unconstitutional. Const. of Maine, Art. 1, § § 19, 21; *Preston et al.* v. *Drew*, 33 Maine, 558; *Thacher* v. *Dartmouth Bridge Co.* 18 Pick. 501.

Wm. P. Frye, *John B. Cotton* and *W. H. White*, for the defendant corporation, cited: *Spring* v. *Russell et als.* 7 Maine, 273; *Parker* v. *The Cutler M. D. Co.* 20 Maine, 353; *Moor* v. *Veazie*, 32 Maine, 343; *Boston & Roxbury Mill Corp.* v. *Newman*, 12 Pick. 467; *Boston Water Power Co.* v. *B. & W. R. R. Corp.* 23 Pick. 361; *Chase* v. *Sutton M'f'g Co.* 4 Cush. 152; Cooley Cons. Lim. 650, (4th ed.); *Mellan et al.* v. *R. R. Co.* 4 Gray, 301; *Rowe* v. *Granite Bridge Corp.* 21 Pick. 348; *Dodge* v. *Co. Com.* 3 Met. 383; *Carson* v. *Western R. R. Co.* 8 Gray, 423; *Prop's of L. & C.* v. *R. R. Co.* 10 Cush. 385; *Curtis* v. *Eastern R. Co.* 14 Allen, 55; *Walker* v. *O. C. R. R.* 103 Mass. 10; Broom's Leg. Max. ed. 1874, 198; *Spring* v. *Russell*, 7 Maine, 273; *Rogers* v. *K. & P. R. R.* 35 Maine, 319; *Whittieer* v. *P. & K. R. Co.* 38 Maine, 26; *Boothby* v. *A. R. R.* 51 Maine, 318; *Frye* v. *Moor*, 53 Maine, 583; *Lawler* v. *Baring Boom*, 56 Maine, 443; *Davidson et als.* v. *B. & M. R. Co.* 3 Cush. 105; *Callender* v. *Marsh*, 1 Pick. 435; *Toothaker* v. *Winslow*, 61 Maine, 123; *Davis* v. *Getchell*, 50 Maine, 602; *Davis* v. *Winslow*, 51 Maine, 264–298; *Phillips* v. *Sherman*, 64 Maine, 171; *Springfield* v. *Harris*, 4 Allen, 494; *Pool* v. *Harris*, 2 Am. R. 526; *Gould* v. *Boston Duck Co.* 13 Gray, 442; *Marble* v. *Worcester*, 4 Gray, 397; 1 Hilliard's Torts, 78; *China* v. *Southwick et al.* 3 Fairf. 238.

APPLETON, C. J. The defendant company was incorporated by an act of the legislature of this State, in which provision is made for the payment of damages, but the plaintiff is not entitled to any within the terms of the act.

The dam, which the plaintiff claims was the cause of the injury he has sustained, was distant one hundred and twenty-five miles from the land claimed to have been damaged. The waters it accumulated were discharged into Lake Umbagog. Below this lake at Errol, in New Hampshire, is a dam erected by the

Androscoggin River Improvement Company a company incorporated by the legislature of New Hampshire. The waters of the lakes of the Androscoggin river and of the streams entering it above the Errol dam, are controlled by it. Whatever damage has been done was caused by the water accumulated at the Errol dam. But the defendant has nothing whatever to do with the dam at Errol. Whether the water is discharged in too large or in too small quantities — whether negligently or prudently, the act is not the act of the defendant. The defendant neither retains nor discharges the water at Errol dam. There is no allegation of fault or negligence on its part. There is no allegation of fault or negligence on the part of the corporation controlling the Errol dam, and if there was fault or negligence on its part, there is no pretence that the defendant is responsible in any way for such fault or negligence. It is difficult, upon the facts admitted, to perceive any ground upon which the defendant can be held chargeable for results, with the causation of which it had nothing to do.

By the agreement of the parties, a nonsuit is to be entered, "if the defendant under its charter has the right to use the water of the river at all seasons, in quantities which may be reasonably required for the purpose of driving and floating logs, without payment of damages." The damages here referred to are not damages for which compensation is given by statute.

As was remarked by BARROWS, J., in *Toothaker* v. *Winslow*, 61 Maine, 131, "the legislature in the legitimate exercise of the power of eminent domain have granted powers and privileges to the Richardson Lake Dam Company, which must necessarily to some extent affect the use of the water below, and the common rights of all citizens to the use of the stream as a public highway; yet the powers thus granted are to be exercised in a reasonably discreet manner, for the accomplishment of the purpose for which the grant was made, with as slight disturbance or abridgment of the public rights as may be." There is no negligent, careless or wrongful act done or alleged to be done by the defendant. That indirect and remotely consequential injury might arise would not make the defendant liable when such injury was not the result of its action. When a company only does, what

by its charter it is authorized to do, and is free from fault and negligence, it is not liable for consequential damages. *Boothby* v. *A. & K. R. R. Co.* 51 Maine, 318; *Burroughs* v. *Housatonic R. R. Co.* 15 Conn. 124; *Lawler* v. *Baring Boom Co.* 56 Maine, 443. The defendant is in the exercise of the power of eminent domain derived from the State and is not liable for any consequential injury arising in the careful and judicious use of all legal powers conferred by the legislature. *Hatch* v. *Vermont Central R. R. Co.* 25 Vt. 49; *Cleveland & Pittsburg R. R. Co.* v. *Speer*, 56 Penn. 325.

The defendant uses the water in accordance with its chartered rights. No fault whatever is shown either of action or inaction. The numerous cases cited by the defendant all concur that an action like the present cannot be sustained against a corporation acting strictly within the limits of the authority conferred upon it.

Plaintiff nonsuit.

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

JOSEPH W. LITTLEFIELD *vs.* LEVI T. COOMBS.

Androscoggin. Opinion March 21, 1880.

Memorandum upon a contract. Promissory note. Alteration.

When a contract or promise is unilateral, and the body of the contract fails, for any reason, to express the agreement between the parties, and a memorandum is made upon the same paper and delivered as a part of the contract, it is as much a part of the contract as if written in the body of it.

When the memorandum is collateral to and independent of the contract, it does not become a part of the contract and no way changes it.

Thus, where a promissory note, signed by G. W. C. and L. T. C. payable "on demand with interest," had the following memorandum upon it, written below the signatures: "Interest on the above note to be nine per cent. G. W. C.;" *Held*, that it was not a material alteration of the note so far as L. T. C. was concerned.

ON EXCEPTIONS.

This is an action of assumpsit against the defendant on a promissory note, of which the following is a copy:

"Lisbon Falls, Dec. 3, 1872.

"$174. For value received, I promise to pay to Joseph W.

Littlefield or order, one hundred and seventy-four dollars on demand with interest.

G. W. COOMBS.
LEVI T. COOMBS."

"Interest on above note to be nine per cent. G. W. C."

Other material facts appear in the opinion.

Wm. B. Bennett, for the plaintiff.

Asa P. Moore, for the defendant.

I. As to material alteration, and what is such alteration, cited the following authorities:—1 Greenl. Ev. § 565; *Chadwick* v. *Eastman*, 53 Maine, 17; *Lee* v. *Starbird*, 55 Maine, 491; *Hewins* v. *Cargill*, 67 Maine, 554; *Morrill* v. *Otis*, 12 N. H. 466; 2 Pars. Bills, 545, 549, 550, 582; *Warrington* v. *Early*, 75 Eng. C. L. (2 E. & B.) 763; *Gardner et als.* v. *Walsh*, 85 Eng. C. L. (5 E. & B.) 83.

II. Memorandum a part of the note. *Tuckerman* v. *Hartwell*, 3 Greenl. 154, 155; *Johnson* v. *Heagan*, 23 Maine, 331; *Wheelock* v. *Freeman*. 13 Pick, 165, 168; *Benedict* v. *Cowden*, 40 N. Y. 396; *Warrington* v. *Early*, *supra*; *Gardner et als.* v. *Walsh*, *supra*; 2 Pars. Bills, 517.

III. Effect of the alteration upon the note, as to this defendant. *Waterman* v. *Vose et al.* 43 Maine, 511; *Andrews* v. *Marrett*, 58 Maine, 539; *Boston* v. *Benson*, 12 Cush. 61; *Fay* v. *Smith*, 1 Allen, 477; *Watries* v. *Pierce*, 32 N. H. 577; *Wright* v. *Bartlett*, 43 N. H. 549; Chitty on Contracts, 577, note *y*; *Miller* v. *Stewart*, 9 Wheat. 680; *Henderson* v. *Marvin*, 31 Barb. 297; *Starr* v. *Lyon*, 5 Conn. 540; *Lockwood* v. *Jones*, 7 Conn. 435; *Parsons* v. *Williams*, 9 Conn. 239; *Mahaive Bank* v. *Douglass*, 31 Conn. 181; 1 Greenl. Ev. § 565; 2 Pars. Bills, 545, 565, 571, 581; *Warrington* v. *Early*, *supra*; *Gardner et als.* v. *Walsh*, *supra*; *Belknap* v. *Nat. Bank of N. A.* 100 Mass. 376; *Draper* v. *Wood*, 112 Mass. 315; *Citizens Nat. Bank* v. *Richmond*, 121 Mass. 110; *Wood* v. *Steele*, 6 Wall. 80.

LIBBEY, J. We regard the rule as well settled, that when the contract or promise is unilateral and the body of the contract fails, for any reason, to express the agreement between the parties, and a memorandum is made upon the same paper, either

upon the margin or at the foot,—above or below the signature of the promiser,—or indorsed upon the back, and delivered with and as a part of the contract, the whole instrument constitutes but one contract, and the memorandum is as much a part of it as if written in the body of it. *Tuckerman* v. *Hartwell*, 3 Maine, 147; *Johnson* v. *Heagan*, 23 Maine, 329; *Jones* v. *Fales*, 4 Mass. 245; *Springfield Bank* v. *Merrick*, 14 Mass. 322; *Barnard* v. *Cushing*, 4 Met. 230; *Shaw* v. *First Methodist Society*, 8 Met. 223; *Heywood* v. *Perrin*, 10 Pick. 228; *Wheelock* v. *Freeman*, 13 Pick. 165; *Benedict* v. *Cowden*, 49 N. Y. 396; *Warrington* v. *Early*, 75 Eng. C. L. (2 E. & B.) 763; *Gardner* v. *Walsh*, 85 Eng. C. L. (5 E. & B.) 83.

It is equally well settled, that if the memorandum is collateral to and independent of the contract or promise, it does not become a part of it, and in no way changes it; and it is immaterial whether the memorandum is on the same paper or not. Byles on Bills, 95. In such case, if the defendant relies upon it as a defence, he must set it up and prove it.

The note in suit is the joint note of G. W. Coombs and the defendant; after they had signed it—but it does not appear whether before delivery to the payee or afterwards,—the memorandum was made and signed by G. W. Coombs only, without the knowledge or consent of the defendant. The presiding judge, before whom the case was tried without the intervention of a jury, ruled as a matter of law, that the memorandum is not a part of the note, and the placing it on the same paper by G. W. Coombs, was not a material alteration of the note, so far as the defendant is concerned.

We think the ruling is correct. The memorandum, as it stands on the face of the note, does not appear to be a part of the joint promise of the promisers; but the separate, several undertaking of G. W. Coombs alone, by whom it is signed. If it had been put on the face of the note before delivery without being signed, it would undoubtedly become a part of the contract and fix the rate of interest; and if placed there without the consent of the defendant, after he signed the note, would be a material alteration which would discharge him. But it being signed by G. W. Coombs, only, shows that the parties did not

intend to change the joint promise, but to treat it as an independent undertaking by him.

Exceptions overruled.

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

MICHAEL MURPHY *vs.* JOHN ADAMS and another, and logs.

HENRY F. PRESCOTT *vs.* same.

Somerset. Opinion March 26, 1880.

Laborer's lien on logs may be enforced by assignee. Amendment.

One who has purchased the claim of a laborer in the cutting and hauling of logs may maintain an action thereon in the name of such laborer to enforce the laborer's lien on the logs.

The fact that the laborer assigns his claim to a third party, who is willing to advance him money therefor, does not defeat or discharge his lien.

The object of the statute giving the lien is to make the pay of the laborer prompt and secure, and if the laborer can realize his pay more readily by making sale of his claim instead of waiting the slow process of the law, he is at liberty to do so, and the lien may be enforced by seasonable attachment, in the name of the laborer, for the benefit of the purchaser of the claim. Nor does it make any difference that the money when collected will be divided between two purchasers.

Where the writ as originally drawn required the officer to attach "certain logs marked Y P X L, Y P X K and Y P X O now lying," &c., and the officer attached "certain spruce logs . . . 69 in number, being 23 of each of the above named marks," the plaintiff asked leave and the presiding judge allowed him to amend, so as to make the description of the marks more certain, by twice inserting the words "and certain logs marked;" *Held*, the amendment, if one was necessary, was clearly within the discretionary power given the court to amend circumstantial errors or defects, and it does not affect the plaintiff's right to judgment against the logs.

ON EXCEPTIONS AND REPORT.

The facts sufficiently appear in the opinion. The following are copies of the due bills and amendment referred to in the opinion.

(Due bills.)

"14.19.

Due Michael Murphy for labor done in the woods for us the

present winter, fourteen dollars and nineteen cents. Payable in April next.

JOHN ADAMS & Co.

Jan. 15th, 1877."

"18.52.

Due Mike Murphy eighteen dollars and fifty-two cents; it being for labor done in the woods for us the past winter. Payable the first of April next.

JOHN ADAMS & Co.

Kingfield, March 20th, 1877."

"$26.65.

Due H. F. Prescott, twenty-six dollars and sixty-five cents, it being for labor done in the woods for us the present winter. Payable April next.

JOHN ADAMS & Co.

Kingfield, Feb. 7, 1877."

Motion to amend.—"Somerset county. Supreme Judicial Court. September term, 1878. H. Frank Prescott *vs.* John Adams *et al.* and certain logs. And now on the first day of said term, the plff. moves to amend the writ in the action aforesaid, by inserting after the words 'also certain logs marked Y P X L,' the following words, viz: 'and certain logs marked,' and after the words Y P X K, and 'certain logs marked,' so that the writ amended, shall read as follows, viz; 'and also certain logs marked Y P X L, and certain logs marked Y P X K, and certain logs marked Y P X O,' and that the description of the marks upon the said different lots of logs in the body of said writ, wherever occurring, may be similarly amended.

STEWART & HOPKINS, Att'ys for Pl'ff."

The presiding judge allowed the amendment and W. E. L. Dillaway, claimant of the logs as assignee in bankruptcy of Moseley, Wheelwright & Co., the original owners, alleged exceptions.

By the report the full court are to draw inferences as a jury might, and enter such judgment as shall be in accordance with the legal rights of the parties.

D. D. Stewart and *J. I. Hopkins*, for the plaintiffs.

Pillsbury & Potter, for the claimant.

The lien given by statute is an inchoate, personal right. *Pearsons* v. *Tincker*, 36 Maine, 387; *Colley* v. *Doughty*, 62 Maine, 501; *Rollins* v. *Cross*, 45 N. Y. 766; *Ames* v. *Palmer*, 42 Maine, 197. And being but an inchoate, personal right, to be invoked or not at the pleasure of the person for whose benefit it is given, the right to invoke it cannot be assigned or transferred to another. *Pearsons* v. *Tincker*, *supra*; *Ames* v. *Palmer*, *supra*; *Daubigney* v. *Duval*, 6 Taunton, 604; *Caldwell* v. *Lawrence*, 10 Wis. 332; *Rollins* v. *Cross*, *supra*; *Fitzgerald* v. *First Presb. Church*, 1 Mich. (*Nisi Prius*,) 243; *Roberts* v. *Fowler*, 4 Abbot, Pr. (N. Y.) 263, and same case, J. E. D. Smith, 632; *Foster* v. *Westmoreland*, 52 Ala. 223; *Urquehart* v. *McIver et al.* 4 John. 102; *McCombe* v. *Davies*, 7 East. 5. The lien and the debt were inseparable while both existed, and when the plaintiff transferred the debt, fully and unconditionally, so that he had no remaining interest in it, the lien ceased to exist. In Iowa it has been decided, that, while taking a note does not extinguish the lien, the negotiation of the note is a waiver of the lien. *Scott* v. *Ward*, 4 Iowa, 112.

The legislature of Wisconsin passed an act in 1859, c. 113, allowing any number of persons having liens to assign to one of their own number, and that such assignee might have the benefit of the lien act. In this case it is proposed to go farther in that direction without an act of the legislature than they could in that State under that act, for here it is not one lienor assigning to another but to outsiders.

Statutory liens are to be strictly construed, and in order to secure the benefit of these, parties must bring themselves closely within their provisions. *Lord* v. *Woodard*, 42 Maine, 497; *Thompson* v. *Gilmore*, 50 Maine, 428; *Sheridan* v. *Ireland, and logs*, 61 Maine, 486; *Stuart* v. *Morrison, and logs*, 67 Maine, 549.

The amendment to the Prescott writ was improperly allowed; because its effect was to annul the statutory limits within which a lien of that nature should be enforced, and because the rights of third parties had intervened, (the creditors of Moseley, Wheelwright & Co.) and because it introduced a new cause of action.

R. S., c. 91, § 34; stat. 1876, c. 64; *Frost* v. *Illsley*, 54 Maine, 345; *Stuart* v. *Morrison, and logs, supra; Witte* v. *Meyer*, 11 Wis. 295; *Gault* v. *Wittman*, 34 Md. 35; Phillips, Mec. Liens, 427; *In re Dey*, 3 N. B. Reg. 81, S. C. Blatchford, C. C. 285; *Annis* v *Gilmore*, 47 Maine, 152; *Milliken* v. *Whitehouse*, 49 Maine, 527; *Cooper* v. *Waldron*, 50 Maine, 80; *Parkman* v. *Nutting*, 59 Maine, 398; *Farmer* v. *Portland*, 63 Maine, 46; *Bicknell* v. *Trickey*, 34 Maine, 273.

BARROWS, J. The plaintiffs in these actions, being employed by the defendants for that purpose, respectively labored in the cutting and hauling of logs on Jerusalem township, in the winter of 1876–77; and when they quitted work, each received a due bill signed by the defendants, in legal effect a promissory note not negotiable, for the amount due him,—"it being for labor done in the woods for us the present winter, payable in April next." The defendants were operating on the township for Moseley, Wheelwright & Co., by whom they were employed to cut and haul logs by the thousand. The plaintiffs not being paid for their labor, these suits were commenced in June, 1877, and a lien upon the logs claimed therein, and the logs were seasonably attached. Moseley, Wheelwright & Co. procured receipters for the logs, and subsequently having gone into bankruptcy, their assignee now appears to claim the logs, and resist the rendition of any judgment to enforce the lien thereon, because, he says, the lien ceased to exist before the commencement of the suit, by reason of the fact that the plaintiffs respectively sold their claims to other parties, and ceased to have any interest in the enforcement of the lien. Prescott's claim is represented by one due bill which he appears to have sold about the time he came out of the woods, in February, to one Winter, a trader in the vicinity of the operation, to whom he subsequently gave a written assignment of the claim, having indorsed the due bill at the time of its sale and delivery.

Murphy worked at two different periods during the season, received two of the non negotiable due bills, and got one of them cashed by Winter, and the other by one Parker, merely placing his name on the back of the due bills when they were sold and

delivered. Now the claimant of the logs insists, that, by these proceedings, the lien (which he says is a mere personal right to be enforced by and for the benefit of the laborer only,) was destroyed, and that it cannot be made to inure to the benefit of those who have paid the laborers and become the purchasers of their claims.

The case shows that in the present instance a large number of the laborers' claims were thus taken at a small discount by Winter, presumably relying on the lien to secure payment; and the probable extent of the practice among laborers in lumbering operations, of realizing their dues at an early day in this mode, makes it desirable to have the point definitively settled.

The groundwork of the claimant's argument is in the position he takes that the laborer has ceased to have any interest in the collection of the sums due for his work, and that the lien, being but a personal right, to be enforced for his benefit only is destroyed when a third party has paid him for his claim.

In the present case, inasmuch as the laborers indorsed the non negotiable due bills which were given them in blank to the parties who advanced the money for them, the claimant's position cannot be maintained if it be true as laid down in the text books that "an indorsement in blank of a note not negotiable is an undertaking that it may be collected of the maker by using due diligence, which consists in demand on its becoming due; and in case of non payment, the maker being solvent, in immediate suit with attachment where it is allowed, followed by the most vigorous measures for collection." Bayley on Bills, 2d Am. ed. 152, citing *Prentiss* v. *Danielson*, 5 Conn. 175; *Huntington* v. *Harvey*, 4 Conn. 124. In *Seymour* v. *Van Slyck*, 8 Wend. 403, it was held that the indorser of a note not negotiable has no right in an action by his indorsee against him, to insist upon previous demand and notice "because his indorsement is equivalent to a guaranty." If these plaintiffs are liable as guarantors of the due bills, they have just as much interest in the enforcement of the lien as if they never had received the money on them from anybody.

But, aside from this, and independent of any guaranty by the laborer that the amount due him is collectible by the use of due

diligence, we cannot find either in principle or sound authority any good reason for holding that the transfer by the laborer to a third party of an equitable interest in the sum due him for his labor should work a forfeiture of his lien. The object of the statute giving the lien is to make certain the payment for the labor which has gone to increase the value of the timber; (see *Spofford* v. *True*, 33 Maine, 284); and it would detract much from the benefit designed to be conferred to hold that the laborer must necessarily personally incur all the delay and expense that not unfrequently arise from the tedious litigation which follows an effort to enforce a lien of this sort, at the peril of losing it altogether.

If the lien can be enforced in his name by one who has assumed this risk and burden for him, another object of the statute, which is to make his pay prompt as well as secure, will be materially advanced. Murphy testifies that he considered the bills good, only he "did not want to wait around there."

We think it would be laying an unnecessary burden upon the laborer for whose benefit the statute was designed, to say that he should not avail himself of the security which the statute gives him in the way most beneficial to himself, and if he can better himself by giving to an assignee the right to procceed in his name instead of "waiting around there" for the slow process of the law, we see no reason why he may not do it without forfeiting the lien from which he derives that advantage.

The claims of laborers secured by a statute lien, stand substantially in this respect upon the same footing as those of mechanics.

The weight of authority and reasoning is in favor of the assignability of the lien of a mechanic and the right of his assignee to assert his claim in the same manner and to the same extent that the mechanic could. *Kerr* v. *Moore*, 54 Miss. 286, citing *Laege* v. *Bossieux*, 15 Gratt. (Va.) 83; *Tuttle* v. *Howe*, 14 Minn. 150; *Davis* v. *Bilsland*, 18 Wall. 659; and other cases of like purport and effect. See also, *Hull of a new of ship*, Daveis, 199. *The Sarah J. Weed*, 2 Lowell, 556. Nor is there anything adverse to this doctrine in our decisions, cited in behalf of

the claimant of the logs. Assignability is one thing—negotiability another. In *Pearsons* v. *Tincker*, 36 Maine, 387, it was rightly held that a lien claim which had been assigned could not be enforced in the name of the assignee; but it does not touch the right of such assignee to enforce the lien in the name of his assignor. Whether chapter 235, laws of 1874, would operate a change in the rights of the assignee we need not now inquire.

The point decided in *Ames* v. *Palmer*, 42 Maine, 197, was simply that a trespasser could not interpose the lien of a third party as a common carrier upon the goods which were the subject of suit, in which lien he had no interest or concern as assignee or otherwise, to bar the action of the general owner against himself for a tortious interference, upon the ground that the plaintiff must show a present right of possession. The cases have no tendency to sustain the doctrine in support of which they are cited.

These are the suits of the laborers, prosecuted in their names by those to whom they gave authority to enforce their rights in the collection of the sums due them for their labor, when they received their money and made over their claims. It is of no importance to the owner of the logs, to whom the money now goes, if it discharges the laborer's lien. It must be paid once to the laborer, or the man who legally represents him, unless it is released or discharged. There is the same difference that there is between the discharge and the assignment of a mortgage. When an assignment has been made by the laborer of his interest, the courts will protect the interest of the assignee as they will that of the assignee of any other non-negotiable chose in action—let in all equitable defences which are open between the original parties to the contract, and give the plaintiff in interest the same remedy which the plaintiff of record may have. Nor does it make any difference that there are two plaintiffs in interest in the suit of Murphy. There is but one suit. Neither the debtors nor the log owners are subjected to any additional expense or trouble, nor can it concern them how the money, which it is their duty to pay, is disposed of, any more than it would whether the laborer paid two creditors or one with the proceeds of his work.

In Prescott's suit, as the writ originally stood, the officer was commanded to attach "certain logs marked Y P X L, Y P X K, and Y P X O, now lying in the boom in the Kennebec river, at Augusta . . . to enforce the plaintiff's lien as hereinafter set forth." And the officer returned an attachment of "a lot of spruce logs, marked Y P X L, Y P X O, Y P X K, and estimated at seventy-five dollars, being 69 sticks in number, and 23 sticks of each of the aforesaid marks."

Lest it should be said that the punctuation, though intelligible to the officer, as appears by his return, did not sufficiently designate the logs as bearing, not one mark of twelve letters three of them thrice repeated, but certain logs each bearing a mark of four letters varied as specified, plaintiff moved for leave to amend by twice inserting the words, "and certain logs marked" in the description of the property which was ordered to be attached. The claimant excepts to the allowance of this amendment and insists that it is not by law amendable, and at all events, if allowed, vacates the attachment so that no judgment should go against the logs. The claimant relies upon *Stuart* v. *Morrison and logs*, 67 Maine, 549, disregarding the radical difference that in that case four or five different lots of logs belonging to as many different owners were attached, when there was nothing whatever until you reached the parol testimony to indicate that it was other than one lot, each log of which bore all the marks mentioned; while in the present case the logs were substantially one lot, the product of one operation and all belonging to one firm, though the final letter of the marks was not the same on all of them. If there was room for a wrong interpretation, in view of the punctuation between the several marks mentioned, we think it was competent to exclude it by amendment. It comes fairly within the power given by the statute to amend circumstantial errors or defects when the person and case can be rightly understood. It is very clearly not an amendment introducing a new cause of action. The facts and case differ so widely from those in *Stuart* v. *Morrison*, that while it may be doubtful whether an amendment was needed, it was plainly within the power of the presiding judge to allow it and the exceptions to its allowance

must be overruled. Nor can it affect the right of the plaintiffs to judgment against the logs returned as attached. The proof shows that they were the logs on which the plaintiffs labored. The marks were put on after they were hauled to the landing place, and without reference to the time or locality of the cutting —some of those which received the mark last made use of being among the logs that were first cut, and *vice versa*. There was a faint attempt to show that Prescott's bill might have contained a charge of a few cents for something other than his personal labor. But the attempt fails. The witness says that these outside charges were about equal on either side. They seem to have been so adjusted by the parties; for the due bill expressly declares that the sum therein mentioned is due for labor.

Judgment for the plaintiffs, respectively, for the amount of their due bills and interest from the time when they fell due against the personal defendants and against the logs attached.

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

HOWARD B. WYMAN *vs.* FRANKLIN BOWMAN.

Kennebec. Opinion March 30, 1880.

Trover. Election of remedy. Replevin. Sale of property replevied.

In an action of replevin, there was judgment for a return, upon which a writ of restitution issued and was returned unsatisfied, and subsequently a suit commenced upon the replevin bond; *Held*, while the latter suit is pending, trover will lie against one, who purchased the property replevied of the plaintiff in replevin or his bondsmen.

The pendency of a suit upon a replevin bond will not bar an action of trover against one, who received from the plaintiff in replevin the property replevied. The rule, that where a party has two remedies for the same injury the election of one will bar the other, does not apply to this case.

A plaintiff in replevin cannot convey a good title to the property replevied, if he is not the actual owner.

ON REPORT from the superior court, Kennebec county. The law court were to draw inferences as a jury might, and render

such judgment as the law and the evidence, legally admissible, require. The material facts appear in the opinion.

G. T. Stevens, for the plaintiff, cited: 3 Allen, 426; *Davis* v. *Dunklee*, 9 N. H. 545; *Davis* v. *Granger*, 3 Johns. 259; *Percival* v. *Hickey*, 18 Johns. 257; *Buffum* v. *Tilton*, 17 Pick. 510; 1 Chitty Pl. 454, note 3; *Marble* v. *Keyes*, 9 Gray, 222.

Heath & Wilson, for the defendant.

Judgment for a return is a bar to trover. The case, 3 Allen, 426, cited by plaintiff, was where there was no replevin bond. Here there was such bond, and plaintiff has elected his remedy by bringing suit upon it. He cannot maintain trover now. *Tuck* v. *Moses*, 54 Maine, 115; *Parker* v. *Hall*, 55 Maine, 362; *McKnight* v. *Dunlap*, 4 Barb. 36; *Morris* v. *De Witt*, 5 Wend. 71; *Rice* v. *King*, 7 Johns. 20; *Sangster* v. *Commonwealth*, 17 Gratt. (Va.) 124. Plaintiff in replevin has a right to sell. *Gordon* v. *Jenney*, 16 Mass. 465.

DANFORTH, J. This is an action of trover, to recover the value of a pair of oxen, alleged to be the property of the plaintiff, and to have been converted to his own use by the defendant. The plaintiff testifies to his own title, which is not denied by the pleading or evidence of the defendant, and the alleged conversion is admitted.

The defendant puts in evidence, the record of an action of replevin in favor of William B. Robinson against this plaintiff, in which the title to these same oxen was in question, and claims that such record is a bar to any recovery in this suit.

It appears from the record of that suit that it was decided in favor of the defendant, the present plaintiff; that he had a judgment for a return, upon which a writ of restitution was issued and returned unsatisfied, and that subsequently he commenced a suit upon the replevin bond, which is still pending; and it is claimed that this plaintiff,—having been successful in the replevin suit, having obtained his judgment for a return with a writ of restitution,—has elected the remedy which the statute gave him in such cases, and it is now too late to avail himself of this action of trover even though it might have been open to him before such an election had been made.

But it also appears that this defendant was not a party to that action, and hence in no way bound by the proceedings or judgment therein; and on what principle of law he can avail himself of such proceedings and judgment is not apparent, nor has it been pointed out in the argument. True, it is suggested, that during the pendency of that action or subsequent to the judgment, this defendant purchased the oxen of the then plaintiff, though of this we find no evidence in the case. There is some evidence tending to show that he bought them of one of the sureties in the replevin bond, but nothing further.

But assuming the suggestion as true, we do not perceive that his position is any better. If in that way he becomes a privy to that judgment and bound by it, he cannot, as in fact he does not, deny the plaintiff's title to the oxen. It was so decided and he had a judgment for a return which has never been complied with,—nor has his action on the bond afforded him any damages for such non compliance. His title to the oxen has been legally affirmed, he has not received them, nor any pay for them, and this defendant has converted them to his own use. This ordinarily would seem to be sufficient to authorize him to recover. It certainly is not easy to see how the judgment for return with a writ of restitution can change the title of which it is directly confirmatory. In *White* v. *Philbrick*, 5 Maine, 147, it was held that a judgment in trover, if execution be sued out thereon, does so far change the title to the property that an action of trespass cannot afterwards be sustained against another person, for taking the same goods. No case however, it is believed, has gone any further than this, and in *Murray* v. *Lovejoy et al.* 2 Clifford, 191, it is clearly shown that the decided weight of authority, is, that there must not only be a judgment for the value, but satisfaction before an action against another person will be barred. In this case there is neither.

Nor does the objection that this gives two actions for the same cause, rest on any better foundation. It is undoubtedly true, that in many if not in all cases where a party has two remedies for the same injury, the election of one will be a bar to the other. It is the policy of the law that there should be an end

of litigation and consequently when a person has tried his right in one form of action he shall not be permitted to try the same right in another form. The cases cited and relied upon by the defendant, viz: *Tuck* v. *Moses*, 54 Maine, 115, and *Parker* v. *Hall*, 55, *Ibid.* 362, may be authorities to this extent, but they are not applicable to this case. They apply to actions for the original taking in replevin, and hence both remedies sought were for the same cause and against the same party.

In the case at bar the remedy, pursued under the law applicable to replevin suits, was for the wrongful taking under the replevin writ. The remedy now sought is against another party, one who had no part either as principal or aid in that wrong, and for another and entirely distinct violation of the plaintiff's rights of property,—a subsequent conversion of it; but a conversion before the prior remedy had in any respect changed his title to or interest in it, and which has not yet affected such a change.

It is also contended that the plaintiff in the replevin suit could and did convey a good title to this defendant. Conceding that he undertook to do so the legal effect claimed by no means follows. The case of *Gordon* v. *Jenney*, 16 Mass. 465, cited in the argument, is not authority for the law contended for. It is true, in that case, the court in giving a reason for the decision, say the plaintiff might have sold the property; and well he might, for it was his as the result of the case shew, and being his, as the case decided, he was not authorized to hold it till the end of the suit at the risk of the defendant; that having so held it and a considerable depreciation resulting, the defendant was not liable for that loss in value.

In this case the plaintiff was not the owner, nor could the mere taking the property by the writ make him such; otherwise there could only be judgment for damages and not for a return. Nor does it give or purport to give any authority to sell; and a sale without a title, or authority from one who had such title so as to give a right as against the owner, would be a violation of well established principles of law.

The evidence in the case shows the value of the oxen at the time the demand was made for them, in August, 1877, to have been one hundred and fifty dollars; to that amount should be added a sum equal to the interest from that date to the time when the judgment shall be entered in this action.

Judgment for the plaintiff for $150 and interest from September 1st, 1877.

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

GRANITE NATIONAL BANK *vs.* BARKER A. NEAL and trustees, and ÆTNA INSURANCE COMPANY, claimant.

Kennebec. Opinion March 30, 1880.

Trustee process.

If a debt due from a supposed trustee is due to the creditor as agent, it is not attachable as his property.

ON REPORT from superior court, Kennebec county.

This was an action of debt on judgment, in which the Gardiner National Bank and Cobbossee National Bank were summonded as trustees. The Ætna Insurance Company appeared, and claimed the funds in the hands of the trustees. The disclosures of the alleged trustees, the deposition of the defendant, and the writ and return, make up the report, and the law court are to render such judgment for or against the alleged trustees and claimant as the law and facts may require. Writ was served on the trustees, May 6, 1878.

From the disclosure of Gardiner National Bank, by Geo. F. Adams, cashier, it appeared that the defendant first became a depositor in that bank, in November, 1863. The title of the account was "B. A. Neal, Agent." It so continued till January 9, 1875, when the balance was transferred to the account of "B. A. Neal," and the account appeared under that name till April 3, 1878, when the balance, $165.79, was transferred to "B. A. Neal, Agent," and the account has continued under that

name since. The balance of the account, May 6, 1878, was $603.40; and there were then outstanding checks, since paid, amounting to $492.66, which would leave a balance on his account, May 6, 1878, of $110.74.

From the disclosure of the Cobbossee National Bank, by Joseph Adams, cashier, it appeared that the defendant had a deposit account in that bank, in the name of "B. A. Neal, Agent," which he changed to "B. A, Neal," October 22, 1872; and then to "B. A. Neal, Agent," April 4, 1878. The balance of that account, May 6, 1878, was $269.53. Both trustees stated that they had been notified by the defendant and the attorney of the Ætna Insurance Company, that the money on deposit to the account, May, 6, 1878, was the property of that insurance company.

The defendant in his deposition, testified, that the balances in the banks to his account, as agent, $252.03, and $110.71, was the property of the Ætna Insurance Company; that he was at that time indebted to that company for $619.50, less commissions, $92.92, leaving a balance of $526.58; that he was agent for several other companies, and was engaged in the commission business, chartering vessels. He kept the funds of the insurance companies he represented, and his commissions and other private funds all together. Several of the checks, amounting in all to $212, made by him on those banks, subsequent to May 6, 1878, and during that month, were to pay private and personal debts and expenses. He further testified: "I deposited all the money I received from any and all sources, except what I used from my pocket, in said banks, without any distinction as to whom it belonged, and not one dollar of the money deposited by me in said banks, during the last six years, was my own private property. During all of that time I used up all of my commissions before and in advance of making deposits, and during all that time was indebted to said insurance companies."

H. S. Webster, for the plaintiff.

The addition of "Agent" to the defendant's deposit account was mere *descriptio personæ*. *Coburn* v. *Ansart & Tr.* 3 Mass. 319.

It was made simply to cover his means from this plaintiff. There is no privity of interest or contract between the trustees and claimant, but there is between the trustees and defendant. Drake Att. § 490; *Skowhegan Bank* v. *Farrar*, 46 Maine, 293. Outstanding checks at the time of the service upon the trustees cannot be deducted. *Robbins* v. *Bacon*, 3 Maine, 346; *Bullard* v. *Randall*, 1 Gray, 605; *Dana et al.* v. *Third Nat. Bank*, 13 Allen, 445; *Hancock* v. *Colyer*, 99 Mass. 187.

Counsel further cited: Drake Att. § 491; *Jackson* v. *Bank U. S.* 10 Penn. St. 61; *Town* v. *Griffith*, 17 N. H. 165; *Burnham* v. *Beal*, 14 Allen, 217; *Folsom* v. *Haskell*, 11 Cush. 470.

If a man is to be allowed to "deposit all the money he receives from any and all sources, except what he uses from his pocket, in a bank, without any distinction as to whom it belongs," and then cover it from his creditors by writing "Agent" after his name, he has an easy method of evading the exactions of the law.

There have been no allegations of facts filed in this case by the claimant, hence there is no claimant legally in court. R. S., c. 86, § 32. The funds not being legally claimed by any one else, the trustees are clearly chargeable.

L. Clay, for the trustees and claimant, cited: *Dalton* v. *Dalton et als.* 48 Maine, 42; R. S., c. 86, § 32; *Simpson* v. *Bibber, & Tr.* 59 Maine, 196; *Burnell* v. *Weld et als. & Tr.* 59 Maine, 423; *Parker* v. *Wright & Tr.* 66 Maine, 392.

WALTON, J. We think the trustees are not chargeable. The evidence satisfies us that the indebtedness of the supposed trustees was not due to the principal defendant in his own right. We are satisfied that it was due to him as agent of the Ætna Insurance Company. And it is well settled law that if the debt due from a supposed trustee is due to the creditor as agent, or factor, it is not attachable as his property. Cushing's Trustee Process, § § 107–110. *Willard* v. *Sturtevant*, 7 Pick. 194; *Bowler* v. *E. & N. A. Railway*, 67 Maine, 395.

"When the property of a principal can be ascertained and separated, the creditors of an agent cannot be allowed to appro-

priate it to the payment of their debt." *Chapin* v. *Connecticut River Railroad Company*, 16 Gray, 69.

Trustees discharged.

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

MARCELLUS STEWARD *vs.* MICAH W. NORTON.

Somerset. Opinion April 2, 1880.

Evidence.

When a paper that is offered to prove the date of a transaction is objected to by the opposite party, exceptions to its exclusion will not be sustained, if it contains memoranda and recitals respecting the matter in controversy, which are objectionable, unless such memoranda and recitals are expressly withdrawn by the party offering it, even though it may bear a certificate of registration by a sworn officer, which would be competent if separately offered; especially when the exceptions do not show that the existence of such certificate was made known to the presiding judge.

ON EXCEPTIONS.

TROVER for the value of two horses, one a light gray mare known as the "Marshall mare," the other known as the "Abbott horse," alleged to have been converted by the defendant in September, 1870. Date of writ, August 30, 1876. Plea, the general issue; and, by way of brief statement, the statute of limitations.

The exceptions allege that the defendant proved the genuineness of the signature of Isaac N. Pinkham to the following paper:

"$125. January 9, 1869. For value received I promise to pay M. W. Norton, or bearer, one hundred and twenty-five dollars, half in April and half in September, next, with semi-annual interest. And the spotted horse called the Wyman horse, for which this note is given, is to remain said Norton's till this note is fully paid. And for the faithful payment of this note and interest, I have this day sold and delivered said M. W. Norton the gray mare I had of B. Marshall, known as the Ellis mare;

also a brown mare I had of J. R. Howard, the same mare that B. F. Trask owned last summer; and have received payment in full as per agreement of the parties.

Rev. Stamp. 10 cents.

R. S. 10 cts. to pay.

I. N. PINKHAM."

On the back of the paper were the following indorsements:

"Recorded February 23, 1869, Book 2, page 161.

J. CHASE, Town Clerk."

"March 27, 1869. Received the within described Marshall or Ellis mare in very bad condition, agreed to be worth on this note, $20."

"April 17th, 1869. Without recourse to M. W. Norton."

That the paper was then offered as evidence to prove a date, and, upon objection, it was excluded by the court without examination.

Verdict was for plaintiff for $166.10.

To the ruling of the court excluding the paper the defendant excepted.

J. J. Parlin, for the plaintiff.

A. H. Ware, for the defendant.

Pinkham was the agent of the plaintiff, and the paper offered by the defendant and excluded by the court, without examination, bears directly upon the question: When did the plaintiff buy the gray mare of Benj. Marshall? It shows that it must have been in the fall of 1868, and not 1869, as plaintiff and his witness testified. And the conversion by defendant, if there was one, must have been in 1869, more than six years prior to the date of the writ. The certificate of the town clerk was legal evidence of the *time* of record, which was material in this case. R. S., c. 91, § 2; 37 Maine, 182; 109 Mass. 61; 115 Mass. 168.

BARROWS, J. The language of the exceptions is peculiar, and indicates an ingenious effort to raise a point which was not thought of when the paper was offered in evidence at the trial, rather than a real grievance on account of the exclusion of testimony which the party offering it regarded as competent, or

presented to the court in such a manner as to show that there was any part of it that might be competent in case the whole was not.

The contention was as to when the plaintiff bought one of the horses in controversy as bearing on the question when, if at all, the defendant converted it. The plaintiff offered evidence to show that he bought it of one Marshall in the fall of 1869; and defendant, that it came into his (defendant's) possession from one Pinkham in March, 1869.

The exceptions state that defendant proved the genuineness of the signature of said Pinkham to a certain "paper dated January 9, 1869, and recorded on the town records of Lexington, February 23, 1869, and offered the same as evidence to prove date." "Said paper being objected to by plaintiff's counsel was excluded by the court without examination."

Upon examination the paper thus offered by the defendant proves to be a note given by Pinkham to the defendant for $125, for a horse called the "Wyman horse," (not in controversy,) with a stipulation that the horse should remain the defendant's property until paid for, and a recital that for further security of the note, Pinkham had also sold and delivered to defendant, two other horses, one of which appears to be the one above referred to as involved in this suit, and which Pinkham says in this paper he had of Marshall. We should infer from the recital in the exceptions, that it was summarily excluded upon a statement of its purport, as a matter between the defendant and Pinkham not brought home in any manner to the knowledge of the plaintiff. That it was not offered nor relied upon by the defendant as evidence of title is apparent, for the exceptions expressly declare it was "offered as evidence to prove date."

But now the defendant's counsel ingeniously argues, inasmuch as the plaintiff had testified on cross examination that Pinkham was lumbering for the plaintiff, hauling logs by the thousand, and using the plaintiff's horses, and sometimes buying horses for him, sometimes swapping them subject to ratification by the plaintiff, that this paper was evidence of what the plaintiff's agent did with the horse in controversy, and when he did it.

But the paper shows for itself, that Pinkham was acting in this transaction on his own account, ignoring the plaintiff's title, if he then had one, and there is nothing in the testimony to indicate either authority or ratification; and as before remarked, it was not offered as evidence of title, but "to prove date." Counsel cannot now claim that it was evidence for any other purpose than than for which he says in his exceptions he offered it. As to the plaintiff, the paper must be regarded as *res inter alios acta;* and it would of itself be no evidence to prove the correctness of its own date. Moreover it contained the recital that Pinkham had the horse of Marshall, which though not sworn to, would be likely to be accepted by the jury as evidence of the fact if the paper was received. Besides this, it bore an indorsement made by the defendant of the following tenor: "March 27, 1869. Received the within described Marshall or Ellis mare in a very bad condition, agreed to be worth on this note, $20." The defendant had testified to all this, but this memorandum made by himself was not competent to corroborate his testimony. It is obvious that if the paper as a whole had been received, against the plaintiff's objections, as it was offered, upon the naked proof that it bore the genuine signature of Pinkham, the plaintiff would have had good ground for exceptions. It was the defendant's duty, if he desired to insist upon the introduction of any part of the paper, for the purpose in connection with other evidence of fixing a date, to obviate the plaintiff's objections by expressly excluding such portions as were not competent and presenting only so much as would be receivable. Offering the paper as a whole, he cannot complain of its exclusion, when it contained objectionable matter which he did not take the trouble to withdraw.

That part of it which he now most strenuously counts on as making it admissible for the purpose for which it was offered, is the certificate of the town clerk of the date of its registration.

The authorities which he cites would go far to sustain the position, if that certificate had been offered accompanied by only so much of the document as would be necessary to apply it to the subject matter, thus relieving it from the plaintiff's objections.

But it does not appear that the certificate of the town clerk was ever offered at all, except as it was borne on a document which was offered, upon proof that it was signed by Pinkham.

The exceptions do not show that the attention of the presiding judge was called to its existence. We should infer the contrary.

Exceptions overruled.

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

JANE DAY *vs.* AMOS BISHOP.

Aroostook. Opinion April 6, 1880.

Rights of a married woman prior to March 22, 1844, in real estate. Title under the treaty of Washington.

A woman who was married before March 22, 1844, cannot, while her husband lives, sustain an action against his grantees for land by him conveyed, even though she should show a title in fee in herself.

By a marriage previous to that date the husband acquired a freehold in her land and a right to the rents and profits of the same during their joint lives, and, in case of living issue, an estate for his own life if he survived her; all which would pass to his grantees by his conveyance.

Where the demandant claims title, by having acquired, as of her own property and estate, the rights of the party, who was in possession six years prior to the treaty of August 9, 1842, between the United States and Great Britain, the evidence must show the connection between her title and the party thus in possession; and the claim cannot be sustained upon loose, vague and uncertain testimony.

ON REPORT.

WRIT OF ENTRY, dated February 8, 1878, wherein the plaintiff demands certain real estate situated in Fort Fairfield. The facts sufficiently appear in the opinion. The law court to decide what judgment shall be entered thereupon.

L. R. King, for the plaintiff.

Powers & Powers, for the defendant.

BARROWS, J. The tenant's title which the demandant proposes to overcome is derived from a conveyance in mortgage with warranty, covering the demanded premises with other land, given

by the demandant's husband, August 19, 1854, which it is admitted was duly assigned to one Washington Long and by him foreclosed. It is supplemented by another warranty deed, given by demandant's husband, while in possession of the premises, to said Long, July 28, 1862. Upon this title said Long had judgment for possession against the demandant's husband in 1868, and subsequently took possession under said judgment, and conveyed to the defendant's wife under whom he justifies, in 1877.

Lot 15, which includes the demanded premises, was assigned to the demandant's husband by the commissioners appointed under a resolve of the legislature having the force of law, c. 133, 1854, to examine all claims under the treaty of Washington, by reason of possession and improvement of lands lying within the township granted to the town of Plymouth, and report to the Governor and Council the names of parties holding such possession at the time of the treaty, and of the present claimants, with the value of improvements and other matters of no importance in the present inquiry. The report of the commissioners, which is made part of the case, and which, looking at the authority by and the circumstances under which it was made, we regard as a public document, entitled to be considered as competent legal evidence of the matters and things therein contained, shows that they set out to William Day (who is the husband of the demandant), as claimant thereof by virtue of possession and improvement as aforesaid, Lot 15 containing 82.65 acres, and that William Day was the person in possession thereof August 9, 1842, the date of the treaty. William Day, called by the demandant, testifies, on cross examination, that he built the house on the premises. The demandant, on cross examination testifies that she knew when the commissioners went there to settle the rights of the settlers, and that her husband went before them, and claimed Lot 15—that she herself did not go near them; though she says she supposed it was run out to her because she says she bought it and paid for it.

The clear and satisfactory proof of a superior title in the wife, which is necessary to overcome that of those who under such circumstances derive their title from the husband is wanting. She

produces no conveyance to herself of any part of the premises, nor any evidence of an occupation by herself independent of her husband. She produces no testimony tending to show that she had means, independent of him, to purchase what she says she bought.

I. The testimony goes to show that she was married before the act of March 22, 1844, (which was the first statutory innovation in this State upon the common law doctrines respecting the rights of married women in property,) took effect. Her witness, John Twaddle, says he gave Mrs. Jane Day a narrow strip of land, not measured, on the upper side of the Lot, in the fall of 1842. It would seem to have been nothing but a verbal gift, made at a time when, according to the commissioners' report, William Day, the husband, was in possession of the lot. But suppose it were proved that demandant had a title in fee to this strip and the rest of the demanded premises, she could not maintain this action against the grantees of her husband while he lives, because by the marriage prior to March 22, 1844, he would have acquired a freehold in her lands (and a right to the rents and profits of the same, during their joint lives at all events), which might, by possibility, last during his life if he survived her —an estate which he could lawfully convey, and which was made by law, subject to be taken in execution for his debts. The rights of the husband in the wife's estate acquired by a marriage contracted before March 22, 1844, are not affected by the statute then passed, R. S., c. 61, § 2. This action cannot be maintained; for the demandant's husband is still living and the tenant has his title.

II. But we think there is a more radical defect in the demandant's title. She claims that the provision in Article IV, of what is called in the case and in some of our legislative resolves, the treaty of Washington, inures to her benefit and gives her a right superior to that of her husband, who was the party found by the commissioners to be the person entitled to whatever rights that article in the treaty might confer upon actual settlers. It is necessary for her to show that she and not her husband had somehow legally acquired the rights of those whom the treaty recognizes as having claims which the government was bound by the treaty to respect.

Two classes of claims to land, it was agreed by the high contracting parties in Article IV, of the treaty between the United States and Great Britain, dated August 9, 1842, should be "held valid, ratified, and confirmed": 1. Those of persons in possession under grants previously made by either party within the limits of the territory which by the treaty should fall within the dominions of the other party; and such a claim was recognized as valid and superior to an earlier grant from the commonwealth of Massachusetts in *Little* v. *Watson*, 32 Maine, 214; 2. "All equitable possessory claims arising from a possession and improvement of any lot or parcel of land by the person actually in possession, or by those under whom such person claims for more than six years before the date of the treaty." The demandant fails to present the evidence that she claims under such person. The testimony she produces besides being of the vaguest and most uncertain sort does not show the necessary connection with the claim of any such person as is referred to in the treaty.

John Twaddle says he bought of Brainard Guigey a claim which included what is now known as Lot 15. But there is nothing to show whether Brainard Guiguy, or those under whom he claimed had been in possession six years before the date of the treaty. Moreover Twaddle's statement of the extent of his donation to Mrs. Day is so indefinite, that it would be impossible to found a judgment for possession upon it. Twaddle says he sold a piece next adjoining this donation strip to Samuel Farley, in the fall of 1845; that Farley occupied it about two years and died; and then his brother Ezekiel Farley moved on to it and occupied it about two years. "Then William Day occupied it next after Farley." Thus far no evidence of any written conveyance whatever, and no evidence of even a verbal assignment or transfer of possession from Samuel Farley to Ezekiel.

The demandant produces a fragment of a deed, never recorded, and bearing nothing upon it to indicate to whom it was given or what it embraced, which, of itself shows nothing, in fact, except that it appears to be the concluding portion of a quitclaim deed executed by Ezekiel Farley to somebody, August 18, 1849, and acknowledged before a magistrate who is not produced nor his

absence accounted for. The widow of Farley is produced, and she professes to recognize her husband's mark, doubtless believes that it is his genuine signature; but we cannot deem her testimony as to the contents of a deed which she never saw but once, twenty-seven years before, at Mrs. Day's, after she had herself removed from the neighborhood, and so far as appears had no occasion to examine the deed or charge her memory with its contents, as very reliable. Upon the whole this fragment of a deed, together with the testimony as to the consideration paid for it, a horse and fifteen bushels of buckwheat, makes quite as strongly in favor of William Day's title as it does in favor of that of the demandant.

But there is no evidence that Ezekiel Farley had any of the rights of a person in possession at the date of the treaty. His widow says he had no deed of it—that Samuel Farley occupied it before her husband, and John Twaddle before Samuel Farley, and Frederick (not Brainard) Guigey before Twaddle—that Frederick Guigey lived on it, and "must have been there about two years before I moved there." This witness' testimony fixes the date of her moving into the neighborhood in 1837; and if she had good foundations for her conclusion that Frederick Guigey must have been there about two years before she went there, Frederick and his grantees would appear to have the claim referred to in the treaty. The witness only says he "might have transferred it to his brother and his brother to Twaddle." We cannot sustain the demandant's claim upon such loose and uncertain testimony.

It is not necessary to determine whether the assignment by the commissioners ought to be deemed conclusive, as to the person who is entitled to the possessory claim under the treaty.

Judgment for the defendant.

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

MALINDA S. KIMBALL, Administratrix, *vs.* CITY OF ROCKLAND.

Kennebec. Opinion April 7, 1880.

Ways — damages in laying out. R. S., c. 18, § 7.

If a new street or town way is legally laid out, accepted and established by the proper municipal officers of a city, and they assess the damages of a land owner, over whose land the street crosses, for the land so taken, and award the amount to be paid to him generally, without suspending the payment until the land is actually taken, such land owner may maintain an action for the sum awarded, when such action is commenced more than thirty days after demand of payment.

The first clause of § 7, c. 18, R. S., is permissive, not peremptory, as may be seen by a reference to its origin in c. 92, stat. 1854.

Whether it can be extended to awards of damages made by municipal officers — *Quere.*

ON AGREED STATEMENT OF FACTS.

This is an action of debt, to recover damages allowed for the location of a town way. The case was submitted to the law court on the following agreed statements: "That a new street or town way was legally laid out, accepted and established by the proper municipal officers of the city of Rockland, December 7, 1875; that said street crossed over the land of Bradford Kimball, the intestate, and took of his land for said street 14,629 square feet; that said city municipal officers, then and there, estimated his damages for the land so taken at $400, and awarded that sum to be paid to him therefor. The record was silent as to time of payment. That afterwards, on the 10th day of January, 1876, said Bradford, then alive, demanded of the treasurer of said city, the payment of said damages; and that afterwards, in May, 1876, said Bradford being deceased, and the plaintiff having been appointed administratrix, demanded of said treasurer the payment of said award; and again on the — day of January, 1877, she again demanded the same of said treasurer, which has never been paid. And it is also agreed that said street has never been opened, and nothing has been done with, or in regard to it by said city since its action in December, 1875. If the defendants are not liable for the damages awarded, until the street is actually opened for use, judgment is to be rendered for the defendants, otherwise it is to be for the plaintiff."

J. W. Bradbury, for the plaintiff, cited: *Westbrook* v. *North*, 2 Maine, 179; *Harrington* v. *Co. Com. of Berkshire*, 22 Pick. 263; *Hallock* v. *County of Franklin*, 2 Met. 559; *Shaw* v. *Charlestown*, 3 Allen, 538.

True P. Pierce, for the defendant.

This action is to enforce the payment of damages for the location of a town way over the plaintiff's land. The land of the plaintiff has never been taken, within the meaning of the statute; § 1, c. 18, R. S., confers authority upon county commissioners to lay out, alter, or discontinue highways; § § 4, 5 and 6, *Ibid.* provide the manner of return of their proceedings, final acceptance and establishment of the highway, and the determination of damages for land to be used in building. Certainly the way must be located and established before damages can be assessed; § 7, *Ibid.* provides that after all this has been done there must be something in addition to constitute a taking. This section has received judicial consideration, in *Gay* v. *Gardiner*, 54 Maine, 479, and a distinction clearly made between location and taking. In *Nichols* v. *Som. & Ken. R. R. Co.* 43 Maine, 361, the court, referring to the sense in which taking is used in this connection, say: "The time of taking here referred to must be the time of entering into the occupation of the land." And in *Cushman* v. *Smith*, 34 Maine, 255, SHEPLEY, C. J., in his very able opinion says: "It is believed to have been the long established course of proceedings in this part of the country, at least, to authorize the exclusive occupation required for such public uses as the laying out of highways and streets, by making provision by law for compensation to the owner, to be subsequently paid." *Jones* v. *Oxford Co.* 45 Maine, 419, has a general bearing in the same direction.

After a town way is laid out by the proper authorities, it will be discontinued by operation of statute, if not opened within six years; § 27, c. 18, R. S.; *State* v. *Cornville*, 43 Maine, 428; "What must be done to constitute an opening of a road within the meaning of the statute, is not precisely defined therein;" but some action must be taken.

The encumbrance created by legally laying out, accepting, and opening a highway is a perpetual public easement of the right of travel and repairs; and payment of damages is to secure this perpetual easement: 1 Waterman on Trespass, § 646. In this case the fee of the land remains in the plaintiff. It has been occupied precisely as it was previous to December 7th, 1875, and the only damages sustained, if any, are of a very different character from those claimed in the writ.

R. S., c. 18, § 7, provides that "payment of damages may be suspended until the land, for which they are assessed, is taken." When no act is done after the formal laying out of the way, a proper construction of the statute would seem to be that the award of the full value of the land should not be recoverable until the plaintiff is dispossessed of it. There is no statute, which I can find, which gives a right for an award until "the time of entering into the occupation of the land," in some form, and no decision which does not make a distinction between the formal acts of locating and laying out and establishing, and the taking, or occupying, within the meaning of the statute. In *Gay* v. *Gardiner*, 54 Maine, 479, the court say: "If interest could be allowed at all, it would only be allowed from the time when the land was taken, and not from the time of location. Till then, the owners would have no right to demand payment of their damages, and the respondents would not be in fault for not paying them." R. S., c. 18, § 7, is referred to as authority in this case, although the way in question is a town way; the court thus make the rule applicable to town as well as county ways. *Comins* v. *Bradbury*, 10 Maine, 449, lays down this rule: "Compensation must be made or provided for, when the property is taken," not at the time the location is made.

This statute rule is designed for the same purpose in this State, that the statute of 1847, c. 259, § 4, was enacted in Massachusetts. It was held in Massachusetts, *LeCroix* v. *Medway*, 12 Met. 123, that damages assessed by county commissioners could not be lawfully demanded "until the land over which the way is located is entered upon, and possession taken for the purpose of constructing the way." In *Bishop* v. *Medway*, *Ibid.* 125, it was

held that the "language was so precise in limiting its provisions to acts done or directed by county commissioners," that the same rule could not be applied to acts done by selectmen. But the court denounced the principle as "harsh in its operation," and suggested further legislation to correct the evil, which was promptly had.

If I have correctly interpreted our statute rule with the aid of our decisions, it is identical in its operation with the present Massachusetts statute, c. 43, § 62, which makes the damages for taking land for county and town ways alike payable at or after an actual entry for exclusive occupation for the purpose of building the way. *Shaw* v. *Charlestown*, 3 Allen, 538; *New Bedford* v. *Co. Com'rs*, 9 Gray, 346.

BARROWS, J. A street was legally laid out, accepted and established across land owned by Bradford Kimball, the plaintiff's intestate, December, 7, 1875, by the proper municipal officers of Rockland, who, at that time, estimated his damages for the land so taken at $400, and awarded that sum to be paid to him therefor, saying nothing about the time of payment. Said Kimball demanded payment of the sum thus awarded January 10, 1876, and his administratrix did the same in May, 1876; and the same not being paid, in February, 1877, she brought this suit. Defendants deny their liability, and claim that the action was prematurely brought because the agreed statement, on which the case is submitted, shows, in addition to the foregoing facts, that said street has never been opened and nothing has been done with or in regard to it by said city since its location as aforesaid. Before the passage of chapter 92, of the laws of 1854, now condensed to such an extent as tends to obscurity in R. S., c. 18, § 7, (copied from the same chapter and section in the revision of 1857,) it would not be doubted that the rights both of the land owner and the public became fixed and vested by the passage of the final order closing the proceedings requisite for the establishment of a highway or town way, before any act done towards fitting the land thereby appropriated for use as a way; and the public thereby acquired a right to the easement, to be exercised as long as they pleased, and the land owner's

right to his compensation, as ascertained by the proper tribunal, was complete.

The courts of this State and New Hampshire and Massachusetts, under statutes substantially similar, concurred in so holding. *Westbrook* v. *North*, 2 Maine, 179; *Hampton* v. *Coffin*, 4 N. H. 517; *Harrington* v. *Co. Com'rs of Berkshire*, 22 Pick. 263; *Hallock* v. *Co. of Franklin*, 2 Met. 558. Upon the apparent injustice of requiring the defendants to pay the full value of the land for a mere naked right which they never have exercised, and perhaps never may, and upon the unreasonableness of the land owner's claim for full compensation as upon a complete actual taking of the land, when his possession never has been disturbed and perhaps never may be, and upon inferences from some of our own decisions in cognate cases, defendant's counsel constructs an able argument which merits careful consideration, and would seem, so far as equitable reasons can be regarded, entitled to prevail, if existing statute provisions and the settled law applicable thereto and the acts of the parties here, would permit.

The commonwealth of Massachusetts met the difficulties in the way of justice thus suggested, by the enactment of c. 86, stats. of 1842, providing that when county commissioners have estimated the damages sustained by any persons in their property by the laying out of any highway, they shall not order the damages to be paid, nor shall any person claiming damages, have a right to demand the same until the land over which the highway is located shall have been entered upon and possession taken for the purpose of constructing said highway. And this was held in *Harding* v. *Medway*, 10 Met. 470, to apply to all traveled ways in relation to which county commissioners were called upon under its provisions to direct or adjudicate. But the court, finding in *Bishop* v. *Medway*, 12 Met. 126, that they were not warranted by any just rules of construction in applying it to cases of damage awarded by selectmen to the owner of land over which they have laid out a town way, in 1847 (c. 259) an additional act was passed, expressly applying the same provisions to town ways, and imposing like restraints and duties

upon selectmen. The effect of these statutes was considered in *New Bedford* v. *Co. Com'rs of Bristol*, 9 Gray, 348.

If we had such statute provisions as these, this case could be readily disposed of; nor should we be troubled with any such difficulty as the Massachusetts court encountered in *Shaw* v. *Charlestown*, 3 Allen, 538, in applying them to the case of a street established by the municipal officers of a city, because, with us, "the word town, includes cities and plantations, unless otherwise expressed or implied;" and the term municipal officers includes the mayor and aldermen of cities as well as the selectmen of towns. R. S., c. 1, § 4, clauses 17 and 23.

Under such statutes, there could be no doubt that the land owner might properly be relegated in all cases where the land was not actually taken from his possession, to his action of trespass or case for the damages really suffered, when and so long as the taking is only partial and minatory but enough is done to interfere with the owner's use or disposition of his property. That such an action may be maintained, when no effectual steps are taken to secure the public rights, by paying or tending within a reasonable time the compensation to which the constitution declares all whose property is taken for public uses to be entitled, seems to be held in *Cushman* v. *Smith*, 34 Maine, 248, and *Nichols* v. *Som. & K. R. R. Co.* 43 Maine, 356; or, where no provision is made in the act authorizing the taking, for the assessment and payment of such damages, *Comins* v. *Bradbury*, 10 Maine, 447.

But the precise question before us, is, whether such action is the only or the proper remedy where the damages have been assessed by the proper tribunal, assented to by the land owner, and no order suspending the payment until the land is actually taken for the construction of the road, was made.

The only statutory provision which we have, looking to the end which the Massachusetts statutes so thoroughly accomplish, is found in R. S., c. 18, § 7; "Payment of damages may be suspended until the land for which they are assessed is taken." It is found among the provisions regulating the location, alteration and discontinuance of highways by the county commissioners.

The act from which it was derived, c. 92, laws of 1854, runs thus: "The county commissioners in their several counties are hereby authorized to suspend the payment of damages awarded to owners of land over which any county road may be located until said land is actually taken for said road." The act is plainly permissive, and not peremptory like the Massachusetts statutes; and there is nothing to show any change of legislative intention in this respect in the revision.

If we could extend the power thus conferred upon county commissioners, by judicial construction to the municipal officers of towns and cities, still the case finds that the municipal officers of Rockland did not undertake to suspend the payment to Kimball; but awarded the sum to be paid to him as damages, apparently on demand. Defendant's counsel labors earnestly to show that our statute rule with the aid of our decisions, is identical in its operation with the Massachusetts statutes. We think there is a radical difference, which it passes the just limits of judicial construction to correct. Whether further legislation is not required, is a matter which may well command the attention of our legislators. It does not appear, in *Gay* v. *Gardiner*, 54 Maine, 478, (upon which defendant's counsel lays much stress as a judicial interpretation of c. 18, § 7,) when the damages were made payable in that case by the tribunal which originally assessed them. From the reading of the case it might fairly be inferred that payment was suspended in that instance until the land should be actually taken. But the point decided, is, that a jury assessing damages independently, on an appeal, are not to allow interest as such, on such sums as they may find, from the time of the location. A doubt is expressed whether interest as such should be allowed at all. It does not seem to touch the case of the payment of an award of damages which is silent as to the time of payment.

If the city of Rockland pays more than is right, here, for the acquisition of an easement which they have thus far held to the probable inconvenience and embarrassment of the land owner, though they have not seen fit to avail themselves of it in actual use, they must charge it to a defect in the law which we cannot

correct, or to a defect in the action of their own municipal officers under the law.

Judgment for plaintiff.

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

J. LOYALIST BROWNE and others, in equity, *vs.* INHABITANTS OF BOWDOINHAM.

Sagadahoc. Opinion April 12, 1880.

Town ways — may be established by deed of land for a road and acceptance by the town.

The existence of a legal town road, upon which the money of the town raised for the purpose of maintaining town and highways, may lawfully be expended, may be established by other evidence than the record of proceedings under the statute, to have the same laid out by the municipal officers and accepted by the town. It may be established by proof of dedication of the land by the owner, and acceptance by the town for that purpose.

A deed from the owner of the land to the inhabitants of the town, conditioned for the maintenance by the grantees, in a proper manner of a road, which he has constructed over the premises conveyed, as a town road, and a regular acceptance of the conveyance by the town at a regular meeting under a proper article in the warrant, is sufficient proof of such dedication and acceptance to make the way a legal town way, open like all other town ways for the use of the public generally, when they have occasion to use it. Money raised by the town for the support of roads may lawfully be expended on it.

BILL IN EQUITY, to restain the town from expending money raised for the support of ways, upon a road established by the following deed and vote of the town:

Deed. "Know all men by these presents, that I, Robert Jack, of Bowdoinham, in the county of Sagadahoc, and State of Maine, in consideration of one dollar paid by the inhabitants of Bowdoinham, the receipt whereof I do hereby acknowledge, do hereby give, grant, bargain, sell and convey unto the said inhabitants of the town of Bowdoinham, the following described piece or parcel of land, situated in Bowdoinham, in the county of Sagadahoc and bounded and described as follows, to wit: commencing on the northern side of town way, near Robert Jack's

stable, thence running southeast by east forty-six rods, opposite John Brown's dwelling house; thence running southeast by east, one-half east, twenty-nine and one-half rods opposite John L. Brown's house; thence running south, southwest ten rods opposite the said Robert Jack's house on Abbagadasset point; thence south by west eight rods; thence east, southeast forty rods to low water mark on Kennebec river; thence two rods southerly by low water mark; thence W. N. W. forty rods; thence N. by E. eight rods; thence N. N. E. ten rods; thence N. W. by W. one half W. twenty-nine and one-half rods; thence N. W. by W. forty-six rods to the said town way; thence northerly to the first mentioned bounds; meaning to convey the land graded up and made a road, by said Jack, two rods in width, *on condition* that said grantees maintain a town road over the premises, and keep the same in good repair, so that the same may be safe and convenient for travelers, *as by law provided.* To have and to hold the aforegranted and bargained premises with all the privileges and appurtenances thereof, to the said inhabitants of Bowdoinham, to their use and behoof forever, so long as they shall maintain and keep in repair the road aforesaid over said premises. And I do covenant with the said inhabitants of Bowdoinham, that I am lawfully seized in fee of the premises, that they are free of all incumbrances, that I have good right to sell and convey the same to the said inhabitants of Bowdoinham to hold as aforesaid, and that I and my heirs shall and will warrant and defend the same to the said inhabitants of Bowdoinham against the lawful claims and demands of all persons. In witness whereof, I, the said Robert Jack and Nancy M. Jack, wife of the said Robert Jack, in testimony of her relinquishment of her right of dower in the above described premises, have hereunto set our hands and seals this twentieth day of February, in the year of our Lord, one thousand eight hundred and seventy-eight."

Signed, sealed and delivered in the presence of Edward J. Millay. } ROBERT JACK, (SEAL.) NANCY M. JACK, (SEAL.)

Acknowledged same day.

Article in warrant for town meeting, dated February 20, 1878: "To see if the town will vote to accept as a gift to the inhabi-

tants of said town the following road already constructed by Robert Jack, to wit: Leading from the terminus of the town way at said Robert Jack's stable to the Kennebec river, at low water mark, according to warranty deed, dated February 20, A. D., 1878."

Vote at town meeting March 4, 1878: "Voted to accept as a gift a road from Capt. Robert Jack already constructed, to wit: Leading from the terminus of the town way at said Robert Jack's stable to the Kennebec river, at low water mark, according to warranty deed, dated February 20, A. D., 1878.

It was agreed that the town meeting of March 4, 1878, was a legal meeting and that the road described in the bill had been opened to public travel by the town for a year prior to the date of the bill, and that the selectmen had made repairs upon it during that time.

J. W. Spaulding and *F. J. Buker*, for the plaintiff, cited: R. S. c. 18, § 44; *Hemphill* v. *Boston*, 8 Cush. 195; *Marquis of Stafford* v. *Coyney*, 7 B. & C. 257; *Commonwealth* v. *Low*, 3 Pick. 408; *Avery* v. *Stewart et als.* 1 Cush. 501; *Commonwealth* v. *Belding*, 13 Met. 10; R. S., c. 18, § 68; *Maine* v. *Strong*, 25 Maine, 296; *Cleaves* v. *Jordan*, 34 Maine, 9; *Waterford* v. *Co. Com'rs*, 59 Maine, 450; *State* v. *Sturdivant*, 18 Maine, 66; R. S., c. 18, § 21; *Bartlett* v. *Bangor*, 67 Maine, 460; *Todd* v. *Rome*, 2 Maine, 55; *State* v. *Berry*, 21 Maine, 169; *State* v. *Bunker*, 59 Maine, 366; *Hobbs* v. *Lowell*, 19 Pick. 408; *Valentine* v. *Boston*, 22 Pick. 75; *Larned* v. *Larned*, 11 Met. 423; *Commonwealth* v. *Holliston*, 107 Mass. 232; *Mayberry* v. *Standish*, 56 Maine, 348; *Windham* v. *Co. Com'rs*, 26 Maine, 409.

Counsel contended that an underlying principle, disclosed by the authorities cited, seemed to be, that a way established by dedication and acceptance, could not be a town way, and that the condition of the deed, requiring a "town road" to be maintained, could only be performed by establishing a town way over the premises in the manner provided by the statutes—a simple method familiar to everybody. And the effect of the deed was only to relieve the town of damages to land owner and give them the benefit of Capt. Jack's labor in constructing the road.

C. W. Larrabee, for the defendant, cited: *Cleaves* v. *Jordan*, 34 Maine, 12; R. S., c. 1; § 1; c. 19, § 1; c. 18, § § 44, 77; *Windham* v. *Co. Com'rs*, 26 Maine, 406; *Mayberry* v. *Standish*, 56 Maine, 355; *Stedman* v. *Southbridge*, 17 Pick. 162; *Hill* v. *Turner*, 18 Maine, 413; *Todd* v. *Rome*, 2 Maine, 55; *Hemphill* v. *Boston*, 8 Cush. 195; *Stafford* v. *Coyney*, 7 B. & C. 39; *Commonwealth* v. *Low*, 3 Pick. 408; 2 Smith's Leading Cases, 208–212; *Peck* v. *Smith*, 1 Conn. 103; 2 Dill. Mun. Corp. 503–505.

BARROWS, J. The diligent counsel for the plaintiffs have labored zealously to construct out of various dicta, uttered *diverso intuitu*, and applicable almost exclusively to the cases in which they are found, together with some early cases in Massachusetts and this State which have since been rejected by both courts, an argument in favor of the proposition that there is no mode in which a town road or way can be established, except the statute method of condemning the land and appropriating the easement by the action of the municipal officers in laying it out for a road, and the subsequent vote of the town accepting it; and, as a sequence, the further proposition that when the town has recived and accepted a conveyance of land from the owner upon condition that they will maintain a road already constructed over it as a town road, "and keep the same in good repair, so that the same may be safe and convenient for travellers as by law provided," they cannot lawfully appropriate or use the town's money for the performance of the condition under which they hold the estate.

The ingenious effort of counsel fails to satisfy us that these propositions can be maintained.

The statute provisions are made in order to enable the town and the public to acquire a needed easement against the owner of the soil, whether he be willing or unwilling, and to secure to the owner of the land a mode of ascertaining, and a certain payment, of the damages to which he is entitled.

But we know of no law which prevents the owner of land from waiving any possible claim which he might have for damages, and conveying the land to the town, upon condition that they will

maintain a town road, street, or any other sort of public way over it; or which forbids a town to accept such a conveyance, and perform the required condition; or which makes it necessary for the town holding the estate upon such a condition to incur what would seem under such circumstances to be the useless expense and trouble of a statute location. The town has acquired by the deed, something more than the mere easement which a location under the statute would give them, — something more than a mere verbal dedication of the land for a public way would give them, when accepted.

Their interest and their obligation are both defined by the deed under which they hold. *Lex non cogit ad vana seu inutilia.* Why should they proceed to appropriate an easement by statute proceedings, when they have the fee in the soil, "so long as they shall maintain and keep in repair the road aforesaid over said premises?" We see no illegality in their proceeding to protect their estate from forfeiture by a performance of the condition under which they hold it. The plaintiffs contend that there can be no performance of the condition in Robert Jack's deed, unless, in addition to its acceptance and the maintenance by the town of the road, which as the deed recites, has been graded up and made over the premises by the grantor, the town proceeds to lay out a town road there in the manner prescribed by the statute. The condition does not call for the laying out of a town road, but requires the grantees to maintain one and keep it in good repair, so that the same may be safe and convenient for travelers, &c. "Maintain, — to preserve or keep in any particular state or condition, — to continue, — not to suffer to cease." The word itself imports that the road which Jack wished to have "maintained" was already there.

It never can be successfully contended that the grantor had in his mind any technical distinction between a public highway and a town road, so far as the mode of their laying out is concerned, — such as the court have been sometimes called to deal with in indictments, where technical exactness is required. The design of the condition obviously is to secure the maintenance of the road in a proper manner, as other town roads, — *i. e.* roads,

which are all included within the limits of the town, are maintained. The grantor had no motive for using the words "town road" in any technical sense. The rights of the general public, of all who have lawful occasion to use them, are the same in town roads as they are in highways leading from town to town, and laid out by the county commissioners. As remarked by AMES, J., in *Denham* v. *County Commissioners*, 108 Mass. 204: "All the different ways which towns are authorized by law to lay out, are in truth public highways, for the public without discrimination has the right to use them. It is wholly immaterial by what name they are called.

No object which the grantor could have had would be subserved by a laying out of this road by the selectmen or an acceptance by the town. If the town fail to perform the condition they forfeit the estate granted, and the grantor or his heirs may enter and reclaim it for the breach of condition. A vote to discontinue would not be necessary for that purpose, though it might have the same effect. But all that the grantor need show would be an actual breach of the condition, and a re-entry to claim the forfeiture.

The case of *Commonwealth* v. *Low*, 3 Pick. 408, upon which the plaintiffs chiefly rely to establish the proposition that a town way can be established only in the mode prescribed by the statute, was overruled in *Commonwealth* v. *Belding*, 13 Met. 10; see also, remarks of HUBBARD, J., in *Larned* v. *Larned*, 11 Met. 421, to the effect that however it might once have been doubted whether a way was ever made by dedication, "it is now definitively settled" that it may be done; "and this is true not only of a highway but of a town way or private way."

The case of *State* v. *Sturdivant*, 18 Maine, 66, in which SHEPLEY, C. J., says the court followed the Massachusetts court in *Commonwealth* v. *Low*, "not without some reluctance," was overruled in *State* v. *Bigelow*, 34 Maine, 246, and the law as now held in this State on this point is as stated in the latter case, and in *Bigelow* v. *Hillman*, 37 Maine, 52, where RICE, J., remarks that the "the existence of either class" (highways, town-ways or private ways,) "may also be established by proof of

dedication" (including of course acceptance,) "or such long continued use as will raise the presumption that they were legally established." See also, for a full review of the cases and definition of the different kinds of ways, *State* v. *Bunker*, 59 Maine, 366.

We think the case, as stated, shows a town way legally established, upon which the town may lawfully expend "money raised for the maintenance of town and highways."

Bill dismissed with costs for the respondents.

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

CHARLES H. SMITH in equity *vs.* JOHN M. SULLIVAN and others.

Penobscot. Opinion December 4, 1880.*

R. S., c. 70. The assignment law repealed by the insolvent law. Stat. 1878, c. 74. Law and equity.

The assignment law, R. S., c. 70, so far as it applies to insolvent persons, is repealed by the insolvent law, stat. 1878, c. 74. Assignees, therefore, take no title to the property of an insolvent person, by virtue of his general assignment for the benefit of creditors, as against his creditors or assignee in insolvency.

In an action against persons, not parties as assignee, debtor or creditors, the jurisdiction of this court, as between law and equity, rests upon the general principles applicable and not upon stat. 1878, c. 74, § 11; and where the claim is substantially for an unauthorized intermeddling with the property, the remedy is at law and not in equity.

THE OPINION states the case.

Wilson & Woodward, for the plaintiff, in discussing the question of the effect of the insolvent law upon the assignment law, cited: *Knight* v. *Aroostook R. R.* 67 Maine, 291; *Commonwealth* v. *Kelliher*, 12 Allen, 480; *Norris* v. *Crocker*, 13 How. 429; Bump's Bankruptcy, 8th ed. 407.

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*This case is reported in advanee of its chronological order because of its general importance to the profession in this State. — REPORTER.

Humphrey & Appleton, for the defendants, Ivory W. Coombs and James P. Parker, and *Whiting S. Clark*, for the defendants, Alfred Jones and wife.

The provisions of R. S., c. 70, are not repealed by implication or otherwise by the insolvent act of 1878. The able and astute counsel for the complainant by the framework of their bill of complaint admit this. The insolvent courts do not by stat. 1878, c. 74, have *exclusive* but only *original* jurisdiction. The last clause of section one restricts the insolvent court from jurisdiction in a class or classes of "cases arising under the provisions of this act," "where it is otherwise specially provided."

If the legislature of 1878 intended that the insolvent law should repeal the assignment law, they would have said so. Their intention was manifestly the other way, from the restriction of jurisdiction in cases where "it is otherwise specially provided."

It is only where there is no intention, whatever, manifested by the legislature, by a saving clause of any sort to preserve former statutes in force, that a repeal by implication is allowed to operate. And when there is a saving clause or manifest intention to preserve former acts it must prevail, even at the expense of restraining the operation of the subsequent act. *Williams* v. *Pritchard*, 4 T. R. 3; *Rex* v. *Poor Law Com'rs*, 6 A. & E. 1; *Capen* v. *Glover*, 4 Mass. 305; *Pease* v. *Whitney*, 5 Mass. 380; *Commonwealth* v. *Kimball*, 21 Pick. 377; *Brown* v. *Lowell*, 8 Met. 174; *United States* v. *Claflin* 97 U. S. 551.

We ask the particular attention of the court to the case of *Carter* v. *Sibley*, 4 Met. 298, which involved the question of repeal of an assignment act by a subsequent insolvent act. See also, *Sturges* v. *Crowinshield*, 4 Wheat. 203.

"Acts *in pari materia* are to be taken together as one law, and are to be so construed that every provision in them may, if possible, stand. Courts, therefore, should be scrupulous how they give sanction to supposed repeals by implication." *Haynes* v. *Jenks*, 2 Pick. 176; *Commonwealth* v. *Crowley*, 1 Ashmead, 179; *Dr. Foster's Case*, 11 Co. 63; *Loker* v. *Brookline*, 13 Pick. 348; *Goddard* v. *Boston*, 20 Pick. 410; *Snell* v. *Manufacturing Co.* 24 Pick. 299.

DANFORTH, J. This is a bill in equity, to which a demurrer has been filed, and the object of which is to get possession of certain property or its proceeds alleged to have been obtained by fraud or for fraudulent purposes by two of the defendants, Coombs & Parker, assisted by the others. From the allegations in the bill it appears that on May 31, 1879, the copartnership then existing between John M. Sullivan and Alfred Jones was dissolved under an agreement by which Jones received all the partnership assets and agreed to assume all the partnership liabilities; that on June 4, 1879, Jones made an assignment under the law found in R. S., c. 70, for the benefit of his creditors to the defendants, Coombs & Parker. Under this assignment Coombs & Parker obtained possession of the partnership assets of Sullivan & Jones which is the property claimed by the plaintiff in his bill.

It further appears that on July 11, 1879, Sullivan filed in the insolvent court, in the county of Penobscot, his petition that the partnership previously existing between himself and Jones might be declared insolvent, and on the twenty-sixth of the same July, the said Sullivan & Jones, individually and as copartners, were adjudged insolvent by said court, and on the ninth of August following, the plaintiff was chosen and qualified as assignee, and received from the judge an assignment of the individual and partnership estate of Sullivan & Jones.

Thus independent of any allegations of fraud, we have here presented the question of title between these parties. The defendants claim by a prior assignment under R. S., c. 70; the plaintiff, by a subsequent one under the insolvent law of 1878. If the prior law is in force, the defendant's title is good, unless vitiated by fraud. If that law has been repealed, so far as it relates to insolvents, then they have no title, and it will be unnecessary to inquire into the effect of the allegations of fraud.

There is no law, which in terms repeals the prior act relating to assignments; if therefore it is not now in force, it must be because it is repealed by implication. There are two grounds upon which an existing statute may be thus repealed: when the later one covers the whole subject matter of the former,

especially when additional remedies or penalties are added, and when the later one is inconsistent with, or repugnant to the former; when either of these conditions are found, the later act must be considered as declarative of the will of the legislature. This principle has become so well settled that a discussion of it is unnecessary. *Knight* v. *Aroostook Railroad*, 67 Maine, 291; *Littlefield* v. *Paul*, 69 *Ibid.* 527; *Carter* v. *Sibley*, 4 Met. 298; *Norris* v. *Crooker*, 13 How. 438.

It is not now necessary that we should decide whether the former act is entirely repealed, so as to be of no force whatever. That is entitled, "assignment for the benefit of creditors." The act of 1878, relates to insolvents only. If, therefore, a debtor who is not insolvent, chooses for any reason, to make an assignment for the benefit of such of his creditors as may be willing to become a party to it, we have no occasion to say the law will not enforce it. But in this case, the owner of the goods in question has been adjudged an insolvent by the legally constituted tribunal.

The question then, is whether so far as insolvent debtors are concerned, the two laws embrace the same subject matter. By the express terms of the assignment law, its object and purpose is to provide for an equal distribution of all debtor's property among such of his creditors as become parties and all the provisions necessary to accomplish that object are made a part of the law. The act of 1878 has in view the same purpose including all the creditors with certain exceptions, with such provisions for its operation as are sufficient to make it complete in itself. It embraces all the provisions of the former, with more detail and additional remedies and penalties.

But in addition to this, the act of 1878 is so inconsistent with and repugnant to the former statute, that the two cannot have their "definite mode and scope of operation, without the slightest conflict with each other." There must be conflict from the beginning, and all the way through. In the one, the debtor on his own motion makes his assignment and chooses his own assignee. In the other, the court adjudicates as to the insolvency, and the creditors choose the assignee. The duties of these

different assignees are in direct conflict. The one is under the more immediate direction of the court, with no control over the amount of indebtedness to be allowed, but to distribute the assets as required in payment of such as is allowed. The other acting with more independence, himself in the first instance, the tribunal before whom the debts are to be proved, and distributing the property among such creditors only as become parties to the assignment.

But, without further discussion of the details of the two statutes, a cursory reading of which is sufficient to show the entire inconsistency of the proceedings under one, with those of the other, the control of the property alone is decisive. It cannot be in each so as to be administered in accordance with each law at the same time. Nor is it sufficient to say, as in the argument, that the first assignment takes precedence and leaves for distribution by the subsequent assignee, only the after acquired property. The act of 1878 is absolute and unconditional in its terms. It not only gives the assignee authority, but requires him to take possession of all the debtor's assets to be administered upon, and disposed of in accordance with its terms. Take the property in question in this case, it would clearly be assets under the insolvent law, but for the previous assignment. But that assignment makes it no less assets to pay all the debts. Still if the prior assignee is to retain it, the requirement of this fundamental principle of the act of 1878 with all the provisions growing out of it are made of no effect. If then, the assignment law is to remain in force, it will enable the debtor at his option, to render of no effect the plain and unqualified provisions of the insolvent law, and take from his creditors, property which belongs to them, or compel them to become parties to his assignment, which would equally deprive them of remedies and penalties provided for their benefit. We nowhere in this law find any ground for supposing such to have been the intention of the legislature.

The argument founded upon the clause, "except where it is otherwise specially provided" in § 1, of the act of 1878, cannot avail. This in no respect limits the force or application of the

law, but refers only to the jurisdiction of the court. That is to have original jurisdiction, unless otherwise specially provided.

But if it were not so, the result must be the same. The assignment law is not a special provision relating to any particular person or class, as is that which provides for insolvent insurance companies, or for persons under guardianship; but is general in its application, as much so as is the act of 1878, embracing in its provisions, the same persons, and is co-extensive with it. If therefore, it was excepted by virtue of this clause, nothing would be left, upon which the later law could operate. This cannot be supposed to be the intention of the legislature.

We are thus necessarily brought to the conclusion, that the assignment law, so far as it relates to insolvent persons, is repealed by the act of 1878, and that Coombs & Parker, independent of any charges of fraud, take nothing by virtue of the assignment of Jones to them. Hence, whatever claim the plaintiff may have upon them, or their associates, is one for damage for wrongful conversion, or an action of replevin for the property itself. In either case, the remedy at law, would seem to be plain and adequate to secure whatever rights he has.

It is true that by § 11, of the act of 1878, c. 74, as amended by § 3, c. 154, of the acts of 1879, "the Supreme Judicial Court shall have full equity jurisdiction in all matters arising under this act"; which powers "may be exercised . . . in term time or vacation upon bill, summary petition, or other proper process." This clause refers to cases involving the rights of the assignee debtor and creditors, as between themselves, in the management and distribution of the assets. These persons are parties to the proceedings from the beginning, so much so that they may be liable to be brought in upon summary proceedings upon any proper process. The claim involved in this case, is one against outside parties, who can be compelled to answer only upon ordinary process, such as is known to the law regulating proceedings in court. It is provided for in § 32, which gives the assignee "power to maintain in his own name, all suits at law and in equity, for the recovery and preservation of the insolvent estate;" leaving it to the general principles

applicable, to decide whether his remedy shall be in law, or in equity. In this case, whatever remedy he has, is clearly at law. *Smith* v. *Mason*, 14 Wallace, 419; *Marshall* v. *Knox*, 16 *Ibid.* 551.

Nor can this court, under this process, order the assignee to hold and distribute the proceeds as partnership assets. He is equally entitled to the property, whether it belongs to the partnership, or to Jones as an individual, and whether he shall distribute the proceeds to one set of creditors or the other, may be decided upon a proper process to which the creditors are parties and where they can be heard.

Bill dismissed with costs.

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

ELLEN A. REED *vs.* FRANKLIN REED.

Sagadahoc. Opinion April 12, 1880.

Deed of a married woman. Parol evidence to change a deed to a mortgage. Fraud of third person.

Where a married woman, prior to her marriage, had received a deed of real estate from one, who subsequently became her husband; *Held*, that such a deed was in no sense a conveyance to her from her husband, since she received her title from one, who, at the time, sustained no such relation to her; that her sole deed executed after the marriage gave title.

In this State in an action at law, parol evidence is not received to prove that a deed of land, in terms absolute, was intended only as security for a debt.

It is not competent to show fraud or duress on the part of the husband, in procuring from his wife a warranty deed, under which her grantee is a *bona fide* holder of the title, without proof of the complicity of such grantee in such fraud or duress.

ON REPORT.

WRIT OF ENTRY, dated March 18, 1878, for certain real property in Bath. Plea, *nul disseizen*. Plaintiff claimed under a deed given her August 10, 1864, by Samuel D. Reed, whom she afterwards married. Defendant claimed under a deed to him from the plaintiff, January 19, 1874, subsequent to her marriage and in the lifetime of her husband.

The full court were to render judgment for either party according to their legal rights upon the testimony, or send the case to a new trial if the rulings, excluding the testimony offered by the plaintiff, were erroneous. The rulings sufficiently appear in the opinion.

Adams & Coombs, for the plaintiff.

The deed of the plaintiff to the defendant was void because her husband did not join. R. S., c. 61, § 1. *Call* v. *Perkins*, 65 Maine, 439. The deed from plaintiff's husband to her, being delivered after their intermarriage, had no effect until after their marriage, 33 Maine, 446.

The defendant held other and sufficient security for the loans he had made plaintiff's husband, and there was, therefore, no consideration for the deed from plaintiff to defendant, which was obtained from plaintiff by fraud and duress during her sickness, and if we had been permitted to show these facts, and the transactions and relations between defendant and plaintiff's husband the inference, which the jury must have drawn, would have been, that the defendant was a party to the fraud practiced upon the plaintiff.

C. W. Larrabee, for the defendant, cited: R. S., c. 61, § 1; Smith on Constitutional Construction, 604, 620; *Deering* v. *Sawtel*, 4 Maine, 191; *Brown* v. *Allen*, 43 Maine, 590; 2 Whar. Ev. § 1033.

SYMONDS, J. The weight of evidence is in favor of the defendant's claim that the deed, of the lot of land which the plaintiff seeks by this writ of entry to recover, was delivered to the plaintiff before her marriage. That she afterwards married the grantor makes this in no sense a conveyance to her, either directly or indirectly, from her husband. She received title from one who sustained no such relation to her, and at the marriage the land was hers by as full title as if the deed had been from a stranger. She could subsequently convey it without the joinder of her husband. That the husband did not join in the deed to the defendant does not defeat it. Her sole deed could give title. R. S., c. 61, § 1. *Brookings* v. *White*, 49 Maine, 479; *Beals* v. *Cobb*, 51 Maine, 348; *Allen* v. *Hooper*, 50 Maine, 371.

In the report of evidence, there is nothing to destroy the effect of this deed from the plaintiff to the defendant. The only question is, whether the plaintiff has been aggrieved by the exclusion of evidence,—so that according to the agreement of counsel by which the case is reported, it should go back for a new trial.

In a proceeding at law, in this State, parol testimony is not admissible to show that a deed, in terms absolute, was intended only as security for debt. On this point, the ruling was correct. *Ellis* v. *Higgins*, 32 Maine, 34; *Whitney* v. *Lovell*, 33 Maine, 318; *Bryant* v. *Crosby*, 36 Maine, 562.

Parol testimony that the delivery of a deed was to be void on the fulfillment of a verbal condition stated was rejected in *Warren* v. *Miller*, 38 Maine, 108.

The same rule formerly prevailed in equity, owing, it is said, to the limitations then existing upon the equity powers of the court. *Thomaston Bank* v. *Stimpson*, 21 Maine, 195; *Richardson* v. *Woodbury*, 43 Maine, 211. Compare, *Gerry* v. *Stimson*, 60 Maine, 186.

In order to meet the statement of the defendant that, when he received this deed from the plaintiff by the hands of her husband acting for her, he had already advanced a valuable consideration therefor, it was not competent to receive evidence that he had other securities for moneys loaned to the plaintiff's husband. It would not tend to prove that this new security was not in fact taken, and without fraud.

The plaintiff did not undertake to prove that there was no advance of money towards the consideration for this deed to defendant, that no moneys were loaned by the defendant; but only to show that the sums loaned were amply secured otherwise, by conveyances of land in Wisconsin or in some other way. The evidence offered—and none was excluded on this point—tended to prove that a certain amount was paid by the defendant when this deed was delivered to him. In the absence of fraud, the defendant had a right to exercise his own judgment as to what security he would take. The testimony offered did not go to the extent claimed in argument of proving that there was no

money at all advanced, either as a loan, or in payment of the consideration. To say that the defendant was over secured does not meet the testimony which tends to show, and is uncontradicted, that the defendant made an actual advance of money. All this, moreover, is open to the objection that it is indirectly reducing the deed to a mortgage by parol testimony. It does not establish the fact that no consideration was paid for the deed.

There being, then, no competent evidence that the defendant was not, what he claims, a holder under a warranty deed from the plaintiff for a valuable consideration, it was not admissible to show that the deed was procured from the plaintiff by fraud or duress on the part of her husband, without undertaking to establish the complicity of the defendant therein, or that he was in some way responsible for the acts of the husband. The fault of the plaintiff's agent could not defeat the title of one who held under her deed by a *bona fide* purchase for valuable consideration. The ruling went as far as the plaintiff had a right to claim in admitting this testimony, on condition that the plaintiff expected to show the complicity of the defendant in the fraud or duress of the husband. *Webster* v. *Folsom*, 58 Maine, 230. For valuable distinctions between different classes of cases on this point, see *Laughton* v. *Harden*, 68 Maine, 208. Neither the testimony received in this case, nor that excluded against the objection of the plaintiff, was such as to put the defendant in the position of one who had received a voluntary conveyance, without paying any valuable consideration therefor.

The declarations of the defendant against the deed, substantially to the effect that it was not an absolute, but a conditional conveyance, were properly rejected. We have already seen that in this State, in a trial at law upon a writ of entry, such testimony is not received. As against the deed, the fact alleged cannot be proved by the parol evidence.

In this real action, the plaintiff seeks to recover the land which she herself has conveyed to the defendant, and of which he is in possession, under a deed of warranty from her, duly executed and recorded. She declares upon an earlier deed to her, from a grantor whom she subsequently married; and ignores, or claims

to prevail against, the later deed which she has given. As the evidence stands, it must be decided that neither a want of valuable consideration for the plaintiff's deed to the defendant, nor its procurement by fraud or duress, are proved; nor do we perceive that the plaintiff has been aggrieved by any ruling of the court, excluding testimony on either of these points.

It is evident from the plaintiff's own claim, that, if it were allowable to prove, or if it were conceded, that this deed was intended only as security for moneys loaned, it was complicated with other transactions between the plaintiff's husband and the defendant, which this process is in no way suited to investigate. If the defendant's deed were in fact and in terms a mortgage, it would be impracticable to attempt to adjust the amount due upon it in a writ of entry brought by the plaintiff and based on her own earlier absolute title, which she had subjected to such incumbrance.

No conditional judgment can be rendered, and no reason appears for rendering judgment for the land in favor of the plaintiff against her own deed.

Judgment for the defendant.

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

REBECCA G. WHITTIER *vs.* HENRY WOODWARD, Administrator on the estate of EZRA KEMPTON, deceased.

Kennebec. Opinion April 12, 1880.

Administrator. Waiver of presentment of claim and demand of payment. Statute of limitations. Stat. 1872, c. 85, § 12.

The filing of the petition in probate court by the administrator for the appointment of commissioners on the ground that he deemed a claim against the estate, exorbitant, unjust and illegal was an admission or waiver by him of a presentation in writing of the claim and demand of payment within two years after notice of his appointment as required by statute.

A claim against the estate of a deceased person, not asserted within two years and six months after notice of the appointment of the administrator, is barred by stat. 1872, c. 85, § 12.

The defendant filed his petition in the probate court for the appointment of commissioners, under the statute, within two years and six months after he had given notice of his appointment as administrator; no action was taken thereon and no notice was given the plaintiff. After the two years and six months had elapsed, the plaintiff accepted notice, agreed to the appointment of commissioners, who were appointed and acted on the claim, disallowing it. *Held*, these proceedings did not deprive the defendant of the right to plead the statute of limitation. There was neither a waiver by him of the limitation, nor a new promise to pay the claim.

ON REPORT.

An action for money had and received, bought under the statute on an appeal from the report disallowing the claim by commissioners, appointed by the judge of probate to examine disputed claims against the estate of Ezra Kempton. The writ was dated September 28, 1877. Plea, general issue and brief statement of no notice to the administrator as required by the statute, and statute of limitation.

The case was reported for the decision of the law court on so much of the evidence as is legally admissible, the court to render such judgment as the case require. The facts sufficiently appear in the opinion.

Bean & Bean, for the plaintiff.

Stat. 1872, c. 85, § 12, relates to the remedy and is to be construed liberally. An administrator may waive the statute of

limitation, and revive and renew an outlawed debt. The defendant here waived a strict compliance of the stat. 1872, c. 85. *Oakes* v. *Mitchell, Adm'r*, 15 Maine, 360; *Bunker* v. *Athearn, Adm'r*, 35 Maine, 364; *Blackington* v. *Rockland*, 66 Maine, 332; *Baxter, Adm'r*, v. *Penniman*, 8 Mass. 133; *Emerson* v. *Thompson et al.* 16 Mass. 429; *Mitchell* v. *Dockray, Ex'r*, 63 Maine, 82.

The limitation in the stat. 1872, relates only to actions brought directly against the administrator. It does not relate to this action, which is only one of the steps (and not the first,) necessary to prosecute an appeal from probate court. *Heald, Adm'r*, v. *Heald*, 5 Maine, 387; *Dillingham* v. *Weston, Adm'r*, 21 Maine, 263; *McNally* v. *Kerswell*, 37 Maine, 550; *Greene, Adm'r*, v. *Dyer*, 32 Maine, 460; *Palmer* v. *Palmer, Ex'r*, 61 Maine, 236; *Hall* v. *Merrill*, 67 Maine, 112; *Guild et al.* v. *Hall, Ex'r*, 15 Mass. 455; *Paine, Judge*, v. *Nichols, Adm'r*, 15 Mass. 264; *Johnson* v. *Ames*, 6 Pick. 330. Counsel further cited: R. S., c. 64, and c. 66, § § 5, 15; *Goff* v. *Kellogg, Ex'r*, 18 Pick. 256; *Ellsworth* v. *Thayer, Adm'r*, 4 Pick. 122.

Pillsbury & Potter and *W. R. White*, for the defendant.

LIBBEY, J. The defendant is administrator of the estate of Ezra Kempton, deceased, and gave notice of his appointment December 31, 1874. The claim in suit is for money collected by Kempton as attorney for the plaintiff.

By his pleadings the defendant sets up two grounds of defence to the plaintiff's right to maintain her action.

I. He says the plaintiff did not present to him the claim in writing, and demand payment within two years from the time he gave notice of his appointment.

II. He says the action was not commenced within two years and six months after he gave said notice.

As to the first question the parties are at issue whether the claim was duly presented in writing by the plaintiff, and their testimony is directly in conflict. We do not deem it material to determine which should be believed, as we think the petition of the defendant for the appointment of commissioners to determine

the validity of the claim was an admission, or waiver, of a presentation and demand. *Mitchell* v. *Dockray*, 63 Maine, 82.

But we think the second ground of defence well founded. By act of 1872, c. 85, § 12, no action against an executor or administrator shall be maintained on a claim demanded as therein required, unless commenced during two years after giving notice of his appointment, or within six months next following. This action was not commenced within two years and six months from giving the notice, but it is contended in behalf of the plaintiff that the statute limitation does not apply to this action because it is a continuation of the statute process, commenced by the defendant within the two years and six months. The defendant filed his petition for the appointment of commissioners in March, 1877, but no notice was ordered upon it, and none appears to have been given to the plaintiff. On the 23d day of July, 1877, she acknowledged notice, and agreed to the appointment of commissioners. She then first became a party to the process, and up to that time had a right to commence her action. She did nothing to assert her claim by action, or the statute process, till more than two years and six months after the defendant gave notice of his appointment. Her right of action had then become barred. The fact that afterwards the plaintiff's claim was committed to commissioners by the probate court, under the statute, on the defendant's petition on the ground that he deemed it unjust and illegal, does not deprive him of his right to plead the limitation. It was neither a waiver, on his part, of the limitation, nor a new promise to pay the claim. *Oakes* v. *Mitchell*, 15 Maine, 360; *Bunker* v. *Athearn*, 35 Maine, 364.

Plaintiff nonsuit.

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

GEORGE W. SMITH *vs.* SANFORD C. CHASE.

Somerset. Opinion April 12, 1880.

Attachment — exceptions under R. S., c. 81, § 59. "Cart or truck wagon." Peddler's cart.

A peddler's wagon designed to be used in trade from place to place, with the body hung upon three elliptic steel springs, with drawer behind and doors at the sides, and a railing around the top, and dasher in front, is not a vehicle which is exempted from attachment and execution under R. S., c. 81, § 59, clause 9, which exempts "one cart or truck-wagon."

ON EXCEPTIONS.

REPLEVIN of one truck wagon, "to wit, one peddle cart." Writ dated June 14, 1878. The facts sufficiently appear in the opinion. The case was submitted to the presiding judge, who held as a matter of law, that the property was a truck wagon, and exempt from attachment by the statute. To this ruling, the defendant alleged and filed exceptions.

James Wright, for the plaintiff, cited: Webster's and Worcester's unabridged dictionaries; R. S., c. 81, § 59; 48 Maine, 410; 53 Maine, 401; 49 Maine, 34; 56 Maine, 34; 56 Maine, 538.

Folsom & Merrill, for the defendant, cited: 6 Dane Ab. c. 196, art. 5; stat. 1821, c. 95, § 1; stat. 1838, c. 307; stat. 1847, c. 32; stat. 1859, c. 74; stat. 1867, c. 102, § 4; R. S., c. 81, § 59; c. 1, § 4, cl. 1.

BARROWS, J. The vehicle here replevied, is claimed by the plaintiff under a mortgage, from Frank E. Swanton, dated May 29, 1878, in which it is described as "a one horse peddle cart." Defendant justifies the taking of the same, May 25, 1878, (four days before the plaintiff's title accrued) as the property of said Swanton, by virtue of a writ of attachment, in his hands as sheriff of the county.

The justification must prevail, unless the vehicle was exempt from attachment under the 9th clause of § 59, c. 81, R. S., which places upon the list of exempted articles, "one plow, one cart or truck wagon, one harrow, one yoke with bows, ring and staples, two chains, one ox sled, and one mowing machine."

There was no question of fact as to the description of the vehicle. "It was a light one horse peddler's wagon, with four wheels, the body hung upon three elliptic steel springs, with drawers behind, and doors at sides, with railing around the top, and dasher in front." Was it "a cart, or truck wagon," within the meaning of the provision above referred to? The plaintiff claims that it comes directly within the definition of a truck wagon, which he says is a wagon used for the transportation and exchange or barter of commodities, deriving truck, from the French verb *troquer*, "to exchange, to barter, to truck." Defendant derives it from the Greek . . ., "a wheel," from which come the English truck and trucks, signifying "a low carriage for carrying goods, stone," &c. Both fortify their positions by Webster's dictionary, an acknowledged authority; but this does not bring us perceptibly nearer a solution of the question. What did the legislature intend to exempt as "a cart or truck wagon?" The fundamental rule in the construction of statutes, is that they are to be construed according to the intention of the legislature. Dane's abridgment, vol. 6, c. 196, art. 5, § 2. Another is, that "all the statutes on one subject are to be viewed as one;" *Ibid.* c. 196, art. 5, § 16; *Merrill* v. *Crossman*, 68 Maine, 412. Such a construction must prevail as will form a consistent and harmonious whole, instead of an incongruous, arbitrary and exceptional conglomeration. The context, and the course of legislation, as matter of history often throw light upon the meaning and application of terms used in the statutes.

Clause 9 had its origin in laws of 1838, c. 307, entitled "an act, exempting farming tools and other articles from attachment," &c., by which one plough of the value of $10, one cart of the value of $25, one harrow of the value of $5, and all necessary hand farming tools, of the value of $10, together with one cooking stove of the value of $35, were exempted. In 1839, by c. 413, there was a limited exemption of bulls, steers or oxen, to go with the "cart." These exemptions were continued in the revision of 1841, and in 1847, c. 11, were supplemented by the exemption of an ox yoke with its appurtenances, all of the value of $3, two chains, each of the value of $3, and an ox sled of the

value of $10. And the same year by c. 32, the limited exemption of one pair of oxen, steers or bulls was made general, and, horse labor having by that time come into greater use upon farms, "one or two horses, instead of oxen," not exceeding the value of $100, were made "subject to the same exemption." These exemptions went into the revision of 1857.

In c. 74, 1859, came an exemption, in favor of any one owning one or two horses exempt from attachment, of a harness for each of said horses, not exceeding $12 in value, and a horse sled not exceeding $15 in value, in case he did not at the same time own an ox sled, with the privilege of electing which should be exempted, if he did. Finally, in 1867, when nominal values had been greatly enhanced by reason of a plethora in the currency, c. 102, of the laws of that year, introduced a pair of mules among the exempted articles as an alternative for the one or two horses, and at the same time provided for the exemption of a truck wagon in place of the cart, and, in view of the change in nominal values, struck out the small pecuniary limitations as to most of them, or, (as to two or three of the exempted articles) increased them to correspond with the exaggerated prices then prevailing.

And so the exemptions stand—a yoke of oxen, or one or two horses, not exceeding a certain value, or a pair of mules—an ox sled, or a horse sled—a cart, or a truck wagon—the vehicles intended to correspond with the animals used, and all designed as aids to labor rather than traffic.

Looking at the character of all the articles exempted, and their apparent purposes, and the order of their introduction into the list, some of them as substitutes for articles previously exempted, we do not believe that the legislature intended to exempt, under the term truck wagon, one of those movable stores that traverse the State on wheels or runners, covered it may be with the meretricious adornments of carving and gilding, as well as paint and varnish, but rather one of those vehicles used most commonly for farm work or heavy hauling, with horses or mules, as a "cart" is with oxen.

Under the plaintiff's definition, we should be required to hold as exempted, not unfrequently, a vehicle exceeding in value the homestead, which the law allows the poor man to retain only provided he records his claim for that purpose in the county records before contracting debt, and as much unlike the original "one cart of the value of $25," as a state coach with outriders.

If the legislature had designed to exempt one of these vehicles of trade and commerce, in addition to those more appropriate for ordinary labor, it is reasonable to suppose that they would have done so under some more pertinent description than that of truck wagon, and would have affixed some limitation as to kind and cost.

Exceptions sustained.

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

EZRA CARTER, Junior, in equity *vs.* LUTHER C. PORTER.

Cumberland. Opinion May 6, 1880.

Bill in equity cannot be inserted in a capias writ.

A bill in equity inserted in a writ may be served by an attachment of property, but not by an arrest of person.

This was a bill in equity inserted in a writ of capias, or attachment, dated May 14, 1868, and served by the arrest of the defendant. Within the first two days of the return term the defendant filed a motion to dismiss, because:—

"1st. Said suit purports to be a bill in equity and is inserted, unsigned by the plaintiff, in a capias writ running against the body of the said defendant, as appears by the writ, now on file in this court, which is not authorized by law, or by the rules of this court, and said writ and the matters therein contained do not constitute a legal commencement of a suit, either in law or equity, sufficient to give the court any jurisdiction over the parties or subject matter."

"2d. Said defendant at the time of suing out said writ, and ever since was a resident of Chicago, in the State of Illinois, and

not an inhabitant of the State of Maine as appears by said writ, and said capias writ and paper therein purporting to be a bill in equity, was served upon said defendant by an arrest and imprisonment of his body, to be released from which, he, the said defendant, was compelled to give the bond returned with said writ by the officer serving the same, and the said writ was never served upon the defendant in any other manner, all which appears upon the said writ and by the officer's return thereon, which service was wholly illegal, unauthorized and void, and wholly insufficient to give this court any jurisdiction of the person of this defendant, or the subject matter of this suit."

Drummond & Drummond, for the plaintiff.

A preliminary question is raised by the motion to dismiss, but it seems to me there is not enough in it to require much discussion. R. S., 1857, c. 77, § 9, provides "the bill may be inserted in a writ to be served as other writs, or it may be filed in court and served as the rules of court prescribe." Counsel admits that this seems to be decisive, but he says this "does not mean all writs," and instances replevin. But this arises from the fact that a bill in equity and writ of replevin cannot be joined. Nor is there force in the argument that the term "writ" in the statute of 1857 means the same as the term "writ of attachment or original summons" in the statute of 1848. A conclusive answer to this argument is, that the term "writ of attachment" has a well defined meaning, its form is prescribed in the statute of 1821, and preserved by R. S., c. 81, § 1. It is true that in certain cases it is provided that no arrest shall be made, and "the form of the writ shall be varied," but this is only an exception. When the bill is inserted in a writ, the process is *mesne process*, and R. S., c. 113, § 2, points out the method of service. Stat. 1867, c. 67, provides that bills in equity may be inserted in writs of attachment without the signature. This was a writ of attachment. It was served as provided by statute.

The argument of counsel upon the merits of the case is omitted.

Charles P. Mattocks, for the defendant, upon the question raised by the motion to dismiss, cited: Mass. stat. 1798, c. 77; 1817, c. 87; Maine stat. 1821, c. 50, or c. 39; 1830, c. 462;

1835, c. 195; 1837, c. 301; 1848, c. 96, § 10; 1857, c. 77, § 9; 1867, c. 67; *Hughes* v. *Farrar*, 45 Maine, 72; *Marco* v. *Low*, 55 Maine, 552; *Commonwealth* v. *Sumner*, 5 Pick. 366; Barlow's suit in Equity, 49; Story's Eq. Pl. 417; *Carey* v. *Hatch*, 2 Edw. c. 295; *Commonwealth* v. *Kimball*, 24 Pick. 370.

DANFORTH, J. This is a bill in equity inserted in a capias writ, served, by an arrest of the defendant; a preliminary question is raised by a motion, seasonably filed, to dismiss for want of legal service.

By R. S., of 1857, c. 77, § 9, in force when this writ was served, it is provided that, "The bill may be inserted in a writ to be served as other writs." This language is without qualification, and would seem to be sufficient to authorize the insertion of the bill in writs of any form known to the law and a service in accordance with such form. But if so, it would clearly come in conflict with other provisions of law of equal force with this. It is evident then that it must receive such a construction as may avoid such a conflict. This can easily be done by applying the words to such a writ as is appropriate to the subject matter of the action.

The bill in this case alleges a partnership, is commenced for the purpose of settling the partnership accounts and is therefore founded upon a contract. The writ, therefore, should be in the form and served in the manner proper in an action to enforce a contract, or rather to recover damages for its breach. This seems to be conceded, but it is claimed that the form of such a writ as is prescribed by the statute of 1821, c. 63, includes a capias as well as an attachment. This is true, but it is not quite correct as claimed that, that form has been continued to the present day. By the act of 1835, c. 195, § 2, embodied in the R. S., 1841, c. 148, § 1, and continued in force to the present time, arrest on mesne process in any suit founded upon contract was prohibited, except as provided in the next section, and "the writ . . . shall be so varied, as not to require the arrest of the defendant.

It is evident that under this law, the writ to be used in a suit upon a contract must be an attachment only, and would never authorize an arrest unless it comes within the exception alluded to.

Is this exception applicable to bills in equity though inserted in a writ? In the law authorizing them to be so inserted, no allusion is made to any exception. Nor is the exception applicable to matters in equity—but is applicable and intended solely for suits at law. Its purpose is to authorize the arrest of a debtor about to depart and reside beyond the limits of the State, when the debt is founded upon a contract express or implied, so that he may be held to respond to such judgment as may be obtained, or in case of his failure that his sureties may be held responsible. This is appropriate only when applied to an action at law to recover a debt occuring from a contract, when the debt is the only thing sought to be recovered, and all the subsequent provisions in relation to the disclosure of the debtor and the liability of the sureties are applicable only to suits at law, and judgments obtained therein.

If the arrest is allowed in this case it must be in all bills inserted in a writ where the necessary oath is made, for all, or nearly all grow out of a contract. But the defendant must be admitted to bail and we find no authority for taking such a bond as will avail the plaintiff in most cases or even in this. Here the demand of the payment of a sum of money is not the sole, or even the principal claim. The allegation in the bill is that of partnership and the demand upon the defendant is that he shall make full answer, that the partnership matters may be adjusted, and that he may be required to pay, not a definite sum, but whatever may be found to be due. The judgment of the court is not one upon which an execution may issue, fixing definitely the liability of the sureties in such bond as the statute authorizes, but is a decree, perhaps for the payment of money, but if so, usually requiring acts of the defendant in other matters, under which the remedy for default is by attachment for contempt, and for which the sureties could not be holden, and from which there could be no discharge by disclosure under the statute,

for the reason that some of the things required by the decree are acts from which the defendant would not be excused by the payment of money, or an inability to pay it.

In this unfitness of the proceedings, under the only statute authorizing an arrest in cases of contract, to accomplish the decree of the court, and when such authority is not in accordance with the general rule, but is an exception to it, we can hardly infer the right to arrest in the absence of any express provision in the statute given it—more especially as the writ of *ne exeat*, which has never been abolished in our State, would seem to afford not only an appropriate but an ample remedy to secure the full performance of the decree of the court.

An interpretation of the statute relied upon in the light of its own history, leads to the same result. By the laws of 1821, c. 50, § 1, "The bill or complaint, in such cases may be inserted in a writ of attachment, or original summons, and served . . as other writs of attachment, or original summons are by law to be served." It is true, as already seen, that at this time under the form of the writ as prescribed by law, attachment and capias were combined in one. Still there were two distinct and independent powers, but one of which could be used. Arrest and attachment were never lawful under the same writ. The form provided was that of "attachment *or* capias." The only fair inference to be drawn is, that when the statute provides that a writ of attachment may be used, it does not mean an attachment or capias, but that whatever may be the form, it is to be served by attachment alone.

It is inexplicable, under the circumstances, if the legislature intended to authorize a service by arrest, that it should not have said so, and not have limited it to another mode, for even then the word "attachment," applied to a writ by which the suit was commenced, referred to an attachment of property, and not of the person. But the same language is used in R. S., 1841, c. 96, § 10, after the change in the form of the writ in cases upon contract, and the prohibition of arrest, except in special cases. In the revision of 1857, the words describing the kind of writ to be used were first omitted, but as we may well suppose, not for

the purpose of changing the law, but rather because they were considered unnecessary. If, however, this were left in doubt, it must be considered as conclusively settled by the construction of the law by the legislature, as indicated by the act of 1867, c. 67, which was in force when the writ in this case was issued. This act provides that bills in equity, inserted in "writs of attachment," need not be signed. Under this law there is no authority for inserting an unsigned bill in a capias writ, and yet no good reason can be given why such a bill may be inserted in one kind of a writ and not in the other, if either or both were to be used.

But if so, this bill is inserted in a capias writ and is not signed, as it evidently should have been, if inserted in any writ other than one of attachment.

Motion sustained. Writ and bill dismissed with costs.

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

MARY C. BAILEY and another *vs.* WILLIAM W. CORRUTHERS and trustee.

Cumberland. Opinion May 7, 1880.

Bankrupt's discharge — cannot be contested in State court.

The validity of a discharge under the United States bankrupt act, cannot be contested in the State court for the intentional and fraudulent omission of the plaintiffs' names in the list of creditors and the fraudulent omission to give them notice of proceedings in bankruptcy.

The validity of a discharge can only be impeached in the District Court of the United States, in which it is granted.

ON EXCEPTIONS from superior court, Cumberland county.

ASSUMPSIT on account annexed to recover the sum of $219.30. The writ is dated November 7, 1878.

Plea, general issue, and brief statement alleging discharge in bankruptcy.

The plaintiffs filed a counter brief statement, alleging that the defendant intentionally and fraudulently omitted their names

from his schedule of liabilities, filed by him in the bankrupt court, to the correctness of which he willfully swore falsely, and the plaintiffs had no knowledge of the bankrupt proceedings, and no benefit from the dividend paid from the bankruptcy.

The plaintiffs offered evidence to prove the allegations of their counter brief statement, but it was excluded as inadmissible, and on motion a nonsuit was ordered, and plaintiffs alleged exceptions.

A. J. Blethen, for the plaintiffs.

This court in *Symonds* v. *Barnes*, 59 Maine, 191, say, "it must appear that the omission was fraudulent, and the affidavit willfully false." That is just what we alleged, and offered to prove in the case at bar, but the presiding judge excluded the evidence. In *re Myron Rosenburg*, 2 N. B. R. 241.

We are aware that the court in Massachusetts has decided against the position we take, but no grounds were given for the decision, and we submit it is not entitled to the weight of the court in Vermont, where this very question was raised, and was ably discussed in an opinion by WHEELER, J., and the conclusion reached, that a discharge in bankruptcy can be attacked in a state court. *Batchelder* v. *Low*, 43 Vt. 662, S. C. 8 B. R. 571.

That accords with equity and justice and will prevent this defendant from obtaining a discharge in bankruptcy in Missouri, fraudulently keeping all knowledge of the proceedings from creditors in Maine, and then saying to a Maine creditor, who has obtained jurisdiction over him in his state court, "you must go to Missouri, 2000 miles away from home, if you would impeach my discharge in bankruptcy."

C. P. Mattocks, for the defendant.

APPLETON, C. J. This is an action on an account annexed, to which the defendant pleads in bar a discharge in bankruptcy. The plaintiffs reply that the defendant intentionally and fraudulently omitted their names from the list of creditors, — that they had no notices of the proceedings in bankruptcy, and that the discharge was obtained through fraud, and they offered evidence to prove the facts set forth in their replication, which the court ruled to be inadmissible, and a nonsuit was entered.

The discharge is in due form. The validity of the discharge can only be contested in the court granting the same. R. S., U. S. § 5120. This court has no jurisdiction to declare the discharge void. The authority of congress over the subject of bankruptcy, is paramount to that of the state. The statute of the United States determines when and where a discharge may be impeached. The mode of impeachment provided by congress, excludes any other. In *Corey* v. *Ripley*, 57 Maine, 69, it was held that the authority to set aside, and annul a discharge in bankruptcy conferred upon the federal courts is incompatible with the exercise of the same power by the state courts. The same view of the law was taken by the supreme court of Massachusetts in *Way* v. *Howe*, 108 Mass. 502; by the court of appeals of New York, in *Ocean National Bank* v. *Olcott*, 46 N. Y. 12; and by the supreme court of New Hampshire, in *Parker* v. *Atwood*, 52 N. H. 181. The precise question raised in this case, was determined in *Black* v. *Blazo*, 117 Mass. 17, when it was decided that a fraudulent omission to give the plaintiff notice of proceedings in bankruptcy, could not be given in evidence in the state courts, to impeach a discharge regular upon its face. The discharge can only be impeached in the district court of the United States.

Exceptions overruled.

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

GEORGE DRAPER in equity *vs.* EDWIN STONE, Administrator of the estate of CHARLES HARDY, and another.

York. Opinion May 12, 1880.

Equity. Trust. Remedy.

D. transferred eighteen shares of stock of the Hardy Machine Company to H. and took back an agreement under seal for the reconveyance of the same on demand in writing. H. transferred eight of those shares, in his lifetime, to a third person at a time when he held ninety-two shares in his own right and at his death he held one hundred and thirty-three shares of stock in the same company, and his estate was rendered insolvent. *Held*, the transfer and agreement created a trust in H. for the eighteen shares to be re-transferred to D. on demand in writing; that the transfer by H. of the eight shares was in violation of his trust, and equity would require him to replace them, and, as he held a sufficient number of other shares at the time of the conveyance and at the time of his death, equity would treat him as holding them for D. that the same result would follow if the agreement was treated as a contract by H. to convey eighteen shares to D. on demand, as they were fully paid for; that D's. remedy at law is inadequate because of the insolvency of H's estate.

BILL IN EQUITY, inserted in a writ of original summons.

The facts fully appear in the opinion. The following is the agreement referred to in the opinion:

"Know all men that I, Charles Hardy, of Biddeford, in the county of York and State of Maine, in consideration of one dollar and other good and sufficient considerations to me paid by George Draper of Milford, Massachusetts, the receipt whereof is hereby acknowledged, have agreed and do hereby agree with the said Draper, his legal representatives and assigns, that I will transfer and deliver to him, the said Draper, his legal representatives or assigns, eighteen shares in the capital stock of the Hardy Machine Company, each of the par value of one hundred dollars, upon the request or demand of the said Draper, his legal representatives or assigns, being made of me in writing therefor, and for the same consideration I further agree to pay to the said Draper, his legal representatives and assigns, from time to time, a sum of money equal to the dividends, which may be declared hereafter, and become payable, on the said eighteen shares of stock, until the transfer and delivery thereof, as hereinbefore

provided, the sum or amount equal to each dividend to be paid as often and directly after each successive dividend on said stock may be declared and become payable."

"This agreement shall extend to and bind my legal representatives."

"In witness whereof I have hereto set my hand and seal this twenty-ninth day of February, A. D. 1876."

CHARLES HARDY, [L. S.]

"Witness, George P. Hardy."

J. M. Goodwin, for the plaintiff, cited: *Shaw* v. *Spencer et al.* 100 Mass. 382; Story Eq. Pl. § 41; *Clark* v. *Flint*, 22 Pick. 231; *Todd* v. *Taft*, 7 Allen, 371; Pomeroy Specific Performance, § § 17–19.

R. P. Tapley, for the defendant.

The bill asks for a specific performance of the contract to convey the eighteen shares. The contract relates to no specific shares. In *Goodell* v. *Buck*, 67 Maine, 514, it was held necessary that the specific property sought to be reached, should be identified and capable of separation from others of the same kind. That when it became mixed and confounded in the general mass, the bill could not be maintained. It is not one of those cases where you are at liberty to "fire at the flock."

The agreement discloses no trust. It does not purport to be a trust. It is upon the consideration "of one dollar and other good and sufficient consideration to me paid." No kind of reference is made to any conveyance made to him of any property. A trust is where there is such confidence between parties that no action at law will lie; but it is merely a case for the consideration of the court. Lord Hardwicke in *Sturt* v. *Mellish*, (2 Atk. 612,) 2 Story Eq. Juris. § 964.

The complainant has an adequate and plain remedy at law, and the remedy in equity for specific performance is discretionary and not a matter of right. *Snell* v *Mitchell*, 65 Maine, 48. In the case at bar, there is no inadequacy of the remedy at law, other than the poverty of the intestate. The effect of a decree making a levy upon this stock, will be to increase the same kind of inad-

equacy in other cases of equally meritorious contracts of the intestate. It does not seem to us that equity will be promoted by so doing.

LIBBEY, J. From the bill, answer and proofs these facts appear: On the twenty-ninth of February, 1876, the plaintiff was the owner of eighteen shares of the capital stock of the Hardy Machine Company, of which Charles Hardy, the defendant's intestate, was then treasurer, and on that day he transferred said shares to said Hardy, taking from him his agreement, under seal, of that date, by which "in consideration of one dollar and other good and sufficient considerations," he agreed to "transfer and deliver to him the said Draper, his legal representatives or assigns eighteen shares in the capital stock of the Hardy Machine Company, each of the par value of one hundred dollars, upon request or demand of the said Draper, his legal representatives or assigns being made of me (him) in writing therefor," and by the same agreement, and for the same consideration he agreed to pay the plaintiff, from time to time, a sum of money equal to any dividends that might be declared on said stock until the transfer thereof, to be paid as often as, and directly after the dividends should be made and become payable. The stock was taken by said Hardy to be held for the plaintiff till he requested a transfer, as stipulated in said agreement, Hardy paying nothing for, and having no interest in it.

On the third of March, 1876, said Hardy transferred eight of said shares to one Gould, at the same time holding in his own name, ninety-three shares of said stock, besides those transferred to him by the plaintiff; and at the time of his death he held one hundred and thirty-three shares.

The defendant is administrator of the estate of said Hardy, which was duly represented insolvent, and is in fact insolvent. Demand was duly made on the defendant for a transfer of said shares.

Upon these facts we think it clear that the defendant's intestate held the eighteen shares of said stock in trust for the plaintiff; and that this court, acting in equity, has power to require the

defendant, who has no better title than his intestate, to convey and transfer them to him.

It is claimed, however, in behalf of the defendant, that the trust attached to the identical shares transferred by plaintiff to the defendant's intestate, and that, as he held only ten of them at the time of his death, having transferred the other eight to Gould, the plaintiff is entitled to a transfer of the ten shares only.

It was the duty of the trustee, in the proper discharge of his trust, to hold all the shares till the plaintiff demanded a transfer. The transfer to Gould was in violation of the trust, and the plaintiff had a right to require him to replace the stock. Story's Eq. Jurisdiction, § 1263. As he then held a sufficient number of shares in his own name, and continued to hold them at the time of his death, equity will treat him as holding them for the plaintiff.

The same result would follow if we treated the agreement of February twenty-ninth, 1876, as a contract by Hardy to convey to the plaintiff eighteen shares of said stock. They were fully paid for, and nothing further was required of the plaintiff, but to demand a transfer. He was, in the mean time, entitled to all their earnings. Hardy died holding the shares. His estate is insolvent, and the plaintiff's remedy at law is inadequate. He has the right to a decree for a specific performance of the contract. *Clark* v. *Flint*, 22 Pick. 231; *Todd* v. *Taft*, 7 Allen, 371.

Decree for the plaintiff for a transfer of the stock as prayed for, and for costs.

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

SUSAN J. QUINNAM *vs.* ANN QUINNAM.

Androscoggin. Opinion May 13, 1880.

Evidence. Declaration of debtor when making fraudulent conveyance.

In an action under R. S., c. 113, § 51, it is not competent for the defendant to prove a declaration of the alleged debtor made to the defendant at the time of the transfer, but in the absence of the plaintiff, to the effect that he, the debtor, did not owe the plaintiff anything.

ON EXCEPTIONS AND MOTION to set aside the verdict.

An action of the case under R. S., c. 113, § 51, for knowingly aiding and assisting William F. Quinnam in a fraudulent transfer and concealment of his property to secure the same from his creditors, by taking from him a conveyance of certain personal property. The writ was dated September 3, 1878, *ad damnum* $2000; plea, general issue, and verdict $525.

At the trial the conveyance, referred to in the declaration, was called by the defendant a marriage settlement, and she offered to prove, that after the marriage settlement was drawn, and before its execution and delivery, William F. Quinnam stated to Mrs. Quinnam, the defendant, in the presence of Thomas M. Giveen, the attorney who drew it, that nothing was due from him to Susan J. Quinnam [his daughter] for wages or services. Upon objection by plaintiff's attorney, the presiding judge rejected the testimony offered. To this ruling the defendant excepted, and also moved to set aside the verdict.

Ludden & Drew, for the plaintiff, cited upon the question raised by the exceptions: *Fitch* v. *Chapman*, 10 Conn. 8; *Bucknam* v. *Barnum*, 15 Conn. 71; *Baker* v. *Briggs*, 8 Pick. 122; *Lund* v. *Tyngsborough*, 9 Cush. 36.

Bion Bradbury, for the defendant.

The evidence offered was material, as having a tendency to show that there was no fraudulent intent on the part of the defendant in receiving the transfer under the marriage contract.

If in good faith and with the sole purpose of securing a marriage settlement she received the transfer, then there was no fraudulent intent, and no purpose of preventing the attachment of the property or its seizure on execution.

The motive of the defendant, in accepting the transfer, is to be determined by the state of mind produced by such facts as came to her knowledge. Important among these facts, and absolutely conclusive to her, was the statement of Quinnam that he owed his daughter nothing for wages. Counsel, in an able argument, presented the questions of fact arising on his motion to set aside the verdict.

WALTON, J. Two questions are presented for consideration. The first is whether in an action against one for taking from a debtor a fraudulent transfer of property, for the purpose of keeping it away from his creditors, it is competent for the defendant to prove a declaration of the alleged debtor, made to the defendant, at the time of the transfer, but in the absence of the plaintiff, to the effect that he, the debtor, did not owe the plaintiff anything. We fail to discover any ground on which such evidence is admissible, and the learned counsel for the defendant has referred us to no authority for its admission. We think it is not admissible; and that the ruling of the presiding judge, excluding such evidence, was correct. The second question is whether the verdict is so clearly against the weight of evidence as to require the court to set it aside. We think it is not. Consequently the entry must be,

Motion and exceptions overruled.
Judgment on the verdict.

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

INHABITANTS OF NORRIDGEWOCK *vs.* CEPHAS R. WALKER.

Somerset. Opinion May 18, 1880.

Assessment of taxes. Duty of assessors. Evidence of assessment.

It is the duty of assessors to make and subscribe certificates of their assessments upon the lists in the form prescribed by law and to make a record of their assessments, and of the invoice and valuation from which they are made, and to lodge the same or a copy thereof in the assessors' office, if any in the town, and otherwise with the town clerk there to remain, before they issue their warrant of commitment. But their failure to do this will not invalidate the assessment, provided the town is able to prove an assessment regularly made under the hands of the assessors by other legal evidence.

For this purpose a list of the assessments annexed to and incorporated with a commitment to the collector, signed by the assessors, is competent evidence.

ON REPORT.

Debt for a tax assessed against the defendant by the assessors of Norridgewock, in the year 1874. At the trial, a book, claimed by the plaintiffs to be the record of assessments, invoice and valuation of the town of Norridgewock was offered by them. It did not bear the signatures of the assessors, and there was nothing on the book to show by whom it was made. It was admitted subject to the defendant's objection. The plaintiffs afterwards moved to amend the record in such book, by having two of the assessors, present in court, sign the same, which they were ready to do. The case was then withdrawn from the jury and reported to the full court. If the court should be of the opinion that signing of such book is necessary, and that the same is in that respect amendable, at that stage in the proceedings it was to be treated as signed, and if upon so much of the testimony as was legally admissible, a jury would be warranted in finding a verdict for the plaintiffs, judgment was to be for the plaintiffs, otherwise for the defendant.

John H. Webster, for the plaintiffs.

Walton & Walton, for the defendant.

The defendant was not taxable in Norridgewock in the year 1874; he was personally present in Cornville, April 1, 1874. His trunk only was in Norridgewock. *Warren* v. *Thomaston*,

43 Maine, 418; *Church* v. *Rowell*, 49 Maine, 370; *Carnoe* v. *Freetown*, 9 Gray, 357; *Littlefield* v. *Brooks*, 50 Maine, 477.

There is no evidence of any legal assessment in Norridgewock. There is no record until it is signed. The signatures are not errors or omissions covered by R. S., c. 3, § 8; *Tyler* v. *Hardwick*, 6 Met. 470; *Colby* v. *Russell et al.* 3 Maine, 227; *Commonwealth* v. *Hall*, 3 Pick. 263; *Lowell* v. *Newport*, 66 Maine, 83.

BARROWS, J. The defendant disputes the right of the plaintiffs to recover against him, in this action, the amount of his taxes for the year 1874, because, he says, 1st, that he was not an inhabitant of the town, and 2d, that they do not show any legal assessment of the tax. Notwithstanding the defendant's strenuous efforts to evade his fair share of the public burdens, we are satisfied that he was legally taxable in Norridgewock that year.

Upon the evidence, the jury would be fully justified in finding that he was living there both before and after the first of April, in the family of a relative by marriage, not as a visitor, but engaging in the ordinary employments of life; that, not many days before the first of April, upon being informed of the intention of the assessors of another town to tax him there, because some of his effects were left there, he procured their removal to a boarding house in Norridgewock, where they remained until along in the summer; and that, subsequently, being sued by another town for a tax for that year, he made a successful resistance, claiming that his residence was in Norridgewock.

Under these circumstances, his temporary absence from Norridgewock on the first day of April, and his subsequent consent to pay a poll tax in the town where he was on that day, cannot be regarded as effecting a change of residence.

Unless he is relieved by the carelessness of the town officers, for want of evidence of a legal assessment, he must pay his tax. Section 70 of chap. 6, R. S., requires assessors to make the assessment according to existing laws; "to make perfect lists thereof under their hands;" and to commit the same to the proper officer to collect "with a warrant under their hands in the form hereinafter prescribed." Section 94, gives the form of the warrant

which the assessors are to issue for the collection of the State tax, and the form of the certificate of assessment which they are to make; and § 95 prescribes that the warrant for the collection of county and town taxes shall be of the same tenor, *mutatis mutandis;* and § 71 permits the assessors to combine the State, county, and town taxes in one warrant, "and their certificates accordingly."

Section 73 orders them to make a record of their assessment and of the invoice and valuation from which it is made, and before committing the taxes for collection to deposit it, or a copy of it, in the assessors' office, if any, and otherwise with the town clerk there to remain. Under directions so explicit it would seem as if "even the wayfaring man . . . need not err" as to what the law required in these respects.

One of the things to be established in this suit, is the making by the assessors, not merely of an assessment, but of a list of the assessments "under their hands." The report shows that a book which was claimed to be the record of assessments, invoice, and valuation of the town, was offered in evidence by the plaintiffs, but it did not appear to be signed by the assessors, "and their names did not appear upon it anywhere, and nothing on the book showed by whom it was made."

It seems that two of the assessors of 1874 were in court ready to sign the list of assessments, if permitted to do so against the defendant's objection. But it may well be doubted whether, if, up to that time, there had been no list of assessments under the hands of the assessors, it would be competent to supply such an omission under the power given to amend such lists in R. S., c. 3, § 8.

Before one proceeds to amend errors or supply omissions in a tax list, there must be a tax list in existence, such as the law requires, "under the hands of assessors." And that is precisely where the record proof was deficient. It is true that this record is not required to be under the hands of the assessors; a copy will answer; but the original must appear to have been under the hands of the assessors, and this the record fails to show.

The failure to lodge the record in the assessors' or town clerk's office before making the commitment of the warrant and list to

the collector, we think should not be regarded as fatal, under the provisions of § 114, but in order to make the healing provisions of that section applicable there must first be an assessment under the hands of the assessors.

It was the plaintiffs' good fortune that they were able to produce in evidence the tax-collector's book, to which no specific objection is made; and, for aught we see, it is in the form required by law with a list of the assessments appended and referred to in the warrant which is under the hands of the assessors.

It is their further good fortune, that the court, in view of the ill consequences that would be likely to result from a rule which would require anything like technical precision in the doings of these officers, held, in *Lowe* v. *Weld*, 52 Maine, 588, that the commitment subscribed by the assessors, prefixed to and incorporated with the lists in the collector's book and specifically referring to them, was a sufficient authentication of the lists and compliance with the essential requirements of the statute in that particular. Upon the strength of this decision, and those therein referred to, we are enabled to say in the present case that it appears that the assessors did make an assessment which must be regarded as valid, and a list of assessments under their hands, and hence tax payers must pay the sums assessed against them, and are remitted to their remedy against the town under § 114, for such damages as they may have suffered by reason of any errors or omissions of the assessors.

It is obvious that towns cannot afford to let their ability to establish the validity of their assessments depend upon the preservation and production of the tattered book that goes the rounds with the collector; and that assessors who neglect to place upon the records, where it may be preserved, the certificates of assessment required by the law, fail in their plain duty to their town.

Judgment for plaintiffs for $63, and interest from September 7, 1875.

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

DANIEL WING *vs.* C. WALTER HUSSEY.

Kennebec. Opinion May 27, 1880.

Execution, —service of after death of judgment creditor. Duty of officer. Trespass.

At common law a writ of execution in the hands of an officer for service is not abated by the death of the judgment creditor, and it is the duty of the officer to serve it. The statutes of this State have not changed the common law rule in this respect.

It is the duty of an officer to serve an execution in his hands for that purpose, notwithstanding the death of the judgment creditor while the execution is in the officer's hands, and in arresting and committing the judgment debtor he is not a trespasser.

When no trespass is committed by an officer in serving an execution, it follows that the person directing the service is not guilty of trespass.

ON REPORT from superior court, Kennebec county.

TRESPASS for causing the arrest and imprisonment of the plaintiff. Date of writ, October 2, 1878. From the report it appears that July 12, 1878, Arabella Stratton, Adm'x, obtained judgment against this plaintiff before Mark Rollins, trial justice, for twenty dollars and costs; an execution was issued on that judgment, July 15, 1878, and delivered that day or the next, by the magistrate to Llewellyn Libbey, deputy sheriff, at the request of this defendant, who acted for Arabella Stratton, and directed the officer to arrest the plaintiff in this suit. Arabella Stratton died July 21, 1878. The plaintiff was arrested by the officer on the execution July 27, 1878, and committed to Augusta jail, July 31, 1878, and was discharged therefrom on *habeas corpus*, August 9, 1878. The law court are to render such judgment in the case, as the law and evidence require.

Baker & Baker, for the plaintiff.

The arrest of plaintiff was unlawful. Stat. 1821, c. 63, § 1, shows that such an execution can only be served where there is a living creditor. It provides "for want of goods, chattels, and lands of the said debtor, to be by him shown unto you or found within your precinct *to the acceptance of said creditor*, &c. . . detain in your custody within our said jail until he pay . . . or *that he be discharged by said creditor* or otherwise by order

of law. R. S., c. 113, § § 21, 26, 27, require the citation for poor debtor's disclosure, to be served on the creditor; the provision of § 27, for service upon the attorney of record is nugatory, for the moment a party dies the authority of his attorney ceases. 1 Pars. Contr. 71; 1 Am. Lead. Cas. 712; *Gleason* v. *Dodd, Adm'r*, 4 Met. 333.

The rule laid down by Freeman on Executions, § 37, that at common law, an execution issued before the death of the creditor could be served after, does not seem to be supported in its full scope by the authorities cited. There are so many qualifications and exceptions, it is not safe to adopt the rule as a whole. See 6 Mod. 290; 11 Mod. 35; 7 T. R. 20; *Comm* v. *Whitney*, 10 Pick. 434; *Beeker* v. *Beeker*, 47 Barb. 498; *Ellis* v. *Griffith*, 16 Mees. & W. 105; *Gaston* v. *White*, 46 Mo. 486; *Magoun* v. *McCoy's Ex.* 2 B. & M. 198; *Huey's Adm'r* v. *Reddin's heirs*, 3 Dana, 488.

But our chief answer to this rule is, that it is not adapted to our statutes, and is in conflict with the rights of debtors as secured and established by the laws of this State.

This defendant was a stranger. He is not a member of the bar. Whatever authority he had from Mrs. Stratton died with her. Without a shadow of interest or right, he caused the arrest of the plaintiff, and if the arrest was valid, it is no justification to him. Dicey on Parties, 432–3.

S. S. Brown, for the defendant.

LIBBEY, J. The great question involved in this case, is: Whether an execution issued and put into the hands of an officer for service during the life of the plaintiff in the execution, is abated by his death before service.

At common law, the rule is well settled that the death of the plaintiff does not abate the execution, and that it is the duty of the officer to serve it. A return by him of the death of the plaintiff is a bad return. *Cleve* v. *Veer*, Cro. Car. 459; *Thoroughgood's Case*, Noy, 73; *Ellis* v. *Griffith*, 16 Mees. & W. 106; *Comm.* v. *Whitney*, 10 Pick. 434; *Murray* v. *Buchanan*, 7 Blackf. 549; Freeman on Executions, § 37, and cases there cited.

In *Ellis* v. *Griffith*, 16 M. & W. 106, decided in 1846, POLLOCK, C. B., says:—"It appears from the case of *Cleve* v. *Veer*, that so far back as the reign of Charles I, CROKE, J., thus laid down the law:—'There is a difference betwixt a judicial writ after judgment to do execution and a writ original; for the writ judicial to make execution, shall not abate, nor is abatable by the death of him who sues it; as it is, the common course of a *capias ad satisfaciendum* or *fieri facias*, upon judgment issueth, the sheriff shall execute it, although the party who sued it, died before the return of the writ; and though the death be before or after the execution, if it be after the teste of the writ, it is well enough; as where a *capias ad satisfaciendum* is sued, and the party taken before or after the death of him who sued it, and before the day of the return; or if a *fieri facias* be awarded, and the money levied by the sheriff, and the plaintiff dies before the day of the return of the writ, yet the executor or his administrator shall have the benefit, and is to have the money, and it is no return for the sheriff to say that the plaintiff is dead; and therefore he did not execute it.' I believe that ever since that time, the administration of justice has proceeded on that principle, and that this *dictum* of CROKE, J., has been acted on in hundreds of instances. It is said that there are *dicta* somewhere else, which may affect the question, and it is suggested also, that perhaps some inconvenience may ensue from keeping this person in custody; but the inconvenience which was pointed out by Mr. Martin, namely, that where a defendant is taken in execution after the death of the plaintiff, there is no person to whom the money may be paid, is an inconvenience which, on principle, would call for our interference just as much in the case where the arrest of the defendant is made before the death of the plaintiff, who dies immediately after the arrest. I am therefore quite content to abide by so old a *dictum* as that of CROKE, J., and which has been so continually acted on." PARKE, ALDERSON and ROLFE, Barons, concurred.

But it is claimed by the plaintiff's counsel, that this rule of the common law has been changed by the provisions of our statutes, and is not law in this State. If it is found to be clearly incon-

sistent with the provisions of our statutes, so that the two cannot stand together, this result must follow. But no statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express. It is claimed that the form of the execution, the provisions of the statute giving the debtor who has been arrested the right to be released on giving the six months bond to the creditor; or to disclose on the execution on giving to the creditor the notice required, presuppose a living creditor who may determine whether he will accept the property shown to the officer by the debtor, if any; or to whom a bond may be given, or on whom notice may be served. This argument is of weight, and entitled to careful consideration; and if it be found on examination of all the provisions of our statutes bearing upon the question, that the legislature intended to change the common law, we must so declare. If, however, it be found that these provisions may be applicable to the case when the plaintiff in the execution is living, and that the legislature has enacted other provisions for the protection of the rights of the debtor, if the plaintiff is dead, then the whole may stand together consistently with the common law.

By R. S., c. 113, § 26, a debtor who has given bond, or has been committed, or delivered himself into the custody of the jailer, may apply to a justice of the peace, and have a citation issued to the creditor for his disclosure. By § 27, the citation may be served on the creditor, or one of them if more than one, or on the attorney of record in the suit, or any known, authorized agent of the creditor, *if the creditor is alive;* otherwise on his executor or administrator, if to be found in the State, and if not, by leaving a copy with the clerk of the court, or magistrate, who issued the execution. These provisions apply as well to a debtor committed after the death of the creditor, as to one committed before; and it seems to us they recognize the legality of the commitment in either case, and provide for the debtor a remedy for his release.

The argument of the plaintiff's counsel, drawn from the provisions of the statute relied on, applies with as much force to the

case of a debtor committed before the death of the creditor, if he die soon after, as to the case of one arrested and committed after the creditor's death; and their argument and conclusion seem to us, inconsistent with the statutory provisions to which we have referred.

Some light may be thrown on the question of the intent of the legislature, by looking at the consequences of the rule claimed by the plaintiff, in other respects. Suppose the plaintiff has an attachment of personal property to secure his debt, recovers judgment, takes execution and puts it into the hands of an officer, with directions to seize and sell the property attached; and before the sale, and just before the expiration of the thirty days from the rendition of judgment, the plaintiff dies; if his death abates the execution, the officer could proceed no further, and the attachment would be dissolved; and the property would go back into the hands of the debtor, or be taken by a second attaching creditor, if any; for we find no provisions of statute by which the attachment, in such case, could be preserved.

Again, suppose an officer, holding an execution against a debtor who has given bail, notifies the bail as is provided by statute, and the next day the plaintiff in the execution dies, and then the bail surrenders the principal to the officer. If the death of the plaintiff abates the execution, the officer would have no right to receive and hold the debtor by virtue of it. But is the surrender to go for nothing? It is not to be presumed that the legislature intended to establish a rule, practically producing these results, without providing some remedy by which the rights of the parties might be protected.

The same question involved in this case, was before the court, in *Comm.* v. *Whitney*, 10 Pick. 434, and the same argument, drawn from the form of the execution and the statutes, was urged upon it, but SHAW, C. J., after a careful examination of the case, says:—"The court are not prepared to say that the imprisonment was unlawful, so as to entitle the prisoner to his discharge forthwith as a matter of right." It is worthy of remark that, at that time, there was no statute in that state providing for the service of a citation when the creditor was dead and had no executor or administrator.

Our conclusion is that the statutory provisions involved, have not changed the common law, and that the death of the plaintiff in an execution does not abate it.

It was the legal duty of the officer to serve the execution put into his hands for that purpose before the death of the plaintiff; and a direction to the officer to serve it, by arresting the debtor, by the defendant did not render him a trespasser, although he may have had no interest in the execution, because no trespass was committed.

Plaintiff nonsuit.

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

S. T. CHASE *vs.* JAMES A. WILLIAMS and others.

Aroostook. Opinion May 27, 1880.

Levy. Appraisers' return. Officer's return. Amendment.

In a levy of an execution upon real estate the appraisers' return must state the value of the estate appraised. Saying, that they set it off as in full satisfaction of the execution and costs of levy, is not equivalent. Nor does the return of the officer, that they appraised the property at a certain sum, remedy the defect.

An officer's return stating that the appraisers set off the estate "with metes and bounds" is inconsistent with the appraisers' return setting off an undivided part.

Amendments may be made to the return of appraisers as well as to the return of the officer, when the rights of third persons acquired *bona fide*, and without notice by the record or otherwise, would not be destroyed or lessened thereby, according to the facts; that is, when the proceedings were regular and sufficient and only the returns defective. And if the returns contain sufficient matter to indicate that in making the extent the requisites of the statute have been complied with, an amendment may be made notwithstanding any intervening interest of a subsequent purchaser or creditor. But permission to amend a return ought not to be given as a matter of course; nor granted without first notifying the adverse party and give him an opportunity to show cause against the amendment.

There is no imperative necessity for stating in the levy that the estate is held in joint-tenancy and not in common, provided only, that the whole estate be described and the share of it owned by the debtor and levied on be stated. The levying creditor by a valid levy gets an estate in common with his debtor's co-tenant, and is entitled to a partition of the fee.

ON REPORT.

Petition for partition of certain real estate in Plantation No. 11, Aroostook county, dated January 21, 1878. Respondents moved to dismiss "because the petitioner has not stated the proportions belonging to the other tenants in common, nor whether any or all of them are unknown, and has not prayed for partition of the whole premises." The motion was overruled and leave to amend the petition was granted.

The petitioner put in a copy of the judgment, *S. T. Chase* v. *Martha A. Williams*, the execution issued thereon, and levy of the same upon real estate of Martha A. Williams.

The following are copies of so much of the returns as are material to this report:

Appraisers' return.—"Aroostook, ss. July 28, 1875. We, the subscribers, three disinterested men, having been first duly chosen and sworn faithfully and impartially to appraise such real estate as should be shown to us to be taken by the within execution proceeded with the officer . . . to view and examine so far as was necessary for a just estimate of its value, the following described real estate, situate in half township No. 11, R. 1, west from the east line of the State, in said Aroostook county, shown to us by S. T. Chase, the within named creditor, the said Martha A. Williams holding one undivided fifth part of the same with others, the metes and bounds of which are as follows, to wit: . . . And we have set off said undivided fifth part to the creditor, in full satisfaction of this execution and costs of levy, to hold to said creditor, his heirs and assigns, in fee forever."

Officer's return. "Aroostook, ss.—July 28, 1875. By virtue of this execution, on the 27th day of July, 1875, seized the real estate described in the foregoing certificate of the appraisers, and having given notice thereof to the within named Martha A. Williams, and allowed her a reasonable specified time within which to choose an appraiser, and the said Martha A. Williams, the debtor, refusing to choose an appraiser, and having caused three disinterested men, to wit: Varney Putnam chosen by the creditor named in the within execution, William Reed, chosen by me for the debtor, from reasons aforesaid, and William Smith, by myself, all No. 11 in said county, to be duly sworn, faithfully

and impartially to appraise such real estate as should be shown to them to be taken by force of this execution, and the real estate described in the foregoing certificate of the appraisers now referred to for a description thereof, having been so shown to them and to me by the creditor within named, as the estate in fee simple of said Martha A. Williams, the debtor aforesaid, the aforesaid appraisers proceeded with me to view and examine the same so far as is necessary to a just estimate of its value, and having thus viewed and examined the same, they appraise the same at the sum of $94.92, and set the same off with metes and bounds aforesaid, to the said S. T. Chase, the creditor, to hold to him his heirs and assigns in full satisfaction of this execution, and costs of levying the same, taxed at $6.80. I refer to and adopt the return of the appraisers as a part of this, my return, and I have this day levied this execution upon said land described as aforesaid." . . .

The respondents then put in a deed from John Hodgdon to Martha A. Williams and four others, which describes the premises set forth in the petition, dated January 31, 1865, which contains this provision, following the description: "The same to be held by said grantees as joint tenants."

The case was then reported to the full court to give it such direction as the law requires.

J. B. Hutchinson, for the petitioner, cited: R. S., 1841, c. 94, § 11; 1857, c. 76, § 7; 1871, c. 76, § 7; 1 Wash. R. P. 411; *Roop* v. *Johnson*, 23 Maine, 335; *Brackett* v. *McKenney*, 55 Maine, 505; *Glidden* v. *Philbrick*, 56 Maine, 222; *Jones* v. *Buck*, 54 Maine, 308; *Gilman* v. *Stetson*, 16 Maine, 126; *Buck* v. *Hardy*, 6 Maine, 162.

Madigan & Donworth, for the respondents.

The petition is defective because of reasons stated in motion to dismiss. This question is still open as no amendment has yet been allowed. R. S., c. 88, § 2. *Bigelow* v. *Littlefield*, 52 Maine, 24.

The levy upon which the petition is based is void. The appraisers' return is fatally defective. They do not state the

value of the estate appraised. R. S., c. 76, § 3. The officer's return is full of errors and does not meet the requirements of the statutes, and is inconsistent with the appraisers' return. R. S., c. 76, § § 3–5. Neither return states that the estate is to be held in joint tenancy or tenancy in common. *Duncan* v. *Sylvester*, 16 Maine, 388.

BARROWS, J. There is a radical defect in the levy under which the plaintiff claims. The appraisers do not in their return "state the value of the estate appraised," as required by R. S., c. 76, § 3. Nor do they say anything from which its value can be inferred by necessary intendment. It will not do to say that the statement that they "set off said undivided fifth part to the creditor in full satisfaction of this execution and costs of levy" is equivalent. For aught that appears, appraised at its true value, it may have been much more than sufficient for that purpose. See *Meade* v. *Harvey*, 2 N. H. 495.

Nor does the return of the officer that they appraised the property at $94.92, and set it off "with metes and bounds aforesaid," supply the deficiency. The vital matter of the value of the estate taken to satisfy the execution and costs of levy in the estimation of the appraisers, must appear in both the returns—that made by the appraisers, as well as that of the officer. R. S., c. 76, § § 3 and 5.

The inconsistency of the two returns, one stating the setting off of an undivided fifth, and the other a setting off "with metes and bounds," shows a want of understanding or heedlessness that is inconsistent with the requirements of a valid levy.

The motion to dismiss was properly overruled, and leave to amend the petition properly granted. The petition gives the names and residences of the cotenants, and if the amount of the shares, respectively owned by them, had been stated as it appears in evidence, it would amount to an averment that upon the theory of the petitioner, all the owners were known.

But it is not a statute requirement that the petitioner should state the respective shares of the cotenants, although, whenever they are known, it is better practice and contributes to a more

ready understanding of the case to do it. The names and residences of the cotenants are what is called for, and unless the petitioner knows and inserts them all, he must state that there are others unknown. See R. S., of 1841, c. 121, § § 2, 4, 5.

The amendments of the petition which have been allowed, may be expected to make all this more certain.

It does not appear that the petitioner has not asked partition of the whole estate which was originally held by Martha A. Williams and the respondents. His ground is that he has succeeded to the rights of Martha in the estate as described, by virtue of his levy. It will be inferred that it is the whole estate unless the contrary appears.

It does appear that Martha A. Williams, whose share the petitioner claims, and her children, held as joint tenants one fifth each.

Section seven of chapter seventy-six of the Revised Statutes, makes provision that "all the debtor's estate, interest, or share in the premises, whether held in tail, reversion, remainder, joint tenancy, or in common, for life, years or otherwise, shall pass by a levy, unless it is larger than the estate mentioned in the appraisers' return." This necessarily implies, among other things, what was more distinctly expressed in R. S., of 1857, c. 76, § 7, thus: "The whole or a part of an estate held in joint tenancy or in common, may be taken and held in common, but the whole estate must be described and the share of it owned by the debtor must be stated."

Here we have an express provision for the taking upon execution of an estate, held by the debtor in joint tenancy with the same effect in converting it into an estate in common, which is produced by a deed from one joint tenant to a stranger, namely, a severance of the joint tenancy and a destruction of the right of survivorship as to the share conveyed.

No change in legal effect is produced by incorporating in § 7, c. 76, R. S., of 1871, what formed part of § 6, c. 76, in the revision of 1857, and though the mode of levying upon an estate held in joint tenancy, and its effect upon the estate are less distinctly expressed, they remain the same.

No evidence of an intention on the part of the legislature to work a change in the revision is perceived. *Hughes* v. *Farrar*, 45 Maine, 72.

Alienation by deed, given by one joint tenant to a stranger, destroys the joint tenancy, and its distinguishing incident, the right of survivorship; and the grantee in such deed takes simply an estate in common. Greenleaf's Cruise, Vol. II, Tit. XVIII, c. II, § § 1, 2, 8, 10, 12, pp. 370, 372. An authorized and lawful alienation by levy must have the same effect. JACKSON, J., in delivering the opinion of the court in *Bartlet* v. *Harlow*, 12 Mass. 350, says, "The levy of an execution upon real estate is a kind of statute conveyance from the debtor to the creditor;" and he quotes from stat. 1783, c. 58, a section (which seems to be the origin of the provision that we now have, that "all the debtor's estate, interest or share . . shall pass by a levy") to this effect. "It shall make as good a title to the creditor, his heirs, and assigns as the debtor had therein," and remarks thereupon: "It was not the intention of the legislature to allow estates to be created, or transferred in any new manner, altogether repugnant to the principles of the common law, but to put a conveyance under this statute on as good a footing as if made freely by the debtor." Hence a levy upon part of the lands holden in joint tenancy or tenancy in common, by metes and bounds, was held invalid. *Blossom* v. *Brightman*, 21 Pick. 283. And the same doctrine is applied where a tenant in common has undertaken to convey by deed, his interest in a part only of the common estate; *Blossom* v. *Brightman*, 21 Pick. 285, and in this State to attempt to procure partition of only a part of the estate held in common, *Duncan* v. *Sylvester*, 16 Maine, 388; *Bigelow* v. *Littlefield*, 52 Maine, 24. Since an alienation (whether by deed or by levy) to a stranger by one of several joint tenants, is productive of the same effect, and the grantee takes only an estate in common, and the share which is conveyed is by the very act of conveyance converted into an estate in common, we see no imperative necessity for stating in the levy that the estate was held in joint tenancy and not in common, provided only that the whole estate

be described and the share of it owned by the debtor and levied on be stated. The levying creditor by a valid levy gets an estate in common with his debtor's cotenants, and is entitled to a partition of the fee. The question then arises here, are the defects in the returns of the officer and appraisers incapable of being remedied by amendment?

No case has been cited in which a return of appraisers upon an execution has been amended in this State, and none has fallen under our notice. In the only case that we are aware of in which it was proposed, *Harriman* v. *Cummings*, 45 Maine, 351, the question whether it was or was not allowable, was not decided because there was another fatal defect in the proceedings, as to which no amendment seems to have been proposed. We see no good reason, however, why a return of appraisers should not be amended under like circumstances, and upon such proof as make the amendment of an officer's return of an extent upon execution permissible.

The limitations under which such amendments are permitted have been stated by the chief justice of this court thus—"No amendment of an officer's return should be permitted when such amendment would destroy or lessen the rights of third persons acquired *bona fide* and without notice by the record or otherwise. But if the return contain sufficient matter to indicate that in making the extent, all the requisitions of the statute have [probably] been complied with, an amendment may be made, notwithstanding any intervening interest of a subsequent purchaser or creditor." *Glidden* v. *Philbrick*, 56 Maine, 224, and cases there cited. See also, Freeman on Executions, § 388, and cases there cited. *Buck* v. *Hardy*, 6 Maine, 162; *Gilman* v. *Stetson*, 16 Maine, 124.

The only suggestion in the present case that an amendment would affect the rights of third parties, comes from the fact that the judgment debtor, since the levy, has conveyed her share to one of her sons and former cotenant. The consideration named in her deed is $100, and the grantee on the same day mortgages it back for that amount, with condition that the mortgage shall be void if he shall maintain the grantor during the remainder of her life.

That such an arrangment cannot be upheld in equity as against prior creditors of the grantor, even though the grantee had no intention to hinder or defraud the grantor's creditors, was settled in *Egery* v. *Johnson*, 70 Maine, 258. See also, *Barker* v. *Osborne, & Tr. ante* p. 69. It is difficult to see why an amendment is not just as allowable under these circumstances as it would be against the judgment debtor for whose benefit, apparently, the arrangement is made.

Whether the mistakes and omissions in the return of this levy can be corrected in accordance with the facts—that is—whether the proceedings were actually regular and sufficient, and only the returns defective, must be determined by a judge sitting at *nisi prius*, who, for aught to which our attention has been called at the present hearing, may, upon proof of the necessary facts, with a saving of all rights acquired in good faith by other parties, if any such there be, give the appraisers and officer leave to amend their returns upon such terms as to cost as he thinks proper.

The fact that such an amendment may affect the result of the present proceeding is not necessarily an objection. *Howard* v. *Turner*, 6 Maine, 106.

But for the reasons given in Freeman on Executions, § 358, and cases there cited, "permission to amend a return ought not to be given as a matter of course; nor granted without first notifying the adverse party and giving him an opportunity to show cause against the amendment."

Case remanded for such amendments and proceedings as may be found necessary and proper in conformity herewith.

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

STATE OF MAINE, by *scire facias*, *vs.* JOHN C. COBB.

Cumberland. Opinion May 28, 1880.

Scire facias. Waiver of examination. Recognizance. Commissioner.

The waiver of examination by a respondent brought before a magistrate for an alleged offence beyond the jurisdiction of the magistrate may properly be regarded at the hearing and in all subsequent proceedings as the substantial equivalent for the examination and finding thereon contemplated by the statute. R. S., c. 133, §§ 12, 13.

After expressly waiving the preliminary examination it is not open to the respondent to object that it was not made, nor is such objection open to the surety, who assumes his liability after the principal has waived his right in this respect, and the order that the recognizance be given has thereupon been entered. The recital in the recognizance that such an examination had been made is not a material error.

The act of a commissioner of bail, in including in the condition of a recognizance more than the order of the court required, is void of legal effect — the part added by the commissioner is mere surplusage.

EXCEPTIONS from the superior court, Cumberland county.

SUIT on recognizance.

(Writ.)

"[L. S.] State of Maine.—Cumberland, ss. To the sheriff of the county of Cumberland or either of his deputies, Greeting:

"Whereas Francis Kane was brought before the municipal court for the city of Portland, in said county of Cumberland, on the fifth day of February, A. D., 1878, by virtue of a warrant duly issued upon complaint of C. K. Bridges in behalf of said state, on oath charging: that said Francis Kane of Portland, in said county, on the second day of February, A. D., 1878, at said Portland, with force and arms feloniously and willfully in and upon one William S. Morse did make an assault, the said Francis Kane then and there being armed with a dangerous weapon, to wit: a revolver loaded with powder and lead balls, with the intent him the said William S. Morse then and there with the revolver aforesaid so loaded as aforesaid, feloniously and willfully to kill and slay against the peace of said state, and contrary to the form of the statute in such case made and provided; to which complaint he pleaded that he was not guilty thereof, and

waived an examination, and thereupon said court ordered said Kane to recognize to said state in the sum of eight thousand dollars, with sufficient sureties in the sum of eight thousand dollars, for the personal appearance of said Francis Kane, at the superior court, to be holden at said Portland, on the first Tuesday of May, A. D., 1878, then and there to answer to said state, concerning the matters alleged in said complaint, and abide the order and sentence of said court thereon, and stand committed until said order be complied with; and whereas said Kane, not finding said sureties, was committed to jail in Portland in said county, and thereafterwards on the twelfth day of February, A. D., 1878, made application to Charles W. Goddard, Esquire, a commissioner, duly appointed by the Supreme Judicial Court of said state, in the said county of Cumberland, as appears by record thereof in that court, remaining to be admitted to bail in accordance with the provisions of the second section of chapter 137, of the public laws of the year A. D., 1873, of said state of Maine; and at said jail entered into recognizance before said commissioner as follows, to wit:—'State of Maine. Cumberland, ss. Be it remembered, that on the twelfth day of February, in the year of our Lord one thousand eight hundred and seventy-eight, at Portland, in said county, before me, Charles W. Goddard, Esquire, a commissioner, duly appointed by the Supreme Judicial Court in the county of Cumberland, to take recognizances, and admit to bail persons confined in a jail for a bailable offence, or for not finding sureties on a recognizance, personally appeared Francis Kane of said Portland, and John C. Cobb of Deering, Thomas Lennon and Charles Mullen, both of Portland, all in said county, and severally acknowledged themselves to be indebted to the state of Maine in the respective sums following, to wit:

"'The said Kane as principal, in the sum of eight thousand dollars, and the said Cobb, Lennon and Mullen as sureties in the sum of eight thousand dollars each, to be levied of their respective goods, chattels, lands or tenements, and in want thereof, of their bodies, to the use of the state, if default be made in the condition following:

"'The condition of this recognizance is such, that whereas the said Kane was brought before the municipal court of said city of Portland on the fifth day of February, 1878, by virtue of a warrant duly issued upon the complaint of C. K. Bridges, in behalf of said state, on oath charging him, the said Kane, with having on the second day of February, A. D., 1878, made a felonious assault upon William S. Morse, with a dangerous weapon at said Portland, with intent to kill and slay said Morse, against the peace of the state, and contrary to the form of the statute in such case made and provided, and upon examination of the facts relating to said charge, the said Kane on said fifth day of February, A. D., 1878, was ordered by said court to recognize to said state, in the said sum of eight thousand dollars, with sureties in the said sum of eight thousand dollars, for his personal appearance at the superior court to be held at Portland, within and for said county of Cumberland, on the first Tuesday of May, A. D., 1878, and the said Kane having been committed to, and being now confined in jail in Portland, in said county, for not finding sureties to recognize with him on such recognizance, and having made application to me, commissioner as aforesaid, to be admitted to bail in accordance with the provisions of the second section of chapter 137, of the public laws of the year 1873, of said state of Maine. Now, therefore, if the said respondent shall personally appear at the court aforesaid, and answer to such matters and things as may be objected against him, and, more especially, to the charge contained in said complaint, and shall abide the order and judgment of said court, and not depart without license, then this recognizance shall be void, otherwise remain in full force and virtue.'"

"'Witness, Charles W. Goddard, Esquire, commissioner aforesaid.

C. W. GODDARD, Coms'r.'"

"Which said recognizance was duly returned to and entered of record in our said superior court at said May term thereof, and the said Francis Kane, although solemnly called to come into said superior court, at said May term thereof, did not appear but made default, and the said John C. Cobb, Thomas Lennon, and Charles Mullen, although solemnly called in said superior court,

at said May term thereof, to bring in the body of said Francis Kane, did not appear but made default, all as appears of record now remaining in said superior court, and here in court to be produced, whereby the said sum of eight thousand dollars became forfeited to us by the said Kane, Cobb, Lennon, and Mullen, which sum hath not been paid, but still remains to be levied in manner aforesaid, to our use. We, therefore, willing to have the said sum so due to us, with speed paid and satisfied as justice requires, command you to attach the goods and estate of said John C. Cobb, to the value of ten thousand dollars, and summon the said defendant, if he may be found in your precinct, to appear before our justice of our said superior court, to be held at Portland, in and for said county of Cumberland, on the first Tuesday of January, A. D., 1879, to show cause if any he has, why we ought not to have judgment and our writ of execution thereupon, against him the said Cobb for the sum by him forfeited, as aforesaid, to wit: the said sum of eight thousand dollars and costs in this behalf, sustained, and further to do and receive that which the said court shall then consider."

"Hereof fail not, and have you there this writ with your doings therein.

"Witness, Percival Bonney, Esquire, at said Portland, the twenty-fourth day of December, in the year of our Lord one thousand eight hundred and seventy-eight.

D. W. FESSENDEN, Clerk."

Attachment of real estate, December 24, A. D., 1878. Service made on defendant, December 24, A. D., 1878.

Defendant demurred to the writ and the demurrer was joined. The court overruled the demurrer and adjudged the writ good, and ordered the defendant to plead over forthwith, to which ruling the defendant seasonably excepted.

In obedience to said order of court, defendant then pleaded *nul tiel record*, with brief statement, which was joined, and on hearing before the judge with right of exception, upon inspection, the judge ruled that there was such record as in the writ alleged, and that it was sufficient to maintain said suit, notwithstanding

the matters pleaded in the brief statement, and ordered judgment for the State, for the penalty of the bond, to wit: $8,000.

Defendant excepted.

T. H. Haskell, county attorney, for the State.

S. C. Strout and *H. W. Gage*, for the defendant.

The jurisdiction of the municipal court is limited to such "jurisdiction in all such matters and things within the county of Cumberland, as justices of the peace may exercise, and under similar restrictions and limitations."

The powers of magistrates in criminal matters are derived from the statute, and not from the common law. *Owen* v. *Daniels*, 21 Maine, 184.

Such power being derived solely from the statute, it follows that the requirements of the statute must be strictly followed, or the recognizance will be void. *Underwood* v. *Clements*, 16 Gray, 169; *Commonwealth* v. *Field*, 9 Allen, 584; *Tucker* v. *Davis*, 15 Geo. 573.

By R. S., c. 133, § 13, bail may be taken, if on examination, it appears that an offence has been committed, that there is probable cause to charge the accused, and the offence is bailable.

The record shows that the respondent is brought into court upon a warrant, &c., for examination thereon. "And said complaint is read to him, and he pleads and says he is not guilty, and waives an examination in this court." "It is therefore considered and ordered by the court, that said Francis Kane recognize," &c.

It does not appear that any offence had been committed, nor that there was probable cause to charge said Kane of any offence.

It has been expressly held by this court that, "until the facts are made to appear in an examination before a magistrate, in process issued in due form of law, there is no authority on the part of the magistrate to require bail." *State* v. *Hartwell*, 35 Maine, 131.

If, however, Kane was bound by his waiver of examination, no such effect would follow to this defendant. He was not a party to it in any way, and first became a party at the time of entering into the recognizance.

The municipal court had no authority to hold to bail, as the complaint before it did not charge any offence known to the law. No such crime as "assault with intent to kill and slay," is known to the common law or the statute. In *Moore* v. *State*, 34 Texas, 138, the court held a bail bond, conditioned to appear and answer to a charge of "shooting with intent to kill and murder" void, as no such offence is known to the law.

It also exceeded its authority by ordering Kane not only to "appear," but to "answer" and "abide the decision and order of said court," while the statute, c. 132, § 5, only requires the respondent to recognize to "appear." The order was an entirety, and requiring of Kane more than could be legally required of him, was invalid, and the recognizance therefore void.

If the order of the court was valid, the recognizance is made void by the act of the commissioner, who had no authority whatever to take bail, except as ordered by the municipal court. Its order was for Kane's appearance "to answer to said State concerning the matters of said complaint," while the recognizance is "to answer to such matters and things as may be objected against him, and more especially to the charge contained in said complaint." *State* v. *Buffum*, 22 N. H. 267; *Vide* also, *Dillingham* v. *United States*, 2 Wash. C. C. 422.

The sureties cannot be held, when the indictment charges a different offence from that set out in the recognizance. *Duke* v. *State*, 35 Texas, 424; *Gray* v. *State*, 43 Ala. 41; *State* v. *Brown*, 16 Iowa, 314.

On the demurrer, there is no presumption in favor of the jurisdiction of the magistrate, and the recognizance must exhibit enough to show its validity and authority in the magistrate to take it. *Dodge* v. *Kellock*, 13 Maine, 136; *State* v. *Hartwell*, 35 Maine, 129. It does not show that C. W. Goddard was a duly qualified commissioner at the time of the taking of the recognizance.

The writ is bad, as it nowhere appears therein that Kane was indicted at said May term of the superior court, or that any matters and things were there objected against him, either relating to the charge in said complaint or any other charge. *Liceth* v. *Cobb*, 18 Geo. 314; *McKay* v. *Ray*, 63 N. C. 46.

The conclusion of this recognizance is precisely like that in case of *State* v. *Hatch*, 59 Maine, 411. It was there discussed and held good by a majority of the court; but with all due deference to the two remaining members of the court, who joined in the decision, we submit that to us the dissenting opinion seems to contain the better statement of the law. The recognizance is an entirety, and contains provisions which the commissioner was not authorized to require of the accused.

SYMONDS, J. We think that under the provisions of R. S., c. 133, § 22, declaring that no action on a recognizance in a criminal case shall be defeated for any defect of form, "if it can be sufficiently understood, from its tenor, at what court the party or witness was to appear, and from the description of the offence charged, that the magistrate was authorized to require and take the same;"—and under the decision of the court in *State* v. *Hatch*, 59 Maine, 410, the judge of the superior court correctly ruled against the demurrer filed to this writ of *scire facias*, and under the issue joined upon the plea and brief statement, after the overruling of the demurrer, upon inspection of the record properly held that there was such a record as is in the writ alleged, and that it was sufficient to maintain the suit.

According to the letter of the statute, the authority of the magistrate to require bail of one accused of an offence beyond his jurisdiction does not arise, until the fact that the offence has been committed, and that there is probable cause to charge the accused, has been made to appear, upon examination, by proof produced, R. S., c. 133, § § 12, 13. The record in this case shows no such examination or production of testimony, but, instead thereof, a waiver of examination by the accused before the judge of the municipal court.

This provision of the statute is clearly for the benefit of those who are under arrest for crime. It is a privilege and a right afforded for their security. They may hear the witnesses against them, may offer testimony in their own behalf, and may stand upon their right to go free, without bail, unless the commission of the crime, with probable cause to charge them, appears upon examination. But such a requirement of law may be waived by

those whose safety it was designed to secure, and, if waived, it cannot be necessary for the magistrate to proceed with the examination and find the facts which independently of such waiver would give him authority to require bail. It is not a question of jurisdiction. To order bail upon waiver of examination is no more to take jurisdiction by consent, than it would be to order bail upon plea of guilty. We apprehend that if the record of the magistrate disclosed that the respondent pleaded guilty, and was thereupon ordered to recognize with sureties for his appearance in the court having jurisdiction, it would be sufficient, without showing an examination of testimony and finding of fact by the magistrate. The same result follows upon waiver of examination by the accused.

After expressly waiving the preliminary examination, it is not open to the respondent, to object that it was not made. Nor is such objection open to the surety, who assumes his liability after the principal has waived his right in this respect, and the order that the recognizance be given has thereupon been entered. At the hearing in the municipal court and in all subsequent proceedings, the waiver may properly be regarded as the substantial equivalent for the examination and the finding thereon which the statute contemplates. The recital in the recognizance that such an examination had been made, is not a material error, because what was in legal effect precisely the same had occurred.

It is urged that the offence charged in the complaint, an assault with intent to kill and slay, is not one known to the common law or the statute. We think it is neither more nor less than an assault with intent to kill.

The conclusion of the recognizance is in conformity with that which was held good in *State* v. *Hatch*, *ubi supra*;—and while doubts were then entertained by some members of the court, in regard to the validity of a recognizance containing so broad a requirement, the doctrine prevailed that under R. S., c. 133, § 22, effect might be given to it by treating that part of the condition which was in excess of the magistrate's authority as unauthorized and void. There can be no reason for disturbing what has now become the established practice under that decision.

It follows that the act of the commissioner, in including in the condition of the recognizance more than the order of the court required, was void of legal effect;—the part added by the commissioner being regarded as mere surplusage. The legal effect of the recognizance, taken by the commissioner, in this respect, is in precise accordance with the order of the committing magistrate.

It is contended that, under the issue joined upon the plea, an inspection of the record, showed that the respondent was indicted for a different offence from that which he was held by the recognizance to appear and answer. The complaint, as we have seen, was for an assault with intent to kill. The indictment was for assault with intent to kill and murder. The greater includes the less. *Commonwealth* v. *Slocum*, 14 Gray, 395.

We have examined the objections taken upon the demurrer to the sufficiency of the writ, and think the defects alleged are formal, not material, not of a character to defeat the action under R. S., c. 133, § 22. The statute under which the commissioners of bail are appointed (1873 c. 137) in terms requires neither oath, bond nor commission, but only an appointment by the court. The commissioner in this recognizance recites his authority as one duly appointed by the court and signs in that capacity. It cannot be fatal to the validity of the recognizance that the commissioner recites no other authority on his part to take it, than that which is specified in the statute creating his office. *Commonwealth* v. *Dunbar*, 15 Gray, 209.

The omission to state that the commissioner inquired into the case before admitting to bail, if an error, is of the same class as those to which we have already referred;—one which the statute was designed to render immaterial. It sufficiently appears also at what court the respondent was held to appear.

Although the fact that an indictment was found against the respondent appears of record, upon the demurrer it is urged as a fatal defect in the writ that it does not so allege. It is averred that the recognizance was duly returned and entered of record in the superior court, where the principal failed to appear, and was defaulted with his sureties. This is sufficient. The default

is presumed to have been rightfully entered, and, while it stands, full effect is to be given to it in all matters dependent upon it. "The record of the default is conclusive evidence of the fact, and of course not subject to be impeached, controverted or affected by extrinsic evidence." *Commonwealth* v. *Slocum*, 14 Gray, 397; *Comm.* v. *Bail of Gordan*, 15 Pick. 193.

Exceptions overruled. Judgment for the State.

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

JAMES WOODSIDE, in error, *vs.* GEORGE W. WAGG.

Cumberland. Opinion May 28, 1880.

Municipal court of Brunswick—jurisdiction of. Vacancy in the office of judge. Judge de facto.

Under special laws 1874, c. 565, the municipal court for the town of Brunswick has jurisdiction of the process of forcible entry and detainer where both parties live in that town, and the land is situated therein, and the damages alleged do not exceed fifty dollars.

The office of judge of that court would be vacated by the incumbent taking a seat as a member of the legislature, and his authority as a judge *de jure* would cease; still, if he continued peaceably to act under his commission and to exercise the functions of a judge, with the usual insignia of his office, he would be an officer *de facto*, and with reference to the public and third persons, his acts, including judgments rendered by him in cases within the jurisdiction of the court, would be valid. But he might be removed upon information filed against him in behalf of the State.

ON EXCEPTIONS.

ERROR to reverse a judgment of the municipal court for the town of Brunswick.

The case comes to the law court on exceptions by the plaintiff in error. The material facts appear in the opinion.

H. Orr, for the plaintiff in error.

Error is the only efficient remedy in this case. *Jewell* v. *Brown*, 33 Maine, 250.

When the judge of the municipal court of Brunswick, qualified as a member of the legislature, he vacated his office as judge. Constitution, art. 3, § § 1, 2; art. 9, § 2.

By the act establishing the court, 1850, c. 195, § 11, it is provided in case of vacancy in the office of judge, that a justice of the peace, residing in Brunswick, may perform all the duties appertaining to the office of justice of the peace, during the continuance of such vacancy. This is saved in the repealing act of R. S., 1857, § § 2, 3; 1871, § § 1, 2. Then at the time of the judgment, justices had jurisdiction of forcible entry and detainer in Brunswick, when damages claimed did not exceed twenty dollars.

The municipal court of Brunswick, if the judge was authorized to act, had no jurisdiction in this case, where damages claimed were fifty dollars. See private laws, 1874, c. 565; stat. 1868, c. 151, § 5; Stearns, R. P., c. 1, § 1.

Weston Thompson, for the defendant in error.

SYMONDS, J. This is a writ of error to reverse a judgment rendered in the municipal court for the town of Brunswick. The rulings at *nisi prius* were against the plaintiff in error, exceptions were taken, and in support of the exceptions the argument relies upon one essential ground, variously stated in several of the assignments of error. It is insisted that the judgment is erroneous, because before it was rendered the judge of that court had vacated his office by accepting an election to the legislature, and by qualifying and acting as a member of that body. By that fact, it is claimed, the judge ceased to hold his office, became a member of the legislative, and could not be at the same time of the judicial department, and any judgment subsequently rendered by him was necessarily without jurisdiction and erroneous.

Independently of this claim, it is urged that, even if the authority of the judge had not expired, the court did not have jurisdiction of an action, involving the title to real estate, where the damages claimed exceeded twenty dollars. But we think the jurisdiction of the court was clear under the special laws of 1874, c. 565. Both the parties resided, and the land was situated, in Brunswick,

and the terms of that act gave the court "exclusive jurisdiction in all cases of forcible entry and detainer in said town." This is in addition to "concurrent jurisdiction with trial justices, in cases of forcible entry and detainer" in the county, and "also concurrent original jurisdiction with the superior court for the county of Cumberland in all civil actions at law, where the damage demanded does not exceed fifty dollars," when the parties, or one of them and a trustee, are residents of the county.

We have no doubt that under these provisions, and under R. S., c. 94, § 4, the court had jurisdiction of a process of forcible entry and detainer, inserted in a writ, and claiming damage in the sum of fifty dollars, when both parties lived in Brunswick, and the land was there situated.

We recur, then, to the principal inquiry in the case, and the conclusion we have reached upon that will render it unnecessary to consider whether, if the judgment were void, as the plaintiff claims, a writ of error was or was not the appropriate remedy. There is nothing to prevent, and we prefer to decide the main issue, rather than any question of the form of process.

That the two offices, judge of the municipal court and member of the legislature, were incompatible, cannot be denied. Constitution of Maine, art. 9, § 2. *Commonwealth* v. *Hawkes*, 123 Mass. 525.

That to accept and qualify for one of these offices, while holding the other, would be a resignation of the one first held, is a rule already adopted by this court. *Stubbs* v. *Lee*, 64 Maine, 195.

It follows that when Judge Humphreys was qualified as a member of the legislature, his strictly legal authority to act as judge of the municipal court ceased. He was no longer judge *de jure*. If he continued to exercise the functions of a judge, he might have been ousted by an information in the nature of a *quo warranto*. *Commonwealth* v. *Hawkes*, 123 Mass. 525.

But the immediate question under consideration is, what was the character of his acts, as to validity or invalidity, during such continuance in the exercise of the duties of his judicial office, after expiration of the legal tenure. They must be void, unless

they are to be upheld on the ground that a judge holding over, under such circumstances, is to be regarded as an officer *de facto*.

In *State* v. *Carroll*, 38 Conn. 449, after an elaborate review of the English and American cases on this subject, it is said, "the *de facto* doctrine was introduced into the law as a matter of policy and necessity, to protect the interest of the public and individuals, where those interests were involved in the official acts of persons exercising the duties of an office, without being lawful officers. It was seen, as was said in *Knowles* v. *Luce*, Moore, 109, that the public could not reasonably be compelled to inquire into the title of an officer, nor be compelled to show a title, and these became settled principles in the law. But to protect those who dealt with such officers when apparent incumbents of offices under such apparent circumstances of reputation, or color, as would lead men to suppose they were legal officers, the law validated their acts as to the public and third persons, on the ground that, as to them, although not officers *de jure*, they were officers in fact, whose acts public policy required should be considered valid."

On this ground it was held that a justice of the peace, temporarily holding a city court, under a law alleged to be unconstitutional, was at least, under the circumstances of that case, an officer *de facto*, if not *de jure*, and judgments rendered by him were valid.

"An officer *de facto*," the court say, "is one whose acts, though not those of a lawful officer, the law upon principles of policy and justice will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised;

"First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people without inquiry, to submit to, or invoke his action, supposing him to be the officer he assumed to be.

"Second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond and the like.

"Third, under color of a known election or appointment, void, because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public.

"Fourth, under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such."

It is clear that the first of these specifications was intended to include the case of an officer holding over after the expiration of his term, or after it has been determined in any other way than by lapse of time, as well as that of one who assumes the office without an original appointment or election. In either case, at the time referred to, the officer is "without a known appointment or election" to uphold his acts. "In the case of public officers, who are such *de facto*, acting under color of office by an election or appointment not strictly legal, or without having qualified themselves by the requisite tests, or *by holding over after the period prescribed for a new appointment*, as in the case of sheriffs, constables, &c.; their acts are held valid as respects the rights of third persons who have an interest in them, and as concerns the public, in order to prevent a failure of justice." 2 Kent. 295.

In a learned note which Judge REDFIELD adds to the opinion, cited from the Connecticut court, Law Register, March, 1873, it is said: "The result of all the cases seems to be that an officer *de facto* is just what the term implies—one who by right, but without having complied with all the formal requisites and qualifications, or else by mistake and misapprehension, or perhaps by downright wrong and gross usurpation, is for the time exercising the functions of the office, and whom from necessity all persons having to do with such functions must employ, and to whose acts all must submit, since he holds the *insignia* of the office, and the power to enforce obedience to his demands." From its statement of the general rule in regard to the validity of the acts of officers *de facto*, the note excludes the cases where the office itself is in conflict, two or more persons claiming to hold it and each denying the authority of the other. To that class of cases, it is unnecessary

for the present purpose to determine what distinct considerations may apply.

In *Wilcox* v. *Smith*, 5 Wendell, 232, it was held that an execution issued by one who had acted as a justice of the peace for three years was a protection to an officer in taking property on it, although there was no proof that the justice came into office under color of an election. "The principle is well settled that the acts of officers *de facto* are as valid and effectual, when they concern the public or the rights of third persons, as though they were officers *de jure*. The affairs of society could not be carried on upon any other principle."

The same rule is held in *Brown* v. *Lunt*, 37 Maine, 423, with a citation of authorities, and discussion of principles which leave very little to be added on the subject.

It is necessary only to add that the precise question under consideration has been recently determined by the supreme court of Massachusetts, in *Sheehan's Case*, 122 Mass. 445, where it is said, "If Mr. Hawkes upon taking his seat in the house of representatives ceased to be a justice *de jure*, he was, by color of the commission which he still assumed to hold and act under, having the usual signs of judicial office — sitting in the court, using its seal and attended by its clerk — and no other person having been appointed in his stead, a justice *de facto*. Upon well settled principles, it would be inconsistent with the convenience and security of the public, and with a due regard to the rights of one acting in an official capacity, under the color of, and a belief in lawful authority to do so, that the validity of his acts as a justice should be disputed, or the legal effect of his election and qualification as a representative be determined in this proceeding to which he is not a party. The appropriate form of trying his right to exercise his office as a justice is by information in behalf of the Commonwealth, or perhaps by action against him by the person injured."

Upon *habeas corpus*, the court refused to release a prisoner committed by the magistrate under such circumstances, although upon information filed, as we have seen — 123 Mass. 525 — it was

held that the two offices were incompatible, and that by taking his seat in the house of representatives the defendant legally vacated his judicial office.

Exceptions overruled.

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

JOHN S. ABBOTT *vs.* ANSON G. STINCHFIELD, and JOSEPH BAKER, Trustee.

Kennebec. Opinion May 28, 1880.

Trustee process. Interest.

Where an attorney collected money on a judgment belonging in part to S. and set apart from the net proceeds a sum not greater than S.'s part of the judgment and equal in amount to the bill of A. for services as the counsel for S. in that case, and retained the same that it might be appropriated to the payment of A; *Held*, that he is chargeable as trustee of S. for the sum so set apart and retained, on a suit brought by A. against S. and served upon him as trustee.

A trustee is chargeable with interest whenever he receives interest, or when he has expressly promised to pay interest but not when it is recoverable simply as damages.

ON REPORT.

This was an action of assumpsit brought on an account annexed to the declaration for $1821.65. The writ was dated August 1, 1878. The issues presented to the law court are founded upon the disclosure and allegations, and the material facts appear in the opinion.

John S Abbott, the plaintiff, *pro se*.

Joseph Baker, the alleged trustee, submitted without brief.

WALTON, J. The only question is whether the trustee is chargeable. We think he is. The money in his hands was collected by him on a judgment belonging, one third to A. G. Stinchfield (the principal defendant in this suit), one third to the executors of Matilda K. Page, and one third to A. H. Howard. The judgment was for $14,723.50, and costs of suit. The

amount collected by the trustee was $9,576.18, leaving $5,146.32 still due upon the judgment. Of the amount collected, he appropriated $900 to the payment of his own fees for services as counsel in the case, retained in his hands $1600, the amount of the plaintiff's bill for services as counsel in the case, and paid the balance, $7,056.18, to Mr. Howard. From the sum received by him Mr. Howard retained what he claimed to be his third of the judgment, and paid the balance, $1673, to the executors of Mrs. Page. The question is, whether the $1600 remaining in the hands of the trustee, can be regarded as the money of Stinchfield, so as to make it trusteeable as his property. We think it must. It is claimed by him as his property, and the case fails to show that it is claimed by any one else. It is the precise amount due from Stinchfield to the plaintiff; and the evidence satisfies us that this sum was set apart by the trustee (one of the attorneys in the suit in which the judgment was recovered) and retained by him, not only as the money of Stinchfield, but for the express purpose of enabling him to pay the plaintiff's bill, voluntarily, if he chose so to do; or to enable the plaintiff to enforce payment by trustee process, if Stinchfield did not choose to pay voluntarily; and we think it was competent for the attorney to make such an appropriation.

Another question is, whether the trustee is chargeable with interest. We think he is. A trustee is chargeable with interest whenever he receives interest, or when he has expressly promised to pay interest, but not when it is recoverable simply as damages. *Adams* v. *Cordis*, 8 Pick. 260; *Rennell* v. *Kimball*, 5 Allen, 356. The trustee discloses that he has deposited the money in a savings bank, and that it is drawing interest at the rate of five per cent. For this interest he is chargeable.

Trustee charged for $1600, and such interest thereon as he receives.

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

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

Somerset. Opinion May 28, 1880.

Action for aiding a debtor in fraudulent transfer of property. R. S., c. 113, § 51. Bankruptcy. Waiver.

One, who has commenced an action to recover the penalty provided by R. S., c. 113, § 51, for knowingly aiding a debtor in the fraudulent transfer of his property to secure it from the creditors, waives his right to prosecute his suit by filing a petition against his debtor and having him declared a bankrupt, and then causing a suit to be commenced against the alleged fraudulent transferee by the assignee in bankruptcy to recover the value of the property alleged to have been fraudulently transferred.

ON AGREED STATEMENT OF FACTS.

An action under R. S., c. 113, § 51, against defendant for aiding one William P. Farnsworth in an alleged fraudulent sale of personal property.

Writ dated April 28, 1876. The case has been once before presented to the law court and is reported in 68 Maine, 78. It is now presented on facts agreed upon, the material portion of which are as follows:

William P. Farnsworth, while indebted to this plaintiff on a note dated October 14, 1875, for $900, with interest at eight per cent. made a sale to the defendant April 26, 1876, which the plaintiff claims is fraudulent. June 19, 1876, the plaintiff filed in the district court of the United States, Maine district, a petition in bankruptcy against Farnsworth, upon which he was declared a bankrupt, July 25, 1876, and Orrison Burrill was appointed assignee, receiving proper assignment September 22, 1876. March 24, 1877, the assignee, at the request of the plaintiff, brought a bill in equity in such district court against the defendant, alleging the same frauds that are set out in the writ in this case, to recover of the defendant the value of the property alleged to be fraudulently conveyed. December 14, 1878, the district court entered a decree in favor of the assignee, for $1051 — from which an appeal was taken to the circuit court of the United States, which was pending at the time of presenting this case to the law court. If these proceedings furnish a bar to

this suit, judgment is to be entered for the defendant—otherwise the action is to stand for trial or such further disposition as the court may direct.

S. S. Brown, for the plaintiff, upon the question stated in the opinion, argued:

The objection is made that the defendant may have to suffer more than the statute contemplates, by as much as he has to pay on the suit of the assignee in bankruptcy in United States court. But this court can take no notice of a contingency so remote. The defendant may never pay anything on that suit, but if he does it is the natural fruit of his own wickedness. Simple honesty will save a man from a multitude of misfortunes, which are the legitimate fruits of dishonesty. This is an action based upon the statutes of this State, which give this plaintiff certain rights. If the defendant is guilty, the court nor the plaintiff are in no way responsible for the consequences to him.

D. D. Stewart, for the defendant, upon the same question, cited: *Haskell* v. *Hilton*, 30 Maine, 419; Story's Eq. Pl. § 516; *Carr* v. *Hilton*, 1 Curtis, C. C. 230; *Holland* v. *Cruft*, 20 Pick. 330; *Gibbens* v. *Peeler*, 8 Pick. 254; *Butler* v *Hildreth*, 5 Met. 49.

WALTON, J. The question is whether one, who has commenced an action to recover the penalty provided for in R. S., c. 113, § 51, (which declares that whoever knowingly aids a debtor in a fraudulent transfer of his property, to secure it from creditors, shall be liable to any creditor suing therefor in double the amount of the property so fraudulently transferred, not exceeding double the amount of such creditor's demand), by filing a petition against his debtor and having him declared a bankrupt, and by causing a suit to be commenced against the alleged fraudulent transferee, by the assignee in bankruptcy, to recover the value of the property alleged to have been fraudulently transferred, thereby waives his right to further prosecute his own suit. We think he does. By first commencing a suit to recover the penalty provided for in the statute, a creditor undoubtedly obtains a priority of right to prosecute it to final judgment, not only as against other creditors, but also as against the debtor's assignee in bankruptcy. But this is a right which

he may waive. If he requests the debtor's assignee in bankruptcy to pursue the same property, and, in pursuance of such request, the assignee commences a suit against the alleged fraudulent transferee to recover its value for the benefit of all the creditors, we think the plaintiff in the first suit does thereby waive his right to prosecute it further; that such request, when acted upon, becomes irrevocable while the second suit is pending. To hold otherwise would make the defendant liable to pay three times the value of the property conveyed to him, — once to the assignee, and twice to the pursuing creditor. This is a greater penalty than the statute imposes. The statute makes him liable for double the value of the property fraudulently conveyed to him, but it does not make him liable for three times its value. The statute though technically a remedial one, is penal in its character, and must be strictly construed. It must not be so construed as to impose a greater penalty than the plain meaning of its terms requires.

Judgment for the defendant.

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

SAMANTHA P. TURNER *vs.* JAMES F. FOOTMAN.

Somerset. Opinion May 29, 1880.

Trespass. Assault and battery. Instructions. Practice. Measure of damages.

It is the abuse of some special and particular authority given by law, and not of a legal right which is common to all, which will make a man a trespasser *ab initio* and so responsible for all his acts in the transaction, and liable to make compensation to the injured party for all the damage he has suffered, whether it arose from acts which would have been justifiable if the legal right had not been exceeded, or otherwise.

Where the legal right of self defence has been exceeded, the party so offending is liable only for the excess of force, and not for any damage which his opponent may have suffered from acts that were within the proper line of self defence.

It is erroneous in an action for assault and battery, where the defendant not only pleads the general issue, but further by way of brief statement that he "was unlawfully imprisoned by the plaintiff in her shop and used no more force than was necessary to liberate himself from such unlawful imprisonment," and offers evidence in support of the last plea, to instruct the jury that if their verdict is for the plaintiff, it should be for such sum as would make her pecuniarily whole, and as would fairly and justly compensate her for the injury received. Such instruction is appropriate only in case the jury should find that the attempted imprisonment was not unlawful. Upon such pleadings, with evidence in support of them, the jury should also be instructed as to the proper measure of damages in case they should find that the attempted imprisonment was unlawful, but that defendant used excessive or improper force to relieve himself from it. Nor does the defendant waive his right to have such instructions by omitting to make a special request for them, when the only rule for the measure of damages given to the jury is full compensation.

ON EXCEPTIONS.

Trespass for an alleged assault and battery, committed January 29, 1877. The writ is dated February 14, 1877. The verdict was for $600. The case comes to the law court upon the defendant's exceptions to certain instructions in the charge to the jury. The facts sufficiently appear in the opinion.

Baker & Baker, for the plaintiff.

There is no objection to the instructions actually given. They were required by the facts and contingencies of the case, and are sound law as applicable to one contingency. The complaint is simply that there was another possible contingency on which

the court omitted to give instructions, and none were asked by the counsel. It is too late for him to take advantage of this omission now. *Darby* v. *Hayford*, 56 Maine, 246; *Hunter* v. *Heath*, 67 Maine, 507. But there was no omission. The rule of damages was the same in both contingencies. The license, which the defendant had, to use any force, was conferred on him by the law, and if he abused that authority, or used excessive force, he became a trespasser *ab initio*, and liable for all damages the same as if he had no authority. *Six Carpenters' Case*, 8 Coke, 146; 1 Smith's Leading Cases, part 1, [*216,] 274–279, and cases there cited; Bacon's Abridgment, Trespass, B.; *Mussey* v. *Cummings*, 34 Maine, 74; *Ross* v. *Philbrick*, 39 Maine, 29; *Hunnewell* v. *Hobart*, 42 Maine, 565; The case, *Coleman* v. *R. R. Co.* 106 Mass. differs from this.

D. D. Stewart, for the defendant, cited: *Six Carpenters' Case*, 8 Coke, 146, a; *Bagshaw* v. *Gaward*, Metcalf's Yel. 97; 1 Espinasses, *Nisi Prius*, 317; 5 Davies Abr. 556, 585; *Watson* v. *Christie*, 2 B. & P. 224; *Etherton* v. *Popplewell*, 1 East. 139; *Winterbourne* v. *Morgan*, 11 East. 395; *Kerby* v. *Denby*, 1 M. & W. 337; *Gale* v. *Dalrymple*, 1 C. & P. 381; *Penn* v. *Ward*, 2 Cr. M. & Ros. 338; *Van Brant* v. *Sherick*, 13 Johns. 414; *Mussey* v. *Cummings*, 34 Maine, 74; 1 Steph. *Nisi Prius*, 216, 221, 222; *Bennett* v. *Appleton*, 25 Wend. 376; *Bowen* v. *Parry*, 1 C. & P. 394, (11 E. C. L. 433); *Rogers* v. *Waite*, 44 Maine, 276; *Jewell* v. *Mahood*, 44 N. H. 474; *Dingley* v. *Buffum*, 57 Maine, 379; *Dole* v. *Erskine*, 35 N. H. 503; *Brown* v. *Gordon*, 1 Gray, 185; *Coleman* v. *R. R. Co.* 106 Mass. 164; *Esty* v. *Wilmot*, 15 Gray, 168; *Smith* v. *Pierce*, 110 Mass. 35; *Hunnewell* v. *Hobart*, 42 Maine, 565; *Seekins* v. *Goodale*, 61 Maine, 400.

BARROWS, J. The defendant by his pleadings, placed his defence to this action for an assault and battery, alleged to have been committed by him upon the plaintiff, in part upon the general issue, and in part upon the ground that the plaintiff was attempting unlawfully to detain him in her shop; and introduced evidence, tending to show that no force was used by him, beyond what was necessary to remove her from the door where she was opposing his egress and enable him to open it and go out.

The presiding judge instructed the jury that if from all the evidence, they should be satisfied that certain facts upon which defendant relied to show that the plaintiff was unlawfully attempting to detain him in the shop were established, the plaintiff could have no right to detain him, and that "defendant would be justified in using reasonable and sufficient force to relieve himself from such unlawful imprisonment; but that if he used more force than was reasonably sufficient, under the circumstances, for that purpose, then the plaintiff would be entitled to recover in this action." After stating the elements of damage, in terms of which defendant makes no complaint here in argument, he further told the jury that, if their verdict was for the plaintiff, it "should be for such a sum as would make the plaintiff pecuniarily whole—for such a sum as would fairly and justly compensate her for the injury received."

If the case were to turn upon the general issue only, or upon a finding by the jury that the plaintiff was not unlawfully attempting to detain the defendant in the shop, the defendant could not complain of this instruction as to the assessment of damages. It is substantially the same instruction which was given in *Watson* v. *Christie*, 2 Bos. & Pul. 224, and sustained there because the pleadings did not set up a justification, and so no question as to excess of force upon the part of the defendant could properly arise.

The difficulty with it in the present case is, that it seems to have been the only measure for the amount of damages which was given to the jury, and it is not appropriate upon the hypothesis that the jury should find that the defendant was subjected to an unlawful imprisonment by the plaintiff, and so had a right to use so much force as was necessary to liberate himself, in which case he would be responsible, only for so much of the damage suffered by the plaintiff as arose from the excess of force.

Upon this phase of the case the plaintiff could not properly be said to be entitled, as matter of law, to the full compensation contemplated in the instruction. She might, or she might not be. It would depend upon the finding of the jury whether the defendant could have relieved himself from the unlawful imprisonment without doing the plaintiff any damage.

The defendant complains, and we think justly, that the instruction withdrew from the jury, the inquiry how much of the damage which the plaintiff suffered, was attributable to her own unlawful resistance to the egress of the defendant; and that the jury should have been told, that in such case she could recover only for such damage as she sustained from the excess of force used by the defendant, above what was necessary to secure his release.

That this last is the proper and accurate limitation of the plaintiff's right to damages, seems to be settled both on principle and authority. *Rogers* v. *Waite*, 44 Maine, 276; *Jewell* v. *Mahood*, 44 N. H. 474; approved in *Dingley* v. *Buffum*, 57 Maine, 379; *Brown* v. *Gordon*, 1 Gray, 185; *Esty*, v. *Wilmot*, 15 Gray, 168; *Coleman* v. *N. Y. & N. H. R. R. Co.* 106 Mass. 164. The plaintiff's counsel argues that inasmuch as the instruction given was correct if the jury found that there was no unlawful detention by the plaintiff, it was the duty of defendant's counsel, if he desired instructions applicable to the other phase of the case, to request them, and that the omission to give them when no request was made is not the subject of exceptions. The same position was taken and overruled in *Esty* v. *Wilmot*, 15 Gray, 168, where the ruling at *nisi prius*, though not identical in form was the same in effect. In that case the ruling was that one who used unnecessary and improper force to accomplish a purpose which was lawful (though not made so by virtue of any special and particular authority given to him by law), thereby "became a trespasser *ab initio*, and would be liable for all his acts." It could only be upon the ground that he was thus liable, that the rule, as to the measure of damages given in the case before us, could be regarded as correct. He would not be liable to make compensation for all the damage suffered by the plaintiff, unless he was "liable for all his acts;" and this excludes the idea that he might lawfully use so much force as might be necessary to free himself from an unlawful detention by the plaintiff, and be liable only for the excess.

While we do not doubt that if the attention of the presiding judge had been called to this branch of the defence, when he was giving his instructions as to the measure of damages, he would have made the needed correction, we do not feel at liberty

to say that the defendant's omission to call for instructions upon the hypothesis that the jury might find an unlawful detention of defendant by plaintiff, should be regarded as a waiver of his rights, under the pleadings and evidence stated in the exceptions. We think it was the duty of the presiding judge, without being specially thereto requested, to give the jury the rule of damages that would be appropriate in case they should find the defendant justified in using some force to remove the plaintiff from the door. That they did not so find it is impossible for us to say. If they did, the remark of YELVERTON, J., in *Bagshaw* v. *Gaward*, Yelv. 97, Metcalf's ed. becomes appropriate: "The party shall be punished only for that in which the act is tortious and for nothing more."

Exceptions sustained.

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

ALVAN ROGERS and others *vs.* WILLIAM P. WHITEHOUSE, Assignee.

Kennebec. Opinion May 29, 1880.

Replevin. A condition to a sale of goods to a retail dealer is binding upon him and his assignees, but not upon his vendees in the regular course of business.

Goods bought by a retail trader upon a condition that the property shall not vest in him until they are paid for, but with an understanding between him and his vendor that they are to go into his store and be sold by him in the regular course of trade, will not pass to his assignee in insolvency, or for the benefit of creditors, although the original vendor would be estopped to deny the title of those who might purchase portions of them of the retailer in the regular course of his business.

It is not essential to the existence and validity of such a condition that the conditional vendor should have no right to sell to others. His assignee takes only such right as he himself could assert in the goods against his vendor, and if he has agreed that the property in the goods shall remain in the vendor until they are paid for, the vendor may replevy them from his assignee although such vendor could not dispute the title of those who had purchased portions of them in good faith and in the regular course of trade from his vendor.

ON EXCEPTIONS.

Replevin for certain goods claimed to have been delivered May

4, 1877, by the plaintiffs, Rogers & Co. to Pope & Sibley, the assignors of the defendant, under the following agreement printed on the bill-head: "Goods sold for cash, only conditionally delivered until paid for."

The assignment to defendant was for the benefit of creditors, and dated June 8, 1877.

Writ was dated June 11, 1877. The verdict was for defendant. The plaintiffs alleged exceptions to the instructions of the presiding judge, which are sufficiently stated in the opinion.

Orville D. Baker, for the plaintiffs, cited: *Whitney* v. *Eaton*, 15 Gray, 225; *Stone* v. *Perry*, 60 Maine, 48; *Hussey* v. *Thornton*, 4 Mass. 405; *Barrett* v. *Pritchard*, 2 Pick. 512; *Hill et als.* v. *Freeman*, 3 Cush. 257; *Tyler* v. *Freeman*, *Idem*, 261; *Blanchard* v. *Child*, 7 Gray, 155; *Coggill* v. *R. R. Co.* 3 Gray, 545; *Benner* v. *Puffer*, 114 Mass. 376; *Tibbetts* v. *Towle*, 12 Maine, 341; *Heath* v. *Randall*, 4 Cush. 195; *Burbank* v. *Crooker*, 7 Gray, 158.

G. C. Vose, for the defendant, submitted without argument.

BARROWS, J. The plaintiffs claim that the crate of crockery ware, the unsold remainder of which they here replevy from the assignee of their vendees was only conditionally sold by them to Pope & Sibley, the defendant's assignors—that there was an understanding between their selling agent and Pope & Sibley, that though the goods were delivered to go into Pope & Sibley's store, and be disposed of by them in the ordinary course of retail trade, the property in them was not to pass until they were paid for. The making of any such arrangement was denied and the testimony is contradictory. If it were certain that the jury found that the plaintiff had failed to prove the existence of such an arrangement, the plaintiffs would have no case.

But, as to the force and effect and legal consequences of such an arrangement, the jury were instructed in substance among other things, that the position of the plaintiffs was that the title to the goods remained in the plaintiffs, and that Pope & Sibley had no legal title to sell any of them, and could give no legal title to any of them to any purchaser—that there was no evidence that would warrant the conclusion that the plaintiffs constituted

Pope & Sibley their agents, to sell the goods for them—that it was incumbent upon the plaintiffs to show that some special contract was made between the parties, "that the title was to remain in the plaintiffs, until fully paid for, Pope & Sibley having no title, no right to sell to others." If that was established, plaintiffs would have a right to reclaim these goods at any time if payment was not made. And, on the other hand, the jury were instructed that if the real contract was that Pope & Co. were to receive the goods and have such title and right as would authorize them to sell them in the course of their business, as they had occasion to, the vendors undertaking to retain a lien upon the goods for their security, then the title would not be retained by the plaintiffs but would pass to the purchasers, "because selling by one merchant to another with an agreement and understanding between them, that the purchaser is to take such a title as would give him a legal right to sell as he pleased in the course of his business, would be entirely inconsistent with, and repugnant to an agreement that no title was to pass but was to remain in the vendors."

As touching the real character of the transaction, the presiding judge put the following questions to the jury: "Was it one by which no title was to pass to Pope & Co., by which they were to have no legal right to sell the goods? Or was it one understood between the parties to give to them a legal right to sell the goods in their business, as they had occasion from time to time, the plaintiffs undertaking to retain a lien for their security?" And the jury were finally instructed in accordance with the whole tenor of what had gone before, that if they were "satisfied that no title was passed to Pope & Co. then the plaintiffs have a right to maintain this suit. If, however, such a title was passed to them as would authorize them to sell the property as their own as they had occasion in their business, and the plaintiffs merely undertook to retain a lien upon it then they did not do the business in such a way as to give them a legal right to retake the property."

The jury must have understood that if the arrangement between the plaintiffs and Pope & Sibley was such that the latter could

give a good title to their customers purchasing at retail, the title to the goods could not remain in the plaintiffs, and the action could not be maintained against the defendant who took the unsold portion of the crate under the assignment. The logic of the instructions seems to be this. The property in the crockery passed to the vendees by the sale, or it did not. If it passed, so that they could give a good title to any portion of it to their customers at retail, then no title remained in the plaintiffs, and the vendees could dispose of it in any manner they pleased. Now unless the vendees could lawfully dispose of the property in the regular course of their retail business, the transaction was altogether futile; and the jury could not well come to any conclusion under the instructions, except that it was an attempt to retain a lien for the price in a manner which they had been told was repugnant to, and inconsistent with, any right on the part of Pope & Sibley to sell to any one. But we do not think that the case should be made to turn upon the power of Pope & Sibley to give a good title to such articles as they might sell from the crate at retail. Though there had been a distinct and positive and undisputed agreement in writing, between the plaintiffs and their vendees that the property should not pass until paid for, still, if the plaintiffs had delivered it under the circumstances here stated, with the obvious intention and expection that it was to go into Pope & Sibley's store, and be disposed of by them from time to time as their customers called for it, they would be estopped to assert their own title against that given to a *bona fide* purchaser at retail from Pope & Sibley. *Pickering* v. *Busk*, 15 East. 38. But this defendant acquired by the assignment no rights except those which his assignors could have asserted against the plaintiffs. *Goss* v. *Coffin*, 66 Maine, 432; *Hersey* v. *Elliot*, 67 Maine, 527, and cases there cited. *Whitney* v. *Eaton*, 15 Gray, 226. No such estoppel would arise as to him. *Burbank* v. *Crooker*, 7 Gray, 158–159; *Stone* v. *Perry*, 60 Maine, 48. See also, for further discussion of the mode of making, and the effect of these conditional sales, where the title is not to pass from the vendor until payment is made,

Hussey v. *Thornton*, 4 Mass. 407; *Hill* v. *Freeman*, 3 Cush. 259; *Tibbetts* v. *Towle*, 12 Maine, 341.

In the latter case attention is called to the rule that in the case of a conditional sale, no property passes but subject to the condition; and to the ancient maxim from Shepard's Touchstone, "It is a general rule that when a man hath a thing he may condition with it *as he will*." We see no legal objection to a wholesale dealer making a conditional sale to a retailer with the understanding that he may dispose of the goods as they may be called for at retail, but that as between themselves the property shall not pass until the goods are paid for; and in such case while the purchaser at retail would get a title which the original vendor could not impeach because of his agreement with the retailer, it would be the title of the original vendor and not that of the retailer who has none and can convey none except in the manner which his arrangement with the vendor permits. One to whom he sells his whole stock will take no title. *Burbank*, v. *Crooker*, 7 Gray, 158. Neither will his assignee in bankruptcy or insolvency.

The real question here was one for the jury. Was the conditional sale agreed upon between the plaintiffs' agent and Pope? To find that it was, it was not necessary that the jury should also find that Pope & Sibley could give no legal title to any of the goods to any purchaser. If they could, it would not necessarily follow that they could give a legal title to the part remaining unsold to this defendant as their assignee.

Exceptions sustained.

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

FRANCES WYMAN and another *vs.* JOHN H. LEAVITT.

SAMUEL D. WYMAN *vs.* SAME.

Lincoln. Opinion May 31, 1880.

Negligence in blasting. Damages. Mental anxiety for personal safety.

In the trial of an action on the case for simple negligence in blasting out a ledge within the located limits of a railroad whereby rocks were thrown upon the plaintiff's land and buildings, the plaintiff's mental anxiety in relation to his own personal safety is not, in the absence of personal injury, an element of damage.

Nor is his anxiety in relation to the personal safety of his child while going to and returning from school.

ON EXCEPTIONS AND MOTION to set aside the verdict.

The facts sufficiently appear in the opinion.

Baker & Baker, for the plaintiffs.

The objection to the testimony of Mrs. Wyman is not well founded, because:

I. The element of fear is a legal element of damage in a case like this.

II. These facts were a part of the *res gestæ*, and proper to go to the jury to determine whether there was gross negligence, amounting to a willful and wanton intent on the part of the defendant.

III. It was competent for Mrs. Wyman to testify to her own feelings and no other evidence was offered. *Stowe* v. *Heywood*, 7 Allen, 118.

This is an action for injury to the domicil of the plaintiff, while she and her family were occupying it, and it is a legitimate element of damages, that the peace of the house was disturbed, and that the plaintiff was put in fear and peril, not as a ground of action, but as an inevitable consequence.

It is absurd to hold that if a person assaults a dwelling house with huge rocks, and breaks in the roof, and endangers the lives of the owner and occupant, and her children, although they are not in fact killed or wounded, that the owner is to have no compensation for her fear, peril and mental suffering. Suppose the

danger so alarming as to cause a fright, so great as to produce sickness, fever or insanity, would this be no element of damage?

The cases cited by the defendant's counsel are not analogous, and cannot control this case. The counsel further ably argued other questions arising in the case which it did not become necessary for the court to consider.

A. P. Gould and *J. E. Moore*, for the defendant, upon the question considered in the opinion, cited: 2 Greenl. Ev. § § 253, 267, 574; *Wadsworth* v. *Treat*, 43 Maine, 163; *Flemmington* v. *Smithers*, 2 Car. & Pa. 292, (12 E. C. L. 131); *Lynch* v. *Knight*, 9 Ho. of Lord's Cases, 577, 598; *Johnson* v. *Wells et als.* 6 Nev. 224; *Meagher* v. *Driscoll*, 99 Mass. 281; Shearman & Red. Negligence, (2d ed.) § 608, *a*; *Black* v. *Carrollton* R. R. 10 La. Ann. 33; *Coakley* v. *North Penn. R. R.* 6 Am. L. Reg. 355; *Stowe* v. *Heywood*, 7 Allen, 118; Schouler, Domestic Rel. 356; *Blaymire* v. *Haley*, 6 Mees. & Wels. 55; *Grinnell* v. *Wells*, 7 M. & Gra. 1032 (49 E. C. L. 1032); *Davies* v. *Williams*, 10 Adol. & Ell. 725 (59 E. C. L. 723); *Ballou* v. *Farnum*, 11 Allen, 73; *Wade* v. *Leroy*, 20 How. 43; *Fay* v. *Parker*, 53 N. H. 342.

VIRGIN, J. These are actions on the case against a sub-contractor to recover damages caused by his alleged negligence in blasting out a ledge within the located limits of a railroad, whereby rocks were thrown upon the plaintiffs' adjoining lands and buildings, and for not removing, within a reasonable time thereafter, rocks thus lodged on their respective premises.

The cases were tried together. At the trial, Mrs. Wyman's counsel asked her, when upon the stand as a witness, to "give the jury some idea of her anxiety in relation to the blasting of the ledge while she was in and about the house—in relation to herself and family." The question was seasonably objected to by the defendant, but the witness was allowed to answer as follows: "At first, I was not much frightened; then after the second Jordan began the heavy blasting, I used to watch my little boy when he went to school and came." This answer was objected to and admitted. After giving a detailed statement of the warnings of the blastings, she further testified in answer to

the above general question: "I felt afraid the rocks would hit him" . . . "I was afraid." (Objected to; admitted.) "I was in fear from the time the second Jordan began to blow those heavy blasts, until they got through." This was also objected to.

The jury were required to find specially, among other things, how much damages they assessed in each action, "for negligence in blasting, including as well the mental anxiety, as the other sources of damages." The jury answered these questions; and in the case of Mrs. Wyman, they found the sum of $264.

There is no evidence in the cases of any injury to the persons of either party or to their child; or of any wanton conduct on the part of the defendant or of his servants. Was the testimony objected to and admitted in relation to Mrs. Wyman's fear of her own or of her child's safety, legally admissible?

As a general proposition, damages are recoverable when they are the natural and reasonable result of the defendant's unlawful act—that is when they are such a consequence as in the ordinary course of things, would flow from such an act. This is the broad rule, covering all the elements of damages, some of which do not enter into every case. The rule though correct as a general abstract statement has its limitations in particular cases. It may include insult and contumely, but they do not exist in every case of personal injury. Personal injury usually consists in pain inflicted both bodily and mental. When bodily pain is caused, mental follows as a necessary consequence, especially when the former is so severe as to create apprehension and anxiety. And not only the suffering experienced before the trial, but such as is reasonably certain to continue afterward, as the result of the injury, rightfully enters into the assessment of damages.

In trespass for assault and battery, the jury may consider not only the mental suffering which accompanies and is a part of the bodily pain, but that other mental condition of the injured person which arises from the insult of the defendant's blows. *Prentiss* v. *Shaw*, 56 Maine, 427; *Wadsworth* v. *Treat*, 43 Maine, 163. Or for an assault alone, when maliciously done, though no actual personal injury be inflicted. *Goddard* v. *Grand T. Ry.* 57

Maine, 202; *Beach* v. *Hancock*, 27 N. H. 223; 2 Greene's Cr. Rep. 269. So in various other torts to property alone when the tort-feasor is actuated by wantonness or malice, or a willful disregard of others' rights therein, injury to the feelings of the plaintiff, resulting from such conduct of the defendant, may properly be considered by the jury in fixing the amount of their verdict.

But we have been unable to find any decided case, which holds that mental suffering alone, unattended by any injury to the person, caused by simple actionable negligence, can sustain an action. And the fact that no such case exists, and that no elementary writer asserts such a doctrine, is a strong argument against it. On the contrary it has been held that a verdict, founded upon fright and mental suffering, caused by risk and peril, would in the absence of personal injury, be contrary to law. *Canning* v. *Williamstown*, 1 Cush. 451. So it is said (in *Lynch* v. *Knight*, 9 Ho. L. 577, 598,) that, "mental pain and anxiety, the law cannot value, and does not pretend to redress when the unlawful act complained of causes that alone." Again, in *Johnson* v. *Wells*, 6 Nev. 224 (3 Am. R. 245), after a very elaborate examination, it was held that pain of mind aside and distinct from bodily suffering, cannot be considered in estimating damages in an action against a common carrier of passengers. If the law were otherwise, it would seem that not only every passenger on a train that was personally injured, but every one that was frightened by a collision or by the trains leaving the track, could maintain an action against the company. See an elaborate note by Mr. Wood in his edition of Mayne on Dam. 70 *et seq.* We are of the opinion, therefore, that Mrs. Wyman's testimony relating to her fears, as to her own personal safety, was erroneously admitted. Whether a fright of sufficient severity to cause a physical disease would support an action, we need not now inquire.

We also think that her testimony, relating to her anxiety about her child's safety, was inadmissible.

If the child had suffered an injury in his own person, the redress would have had no necessary connection with the family

relation; for the injury which one suffers in the relation of parent is limited, in the absence of any statutory provision, to the deprivation of the child's services. 2 Kent's Com. 195; *Fort* v. *Union, Pac. R. R. Co.* 17 Wall. 553. And when the injury is to the person of the child, and the father thereby loses the services of the child, the father may maintain an action for the latter wrong, and the child for the former. Cooley Torts, 229. But generally a father can recover no damages for injury to his parental feelings. *Flemington* v. *Smithers*, 2 Car. & P. 292; *Black* v. *Carrolton*, 10 L. Ann. 33; Shearman & Redf. Negl. (2d ed.) § 608, *a*. This rule, like most others, has its exceptions, among which are seduction (2 Greenl. Ev. § 579; *Phillips* v. *Hoyle*, 4 Gray, 568); forcible abduction of a child (*Stowe* v. *Heywood*, 7 Allen, 118), in both of which, though based upon the predicate of a loss of service, parental feelings may be considered by the jury; and trespass *quare clausum* for disinterring and removing in a willful disregard of the father's rights, the remains of the deceased child. *Meagher* v. *Driscoll*, 99 Mass. 281. But we fail to perceive upon what principle of law the mother or father could recover for parental feelings in an action like the one at the bar.

As to the action of Mr. Wyman—the jury found specially, as in his wife's case, a certain sum for mental anxiety, though less in amount, although there was no testimony upon that point coming from him. The two cases were properly tried together, and the wife must necessarily have had more or less influence upon the other, and cannot well be now separated. We therefore think exceptions should be sustained in both cases.

Exceptions sustained.

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

ROBERT W. WALDRON *vs.* OTIS B. PATTERSON and others.

Waldo. Opinion June 4, 1880.

R. S., c. 113, § 15. Bond.

A bond given in accordance with R. S., c. 113, § 15, to procure a discharge from arrest of a defendant in an action of tort, is obligatory as a statute bond.

The case of *Richards* v. *Morse*, 36 Maine, 240, is re-affirmed.

ON AGREED STATEMENT OF FACTS.

An action of debt on a fifteen days' bond, given January 29, 1879, to relieve the defendant from arrest on a writ in an action of trespass for assault and battery, in which action judgment was subsequently rendered for plaintiff for seventy-five dollars damages and costs of court. The conditions of the bond were not performed.

If the action can be maintained, default is to be entered and damages assessed by the clerk. Otherwise nonsuit is to be entered.

Thompson & Dunton, for the plaintiff.

N. H. Hubbard, for the defendants.

APPLETON, C. J. This is an action of debt on a bond, given under the provisions of R. S., 1871, c. 113, § 15, by the defendant Patterson, to procure his release from imprisonment on an arrest at the suit of the plaintiff for an assault and battery.

It was held under R. S., 1841, c. 148, § 17, that in an action of tort, a bond given in accordance with the requirements of that section, was obligatory on the signers as a statute bond. *Richards* v. *Morse*, 36 Maine, 241.

The provisions of R. S., 1841, c. 148, § 17, are found substantially re-enacted in R. S. 1871, c. 113, § 15, with only slight changes, by way of condensation, and not affecting its construction.

The provisions of R. S., 1841, c. 148, § § 1 and 9, are found re-enacted in R. S., 1871, c, 113, § 1.

The result of an examination of the statutes is that the decision in *Richards* v. *Morse*, 36 Maine, 241, is applicable to the statutes now in force and is binding upon the court.

Defendants defaulted. Damages to be assessed by the clerk,—by agreement of parties.

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

JOSEPH S. HALL in equity *vs.* JOHN GARDNER and others.

Penobscot. Opinion June 4, 1880.

Mortgage — redemption of. Costs.

Where by the contract between the parties, the mortgager was to pay the mortgagees, interest after December 1, 1874, on all sums due and unpaid at that date, and the mortgagees credited on the mortgage debt, September 5, 1874, the amount for which they had that day sold certain logs by virtue of the contract, for which they were paid partly in cash and partly in time notes, that had added to them the amount of the interest on each, for the time they severally had to run; *Held*, that the mortgagees were not required to account for, and credit upon the mortgage debt, the interest thus added to the notes, or any part of it.

When mortgagees, upon a request in writing from the mortgager, for an account in writing of the amount due on the mortgage, render an account, which is imperfect and inaccurate, they will be liable to costs on bill in equity to redeem, if the mortgage is redeemed within the time named in the decree of the court.

BILL IN EQUITY to redeem a mortgage.

The facts sufficiently appear in the opinion.

John Varney, for the plaintiff.

Wilson & Woodward, for the defendants.

APPLETON, C. J. This is a bill in equity to redeem a mortgage given to secure two notes of hand and a contract for advances by the mortgagees for supplies to be by them furnished to the complainant in a lumbering operation.

The case comes before us on exceptions to the master's report.

By the contract between the parties secured by the mortgage, and bearing date October 23, 1873, the complainant was to allow a commission of ten per cent. on all advances, and to pay interest at the rate of ten per cent. after December 1, 1874, "on all sums due and unpaid at that date."

The mortgagees sold the logs on September 5, 1874, for $8,377.33, and credited the complainant with that sum as of that date, but they gave the purchaser time on part, receiving interest for the time payment was extended. The master did not allow the complainant for the interest paid by the purchaser for the delay given him on payment. We think the ruling of the master correct. If the defendants chose to give the purchaser delay, it was a matter between them and the purchaser, and they are entitled to interest for the delay, and not the complainant.

The respondents were requested in writing to render an account of the amount due on the mortgage. One of them rendered no account whatever,—the other an imperfect and inaccurate one. The complainant is entitled to recover cost in case the mortgage is redeemed—otherwise not.

The bill is to be dismissed unless within sixty days from the entry of the decree, in this case the plaintiff pays to the defendants the sum of $3,785.97, found due by the master December 10, 1879, with interest thereon from said date to the time of payment, less the plaintiff's taxable bill of costs—otherwise said mortgage to stand forever foreclosed.

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

MATILDA B. BRIGGS in equity *vs.* ELISHA JOHNSON.

Waldo. Opinion June 4, 1880.

Bill in equity — when sustained, to remove cloud from title.

A bill in equity will not be sustained to cancel or remove an alleged cloud upon the title when the invalidity of the agreement, deed or other instrument constituting such alleged cloud is apparent on its face. Nor when the invalidity of a tax title is involved without tender or offer to pay the tax, interest and charges if such tender or offer is required by the stat. 1874, c. 234, when the deed is void on its face.

BILL IN EQUITY.

The facts sufficiently appear in the opinion.

Thompson & Dunton, for the plaintiff.

The tax deed in this case is a cloud upon the complainant's title and tends to depreciate the value of her property and she is entitled to the relief prayed for. Story's Eq. Jur. 6th ed. § 700. *Piersoll* v. *Elliott*, 6 Peters, 95.

The deed is in the usual form and the invalidity does not appear on its face. It is not like the cases cited by counsel. *Lovejoy* v. *Lunt*, 48 Maine, 377; *French* v. *Patterson*, 61 Maine, 203.

Any deed, which, according to the rules of the common law, would be sufficient to transfer the title of the former owner, is sufficient, provided it recites the power under which it was made. Bolster's Tax Collector, 85; *Chandler* v. *Spear*, 22 Vt. 388; *Brown* v. *Hutchinson*, 11 Vt. 569; *Spear* v. *Ditty*, 8 Vt. 419; stat. 1874, c. 234; stat. 1879, c. 117.

Courts of equity will entertain jurisdiction to set aside an instrument void on its face. *Hays* v. *Hays*, 2 Ind. 28. See *Allen* v. *Buffalo*, 39 N. Y. 386.

Wm. H. Fogler, for the defendant, cited:

Lovejoy v. *Lunt*, 48 Maine, 377; *French* v. *Patterson*, 61 Maine, 203; 1 Story's Eq. Jur. 9th ed. § 700, A. p. 664; *Cox* v. *Clift*, 2 N. Y. (2 Comst.) 118; *Ward* v. *Dewey*, 16 N. Y. (2 Smith) 519; *Fleetwood* v. *City of N. Y.* 2 Sand. 475; *Hotchkiss* v. *Elting*, 36 Barb. 38; *Townsend* v. *The Mayor of N. Y.* "Reporter," November 12, 1879, p. 626; *Piersoll* v. *Elliott*, 6 Peters, 95; cases named in U. S. Dig. vol. 8, 1877, p. 145.

APPLETON, C. J. This is a bill in equity in and by which the complainant seeks to have an alleged cloud resting upon her title to certain real estate removed.

The bill alleges that the complainant was the owner of two hundred and thirty acres of land in Freedom, upon which, for the year 1876, was duly assessed a tax of $21.53; that the tax was paid on the 19th of September, 1877; that on the 28th of February, 1878, the respondent, Johnson, acting as collector of taxes for said town, after duly advertising the land for non payment of taxes, proceeded to sell the entire tract, for twenty-four dollars and seventy-five cents to discharge the tax of $21.53, and the cost and charges of sale; that on the day of said sale, he executed and acknowledged a deed of said land to the defendant Hustus; said entire tract of one hundred and thirty acres being sold to satisfy the taxes assessed thereon and charges, and that he lodged said deed and the certificate required by R. S., c. 6, § 170, with Daniel W. Dodge, treasurer of said town.

The bill further alleges that this tax deed is invalid because neither in said deed nor in the certificate of sale, does it appear that the sale of the entire tract was necessary in order to satisfy and discharge said tax and costs and charges of sale, &c.

The tax deed is annexed and made part of the complainant's bill and it is in accordance with the allegations therein. The deed purports to sell and convey certain tracts of land, in all amounting to two hundred and thirty acres, for the sum of twenty-four dollars and seventy-eight cents, to the defendant Hustus, he being the highest bidder therefor.

By R. S., c. 6, § 169, the collector is directed, whenever one appears to discharge a tax, "to sell at auction to the highest bidder, so much of such real estate or interest, as is necessary to pay the tax then due, with three dollars for advertising, and twenty-five cents for each copy required to be lodged with the town clerk." The deed utterly fails to show a compliance with the statute. It is not enough that the land was sold to the highest bidder. It must appear that it was necessary to sell the whole to pay the tax and charges, and that no person would pay the same for a less quantity of land. *Lovejoy* v. *Lunt*, 48 Maine,

377; *French* v. *Patterson*, 61 Maine, 203; *Loomis* v. *Pingree*, 43 Maine, 311. The deed is void on its face.

The bill alleges, and truly, that the deed of the collector of taxes is void. This fact would appear on its face when it should be offered as an instrument of defence or of offence. Being void and not merely voidable, it is not a case where the intervention of a court of equity is required. When the illegality of the agreement, deed or other instrument appears on its face, so that its nullity can admit of no doubt, courts of equity will not order it to be cancelled or delivered up. Such an instrument can in no just sense be deemed a cloud upon a title. *Cox* v. *Clift*, 2 Coms. 118. The court will only intervene when the controverted deed or other instrument appears on its face, to be valid and extrinsic evidence is required to show its invalidity. *Marsh* v. *The City of Brooklyn*, 59 N. Y. 280; *Newell* v. *Wheeler*, 48 N. Y. 486; *Bockes* v. *Lansing*, 74 N. Y. 437; 1 Story Eq. § 700. According to the principles adopted in courts of equity, the complainant is not entitled to recover.

If, by the act of 1874, c. 234, a tender is necessary in case of a deed void on its face, then this bill cannot be sustained. The bill alleges no tender nor offer to pay the tax, interest and costs for the non payment of which the complainant's land was sold, and the deed given. To sustain the bill, in such case, would be an evasion of the statute, if applicable.

In either event the bill must be dismissed.

Bill dismissed.

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

FRANK H. MACE *vs.* JOHN PUTNAM.

Kennebec. Opinion June 4, 1880.

Lord's day. Void contract.

Where the signing of an order, drawn by P. upon J. P. in favor of M., the acceptance, the delivery, and the payment by M. to P. of the amount represented by the order, was all done on the Lord's day, in order that, in that way, J. P. might pay a sum due for labor to P. who was about to leave; *Held*, that this was not a work "of necessity or charity,"—and that M. cannot recover of J. P. the amount so paid by him upon such accepted order because the whole transaction, upon which the claim to recover rests, is in violation of the statute.

ON MOTION AND EXCEPTIONS.

The facts are stated in the opinion.

Heath & Wilson, for the plaintiff.

Money paid on the Lord's day, and retained afterwards, discharges the debt. *Johnson* v. *Willis*, 7 Gray, 164. The defendant's debt, then, was paid by the plaintiff. Whether work or acts done are a necessity, is a proper question for a jury. 120 Mass. 493; 118 Mass. 195. Counsel further argued other questions arising under the motion and exceptions, which, under the opinion, it did not become necessary for the court to examine.

Bean & Bean, for the defendant, upon this branch of the case, cited: *Towle* v. *Larrabee*, 26 Maine, 464; *Nason* v. *Dinsmore, et al.* 34 Maine, 391; *Hilton* v. *Houghton et al.* 35 Maine, 143; *Hinkley* v. *Penobscot*, 42 Maine, 89; *Pope* v. *Linn*, 50 Maine, 83; *Benson* v. *Drake et al.* 55 Maine, 555; *Tillock* v. *Webb*, 56 Maine, 100; *Parker* v. *Latner*, 60 Maine, 528; *Plaisted* v. *Palmer*, 63 Maine, 576; *Meader* v. *White*, 66 Maine, 90; *Day* v. *McAllister*, 15 Gray, 433; *Ladd et al.* v. *Rogers*, 11 Allen, 209; *Bennett* v. *Brooks*, 9 Allen, 118; *Bradley* v. *Rea et al.* 103 Mass. 188; *Myers* v. *Meinrath*, 101 Mass. 366; *Commonwealth* v. *Sampson et al.* 97 Mass. 407.

APPLETON, C. J. There are no material facts in dispute. The evidence discloses that one C. A. Page had worked for the defendant; that there was due him for his labor $50.10; that

Page being about to leave, and the defendant not having on hand the means of immediate payment, they entered into negotiations with the plaintiff, in which it was arranged that Page should draw an order on the defendant in favor of the plaintiff, which being accepted, the plaintiff was to pay Page. Accordingly the order was drawn and accepted, and the stipulated payment made.

Unfortunately for the plaintiff this whole transaction was begun and concluded on the Lord's day. This was not a work "of necessity or charity." The statute, R. S., c. 124, § 20, not merely prohibits manual labor, but it likewise forbids the making of bargains and all kinds of trafficking. The plaintiff cannot recover because the whole transaction, on which his claim to recover rests, is one in violation of the statute. *Pattee* v. *Greely*, 13 Met. 284; *Meader* v. *White*, 66 Maine, 90; *Plaisted* v. *Palmer*, 63 Maine, 576.

Motion sustained.
New trial granted.

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

WILLIAM COOMBS and others, appellants from the COUNTY COMMISSIONERS of Franklin County.

Franklin. Opinion June 7, 1880.

Ways — time of opening. R. S., c. 18, § 27.

The time of opening a road must run from the final action of the tribunal having jurisdiction. While the result is in doubt, or controversy, the town is not required to act, nor are the county commissioners required to intervene.

ON EXCEPTIONS.

On the thirty-first day of December, A. D. 1869, a certain highway was laid out by the county commissioners on petition of appellants in the towns of Farmington and Strong, and two years from December 17, 1870, were allowed to open and make said road. Subsequently, before the road was built, or any thing done towards building it, the county commissioners discontinued said highway. The petitioners appealed and a committee was

appointed who reversed the decision of county commissioners and ordered the road built. Exceptions were allowed to the acceptance of the report of the committee, which exceptions were overruled by the full court. At the March term, 1879, the appeal being brought forward on the docket, a motion was filed that the appeal be dismissed for the reason that more than six years have elapsed since the time allowed for opening on the original petition.

The justice presiding overruled this motion.

To this ruling and adjudication, dismissing and overruling the motion, the inhabitants of the town of Farmington, and the inhabitants of the town of Strong excepted.

H. L. Whitcomb, for the plaintiff.

S. Belcher and *S. Clifford Belcher*, for the inhabitants of Farmington and Strong.

The exceptions show that all proceedings were closed December 17, 1870, and two years from that date were allowed to open and make said road. That time expired December 17, 1872. When a way is laid out by commissioners, it is to be regarded as discontinued, if not opened within six years from the time allowed therefor. R. S., c. 18, § 27.

That time had elapsed, when the motion was filed in this case, and the road should have been regarded as discontinued. *State* v. *Cornville*, 43 Maine, 427; *State* v. *Madison*, 59 Maine, 538, 542.

APPLETON, C. J. By R. S., c. 18, § 27, when a town, private, or highway is laid out by the county commissioners, "the way is to be regarded as discontinued, if not opened within six years from the time allowed therefor."

By § 28, "when a town or highway is not opened and made passable by the town liable, within the time prescribed therefor by the commissioners, they may after notice to the town, cause it to be done by an agent, not one of themselves, on petition of those interested."

In this case an appeal was had from the laying out of the commissioners, and upon such appeal the highway was discon-

tinued. An appeal was had from the decision, discontinuing the highway, and that decision was reversed and the highway ordered to be built.

Towns are punishable by information for not opening highways newly laid out, as well as for not subsequently keeping them in repair. *Maine* v. *Kittery*, 5 Maine, 254. Now a town could not be indicted for not opening a road which had been discontinued. Neither, in such case, would the county commissioners intervene to appoint an agent to open a road which they had discontinued.

The original proceedings were vacated by the subsequent action of the parties litigant. The time for opening a road must run from the final action of the tribunal having jurisdiction. While the result is in doubt and in controversy, neither the town is required to act nor are the county commissioners to intervene.

Exceptions overruled.

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

DARIUS GROSS *vs.* WARREN W. RICE.*

Penobscot. Opinion June 15, 1880.

R. S., c. 140, § 40, unconstitutional.

Section 40 of chapter 140 of revised statutes, which provides that no convict shall be discharged from the state prison, until he has remained the full term for which he was sentenced, excluding the time he may have been in solitary confinement for any violation of the rules and regulations of the prison, is in derogation of the constitutional provision that a man shall not be deprived of his liberty without due process of law, and is for that reason unconstitutional and void.

In an action by a convict against the warden of the prison for such over-detention, actual (but not punitive) damages are recoverable, notwithstanding the statute has never before been judicially declared to be unconstitutional.

Dissenting opinions by APPLETON, C. J., and BARROWS, J. SYMONDS, J. concurring.

ON FACTS AGREED.

Trespass to the person, and false imprisonment.

In a plea of the case, for that the defendant at said Thomaston, on the tenth day of March, 1873, with force and arms, unlawfully

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*This report was prepared by Hon. D. R. Hastings, late Reporter.

imprisoned the defendant in the state's prison in said Thomaston, and kept and held him imprisoned therein during all the time inclusive of that day and between that day and the sixteenth day of May, 1873, then next, making in all sixty-eight days, and subjected the plaintiff, during all that time, to hard labor, to the force and treatment of common convicts imprisoned in said prison, by means whereof the plaintiff was deprived of his liberty, prevented from attending to any business, or laboring for himself, or for others, for hire or compensation, as otherwise he would have done, and suffered great pain of body and distress of mind throughout all that long period of time, etc.

Writ is dated September 3, 1874.

Plea, the general issue, with the following brief statement of defence, to wit:

"That by the consideration of the justices of the Supreme Judicial Court of said State, begun and holden at Bangor, within and for the county of Penobscot, on the first Tuesday of February, A. D., 1869, Darius Gross, the plaintiff, then in the custody of the sheriff of said Penobscot county, convict of the crime of larceny on the twenty-third day of the term of the same court, being the first day of March, A. D., 1869, was sentenced to be punished by confinement to hard labor in the state prison, situated at Thomaston, in the county of Knox, for the term of four years, and to stand committed until he should be removed in execution of said sentence. And on said first day of March aforesaid, a warrant under the seal of said court was duly made out by the clerk thereof, addressed to the warden of said prison, wherein he is commanded forthwith to remove the said Darius Gross from the jail in Bangor in said Penobscot county, to said state prison, and there cause him, said Gross, to be punished by confinement to hard labor, pursuant to the sentence aforesaid, and conformably to the special provisions of law respecting the same.

"That on said first day of March aforesaid, and continuously thereafterwards, until and on the sixteenth day of May, A. D., 1873, and ever since the defendant was, and has been the warden of said prison.

"That said warrant, after it was so as aforesaid made out, was delivered to the defendant, and he as such warden, forthwith thereafter, to wit: on the ninth day of March, A. D., 1869, and before the time when, &c., in the declaration in said writ mentioned, by virtue thereof, caused the plaintiff to be removed from the jail at said Bangor to said state prison, and to be confined therein conformably to the command in said warrant, and the said sentence of the court, and made immediate return upon said warrant of the manner of executing it, and placed the same on file in his office.

"That the defendant as such warden caused the plaintiff to be punished by confinement to hard labor in said state prison by virtue of said warrant, pursuant to the sentence aforesaid, and conformably to the special provisions of the statutes respecting the same from the ninth day of March aforesaid, until the sixteenth day of May, A. D., 1873.

"That of the first four years of the plaintiff's said imprisonment, he was kept in solitary confinement, *one hundred and forty-one days*, and of the last sixty-eight days of his said imprisonment, three days as punishment for known and willful violations of the rules and regulations of said prison, duly established and then in force for the government of said prison and the discipline of its convicts, conformably to said rules and regulations and the statutes of the State, of all which the defendant made due record.

"The defendant as such warden, during all the time of the plaintiff's said imprisonment kept a record of the plaintiff's conduct and submitted the same with the scale of deductions to the Governor and Council, as required by sections 14 and 15, of chapter 140 of the Revised Statutes, and recommended, and the executive of the State granted, deductions from the plaintiff's said sentence, amounting in the whole to thirty days.

"The number of days to which the plaintiff was so as aforesaid in solitary confinement less the number of days allowed him as aforesaid for good behavior, amounted to *one hundred and fourteen days*, but by reason of a clerical error in computing the time, the plaintiff was discharged from his said imprisonment at the end of four years and *sixty-eight days*, to wit: on the sixteenth day of May, A. D., 1873.

"The imprisonment complained of in the plaintiff's said writ, was wholly during the time the plaintiff was so as aforesaid lawfully confined in said state prison, and was a part and parcel of such lawful imprisonment, and was lawful and justified by the laws of the state, especially by section 40, of chapter 140 of the Revised Statutes, upon the facts and authority above set forth."

The commitment of the plaintiff to the state prison was under the following warrant:

{ L. S. } "State of Maine. Penobscot, ss. To the warden of our state prison, in Thomaston, in our county of Knox, Greeting: Whereas by the consideration of our justices of our Supreme Judicial Court, begun and holden at Bangor, within and for the county of Penobscot, on the first Tuesday of February, in the year of our Lord one thousand eight hundred and sixty-nine, Darius Gross of Bangor, in the county of Penobscot, now in the custody of the sheriff of our said county of Penobscot, convict of the crime of larceny on the 23d day of the term of the same court, being the first day of March, in the year of our Lord one thousand eight hundred and sixty-nine, was sentenced to be punished by confinement to hard labor in said prison for the term of four years, and to stand committed until he should be removed in execution of said sentence.

"We therefore, command you, the said warden of our state prison, forthwith to remove the said Darius Gross from our jail in Bangor, in said county of Penobscot, to our said state prison in Thomaston, in said county of Knox, and that you there cause him to be punished by confinement to hard labor, pursuant to the sentence aforesaid, and conformably to the special provisions of law respecting the same.

"Witness, John Appleton, Justice of said court, at Bangor, this first day of March, in the year of our Lord one thousand eight hundred and sixty-nine.

E. C. BRETT, Clerk."

"Maine State Prison, Thomaston, March 9th, 1869. Pursuant to the within warrant, I have this day caused to be removed the

within named Darius Gross from the county jail in Bangor, to the Maine state prison at Thomaston.

WARREN W. RICE, Warden."

It was agreed that on the first day of March, 1869, the defendant was, and ever since has been, the warden of the Maine state prison; that the plaintiff was, on the first day of March, 1869, sentenced by said court to punishment by confinement to hard labor in the state prison for the term of four years; and to stand committed until he should be removed in execution of said sentence, and on the ninth day of March, 1869, was committed to said prison by defendant, as warden thereof, by virtue of the warrant of said court commanding him so to do; that during the first four years of plaintiff's said imprisonment, he was kept by defendant in solitary confinement, one hundred and forty-one days, and during the last sixty-eight days thereof, three more, according to a copy of the punishment record, kept by defendant at said prison, for the several offences, at the several times, and during the several periods specified therein,—said copy was put into the case, and made part of the facts agreed.

The printed rules and regulations for the government of said prison and its convicts, in force during the time of the plaintiff's said imprisonment, are made a part of the case.

The defendant submitted a record of the conduct of plaintiff, to the Governor and Council, as required by sections 14 and 15 ot c. 140, R. S., recommended, and the executive granted, deductions from plaintiff's said sentence, amounting in all to thirty days.

The plaintiff was discharged from his said imprisonment on the sixteenth day of May, 1873, at the end of four years and sixty-eight days, from the day of his said commitment.

If upon these facts the action is not maintainable, the plaintiff is to become non-suit. If it is, defendant is to be defaulted, and damages assessed by a jury.

A. Sanborn, for the plaintiff.

J. Hutchings, for the defendant, cited: R. S., c. 140, § § 13, 2, 35, 40; *Wellington's Case*, 16 Pick. 96; Opinion of justices,

13 Gray, 618; *Shirley* v. *Wright*, 2 Salk. 700; *Parsons* v. *Lord*, 3 Wils. 341, (1772); *Beach* v. *Furman*, 9 Johns. 229; *Washburn* v. *Belknap*, 3 Conn. 502; *Sessums* v. *Botts*, 34 Tex. 335; *People* v. *Salomon*, 54 Ill. 46; *Commonwealth* v. *McComb*, 56 Penn. stat. 436; *Steines* v. *Franklin Co.* 48 Mo. 167; *State* v. *Saline Co. Id.* 390; *Columbia Co.* v. *King*, 13 Fla. 451; *Same* v. *Davidson, Id.* 482; Laws 1824, c. 282, § 16.

PETERS, J. The sentence was for four years. For good conduct, the prisoner had credits which gave some deduction from the sentence. For bad conduct, he was in solitary confinement one hundred and forty-four days. The punishment in solitary confinement was at various times and for various causes. Among the causes were disturbance, laziness, insolence, noise, breaking rules of workshop, assault upon a fellow convict, disobedience, refusal to work, threats, spoiling work, and laughing and talking. He was not discharged, until he had served his sentence and sixty-eight days imprisonment additional thereto. This detention was in pursuance of section 40, c. 140, R. S., which provides that a convict shall not be discharged from the state prison until he has remained the full term for which he was sentenced, excluding the time he may have been in solitary confinement for violation of the rules and regulations of the prison. Is this section of the statute valid and constitutional? We think not.

By the declaration of rights in our State constitution, the accused, in criminal prosecutions other than cases of martial law and impeachment, has the right of a public trial by jury, and cannot be deprived of his life, liberty, property or privileges, but by the judgment of his peers or the law of the land. By the fourteenth amendment to the national constitution, no state shall deprive any person of life, liberty or property, without due process of law. It is not now worth while to discuss the effect of any verbal differences between the state and national prohibitions, as we feel clear that the clause in the national amendment is directly applicable to the question presented.

No one would for a moment deny the proposition, that a person cannot be taken to the state prison and detained there, as a punishment, without an accusation, trial by jury, conviction and

sentence. Nothing less than these forms would amount to due process of law, where an infamous punishment is to be inflicted. No one would deny that such an act, done by the State, would be in direct defiance of the constitutional amendment. But a man, lawfully imprisoned, is detained in prison beyond the term of his sentence, without any new accusation, trial and sentence as a justification therefor. Is not this detention a new imprisonment? Is there a difference whether the person is seized within or without the walls of the prison, to be incarcerated? Does not the constitutional inhibition in its terms apply as clearly and literally to this act as to the other? Suppose the statute was not in existence, and never had been passed. Would it be pretended that the warden would be justified in detaining a convict for a single day over his sentence? If he did, would not the act deprive the prisoner of his liberty without any process of law and without any legal excuse or justification whatever? The State orders it to be done. Does not the State then deprive the prisoner of his liberty without due process of law? Here, punishments are inflicted upon the prisoner during the term of his sentence; for solitary confinement is deemed a much severer infliction than hard labor. After his sentence has expired, he is imprisoned anew for sixty-eight days without a formal accusation, or trial or sentence by any court. It is clear that the imprisonment for more than the four years was not warranted by the sentence itself, nor could it be. A man cannot be sentenced for a crime or offence before he has committed any; not for an offence to be committed; not conditionally. The plaintiff was punished, after his term of sentence, for having been punished during the term. The detention was not as a punishment bestowed by the warden in the exercise of his discretion, but was one imposed by the legislature as a consequence of the warden's doings. In effect, the plaintiff was punished both during his term of sentence and after it, for the same offence. He was doubly punished for a violation of the rules and regulations of the prison. The very statement of the proposition would seem to be its proof. *Res ipsa loquitur.*

It is said that the warden must have the power to inflict punishments upon prisoners for the prison discipline. There can be no doubt of that. It is not to be denied, that the punishment of refractory convicts is a matter within the discretion of the warden, within reasonable limits. Nor is it denied, that the warden had the right to hold the convict in solitary confinement for the time and upon the charges that he did so hold him, during the term of sentence. We are of the opinion, that the warden had no authority to detain or punish him after his sentence had expired. It would be according to due process of law to do the one thing, and in defiance of it to do the other. It does not follow that because a warden may inflict some punishment, he may inflict any. Due process of law requires that a person shall not be subjected to an infamous punishment, which would be a confinement in the state prison, without a trial by jury and sentence by court. Here an infamous punishment was put upon the plaintiff without the order of court.

It is said that this convict has no cause to complain, because he was the instrument of his own misfortune, and could have avoided the additional imprisonment complained of by better behavior. Would that not be as true in the case of all criminals? However guilty and however much deserving punishment in the state prison, can any criminal be sent or be detained there without the ordinary proceedings in court? Is an unlawful imprisonment made lawful because the prisoner deserves imprisonment? It is true, that the prisoner has no cause to complain of the solitary confinement, nor does he. That he could have avoided, and has no remedy if he did not. He complains that, as a consequence of that punishment, he had imposed upon him another and additional punishment of an infamous character without a trial at law.

The common law requires that the punishment of persons convicted of crime shall be definite and certain. *Præmunire* was an exception, as for that offence a convict could be imprisoned during the pleasure of the king. The sentence must inform the convict as to the kind and duration of his imprisonment. This is too clear to need authority or argument. A few cases of interest

may be cited: *Washburn* v. *Belknap*, 3 Conn. 502; *Republic* v. *DeLongchamps*, 1 Dallas, 120; *Yates* v. *The People*, 6 Johns. 337; *Rex* v. *Hall*, 3 Burrows, 1637. But if this statute (sec. 40) is constitutional, then there can be no definite sentences awarded. The will of the warden would in effect control the maximum duration. It is plainly to be seen that, in this way, the warden could extend a punishment indefinitely. If he can prolong a sentence a day, he can a week, or a month, or even for years. And that too for transgressions not of an aggravated character. It should be noticed, that the operation of this statutory provision was to detain the convict in prison sixty-eight days for a long list of transgressions and delinquencies, which (the assaults excepted) could not by possibility be indictable offences. For instance, he is imprisoned for five days after his sentence expired for chewing wax and laughing upon an occasion before its expiration. He was in solitary confinement for three days, for a transgression committed after the expiration of his sentence.

What a wild field this idea of such unlimited power over a convict opens into! How uncertain and varying would be the results! How much would be made to depend upon the good or bad judgment of a warden! How much upon the whim or caprice, the passions and temper, not only of the warden, but of his agents and servants and employees! It is not an answer, that an appeal lies from the warden to the overseers. The convict is in no position to make an appeal. "Bondage is hoarse, and may not speak aloud," says the great poet. But it is as objectionable (constitutionally) for such power to be reposed in the hands of the board of overseers as in the warden's hands. A convict cannot be properly imprisoned by either after his sentence has expired. As said before, as far as certain kinds and amounts of punishments are concerned, the convict must submit to the exercise of a sort of judicial power in the warden and overseers, whether severely or clemently exercised. But when a punishment of an infamous character is to be imposed upon a prison-convict or any one else, the constitutional provision requires that such a deprivation of one's liberty shall only be authorized by proper proceedings in a

judicial court. Nothing else in such case can be regarded as due process of law.

It is contended that a warden may have the same control over a convict that a parent has over a minor child, or the teacher over the scholar, or the master over his apprentice; a private class of cases where restraints upon personal freedom are permitted by the law, as an exception to the general rule. (Cool. Const. Lim. * 342). Or perhaps it would be more correct to say, that it is due process of law for a parent to chastise his child, he being within a reasonable and limited extent the judge of the propriety or necessity of the punishment. But how does the comparison hold good between the authority exercisable in any of this class of cases, and the authority exercised in the case at bar? The warden detained the prisoner after the relation of warden and prisoner had legally ceased to exist. Can a father punish his son after the son has become of the age of twenty-one? Can a master for any purpose whatever control an apprentice after the term of apprenticeship has terminated? Can a teacher punish a scholar in any form after the term of school has finally closed? Can a father inflict an infamous punishment upon his minor son? On the contrary, for any abuse of his legal right of control, he will himself be liable even to criminal prosecution.

It does not militate against our proposition in this case, to admit that there are other instances where persons may suffer imprisonment where there has been no trial by jury. A man may be arrested upon mesne or criminal process and lodged in jail. That is for custody and not for punishment. So a person may be imprisoned for contempt of court without a trial by jury. But this is all by due process of law. The law of the land has ever permitted it. And there are other instances. But it does not follow at all from these or any other instances or illustrations, that the constitutional provision should not apply to the case at bar.

It is argued that the sentence was four years imprisonment at hard labor, and that the sentence had not expired at the end of the four years, because the labor had not been performed, the convict doing no work when in solitary confinement. But the

imprisonment is the primary purpose of the sentence. It is such hard labor as during the sentence can be obtained. But this literal construction does not aid the defendant's argument, for while there are to be four years of hard labor, there are to be but four years of imprisonment.

It is urged upon our attention that this statute is of ancient origin, existing in 1824. But the judicial opinion and the public sense were not so much awakened to the importance of the principle underlying this matter then as now. The fourteenth amendment, which is perhaps more definite and pronounced than the personal liberty clauses in the bill of rights in our State constitution, has been added since. Decisions, sustaining the constitutionality of certain statutes allowing summary proceedings, have been overruled since. See *Portland* v. *Bangor*, 65 Maine, 120, a case in its whole course of reasoning particularly applicable.

Dolan's Case, 101 Mass. 219, is relied on by the defendant. That case denies that a sentence is to be abridged by the absence of a prisoner who escaped and was retaken during his term of sentence. During his absence he was suffering no imprisonment. Here, while the convict was not at hard labor, he was suffering a severer punishment. That case differs much from this. *State* v. *Gurney*, 37 Maine, 156, and *Lord* v. *State*, *Idem.* 177, are much more like the case at bar. In those cases it was decided that the legislature could not provide that a greater penalty should be applied in an appellate court, in case of an appeal, than in the court below. See *Jones* v. *Robbins*, 8 Gray, 329.

In *Commonwealth* v. *Halloway*, 42 Pa. St. 446, it was held that a law like our own was unconstitutional "as interfering with the judgments of the judiciary." There, as here, the sentence was pronounced after the law was passed. The question presented was whether the act was binding to lessen a sentence for good conduct. The court says that "the discretion as to the length of a sentence is vested only in the judiciary," and adds: "Any interference with that sentence, except by a court of a superior jurisdiction, or by the executive power of pardon, would seem to be a prostration of that distribution of governmental functions which the constitution makes among three co-ordinate depart-

ments. In this view the act would be highly unconstitutional." We need not say as much in the discussion of the question presented to us. What we do say is, that under a sentence of four years a prisoner cannot be held longer than four years; that all punishments must be inflicted upon a convict during his term, and neither directly nor indirectly afterwards. Although the process authorized by the statute and prison rules for prison discipline, may be ever so just and humane, yet so far as punishment was imposed after (not during) sentence, it was not *the* process, not the due process of law demanded by the constitution.

A point is raised for the defence, that the warden should be protected, because the statute had not been declared unconstitutional when he acted under it. We do not comprehend the logic of a statute having effect as if constitutional, when not so; to be a law for one purpose and not another; a law for one man and not another. It must be either valid or invalid from the beginning, or from the date of the constitutional provision affecting it. Judge COOLEY says, (Const. Lim. *188), "when a statute is adjudged to be unconstitutional, it is as if it had never existed." Such is much the better opinion upon the authorities, and such has been the view of the question in the practice in this State. An unconstitutional law is not a law. It is null and void. The warden is only liable to the perils that more or less follow official stations. He had no warrant of court that could protect him. He is liable for the actual, not punitive, damages for the injury suffered.

WALTON, VIRGIN and LIBBEY, JJ., concurred.

DANFORTH, J., being a relative of the defendant, did not sit.

DISSENTING OPINIONS.

APPLETON, C. J. The plaintiff "was sentenced to be punished by confinement to hard labor," in the state prison for the term of four years, and the warden was ordered that he "there cause him to be punished by confinement to hard labor, pursuant to the sentence aforesaid, and *conformably to the special provisions of law respecting the same.*" For known and willful violations of

the rules and regulations of the prison he was kept in solitary confinement one hundred and forty-one days. He was allowed for good behavior, twenty-seven days, but owing to an error in the computation, he was detained in prison but four years and sixty-eight days—the time he was in solitary confinement for a violation of the rules and regulations being excluded from the full term of his sentence in pursuance of R. S., c. 140, § 40.

This suit is brought against the warden for his detention of the plaintiff, as required by § 40.

By R. S., c. 140, § 11, the inspectors of the state prison shall "establish such rules and regulations, consistent with the laws of the State, as they deem necessary and expedient for the direction of the officers, agents and servants of the prison in the discharge of their duties . . . shall establish rules for the government instruction, and discipline of the convicts and for their clothing and subsistence." These rules and regulations are to be laid before the Governor and Council, "who may approve, amend, or modify them, and make and establish such other rules and regulations consistent with the laws of the State, as they see fit; and the Governor shall communicate all rules and regulations, thus approved, to the next legislature," &c.

In pursuance of the authority thus given, rules and regulations have been established and approved. They are "consistent with the laws of the State. They must be stringent, else there could be no order nor discipline, but they are wise and humane. The prisoner who conforms has no cause of complaint. The prisoner who violates or disobeys them, will and should suffer the penalty of disobedience. These rules and regulations have the force and effect of law.

These rules and regulations to be of any avail must be enforced. How and by whom? By criminal proceedings before a magistrate? Must the warden or other officer on any infraction of the rules and regulations of the prison, enter a complaint before a magistrate, and process issue, and the convict under charge of an officer, or officers be brought before the magistrate and a trial had to determine whether the accused has been guilty of disobedience and misconduct? If found guilty, is he to have the right of

appeal and a trial by jury? The proposition is absurd. The convict is there for purposes of discipline within the authority and limitations conferred by the State.

Within the powers conferred by the statute, and the rules and regulations in conformity therewith, the authority of the warden is discretionary and despotic. Exceeding his authority he is liable to punishment. Within it he is to be protected. By § 13, "he may punish any convict for disobedience, disorderly behaviour, or indolence, as directed by the inspectors or prescribed in the rules and regulations, and shall keep a register of all such punishments, and the cause for which they are inflicted."

The warden has charge of the prisoners. "He shall inspect and oversee the conduct of the prisoners, and cause all the rules and regulations of the prison to be strictly and promptly enforced." Within a limited extent his power is and must be absolute. He is to determine if a rule or regulation has been violated. He must determine as a preliminary to their strict and prompt enforcement. There is no appeal from his determination; for he is to inflict the punishment consequent on his determination if a rule or regulation has been violated.

The check upon the warden is found in the record, he is required by § 14, to keep of the conduct of each convict, and which is to be reported by § 15, to the Governor and Council once in three months.

The inspectors by § 10, may "order such corporal punishment as they may deem necessary to enforce obedience, not inconsistent with humanity, and authorized by the rules and regulations established for the government of the prison." In the rules and regulations furnished us, we find no order for corporal punishment. The warden is therefore left to the authority given by § 2, that "solitary imprisonment may be used as a prison discipline for the government of the convict." By § 35, the diet of the convict is prescribed when solitary imprisonment "is inflicted for the violation of the rules and regulations of the prison."

The punishment inflicted was for a violation of the rules and regulations of the prison. It was inflicted by an officer, clothed with authority so to punish. It was in accordance with the statutes

of the State. It was a lawful punishment, and one appropriate to the offence.

By § 40, no convict is to "be discharged from the state prison until he has remained the *full* term for which he was sentenced . . . excluding the time he was in solitary confinement, for any violation of the rules and regulations of the prison, unless he is pardoned or otherwise released by legal authority." The section assumes that rules and regulations may be made, that solitary confinement may be a punishment for their violation, and that time so spent shall not be deemed part of the *full* term of the convict.

The convict was sentenced for larceny. His sentence was subject "to the special provisions of law respecting the same." It was incident to and part of the sentence that he should be subject to the rules and regulations of the prison, and liable to the penalties for their violation. It is his own act that he violates them. If the rules and regulations, and the statute authorizing them are constitutional, then is the punishment inflicted for their violation legal. If so, then the legislature may well say that time spent for that punishment shall not count on the time for another and different punishment. Solitary confinement for violation of the rules and regulations of the prison, was the punishment for such violation. It was not for or on account of the larceny for which he was sentenced.

The punishment for violation of prison discipline must be within the walls of the prison. It cannot be elsewhere. The convict is not at hard labor. He is suffering punishment for an omission or commission of some act, which was a part of the sentence imposed, that he should do, *i. e.* obey the prison rules.

It is urged that the sentence must be fixed and definite. True. It is fixed and definite. In the present case it was four years. The time is certain. The time to be deducted for solitary imprisonment as a punishment is certain. In *Clerk* v. *Commonwealth*, 21 Grattan, 777, the plaintiff escaped from jail before the expiration of his sentence. After its expiration he was indicted for the escape. It was held that he was to be held in prison for the time he was out when he escaped. It was argued that it

would be dangerous to give a man ministerial power to prolong the imprisonment for the purpose of obtaining compensation for so much of it as may have been avoided by an escape. "But," says the court, "there would be no difficulty in ascertaining the measure of such compensation. The jailer would know the precise period of the escape, and the recapture; and would act at his peril. If he erred, the party aggrieved would have a prompt and efficient remedy by *habeas corpus*, in which the facts on which the legality of the act of the jailer would depend, could be easily and clearly ascertained." If during his term of punishment a prisoner escapes, he may be retaken after the term, and held to answer for the residue of the time for which he was imprisoned. *Haggerty* v. *The People*, 6 Lansing, (N. Y.) 332. So if a prisoner under sentence, be imprisoned for a term expressed only by the length of escapes during the term, the period during which he remains at large does not abridge the term of imprisonment, which remains for him to suffer before fully performing the sentence. *Dolan's Case*, 101 Mass. 219. It is obvious that so far as regards definiteness and certainty of sentence, it is equally certain whether the absence from hard labor, which was the sentence, arises from a disobedience of prison rules, and the consequent punishment, or from an escape. In either event the time so lost can be deducted without impairing the definiteness of the sentence.

There must be punishment for the violation of prison rules. Nobody supposes that uttering moral platitudes to convicts, will be very efficacious in its effect on their conduct. Liberty is given under certain conditions to punish informally. Authority to inflict solitary confinement is conferred. It is a part of the necessary discipline of the prison. One so imprisoned is not at hard labor. He is not punished for the offence for which he was committed. His confinement is for another offence. The time when not serving in execution of his sentence is time lost, equally, whether the absence from labor arose from an escape or from the punishment consequent on disobedience. In either event it is the consequence of his own acts, and the time spent as a punishment

should not be allowed to do double service as a punishment at one and the same time for two distinct offences. As was said by MONCURE, P., in *Clark* v. *Commonwealth*, "the two offences are distinct, and each is subject to its appropriate punishment."

The plaintiff was sentenced for larceny. His sentence was to be executed, subject to the laws of the State and the rules and regulations of the prison. While undergoing his sentence he violated one of the rules and regulations prescribed. The legislature say, that the time of the prisoner when suffering imprisonment as and for a violation of prison discipline—as disciplinary punishment—shall not be allowed as part of the term of his original commitment. But if the warden had the right to impose the punishment then there can be no valid reason against the legislative prohibition of its allowance as part of the term of commitment.

It was held in *Commonwealth* v. *Johnson*, 42 Penn. 446, that an act allowing deduction from the term of imprisonment on account of good conduct was unconstitutional, as interfering with the judgment of the judiciary. But the case is not applicable. The section under consideration does not enlarge the time of the prisoner's sentence. It merely gives effect to the rules and regulations established for the promotion of prison discipline. "The danger," observes WOODWARD, J., in the case cited, "is not in the direction of a too vigorous punishment of perverse criminals, but rather to letting of the guilty go unwhipped of justice."

It may be urged that officers may err, be oppressive, tyrannical and abusive. That may all be. But if the argument is good, it tends to the destruction of all government, for there is no government and no officers under any government, of whom possible error and oppression may not be predicated. But is there then to be no government, and if a government are there to be no officers, because they may abuse their trusts? Governments cannot be administered without committing powers in trust and confidence.

The abuse of a trust is no argument against the existence of trusts, but it is a good reason for the punishment of one who abuses a trust. So here the warden is punishable for a violation of law.

It is begging the question to say the prisoner is held beyond his term. The time spent as a punishment for violation of prison rules is not to be counted as part of the term, during which, he was to be at hard labor. That excluded from the computation, he is only held for the term of commitment.

It all comes back to this: Has the State a right to prescribe rules and regulations for the government of its state prison, to entrust the warden with power to determine their violation, and to impose, within the statute, the punishment for such violation? If so, there would seem to be no infringement of the constitution in the enactment that time spent in confinement for disobedience of lawful rules, by way of prison discipline, should not be allowed as part of the term which the prisoner is required to serve.

By c. 282, § 16, of the acts of 1824, it was provided that time spent in solitary confinement for any misconduct or violation of the regulations of the prison, shall not be deemed a part of the time for which he was sentenced. This provision has been preserved in all the revisions of our statutes. Its constitutionality has never been denied or questioned. It has been in force and acted upon for more than half a century. When an act has been passed with all the forms of law, the presumptions are in favor of its constitutionality, and no court will declare it void, unless its invalidity is beyond all reasonable doubt. Such is not the case with the statute under discussion.

There have been two revisions of the statutes in which Chief Justice MELLEN, and Chief Justice SHEPLEY took part, and the statute, under consideration, received their sanction by its re-enactment in the several revisions over which they presided.

To pronounce a law of a State unconstitutional, demands the greatest consideration; and such a law should never be so denominated, if it can upon any other principle be correctly explained. *Fletcher* v. *Peck*, 6 Cranch, 87; *Butler* v. *Pennsylvania*, 10 How. (U. S.) 402.

SYMONDS, J., concurred.

BARROWS, J. I concur in the opinion of the Chief Justice.

The idea that a general law of the State, allowing a convict in the state prison credits for good behavior in reduction of the term of his imprisonment, and excluding in the computation of his term the time that he is in solitary confinement for offences against the rules and regulations of the prison, is unconstitutional, "as interfering with the judgments of the judiciary," while it is the strongest ground that can be taken against the validity of the law, and hence is made the basis of the decision of the learned court in Pennsylvania, in *Com.* v. *Halloway*, 42 Penn. St. 446, does not seem to me to be well founded.

The court imposes, and the convict receives his sentence, subject to such modifications as are created by existing laws.

The court acts in view of these very provisions, contemplating their probable effect upon the practical execution of the sentence. The convict receives the sentence which deprives him of his liberty, and "subjects him to an infamous punishment," (a sentence imposed not merely for the protection of the community against his lawlessness, but for his own possible reformation, and probable restraint from other crimes,) *with all its incidents*, one of which is his necessary temporary subjection to the judgment of the warden, in case of his offending against prison discipline. If he suffers for such offences, he suffers "by due process of law," which from the necessity of the case commits to the warden, jurisdiction over him and them in elaborate and carefully guarded provisions, which give the convict as ample protection against tyranny and injustice on the part of the warden, as the circumstances permit. See R. S., c. 140, *passim*, and particularly § § 9, 11, 13, 15.

Yet, as he is suffering for new offences, other than that for which his sentence was imposed, the law excludes "the time he is in solitary confinement for any violation of the rules and regulations of the prison."

Could the legislature give the warden this jurisdiction, authorize him to punish these offences against prison discipline, and declare that the time so consumed should not be reckoned in computing the term of the sentence? It is a power which they assumed early in the history of the State, executed elaborately, and for more than fifty years it was not questioned.

The legislature seem to have supposed that for the proper government of those committed to his charge the warden must have jurisdiction over such offences against good order, and a discretionary power, regulated as we have seen by statute, and exercised more or less with the advice and supervision of the inspectors, to maintain order and punish by reasonable penalties any infractions of the prison rules; and they gave him such power and jurisdiction accordingly.

Force, even to the extent of wounding and killing, may be used to suppress resistance to authority, and compel obedience to the lawful commands of the officers, and the officers are justified in employing it, § § 36, 37. Are these provisions unconstitutional also? Life has as many constitutional safeguards as liberty. No man should be deprived of either, except in strict accordance with the law of the land.

The legislature seem to have thought that the government of convicts in the state prison might require other methods than those applicable to the community at large. Corporal punishment "not inconsistent with humanity," may be inflicted upon those confined there, under the direction of the inspectors. § 10. The legislature recognized the obvious fact that duties devolve upon the warden of the state prison, which differ somewhat from those of the superintendent of a Sunday school, and they invested him with the powers requisite to enable him to discharge those duties, such powers as men in ordinary life and society do not and should not have.

There are, however, other positions in life where the safety and advantage of all concerned require, and the law accordingly gives, a power to restrain personal liberty, and even to inflict reasonable and salutary punishment, without the formalities of a legal trial, pleading, evidence, conviction, and sentence. Sailors on shipboard, lunatics in asylums, children in families and schools are liable to be dealt with in ways which might be caviled at as deprivations of their liberty and violations of their personal privileges, without the judgment of their peers and due process of law.

But who would think of objecting on constitutional grounds to the just and reasonable exercise of the power vested in shipmasters and others in like responsible positions *ex necessitate*, or of proclaiming that the constitutional rights of citizens are thereby infringed? The rightfulness of their jurisdiction and discretionary power to hear, decide, command, and compel obedience, in fine to execute (even at the expense of confinement, hard fare and stripes to recusants), all that is reasonably necessary and desirable for the general safety and well being of the persons and things under their charge, is as yet unquestioned. I see no reason to hold that convicted criminals have rights any more sacred than those whom the law subjects to the authority of men having the control of them for special purposes other than the punishment of crime.

Unfortunately the noisy and dogmatic philosophy of to-day has spawned many "go as you please" notions, the direct tendency of which is to sap the power of any, even the most liberal, government in the world to protect the peaceable and orderly, and to restrain the vicious from developing, according to their own perverse wills and base instincts, into enemies of society; until the real danger is that an exaggerated tenderness for the rights of criminals may make them the dominant class, before whose unscrupulous audacity the rights of others shall give way. None so ready as they to invoke strict constructions of the constitution to shield them from the just penalties of violated laws.

In various particulars, it seems to me clear, that as a *necessary incident* to the punishment of his crime, the convict incurs a liability to summary punishment for other minor offences, by those having him in charge, a liability to which the citizen is not and ought not ordinarily to be subjected. To this extent, from necessity, and, in one sense, as a part of his punishment, the imprisoned convict has temporarily forfeited the ordinary rights of citizenship, and subjected himself to those laws that are specially enacted for the government and regulation of the state prison. And when he suffers under them, he suffers "by due process of law."

The reasoning in the majority opinion seems to proceed mainly upon the idea that punishments under the direction of the warden

for the breach of prison regulations, are not "by due process of law."

Why not, as much as a punishment for a contempt of court? From the nature of the case, and the necessities of the position, the warden, like a judge in a case of contempt, must have the jurisdiction which those statutes give him. Without the power to maintain good order by appropriate penalties for the breach thereof, it would be impossible for the officers to conduct the work of the prison, or even to keep the convicts in security.

From the necessity of the case, too, the penalties for disorderly conduct, must be inflicted within the prison walls. But the warden does not confine the convict in the state prison for the misdemeanors which he there commits, as the majority opinion seems (erroneously, I think,) to assume; for he is already there, under the sentence of the court. If the legal punishment of his bad conduct practically results in lengthening his detention, it is none the less by force of law, and in due process of law, the law which determined before the sentence was imposed, how its term should be computed.

I do not see that any constitutional rights of convicts require us to deprive them during the term of their imprisonment of all hope of bettering their condition by good behavior, or of all restraint from bad behavior in prison by fear of the consequences. The law seems to me to be a beneficial one, and to put prisoners more upon the footing of those who are not past all hope of redemption; and in most cases it operates to abridge the term of imprisonment. It is the prisoner's own fault if it does not.

At least, the doubt whether the legislature have exceeded their constitutional power in this instance, ought to restrain us from pronouncing the law invalid.

WILLIAM H. BISHOP *vs.* WILLIAM W. ROWE.

Penobscot. Opinion June 17, 1880.

Promissory note. Indorsement. Payment.

A note made payable to the maker's own order, and indorsed by him, thereby becomes payable to the bearer.

When a third person, a stranger to such a note, gives the holder his written obligation, in consideration of the discounting of the note "to be holden precisely the same as if I had indorsed said note," he does not thereby become a party to the note; and, upon non payment according to its terms by those liable upon the note, if he pay it, in pursuance of such written obligation, he is entitled to the note undischarged, and to maintain an action on the same in his own name.

ON FACTS AGREED, which sufficiently appear in the opinion.

Wilson & Woodward, for the plaintiff, cited: *Bosauquet* v. *Dodman*, 2 Eng. C. L. 11; *Goodwin* v. *Cremer*, 83 Eng. C. L. 756; 1 Pars. Contr. 218, 284; *Pray* v. *Maine*, 7 Cush. 253; *Cochrane* v. *Wheeler*, 7 N. H. 202; *Davis* v. *Stevens*, 10 N. H. 186; *Hopkins* v. *Farwell*, 32 N. H. 425; *Guild* v. *Eager*, 17 Mass. 615; *Godson* v. *Richards*, 25 Eng. C. L. 387; *Deacon* v. *Stodhart*, 38 Eng. C. L. 291; *Pollard* v. *Ogden*, 75 Eng. C. L. 459; *Jones* v. *Broadhurst*, 67 Eng. C. L. 173; *Eastman* v. *Plummer*, 32 N. H. 238; 2 Pars. Notes & Bills, 216.

C. Record and *H. C. Goodenow*, for the defendants. The plaintiff was no party to this note. He became liable to the holder, by virtue of his agreement. But that was solely between him and the holder. There was no privity of contract between him and the maker or indorser of the note. The defendant did not request him to pay this note, and when a person not being a regular party to a note, pays it for the honor or credit of the maker or any of the indorsers, without request, he does not thereby acquire a right to repayment from any of the prior parties. *Smith* v. *Sawyer*, 55 Maine, 139; *Willis* v. *Hobson*, 37 Maine, 403. Nor can the plaintiff prevail as a purchaser of this note. There is no pretense that he bought it. He paid it, and took it up.

DANFORTH, J. It is undoubtedly true as claimed in defence, that the plaintiff in this case seeks to recover the amount due upon the note described in the declaration, for his own benefit and as the owner of the note. He is therefore entitled to prevail in his suit only upon showing a title in himself. This title is denied and upon that denial the defence rests.

The note is payable to the maker's own order, by him indorsed and also indorsed by the defendant. Hence the note was payable to the bearer, and in this condition was discounted by the Farmers' National Bank for the maker and became its property. It was then competent for the bank to give a good title to the note to whomsoever it pleased, merely by delivery, with or without a consideration, and as no defence but a want of title is set up, any person to whom such note shall be so delivered may maintain an action upon it in his own name and for his own benefit. In this case the plaintiff has possession of and produces the note with no indication of payment upon it. This is *prima facie* evidence of title and sufficient for the maintenance of the action unless overcome by the proof offered in defence.

This proof it is contended sufficiently appears from the statement of facts which are in the case. From that we learn that after the note was discounted, the plaintiff gave the bank a written obligation, in consideration of the discounting of the note, "to be holden precisely the same as if I had indorsed said note." We further find from the same statement, that when the note became payable it was not paid by either promisor but after certain preliminary steps supposed to be made necessary by the terms of the written agreement, it was paid and taken up by this plaintiff "in pursuance with his obligation in writing." Such payment and taking up of the note, it is claimed, was a discharge and not a purchase of it. If the plaintiff had been under obligation to either party liable, to pay the note, this interpretation would clearly have been the reasonable, if not the legal one. But he was not. He was then no party to the note, nor did he pay it at the request of, or for the benefit of those whose duty it was to pay it. He was a stranger to the note and paid it for no reason except his obligation to the bank, and in pursuance of the writing he had given.

In *Pacific Bank* v. *Mitchell*, 9 Met. 297–302, it was held that by a payment under similar circumstances, the bill was not discharged, but the plaintiffs "became *bona fide* holders of it." See also, *Pollard* v. *Ogden*, 75 Eng. Com. Law, 459.

This view is still further confirmed by the terms of the obligation. It was made in relation to the note, but not to the prior parties. They had no claims under it, nor did it in any way affect their rights. It was optional with the plaintiff to impose such terms upon the bank as he saw fit. The bank was the owner of the note which was payable to bearer and therefore had the same right to sell the note as to discharge it, upon payment by a stranger. Under these circumstances the plaintiff assumed the obligation of an indorser only. This, though it did not technically make him an indorser, as he was not then an indorsee, so far as the bank is concerned, gave him a right to all the benefits growing out of such a relationship to the note, as well as an assumption of its liabilities, and he must have so understood and intended the contract. On the other hand, the acceptance of such an agreement by the bank, imposed upon it a moral if not a legal obligation to give the plaintiff the benefits of an indorser, while claiming his liabilities as such. Hence, the effect of the payment to the bank depending upon the intention of the parties to it, we are necessarily brought to the conclusion that their purpose was to preserve the note and not to discharge it. Thus the statement of facts confirms the *prima facie* case made for the plaintiff by his production of the note instead of overcoming it.

Judgment for the plaintiff for the amount due on note.

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

DORA GARDINER, Libelant, *vs.* FRANK H. GARDINER.

Piscataquis. Opinion June 24, 1880.

Change of a writ before service. Amendment of the date of a writ.

After the time for the service of a writ, for the return term, has expired, and no service has been made, the return day may be changed to the next succeeding term.

An amendment substituting the real for the apparent date of a writ may be allowed in the discretion of the court.

ON REPORT.

LIBEL FOR DIVORCE inserted in a writ.

The presiding justice overruled a motion to dismiss, and granted leave to amend the date of the writ. The facts sufficiently appear in the opinion. It was agreed if the rulings of the presiding justice were sustained, that the case is to stand for trial, otherwise it is to be dismissed.

Henry Hudson, for the libelant.

V. A. & M. Sprague, for the libelee.

VIRGIN, J. The writ was originally dated August 18, and made returnable to the next term thereafter—the second Tuesday of September, following. After the time of service for that term had expired, the libelant, learning that the writ had not been served, caused the return day to be changed to the next succeeding (February) term. He might properly have changed the date to the time when the change in the return day was made, but did not; and the writ having been seasonably served after the alteration of the return day, was entered bearing its original date. The real date of the writ was no longer August 18, but September 27—when the alteration was made; and the presiding justice properly exercised his discretionary authority by allowing the apparent date to be amended by substitution of the real date.

Action to stand for trial.

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

HANNAH MOULTON *vs.* INHABITANTS OF SCARBOROUGH.

Cumberland. Opinion June 28, 1880.

Town — liable for negligence of agents. May carry on a poor farm, and keep live stock thereon. Demurrer.

A town, lawfully owning and managing property for purposes of gain, incurs the same liability for the negligence of its agents and servants in its management as persons.

A town may lawfully own and carry on a farm, on which to keep and support its poor, and employ such of them as are able to labor. This power carries with it the power to stock it, and manage it for purposes of gain, in a manner comporting with the ordinary management of such property among farmers. This embraces the raising of cattle, horses, swine and sheep; and for the propagation of sheep, it may lawfully own and keep a ram. For the proper keeping and restraining of it, when kept for such purpose, it rests under the same liability as persons; and if the ram is vicious and known to be by the town, and by reason of the negligence of the servants of the town it damages any person, the town is liable.

ON EXCEPTIONS.

This was an action of the case, for that the said defendants at said Scarborough, on the twenty-ninth day of December, A. D. eighteen hundred and seventy-seven, and for a long time prior thereto, were the owners and possessed of a certain ram, of vicious disposition and accustomed to attack and butt persons, all which was then and there well known to the defendants; yet the defendants neglecting their duty in the premises, and not exercising proper and suitable care and restraint over said ram, carelessly and negligently, on said twenty-ninth day of December, allowed him to be loose and run at large, to the danger of the citizens of the State; and being so wrongfully and negligently at large and without any keeper, or other restraint said ram on said day came upon the premises of one Henry Moulton in said Scarborough, where the plaintiff then lawfully was, and while she was in the front yard of said Henry's premises and near the house, and in the exercise of due and proper care, said ram suddenly attacked and struck the plaintiff with great force and threw her violently upon the ground, breaking her left hip, and greatly jarring and bruising her whole person, by reason of which the plaintiff has ever since been

confined to her bed, and has constantly suffered great pain, and been put to great expense for doctoring and nursing, and been unable to do work as she formerly had done; and is not likely ever to recover from said injury. Whereby an action hath accrued to said plaintiff to have and recover of said defendants, compensation for her said injuries, which she alleges is.

The defendant demurred to the declaration, and the same being joined, it was overruled *pro forma*.

S. C. Strout and *H. W. Gage*, for the plaintiff, cited: *Marble* v. *Ross*, 124 Mass. 44; *Jewett* v. *Gage*, 55 Maine, 538; *Woodcock* v. *Calais*, 66 Maine, 236; *Hawks* v. *Charlemont*, 107 Mass. 414; *Newert* v. *Boston*, 120 Mass. 338; *C. & O. Canal* v. *Portland*, 62 Maine, 504.

A. F. Moulton, for the defendants, contended that: —.

1. A town is a *quasi* corporation, with powers and duties limited and defined by statute, and, in general, no right of action exists against it unless given by statute.

2. A town cannot own property, except when necessary to aid in the performance of duties imposed upon it by law. For a town to be "the owner and possessor of a ram," otherwise than in the line of its statutory duties, is *ultra vires*.

3. In the performance of its statutory duties, a town is not liable to an individual for negligence, and no action can be maintained unless allowed by statute.

And he cited: *Hooper* v. *Emery*, 14 Maine, 377; *Westbrook* v. *Deering*, 63 Maine, 231; *Hamilton Co.* v. *Mighills*, 7 Ohio St. 109; Dillon on Mun. Corp. § 766 *et seq.*; Shearman & Redfield on Negligence (2d ed.), § 118, and cases cited; *Gallatin* v. *Loucks*, 21 Barb. 578; *Russell* v. *Men of Devon*, 2 T. R. 667; *Mitchell* v. *Rockland*, 52 Maine, 118; *Thayer* v. *Boston*, 19 Pick. 511; 66 Maine, 314; *Harvey* v. *Rochester*, 35 Barb. 177; *State* v. *Great Works*, &c. 20 Maine, 41; *Cushing* v. *Bedford*, 125 Mass. 526; *Rounds* v. *Bangor*, 46 Maine, 541; *Small* v. *Danville*, 51 Maine, 359; R. S., c. 3, § 35; 29 Conn. 363; *Hood* v. *Lynn*, 1 Allen, 103; *Girard Will Case*, 2 How. 127; *Jackson* v. *Hartwell*, 8 Johns. 330; 2 Kent's Com. 283; *Sutton* v. *Cole*, 3 Pick. 232; *Worcester* v. *Eaton*, 13 Mass.

378; *McCarty* v. *Orphan Asylum*, 9 Cowan, 437; *Mayor* v. *Gloucester*, 1 H. L. 285; *Mersey Docks* v. *Gibbs*, Law Rep. 1 H. L. 93, 119; (11 H. L. 713); *Jones* v. *New Haven*, 34 Conn. 1; *Hill* v. *Boston*, 122 Mass. 344; *Mills* v. *Brooklyn*, 32 N. Y. (Appeals) 489; *Eastman* v. *Meredith*, 36 N. H. 284; *Bigelow* v. *Randolph*, 14 Gray, 541; *Walcott* v. *Swampscott*, 1 Allen, 101; *Morgan* v. *Hallowell*, 57 Maine, 375; *Dayton* v. *Pease*, 4 Ohio St. 80; Angell & Ames on Corp. (9th ed.) § 629.

LIBBEY, J. This case comes before us on general demurrer to the declaration. It is for negligence of the defendant in not taking proper care of and restraining a vicious ram, owned and kept by the town, by reason whereof the plaintiff was attacked by the ram and seriously injured.

It is not claimed in support of the demurrer that the declaration is defective; but it is contended in behalf of the defendants, that the town had no legal authority to own and keep a ram; that the act was *ultra vires*, and that, therefore, the town is not liable.

It is admitted, however, by the defendants' counsel, that if the town could legally own and keep the ram for any corporate purpose, for profit and gain, then it rests under the same liability as a person or private corporation for its proper care and control. This is the well settled rule of law. *Small* v. *Danville*, 51 Maine, 359; *Woodcock* v. *Calais*, 66 Maine, 234; *Oliver* v. *Worcester*, 102 Mass. 489; *Eastman* v. *Meredith*, 36 N. H. 295; *Mersey Docks Trustees* v. *Gibbs*, 11 H. L. Cas. 687; S. C. Law Rep. 1 H. L. 93; Dillon on Mun. Corp. § 780, and cases cited in note.

By the statutes of this State it is the duty of a town to support paupers having a legal settlement therein. It is not its duty to own and carry on a farm on which to keep and support its poor, but it may lawfully do so if it see fit; and it may employ on such farm all its paupers able to labor. The power to own and carry on a farm for such purpose carries with it the power to stock it and manage it for purposes of profit in a manner comporting with the ordinary management of such property among farmers. This embraces the raising of cattle,

horses, swine and sheep; and for the propagation of sheep a town may lawfully keep and own a ram. If it does so it is not done in the performance of a public duty enjoined upon it by law, but as a voluntary corporate act, as a part of its system for the most economical support of its poor. For all matters connected with the management of the farm by its agents and servants; for the proper keeping and restraining of all domestic animals kept upon it by its authority for purposes of profit, it undoubtedly rests under the same liability as persons.

Exceptions overruled.

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

REUBEN B. DUNN *vs.* NATHAN WESTON and another.

Kennebec. Opinion June 28, 1880.

Accommodation note. Liability of maker. Transfer by treasurer of savings bank.

The maker of a note payable to a savings bank for the accommodation of a third party to enable such party to raise money thereon, without restriction or limitation as to its use, is liable on the same to one, who, on its delivery by the party to be accommodated, has advanced the amount due and the money has been appropriated to the purpose for which the note was given.

The note being received, the surrender of the first note is a sufficient consideration for a new note similar in form.

The indorsement by the treasurer of the savings bank passes the title.

ON REPORT.

The facts are stated in the opinion.

Foster & Stewart, for the plaintiff, cited: Rule 10, S. J. C.; 3 Kent's Com. 105, 106, 152; 2 Parsons, Notes & Bills, 27, 28, 445, 204; *Clinton Bank* v. *Ayres* 16 Ohio, 282; *Elliot* v. *Abbot*, 12 N. H. 549; *Cross* v. *Rowe*, 2 Foster, 77; 61 Maine, 512; 1 Parsons, Bills & Notes, 226; *McGuire* v. *Godsby*, 3 Call. 234; 5 Wend. 49; 37 Maine, 442.

Orville D. Baker, for the defendants.

The treasurer of a saving bank has no right, *virtute officii*, to transfer title to paper never negotiated by the bank and outside of the ordinary course of business. For this he must have special authority, which cannot be implied from the facts in this case. *Chase* v. *Hathorn*, 61 Maine, 513.

This was an accommodation note purely, and the plaintiff knew it, and that it was made for negotiation at a particular bank, hence he could acquire no right of action against the makers. 2 Daniels on Neg. Inst's, § § 1190, 1332, 1328.

Both defendants stood in the light of sureties, and entitled to all the defences of sureties. Brandt on Suretyship, § § 17, 95; *Lime Rock Bank* v. *Mallett*, 34 Maine, 547; *Cummings* v. *Little*, 45 Maine, 183; *Knox Co. Bank* v. *Lloyds*, 18 Ohio stat. 353.

And it is well settled that where a note is made payable to a particular person, but is purchased by a third person, not the payee, with the knowledge that a signer of the note is surety only, the contract signed is never completed and the note is void as to such sureties and accommodation makers. *Granite Bank* v. *Ellis*, 43 Maine, 367; *Showhegan Bank* v. *Baker*, 36 Maine, 154; *Manufacturers' Bank* v. *Cole*, 39 Maine, 188; *Prescott* v. *Brinsley*, 6 Cush. 233; *Allen* v. *Ayres*, 3 Pick. 298; *Bank* v. *Ayres*, 16 Ohio stat. 283; *Russell* v. *Ballard*, 16 B. Mon. (Ky.) 201.

APPLETON, C. J. This is an action against the defendants on a promissory note for $5000, dated June 17, 1874, payable in four months, to the Waterville Savings Bank or order, and indorsed by bank to the plaintiff.

The following facts appeared in evidence:

On February 17, 1874, the defendants made their promissory note to the Waterville Savings Bank, for five thousand dollars on four months. The note was given for the accommodation of the Somerset Railroad Company, but that corporation was not a party to it. The defendants, one of whom was a director of the railroad company, signed the note without any consideration to enable the railroad company to raise money, the company pledging $5500 of its bonds as collateral and its officers

agreeing to save the defendants harmless. The note was offered to the Waterville Savings Bank, but they declined taking it because not then in funds but agreeing to discount it, when in funds.

The note not being taken by the bank, the plaintiff with a full knowledge of the purpose for which the note was given, discounted the note, receiving the $5500 of railroad bonds at the same time as collateral security. The money thus advanced, was paid to the Somerset Railroad Company, for whose accommodation the note had been given.

The plaintiff retained the note and bonds in his possession, until July 15, 1875, when he negotiated a loan of $5000 for himself, pledging as collateral the note of Flint & Weston, $5500 of the railroad bonds before mentioned, and $5000 of their bonds belonging to himself.

When the plaintiff negotiated his loan, the Flint & Weston note was overdue. At the instance of the bank, that note was renewed by the one in suit, which was left as collateral in place of the original. The note not being paid at its maturity, the plaintiff paid his note and the bank indorsed the note in suit and surrendered it to him with the bonds, which had been left in their possession as collateral.

The note first given was an accommodation note for the purpose of enabling the Somerset Railroad Company to raise money. No limitation or restriction was placed upon its disposition. The Somerset Railroad Company was no party to the note. The defendants signed as principals and they must be so regarded. They did not sign as sureties or indorsees nor can they claim to be treated as such. The plaintiff took the note in good faith and paid its full value. The funds he advanced upon the note were appropriated to the purpose for which it was given. To the defendants, it was immaterial by whom the funds were advanced on their note. Their liability was none the greater because advanced by the plaintiff, than if by the payee.

The question then is, are the makers of the note in suit liable thereon?

The defendants in the first note signed by them, held themselves out as makers, not as sureties. They gave an accommodation note on which money was to be raised. "The maker of an accommodation note cannot set up the want of consideration as a defence against it in the hands of a third person, though it be there as collateral security merely. He, who chooses to put himself in the front of a negotiable instrument," observes BLACK, C. J., in *Lord* v. *Ocean Bank*, 20 Penn. 384, "for the benefit of a friend, must abide the consequence and has no more right to complain, if his friend accommodates himself by pledging it for an old debt, than if he had used it in any other way. This was decided in 3 Barr. 381, in a case resembling the present. Accommodation paper is a loan of the maker's credit, without restriction as to the manner of its use." In *Bank of Newbury* v. *Rand et al.* 38 N. H. 166, the facts were somewhat like the case at bar. Then the defendants, for the purpose of raising money for the use of a railroad, signed a note payable to a bank and delivered it to an agent to procure it to be discounted, but the bank refusing to advance the money, the agent obtained a larger sum of other persons upon the notes of the corporation, and its directors, and pledged the note of the defendants with the bonds of the corporation, as collateral security, and the money was appropriated to the use of the road. *Held*, that the notes of the corporation not being paid, a suit could be maintained on the note of the defendants, in the name of the bank for the benefit of those who advanced the money. "The principle of the case is this," observes EASTMAN, J., "that when a note is made to raise money, it does not change the liability of the parties to the note that the money is advanced by a third person, instead of the payee. In the case just cited as in the case at bar, no restriction was made upon the use of the note. These views are sustained in *Elliot* v. *Abbot*, 12 N. H. 549; *Cross* v. *Rowe*, 22 N. H. 77; *Hunt* v. *Aldrich*, 27 N. H. 31; *Bank of Chenango* v. *Hyde*, 4 Cow. 567; *Bank of Rutland* v. *Bush*, 5 Wend. 66. "He lent his notes," observes WOODRUFF, J., in *DeZeng* v. *Fyfe*, 1 Bosworth, 336, "for the very purpose of enabling the payee to use his credit in any manner which the

exigencies of their business required or made convenient to them. The notes were used accordingly." The signers were held liable notwithstanding the notes were pledged as collateral for an antecedent debt. In *Robbins* v. *Richardson*, 2 Bosworth, 253, WOODRUFF, J., uses the following language: "We regard it as fully settled, that, when a note is made for the accommodation of a payee and delivered without any *restriction* or *limitation of his authority* to use it, he may appropriate it to such uses (being in themselves legal) as his convenience or pleasure may dictate; and the holder is not bound to prove, that he parted with value, as the consideration of the transfer to himself. He may recover thereon, although he received it in payment of a preceding debt, or received it as collateral security for such indebtedness. Indeed mere proof, that a note is an accommodation note, is not sufficient to cast upon an indorsee the burden of showing upon what consideration he did receive the note." The indorsee of an accommodation note is entitled to recover in cases exempt from fraud, by proving that it was received in satisfaction of an existing debt or as a collateral security for its payment. *Lothrop* v. *Morris*, 5 Sandford, 7.

So one who takes an accommodation note after its dishonor, may recover from the maker or indorser if it be used for the purpose for which it was given. 2 Parsons on Bills & Notes, 28 *et seq.* The party giving the accommodation, must show he was injured by the misappropriation. "If the indorsee knew of the fact of the paper being made for accommodation at the time he received it, there could be no difference whether he received it before or after it fell due. The question would be in either case, how far the fact of its being given for accommodation afforded ground of defence in the hand of the holder for value. And the question, it seems to us, will always depend upon whether the paper was used by the party accommodated in the manner contemplated by the original parties, and especially by those signing or indorsing for accommodation. It is true, this question will not be important when the paper passes while current; but when the paper is taken when over due, or with knowledge that it was given for accommodation, the defence is equally available. And

in both cases the proper question seems to be, whether the paper was misapplied by the party accommodated. If not, the holder may recover to the extent of his interest. Redfield & Bigelow's Leading Cases on Bills of Exchange, 216; *East River Bank* v. *Butterworth*, 45 Barb. 476; unless there is an agreement restraining the transfer of an accommodation note after due, and it is used for the purpose for which it was given, it is immaterial whether the holder advances money upon it before or after its maturity. *Sturtevant* v. *Ford*, 4 Manning & Granger, 102; *Stein* v. *Yglesias*, 1 Cromp. Mees. & Ros. 565; *Harrington* v. *Dorr*, 3 Robertson, 283; *Maitland* v. *Citizens' National Bank*, 40 Md. 540.

The plaintiff advanced the money on the defendants' note of February, 1874. The money went to the use of the Somerset Railroad, for whose benefit it was made. It came into his hands either from the railroad or from the bank—but presumably from the railroad as the contemplated railroad bonds which were to be the security for its payment were delivered at the same time. Whether sold, pawned or pledged for the money advanced, the note came rightfully in the plaintiff's possession. Being in his hands for value and in good faith, he might maintain an action upon it in the name of the bank with its assent, or the bank might indorse it, and he could sue it in his own name. *Lime Rock Bank* v. *Macomber*, 29 Maine, 565. From the circumstances of the case, considering the object which the defendants had in view, and which they wished to be accomplished, we think there was an implied permission that the money might be obtained where it could be most advantageously procured. *Chase* v. *Hathorn*, 61 Maine, 513. When the principal throws the note in the market to raise money on it with the assent of the sureties they are liable. *Starrett* v. *Barber*, 20 Maine, 457. But here originally there were no sureties. The defendants are principals.

In the cases cited in defence, the facts were essentially different from the one at bar. They were all cases of suretyship. In *Adams Bank* v. *Jones*, 16 Pick. 575, which is the leading case on the subject, the bank declined to allow a suit to be

brought in its name, and there was a fraudulent misappropriation of the note. In *Skowhegan Bank* v. *Baker*, 36 Maine, 154, the suit was brought without the express or implied assent of the bank, and was not therefore maintainable. In *Manufacturers' Bank* v. *Cole*, 39 Maine, 189, the note in suit was diverted from the purpose for which it was executed, without the consent of the surety. The same was the case in *Rhodes* v. *Ayer & Neil*, 16 Ohio, 282. In *Granite Bank* v. *Ellis*, 43 Maine, 368, it was held the action was maintainable against the maker, but not against the surety unless the transfer was made by his consent.

The note first given being valid in the hands of the plaintiff or of the bank as pledgee, the giving up of the first note is a good consideration for the note in suit. *Dockray* v. *Dunn*, 37 Maine, 442. It is immaterial whether the defendants knew or did not know that the plaintiff had advanced the funds for the railroad, and that the savings bank had not.

The indorsement by the savings bank was valid and passed the legal title to the plaintiff. The assent of the bank may be inferred from the acts of its officers as disclosed in the evidence. Indeed the suit is prosecuted by its president, who is the attorney for the plaintiff. *Chase* v. *Hathorn*, 61 Maine, 507, and cases cited.

Judgment for plaintiff.

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

CHARLES W. BRAY *vs.* GEORGE W. LIBBY.

Cumberland. Opinion June 28, 1880.

Change of writ after service. Waiver.

A change in mesne process after personal service on the defendant, without leave of court is unauthorized and irregular, except in cases where it is permitted by statute.

The defendant will be deemed to have waived his rights, depending upon an unauthorized and irregular change of the writ, unless he takes advantage of the same by plea in abatement, or, when the defects appear of record, by motion seasonably filed. And when the defendant thus waives his rights, the court will not dismiss the writ, unless it perceives that justice or the due course of legal administration requires it.

ON REPORT from the superior court, Cumberland county.

ASSUMPSIT on a promissory note. On the eleventh day of the return term the defendant filed a motion to dismiss, which, it was admitted at the hearing, recites the facts.

Motion to dismiss.—"And now comes the said George W. Libby, and shows to the court here, that plaintiff's pretended writ in said action is void and of no effect, and is no writ because he says that the same was originally sued out of said court on the third day of December, A. D. 1877, under the seal of said court, and bore date on said third day of December, A. D. 1877, and was returnable to said court on the first Tuesday of January, A. D. 1878, and was on the fifth day of December, A. D. 1877, duly served on this defendant by a duly qualified officer to whom the same was directed, to wit: by Gardner M. Parker, a deputy sheriff for said county by the said Parker, deputy sheriff as aforesaid, attaching thereon a chip as the property of said defendant, and giving to him in hand a summons for his appearance at court, as by said writ commanded, who made due return on said writ under his hand as deputy sheriff as aforesaid, bearing date on said fifth day of December, A. D. 1877, that he had by virtue of said writ attached a chip as the property of said defendant, and given him a summons in hand for his appearance at court. And after said writ was so sued out, dated, made returnable, served, and the return aforesaid by the officer aforesaid made thereon, signed by said officer in his official capacity, the said writ was not returned to this court on said first Tuesday of January, A. D. 1878, nor at any time during said term of said court holden on said first Tuesday of January, 1878, but was without consent or permission of this defendant, and without any order of this honorable court materially altered, and changed, that is to say: the date thereof was changed from the third day of December, A. D. 1877, to the thirty-first day of December, A. D. 1877; the return day was changed from the first Tuesday of January, A. D. 1878 to the first Tuesday of February, A. D. 1878; the return aforesaid of the officer aforesaid thereon, was erased; and thereafter, that is to say: after the alterations and changes aforesaid, on the thirty-first day of December, A. D. 1877, a pretended attachment was made thereon, and a return

thereof made by William H. Dresser, sheriff of said county, and a further pretended service was made on said pretended writ, on the nineteenth day of January, A. D. 1878, by E. R. Brown, a deputy sheriff for said county, who made return thereon in his capacity as such deputy sheriff, that by virtue of the said writ, he had, on that nineteenth day of January, A. D. 1878, made service on said defendant, by giving him in hand a summons for him to appear and answer at court, all of which this defendant is ready to verify. Wherefore this defendant says that he ought not to be held to answer to said action, and he moves the court here to dismiss the same and for his costs.

GEORGE W. LIBBY."

Sworn to before a magistrate.

S. C. Andrews and *A. F. Moulton*, for the plaintiff.

M. P. Frank, for the defendant.

SYMONDS, J. The writ used for bringing this suit, was originally dated December 3, 1877, returnable at the next January term of the superior court, and was delivered to an officer, who made return of personal service, and a nominal attachment of property thereon.

Subsequently, discovering it is said that there was no attachment of real estate, and for the purpose of making one, before entry the attorney for the plaintiff caused the date and the return day to be changed, and a new service to be made by an attachment of real estate and by giving a new summons to the defendant. The writ so changed was entered by leave of court on the second day of the February term, to which it was returnable, and on the eleventh day of the term the defendant moved to dismiss.

The question is raised whether after service on the defendant such a change of the writ and new service were authorized.

From the fact that in trustee proeess, a proceeding somewhat similar is expressly permitted, no implication can arise that it is allowed in cases to which that statute does not apply. The inference rather is, that the statute was required in order to warrant such a use of the writ, and that it therefore has no

justification, except in cases to which the statute applies, namely, in cases of foreign attachment.

The writ issues from court, and is returnable thereto, authorizing in the meantime property to be attached, and the defendant to be summoned. When this has been done, the writ has performed its office and should be returned. There should be no change in it, after such service, except by leave of court. "The writ, when served, must be returned into the court by the officer who makes the service. Neither he nor the attorney who gave it to him, can alter or add to it." *Brigham* v. *Este*, 2 Pick. 424.

The cases cited from Massachusetts, *Gardner* v. *Webber*, and *Parkman* v. *Crosby*, 16 Pick. 251 and 297, go no further than to hold that after an attachment of property, and before service on the defendant, a change of the date and return day may sometimes be permitted, upon the ground of a long established practice in that State, with which the court in its discretion declined to interfere, not perceiving that it was liable to abuse, and holding that if a new rule of practice were to be established it ought not to act retrospectively. Such a practice continued for a long time may properly be regarded as having had the sanction of the court.

Whatever may be the practice in this respect, in this State, it is clear that the cases cited afford no authority for a change in the writ after it has been served on the defendant. There is in Massachusetts, a precedent for an indictment against a justice of the peace for altering a writ after service, and before the return day, which apparently failed only for want of technical precision in its averments. *Comm.* v. *Mycall*, 2 Mass. 136. While from the later decisions of *Brown* v. *Neal*, 3 Allen, 74, and *Simeon* v. *Cramm*, 121 Mass. 492, it is clear that alterations of the writ after personal service would not be allowed in that State.

The court in New Hampshire, with greater strictness, refuses to allow a writ which has been served by an attachment of real estate, even if there has been no service on the defendant, to be used to commence a new action of later date between the same parties. *Parsons* v. *Shorey*, 48 N. H. 550.

In *Clindenin* v. *Allen*, 4 N. H. 386, the court say: "When the writ has been served upon the defendant, he at least for some purposes is considered a party to the cause, and there is an action pending between parties having day in court. In this stage of the proceedings, that is, between the service of the writ upon the defendant and the entry of the cause in court, by our practice, depositions may be taken by either party to be used in the cause. . . . . Before the writ is served, the plaintiff is at liberty to alter or amend it as he pleases; but after it is served, any alteration without leave of court is a forgery;" meaning, as we should understand, that such act of changing the writ would be a forgery, if accompanied with the fraudulent intent which is one of the elements of the crime.

There is a series of decisions in New Hampshire, directed against changes in mesne process, after service has once begun by attachment of property, or even against its use for another action between other parties, after it has once been filled, ready for service. But they serve our present purpose only so far as they tend very strongly against allowing changes to be made in the writ after it has been served on the defendant. *Dearborn* v. *Twist*, 6 N. H. 44; *Lovell* v. *Sabin*, 15 N. H. 37; *Lyford* v. *Bryant*, 38 N. H. 89; *Eastman* v. *Morrison*, 46 N. H. 136. The attorney may alter the test and return of a writ *before* it has been served. *Sloan* v. *Wattles*, 13 Johns. 158; *Sullivan* v. *Alexander*, 18 Johns. 3.

But while the change in the date and return day of the present writ, after service, was irregular, the only remedy for the defendant was by plea or motion in abatement. It is a matter which touches only the present proceeding, and does not affect the merits, or show that the plaintiff is concluded. So far as any rights of the defendant grew out of the irregularity, it was competent for him to waive them, and under the rule of the superior court, which provides that all pleas or motions in abatement must be filed within two days after the entry of the action, we think he did waive them by neglecting till the eleventh day of the term to file his motion to dismiss. There is no averment that the facts were first discovered after the usual time for filing pleas

in abatement, nor any reason assigned for the delay. "Objections of a purely technical character, which do not go to the merits of the case, must be made at the earliest practicable opportunity, or they will be regarded as waived." *Raymond* v. *County Com'rs*, 63 Maine, 110.

Nor does it change the result that only a special appearance was entered. "If the time allowed for filing the motion is permitted to pass without doing so, it is as much a waiver as if the appearance had been general. It is a neglect to do that without which the objection becomes of no avail." *Richardson* v. *Rich*, 66 Maine, 249, and cases cited.

It may well be doubted whether, as the case is presented, a plea in abatement, rather than a motion, was not in this instance necessary. It is not alleged in the motion that all the facts appeared upon inspection of the record. The record might show changes and erasures, but it is no where alleged that it would exhibit the state of facts set forth in the motion. Certainly such changes might be made so carefully as not to appear in full upon the face of the papers.

Whatever rights accrued to the defendant from any illegality in the use of the process, having been waived by a failure on his part to observe the rule of court in the time of filing his plea or motion, it remains only to inquire whether the irregularity is of such a character that the court of its own motion will refuse to regard the process as valid, and will interpose to stay further proceedings upon it. It is clear that there may be an abuse of mesne process such that, if both parties assent, it cannot receive the aid or sanction of the court. It is clear, on the contrary, that not every irregularity would be treated as ground for summarily dismissing the action. The whole subject, in cases like this, where the defendant has not put himself in position to claim a legal right in regard to it, must be referred to the discretionary power of the court, to determine in each instance, as in the allowance of amendments, what the due course of legal administration requires; whether the irregularity is so injurious in its effect upon the case at bar, or so dangerous as a precedent, as to render it an abuse requiring correction.

The present case is free from any imputation of intended wrong. Nor do we perceive that anybody has been injured. The defendant had the same notice of the present suit that he would have had if a new writ had been used. He had the same opportunity to appear at the January term and claim costs on non entry of the original writ, and the fact that such a use of mesne process renders it liable to be abated on plea or motion seasonably filed, or to be dismissed in any case in which it becomes apparent to the court that justice requires it, will be a sufficient protection against any tendeney to abuse.

The motion to dismiss is overruled and by agreement of counsel, in that event, the entry was to be,

Defendant defaulted.

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

CECIL J. BURRILL *vs.* SAMUEL A. PARSONS.

Somerset. Opinion June 29, 1880.

Promissory note. New trial.

The rule is firmly established that the holder of negotiable paper, taking it in the usual course of business, for a sufficient consideration, before its maturity, and ignorant of any facts impeaching its validity, can recover against the maker; and when the verdict of the jury is not in accordance with this rule, a new trial will be granted.

ON MOTION.

J. Baker, for the plaintiff.

D. D. Stewart, for the defendant.

The jury were authorized to find from the testimony that the note in suit was originally attached to a written contract which made part of it, and from which it had been fraudulently separated, which rendered the note void even in the hands of a *bona fide* purchaser, which this plaintiff was not. *Johnson* v. *Heagan*, 23 Maine, 329; *Gerrish* v. *Glines*, 56 N. H. 9; *Benedict* v. *Cowden*, 49 N. Y. 376.

There was no consideration for the note. It was fraud in Thompson to dispose of the note until the goods had been furnished and sold and equally fraudulent in the plaintiff to take the note. *Denniston* v. *Bacon*, 10 Johns. 198; 2 Pars. Notes & Bills, 539, 534.

The frauds perpetrated by this Mahan and his agents in New England, New York and Michigan, have become matters of such historical and common notoriety that the court ought to take judicial notice of them. 1 Wharton Ev. § § 328, 338; "*The Minne*," 1 Blatchford's Prize Cases, 333; *Ohio Life Ins. Co.* v. *Debott*, 16 How. 435.

An existing intention is as much an existing fact as any other fact. And the want of it is like the want of any other fact. Fraud may consist in intention or in the want of it. An intention not to pay for property purchased, constitutes fraud. *Dow* v. *Sanborn*, 3 Allen, 181; *Kline* v. *Baker*, 99 Mass. 255; *Wiggin* v. *Day*, 9 Gray, 97; *Rowley* v. *Bigelow*, 12 Pick. 307; *Bryant* v. *Ins. Co.* 22 Pick. 200.

The jury found this fraud was committed by the party taking the note and the law presumes the plaintiff to be simply the agent of the perpetrator of the fraud. *Bailey* v. *Bidwell*, 13 M. & W. 73; *Fitch* v. *Jones*, 5 E. & B. 244, (85 Eng. Com. Law, 243); *Smith* v. *Braine*, 16 A. & L. 244, (71 Eng. Com. Law, 251; *Harvey* v. *Towers*, 6 Exch. 656; *Paton* v. *Coit*, 6 Mich. 505. This presumption of law was not overcome by the plaintiff in the evidence presented to the jury.

Counsel admits that the plaintiff had notice of the obligation given the defendant, but denies that he knew its contents. But notice of the existence of a paper is notice of its contents. *Pike* v. *Collins*, 33 Maine, 39; *Bancroft* v. *Consen*, 13 Allen, 50; *Shaw* v. *Spencer*, 100 Mass. 382; *Sturtevant* v. *Jaques*, 14 Allen, 523; *Connihan* v. *Thompson*, 111 Mass. 270; Bigelow on Fraud, 288 & 289.

The plaintiff then had notice of the obligation. The note and obligation make but one contract, and the note is therefore non-negotiable. *Davlin* v. *Hill*, 11 Maine, 434; 2 Pars. Bills & Notes, 534, 539; *Bank* v. *Blanchard*, 7 Allen, 334; *State* v.

Stratton, 27 Iowa, 420, (1 Am. 283); *Cushing* v. *Field*, 70 Maine, 50.

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

"$433.75. "Dead River, Maine, Oct. 1, 1874.

One year after date I promise to pay to the order of C. B. Mahan, Agent, four hundred and thirty-three seventy-five one hundredths dollars, at the First National Bank, Skowhegan, Maine. Value received.

SAMUEL A. PARSONS."

(Indorsed.) "C. B. Mahan, Agent, Granite Agricultural Works, Lebanon, N. H."

The defendant when he gave the note, announced to the public generally, to whomsoever it might concern, that the note was given for value and that he would pay the same to any *bona fide* indorsee before its maturity.

The defence relied upon is want of consideration. At the time the note was given, the payee of the note gave a contract to deliver certain specified agricultural instruments to the amount of the note, and to assist the defendant in selling the same, and if not sold, to take them off his hands at the price at which they were billed to him.

The contract was a valid one. It was a good consideration for the note. Indeed, it recites that payment was made therefor by the note, "received payment by note due October 1, 1875, payable at First National Bank, Skowhegan, Maine." The defendant, in his testimony, says he "gave a note for this contract to furnish me [him] with these goods just as it reads." It is the simple case of two contracts given at the same time, one the consideration of the other.

It is claimed that the note and contract were both on the same paper and were to be construed together. The evidence entirely fails to show that such was the case. The defendant in his cross examination will not so testify and from his testimony we are satisfied it was not so. Besides, the very contract itself refers to the note as a distinct contract payable at a particular bank, and

obviously to be regarded as something separate from the agreement of which it was the consideration.

The alleged fraudulent representations are but a verbal statement of the substance of the contract.

The plaintiff testifies that shortly after the note was given, he purchased it of the payee and gave $364.35 in cash for the same. He denies all knowledge of fraud in the procuration of the note, or of the existence of the contract for which the note was given. There is no evidence whatever of a contradictory tendency. The amount paid tends to negative knowledge on his part of any fact rendering the note invalid. The note does not refer to any contract to which it is subject, as was the case in *Cushing* v. *Field*, 70 Maine, 50. The fact that it was made payable at a bank, and to the order of the payee is an indication that it was intended for negotiation.

That the plaintiff after his purchase of the note may have seen a contract similar in its terms to the one produced, can in no way affect his right to recover, inasmuch as it was long after he was the indorsee of the note, for value.

The plaintiff was the indorsee of the note before maturity and for value. There is no proof of any knowledge on his part of any facts tending to invalidate the note. There is no evidence, that had it not been for loss by fire, the defendant's contract would not have been fully performed. If the defendant is a loser, it is his own folly that he made his note payable to order.

The plaintiff should not suffer by his reliance upon the defendant's promise. The rule is firmly established that the holder of negotiable paper, taking it in the usual course of business for a sufficient consideration before its maturity, and ignorant of any facts impeaching its validity, can recover against the maker. *Kellogg* v. *Curtis*, 65 Maine, 59; *Farrell* v. *Lovett*, 68 Maine, 326.

Motion sustained, new trial granted.

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

CHARLES H. BOYD *vs.* JOHN CRONAN.

Cumberland. Opinion July 1, 1880.

R. S., c. 82, § 21. Costs as affected by offer of default in trespass quare clausum.

Under R. S., c. 82, § 21, an offer of default may be made in an action of trespass *quare clausum fregit*, with the usual effect of such an offer upon the taxation of costs. Such an action is a personal action, within the meaning of that statute.

ON EXCEPTIONS from superior court, Cumberland county.

ACTION OF TRESPASS *quare clausum* entered at the April term, 1878. On the fourteenth day of that term the defendant appeared and offered to be defaulted for $20, and the court ordered the offer to be accepted, if at all, before the first day of the next term. The case was tried at the February term, 1879, and, the verdict of the jury being for plaintiff for only $4.06, the court ruled that the plaintiff was entitled to costs only to the time of the offer to be defaulted, and the defendant was entitled to costs against the plaintiff after that time. To this ruling the plaintiff excepted.

Webb & Haskell, for the plaintiff.

At common law a plea of tender was not good in actions for the recovery of unliquidated damages. *Hodges* v. *Litchfield*, 9 Bingham, 713; *Fail* v. *Pickford*, 2 Bos. & P. 234; *Strong* v. *Simpson*, 3 Bos. & P. 14; *Hallett* v. *East India Co.* 2 Burr. 1120; *Salt* v. *Salt*, 8 Term R. 47.

But the legislature changed the common law for the benefit of involuntary trespassers by R. S., c. 82, § 20, and that is as far as the legislature intended to go in an action of trespass; § 21, which was enacted in its present form in 1870, cannot also apply to actions of trespass. It couldn't have been the intention of the legislature to put wicked, willful trespassers on an equal footing with involuntary trespassers, and repeal by implication or supplant the provisions of § 20. Yet that would be its effect if the ruling of the court in this case, upon the questions of costs, is sustained. See *Commonwealth* v. *Flannelly*, 15 Gray, 195;

Howard v. *Harris*, 8 Allen, 298; *Commonwealth* v. *Dracut*, 8 Gray, 455; *Byron's Case*, 57 Maine, 343.

F. C. & C. H. Nash, for the defendant.

PETERS, J. Under R. S., c. 82, § 21, an offer of default may be made in any personal action, with the usual effect of such an offer upon the taxation of costs. Does this privilege apply to an action of trespass *qu. cl. fregit?* We think it does. *Linscott* v. *Fuller*, 57 Maine, 406, decides that such an action is so far a personal action as to allow it to be commenced by trustee process.

It is a personal and local action in contradistinction from a personal and transitory action. *Gordon* v. *Merry*, 65 Maine, 168. Bouvier says: "A personal action is one brought for damages or other redress for breach of contract, or for injuries of every other description; the specific recovery of lands, tenements and hereditaments only excepted."

Section 21 is not inconsistent with section 20 of the same chapter. That section authorizes an involuntary trespasser to tender amends before action brought, or to bring money into court after the action is entered. Those privileges are not accorded to the voluntary or willful trespasser. But any trespasser may offer to be defaulted, under the provisions of section 21. The two modes of remedy provided by the two sections are independent of each other. The one is in addition to the other, and not opposed to it.

It is contended, that this is, within the meaning of the statute, a real action, because full costs are to be taxed irrespective of the amount of damages recoverable. But full costs are not allowed because the action is real, but because it is a personal action affecting real estate. The law allows full costs in all real actions, and also in all personal actions in which the reality is involved. Section 21 no more excludes from its operation one kind of personal action than another. It includes any and all personal actions. The language is comprehensive.

Nor do we see any propriety in making the exception. It, admittedly, applies to cases of personal injuries of every character, however wanton and malicious, where there can be no more

justification for its adoption than in suits for injuries to real estate. We think the statute, as interpreted by us, will have a beneficial effect.

Exceptions overruled.

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

S. C. STROUT, Petitioner for the Cumberland Bar Association,

vs.

DANIEL W. PROCTOR.

Cumberland. Opinion July 1, 1880.

Attorney at law. Disbarment.

When it is shown to the court that an attorney at law has violated his official oath, in that he has not conducted himself in his office with all good fidelity to his clients, the court is not only warranted but required to remove such a one from the office of attorney, and counselor of this court.

ON REPORT.

Complaint of the Cumberland Bar Association, by S. C. Strout, vice president, and motion for a rule upon the respondent to show cause why he should not be removed from the office of attorney and counselor at law of this court.

In support of the motion they presented four different charges and specifications, one of which was as follows:

"Third. He has violated his official oath in that he has not conducted himself in his office with all good fidelity to his clients in this: That on or about the first day of March, A. D. 1877, by false pretences and representations, he obtained the signature of one Ann M. Haskell to a bill of sale of her household goods, and other chattels, to one Ida M. Proctor, his wife; that after said bill of sale was obtained, the said Ann M. Haskell having sought his advice as an attorney and counselor, he induced her to leave the State of Maine, falsely alleging that she was about to be arrested by an officer and put in prison, and that it was necessary for her to leave the State immediately in order to avoid

arrest; that after the departure of said Ann M. Haskell, in consequence of said false representations, the said Proctor took possession of the goods and chattels covered by the bill of sale, and refused, upon request, to deliver said goods to the said Ann M. Haskell, whereby she was compelled at expense, to obtain possession of her property by an action of replevin, returnable to the superior court for Cumberland county, at a term held on the first Tuesday of September, A. D. 1877, in which action she has obtained judgment in her favor."

The complaint and answer with the evidence taken, making one hundred and seventy-six printed pages, were referred to the full court who were to render such judgment as they deem proper.

No argument was presented to the law court in behalf of the petitioners.

Clifford & Clifford, for the respondent, cited: *John Percy*, 36 N. Y. 651; *Harvey's Case*, 41 Ill. 277; and in a very able argument contended that the acts complained of had not been proved, and were not true in fact, and that the matters out of which they grew, did not relate to respondent's doings in his office as an attorney.

VIRGIN, J. After a thorough examination of the evidence in this case, we have no hesitation in saying that the third charge and specification under it are sustained by proof. We are satisfied of the fraudulent design and conduct of the respondent throughout the transaction on which this charge is based. His design was to obtain the wrongful possession and use of the household goods and a pretence of title that would serve that purpose; and he did not scruple to avail himself of his wife's name and aid, of Mrs. Haskell's distress and fears, ignorant perhaps but none the less strong, excited in her mind by his own fraud, and of the necessities, and, it may be, the dishonesty of Wm. H. Haskell, as means to accomplish that end.

The account which the respondent gives of the affair, when the whole evidence is reviewed, leaves upon our minds no impression of its truthfulness. There is nothing in the case to explain Mrs. Haskell's sudden flight from the State, leaving all her personal

property in the respondent's possession, except the willfully false representations made by him ostensibly as a friend, and as one to whom she could trust for knowledge of the law, but really with the corrupt intent to make use of her ignorance and terror, as means to secure his own interest by sacrificing her rights. It is not too much to say that, when the situation and the undisputed facts are considered, the respondent's testimony is so grossly improbable, as a whole and in detail, that it scarcely requires refutation; while in many parts of it, it is not difficult to draw a clear inference as to what are the facts that lie below the surface of evasion and falsehood.

The narrative of the transaction contained in Mrs. Haskell's testimony is one that it would be exceedingly difficult, if not impossible for her to fabricate. The main features of it, and many of the details, we have no doubt are correct. When its intrinsic credibility and the confirmations that come from other parts of the evidence are considered, it far outweighs the denial of the respondent and the testimony in his behalf, rendered almost incredible, in many respects, by its inherent improbabilities. There is not a sign about the transaction from first to last that it was, what the respondent claims, a *bona fide* business affair. Upon the question whether a lady of the age of Mrs. Haskell for a trifling sum, without fraud, conveyed to a recent acquaintance all her articles of household use and ornaments, including even the little things, which, from long use, to such an owner acquire a value distinct from their real worth, and other articles which were prized as gifts or for the associations connected with them; upon that question, the auction prices for such goods are of slight weight in estimating probabilities, and render little aid in the search for the true reply.

We regard it as unnecessary, and feel indisposed, to enter more at length into the discussion of the case. The principles of law by which the action of the court is governed in proceedings of this character, have been recently considered in *Penobscot Bar* v. *Kimball*, 64 Maine, 140, and as applicable to the present case could not be more explicitly stated than in that opinion.

The result of a study of the evidence reported, is to convince the court not only that the treatment of Mrs. Haskell by the respondent in the transaction which forms the basis of the charge against him was in the highest degree fraudulent, but that it cannot justly be characterized as less than indecent and cruel; and we believe that the conclusion at which we have arrived is within the limits of reasonable certainty.

Our judgment upon the evidence therefore is that the third charge and the accompanying specification are sustained; that the respondent, prostituting to corrupt uses his professional standing and influence, and in violation of his official oath, by means of false pretences and false advice to Mrs. Haskell, whom he knew was trusting him as a lawyer and a friend, did all in his power to consummate a gross wrong and fraud upon her, of which he himself, directly or indirectly, was to reap the benefit; and we entertain no doubt that, by assuming to advise and act for Mrs. Haskell under the circumstances of this case, he subjected himself in his relations with her to the obligations of an attorney to his client.

Without considering the other charges preferred, the case presented is one which not only warrants, but requires the removal of Daniel W. Proctor from the office of attorney and counselor of this court.

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

SIMON W. BAKER *vs.* DANIEL W. FESSENDEN, Administrator on the estate of ANNIE R. MITCHELL.

Kennebec. Opinion July 3, 1880.

R. S., c. 91, § 27. Lien for alterations and repairs.

R. S., c. 91, § 27, will not give a lien on a mill for labor in altering and repairing the machinery therein, unless it is affirmatively shown, that such machinery is of that character that makes it a part of the realty.

Where a laborer has so intermingled his lien claim with non lien items, that the exact amount for which he is entitled to a lien, cannot be ascertained, the whole lien must fail.

One single lien cannot cover several distinct alterations, made at different times, and independent of each other, so as to entitle the claimant to a lien judgment for the whole, if the action is seasonably brought, after the work has ceased on the last alteration. The action must be brought within ninety days after the labor on an alteration is finished, to give a lien for that alteration, and it must be affirmatively shown that the labor performed within such ninety days, was such as was entitled to be included in the lien.

ON REPORT from the superior court, Kennebec county.

The facts sufficiently appear in the opinion.

Brown & Howard, for the plaintiff.

J. Baker, for the defendant.

DANFORTH, J. R. S., c. 91, § 27, gives to a person furnishing labor in erecting, altering, or repairing a building, or appurtenances, a lien upon such building, and on the lot on which it stands when both are owned by the debtor. Such is the lien claimed and alleged in the declaration in this case. Hence to sustain it, the plaintiff must show that his labor, or some definite and distinct part of it, was furnished in erecting, altering, or repairing the building itself, or appurtenances; that is, that it was done on some portion of the realty.

By the legal appropriation of the credits in the plaintiff's account, it will appear that all the work furnished in erecting the building proper has been paid for, and the case shows that the portion not paid for, and for which a lien is claimed, was furnished in pursuance of a contract to work by the day in superintending the machinery generally, repairing and altering it when necessary, and in making and putting in such new machinery as might be

needed to replace the old, or as the exigencies of a change in the business might require.

Hence in order to sustain the plaintiff's allegation of lien, it must affirmatively appear that this machinery for which the labor was furnished, was so connected with and attached to the building, so adapted to and necessary for the use for which it was erected, as to lead to the conclusion that it was intended to be permanently a part of it, and in this action a part of the realty. The case utterly fails to show this. It may be true that the evidence may satisfactorily show that a part of it, such as the lathes, shafting and saw benches, belonged to the real estate. This it appears was permanently attached to the building. But in regard to much the larger portion of it the preponderance of the evidence leads to a different conclusion. For it appears that its "permanency was contingent on the varying circumstances of business, subject to its fluctuating condition, and liable to be taken in or out, as exigencies might require." *Pope* v. *Jackson*, 65 Maine, 162–166.

The case shows several changes in the business done in the building with corresponding changes in the machinery, and that a material portion of the plaintiff's labor was expended in making such changes, sometimes in making and putting in new, and sometimes in such alterations of the old as might be necessary to adapt it to the new uses required. Another portion of his labor seems to have been furnished in simply superintending the machinery, keeping it in proper order by increasing or diminishing its speed, or in other respects, so that it should properly perform the service required.

Thus if the plaintiff might legally have had a lien for a portion of his labor, he has so intermixed and interwoven it with that for which he has shown none that it is utterly impossible for the court and probably for the parties to make any such distinction between the two kinds as to authorize a lien judgment for any definite amount.

Another and an insuperable objection to a judgment for enforcing the lien, is the lapse of time.

R. S., c. 91, § 31, requires a suit to enforce the lien to be commenced within ninety days after the last labor is performed.

This of course refers to the last labor on the particular work for which the lien is claimed.

It is conceded that for some of the work charged no lien existed, and it is claimed that a deduction was made on that account. The evidence shows the number of days deducted, but fails to show which days and so leaves it uncertain whether the labor within the ninety days was under a lien or otherwise.

But further the case shows that if the plaintiff had any lien it was for alterations and repairs. The work furnished was not alone for one alteration, or for one definite repair, but for numerous distinct and separate repairs and alterations. The lien given is definite and for a particular work, which may indeed be of long continuance, but cannot be distinct jobs. One single lien cannot cover several distinct alterations in the same building made at different times and independent of each other. The plaintiff therefore had not one continuous lien, but if any, a series of liens, following, as the different repairs or alterations followed each other. The ninety days, then, in which to begin the action must commence to run when the finishing work it put upon each. The fact that a person has a second repair to make and expends labor upon it, cannot revive a first or suspend the running of the time in which he must enforce the prior lien.

Thus the plaintiff's liens, if any existed, had all been dissolved except, perhaps, for the last work done, and in the variety of services performed by him, as already seen, it does not appear that he had any for that.

We do not decide that a series of liens upon the same building may not be enforced in one suit, but simply that labor done under a later one will not be considered as the last, or any work done under a former.

The amount claimed as due in this case appears to be sustained by the evidence.

Judgment against the estate for $624.66, and interest from date of writ. Judgment under lien claim denied.

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

NELSON BOWMAN *vs.* NOAH PINKHAM, Trustee.

Kennebec. Opinion August 3, 1880.

Will. Trustee. Levy. Real action. Life estate.

The will of a testatrix gave the estate to her children and grandchild, naming them and added, "said real and personal property however not to be divided or distributed among my said children during the lifetime of my trustee herein and hereby appointed, except by the consent and written approval of my said trustee, and in case such distribution is made, it shall be in such shares and proportions to my said children and their heirs as my said trustee shall determine — and I hereby appoint my said husband, N. P., to be my trustee of said real and personal estate, hereby empowering him to enter upon and manage the same to the best advantage during his lifetime; and I further order that my said trustee shall not be compelled to account to my children, grandchild, or to their heirs for the profits of said real and personal property during his lifetime, and that my said trustee be fully authorized to sell and dispose of all and any of said real and personal estate hereby devised and bequeathed and to execute and deliver deeds of conveyance thereof for such sums as he shall judge best and again to invest the proceeds of such sale in such manner as he shall see fit, said trustee not in any event to be accountable to my said children for the income of said property during his life nor shall my said trustee be required to give bonds as such." *Held*,

1. That the legal effect of the will was to create a life estate in N. P. and to constitute him trustee of the estate during his life with power to sell and re-invest the proceeds.
2. That the children and grandchild took a vested interest in the estate remaining after the payment of debts, and in such property as should be substituted therefor by change of investments, subject only to the life estate of N. P. and to the power of selection and distribution which might be exercised by the trustee at any time during his life.
3. That the trustee had no authority as such to purchase lands on credit and could not charge the estate by giving a note therefor as trustee.
4. That the rights of a levying creditor upon the life estate of N. P. intervening before there was an exercise of the power of selection and distribution, would not be defeated by the fact that the trustee had that power.

Where the demandant in a real action claims to recover an estate in fee simple the action cannot be sustained without amendment when the evidence discloses that he held but a life estate.

ON REPORT.

Writ of entry to recover real estate in West Gardiner.

The will of the deceased wife of the defendant, Abagail P. Pinkham, the material portion of which appears in the head note, made a part of the report as did the William W. Clark deed,

which appears below; all other material facts appear in the opinion. The case was reported to the law court to determine the legal rights of the parties.

(Deed.)

"Know all men by these presents, That I, William W. Clark, of West Gardiner, in the county of Kennebec, in consideration of fourteen hundred and forty dollars, [dollars] paid by Noah Pinkham of West Gardiner, trustee, (the receipt whereof I do hereby acknowledge,) do hereby give, grant, sell and convey unto the said trustee, his successors and assigns forever, a certain lot of land in said West Gardiner, containing sixty-two acres more or less, with the buildings thereon, bounded north easterly by land occupied by Isabel and Oscar Hains, and by land of B. B. Robinson; south easterly by land of Joseph Carlton and T. J. Neal; south westerly by land of T. J. Neal; and north westerly by Collins mill pond, being the same conveyed to William M. Clark, by deed of Peter Clark.

U. S. Int. Rev. Stamp. $1.50.

"To have and to hold the same with all the privileges and appurtenances thereof to the said Pinkham, trustee, his successors and assigns, to their use and benefit forever. And I do covenant with the said Pinkham, trustee, his successors and assigns, that I am lawfully seized in fee of the premises; that they are free from all incumbrances; that I have good right to sell and convey the same to the said Pinkham, trustee, to hold as aforesaid. And that I will warrant and defend the same to the said Pinkham, trustee, his successors and assigns forever against the lawful claims and demands of all persons.

"In witness whereof, I, the said William W. Clark, and Jane M. his wife, she relinquishing her right of dower in the premises, have hereunto set our hands and seals this twenty-sixth day of September, in the year of our Lord one thousand eight hundred and seventy one.

Signed, sealed and delivered, in presence of H. K. Baker, Julia A. McCausland. } Wm. W. Clark. (Seal.) Jane M. Clark. (Seal.)

"Kennebec, ss. September 26, 1871. Personally appeared the above named William W. Clark, and acknowledged the above instrument to be his free act and deed. Before me,

H. K. BAKER, Justice of the Peace."

"Kennebec, ss. Received, September 28, 1871, at 2 H. 30 M., P. M.

Entered and compared with the original, by

P. M. FOGLER, Register."

G. C. Vose, for the plaintiff.

The will of Abagail P. Pinkham, created no trust. *Fisk* v. *Keene*, 35 Maine, 349; *Shaw* v. *Hussey*, 41 Maine, 495; *Doane* v. *Hadlock*, 42 Maine, 72.

Three things are indispensable to constitute a valid trust. (1,) Sufficient words to raise it. (2,) A definite subject, and (3,) A certain or ascertained object. 9 Vesey, 322; 2 Story's Eq. § 964.

Here the third indispensable requisite is entirely wanting, that is, there is no certain and ascertained object. And all the requisites are uncertain. 1 Jarmon, Wills, 318; *Morice* v. *Bishop of Durham*, 10 Vesey, 536; *Jones* v. *Hancock*, 4 Dow. 145.

If there was a trust it was void as to this plaintiff as there is no evidence of any actual notice to him. R. S., c. 73, § 12. The Clark deed disclosed no trust. It was not such a notice as the statute requires.

The language of the judgment, upon which the levy was made, was as broad as the Clark deed. If the word "trustee" has any meaning in the one case it has in the other.

Upon the defendant's theory he had a life estate and that would pass by the levy. R. S., c. 76, § 7.

Joseph Baker, for the defendant.

SYMONDS, J. In this real action, the demandant claims to recover an estate in fee simple in certain lands in West Gardiner by virtue of a levy thereon, in August, 1877, of an execution in his favor and against the defendant. The premises levied on and demanded were conveyed to the defendant described as trustee by deed of warranty from William W. Clark, in September, 1871. The deed contains no description of the nature or pur-

poses of the trust, but designates the grantee, the defendant, as trustee, and runs to him, his successors and assigns. In the execution, as well as in the writ and record of court on which it was issued, the defendant is likewise styled trustee.

The right of the demandant to recover is resisted, not on the ground of any irregularity in the method of procedure in making the levy, but on the ground that the property levied on was part of a trust estate, while the debt on which the judgment was rendered was the personal debt of the defendant, disconnected from the trust, and therefore not reaching or binding such estate; — that to attempt to levy an execution, recovered on a debt due from the defendant personally, on property held by him in trust, was illegal and without effect.

On the case as presented, we think the conclusion is clear that the debt on which the judgment was rendered was the private debt of the defendant. In any view of the case, it was not one he was authorized to incur as trustee. His appointment and his authority, in this respect, were derived from the will of his deceased wife, made on April 4, 1868, and approved later in the same year. The legal effect of this will was to give the real and personal estate of the testatrix to her children and grandchildren, at the determination of a life-estate therein in her husband; and to constitute the husband, during the continuance of such life-estate, a trustee of all the property, with power to sell and re-invest the proceeds, and with power to accelerate the distribution among the children and grandchildren, so that it should take place, discharged from the trust, during his own life, if he preferred.

If such distribution was made during the life of the trustee, then he had under the will the further power of determining what the shares of the other devisees should be, in what proportion each of them should take. If, without the exercise of such power, the distribution awaited the determination of the life-estate, then the power to make it unequal would have failed, and the title would vest in the children and grandchildren, as fully as if such discretion had never been given to the trustee. The division in such event would be according to the ordinary

rules of inheritance, the children taking equally, and the grandchildren by right of representation.

Here we have the elements of a valid trust. The trustee was not to give bond and was not to be accountable for the income of the property during his life, but it was all finally to go to the children and grandchildren. His right to sell and convey was accompanied with the duty to re-invest the proceeds of the sales. He could sell only with a view to reinvestment, and it was only for the purpose of investing the proceeds in his hands that he had a right to purchase. The intention to create such a trust clearly appears, nor does the case show that it violated, or was inconsistent with, any rights of creditors. The subject matter of the trust was the property of the estate, real and personal; the object was to preserve the principal thereof to those entitled thereto, without diminution during the life-estate; while conferring upon the trustee certain powers he could not have exercised, had he been merely tenant for life, namely, the power to change investments, and to anticipate the time fixed in the will for directing the distribution, and, in such event, to determine the proportions of the shares.

"In some cases the donor makes a direct gift to one party, but subjects the gift to the discretion or power of some previous taker or other party; as if a donor limit a fund 'upon trust for the children of A. as B. shall appoint.' In such case the children of A. take a vested interest in the subject of the gift, liable to be divested by the exercise of the power by B. Therefore, on the failure of the power, the children of A. became as absolutely entitled as if the discretion or power had never been given to B. But while the exercise of the power is possible, the donee of it may exercise his discretion in favor of any that he may select; he may select those who are living at the donor's death, or those living at his own death." 1 Perry on Trusts, § 250.

It is unnecessary to consider the class of cases, where the donees take nothing directly by the gift, but their interest comes through the medium of the power, as where an estate is vested in a donee, upon trust to dispose of it among the children of A. But in these cases, if the donee may divide it unequally among

the objects of the gift, and dies without exercisng such power, the court will distribute the fund equally. And even when only a power is given, but is so given as to make it the duty of the donee to execute it, "the court will not permit the objects of the power to suffer by the negligence or conduct of the donee, but fastens upon the property a trust for their benefit. *Burrough* v. *Philcox*, 5 Mylne & Craig, 92.

"The principle of that case, *Pierson* v. *Garnet*, 2 Bro. C. C. 38; and of *Richardson* v. *Chapman*, 7 Bro. P. C. 318, which went to the House of Lords, and all these cases, is, that, if the power is a power which it is the duty of the party to execute, made his duty by the requisition of the will, put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of the power, and not as having a discretion whether he will exercise it or not; and the court adopts the principle as to trusts, and will not permit his negligence, accident, or other circumstances, to disappoint the interests of those for whose benefit he is called upon to execute it." *Brown* v. *Higgs*, 8 Vesey, Jr. 574.

"It is upon the same gronnd that, if a power of appointment is given by will to a party to distribute property among certain classes of persons, as among the relations of the testator, the power is treated as a trust; and if the party dies without executing it, a court of equity will distribute the property among the next of kin."

"Where the instrument gives the fund to a class, the power being merely to determine the shares, all of the class take in default of appointment." 2 Story's Eq. Jur. § 1060, and note.

These authorities go much further than is required to sustain the trust declared in the present will. It is clear that under its provisions the children and grandchildren both took a vested interest in the estate remaining after the payment of debts, and in such property as should be substituted therefor by change of investment, subject only to a life estate in the defendant, and to a power of selection and distribution, which might be exercised by the trustee at any time during his life.

On October 23, 1873, the defendant bought of the plaintiff and Julia A. Bowman, certain lands in Manchester, for $1500. He made no payment in cash, but gave two notes of $750, each, for the purchase money, due in one and two years, secured by mortgage on the property purchased. In this deed to the defendant, he is described as trustee, without further designation, and the deed runs to him, his heirs and assigns. It was on one of these mortgage notes, when overdue, that the suit was brought, judgment obtained and the execution levied on the demanded premises.

From what has already appeared, it follows that the mortgage debt was the personal debt of the defendant. The deed of lands for which the mortgage notes were given ran to him, his heirs and assigns, with the unavailing addition of the word trustee to his name as grantee. Moreover, under the will, he had no authority as trustee to purchase lands on credit, but only to invest the proceeds of parts of the estate sold. The mortgage note on which the execution was recovered was not one he had a right to give as trustee, and did not charge the trust estate.

We next inquire what was the interest of the defendant in the demanded premises.

This deed, as has already been stated, runs to the defendant as trustee, his successors and assigns. According to his own testimony, too,—which on this point is without contradiction,—this Clark farm, which the demandant claims by the levy, was paid for wholly by funds realized from the sale of property which came into the defendant's possession under the will. And, although in a later part of his testimony the defendant states that some of the real estate left by his wife was purchased with the profits of the business done by himself and his sons, he denies that it was conveyed by him to her; no proof to the contrary is offered, and whatever may be the fact, it is not made to appear that any rights of creditors have been prejudiced, or that either the demandant whose debt accrued long after the death of the wife, or any other creditors of the defendant, are in position in a proceeding of this sort, to assert any equitable interest in the defendant in the demanded premises, arising from the former

relations between husband and wife, or resulting by operation of law from the fact that a part of the funds invested in the purchase of them, was originally the separate property of the husband. *Webster* v. *Folsom*, 58 Maine, 232.

Under these circumstances, from the construction already given to the will, it follows that the defendant, personally, apart from his title as trustee, and from the question of subsequent acquirement of title by him by later conveyances not yet considered, had only a life estate in the lands on which the levy was made. Only his interest as tenant for life was subject to seizure and levy for his individual debts. We incline to the opinion that the rights of a creditor intervening before there was any exercise of the power of selection and distribution, the claim of such creditor upon the defendant's estate for life, would not be defeated by the fact that under the will the defendant had this power during life to divest himself of all interest in the estate for the benefit and in the interest of the *cestuis que trust*.

It is not doubted that the terms of the deed from Clark to the defendant were such as to charge the levying creditor, under R. S., c. 73, § 12, with notice of the trust, to the extent to which it in fact existed and was valid.

But it is claimed that, as to some of the heirs, the trust has been extinguished, and that as to their shares or interests full title has been conveyed to the defendant by later deeds to him from such heirs, releasing all their rights under the will. There are five children living, and the grandchildren represent a deceased son. Two of the children, Abagail F. Wright and Harrison D. Pinkham, had prior to the levy, on May 26, 1869, by deed released and conveyed to the defendant all their interest in their mother's estate. What right in equity these two *cestuis que trust*, personally, might have to treat these purchases by the trustee as void at their option, or whether the levying creditor would still be subject to the exercise of such option on the part of the *cestuis que trust*, if he acquired by levy a legal title held by the trustee under such circumstances, are questions which do not arise; because it is apparent from an inspection of these two deeds, that they do not contain the requisite terms to convey

anything more than an estate for the life of the grantee. They do not, therefore, enlarge what we have held to be the rights of the defendant under the will itself; and their construction and effect in other respects, or their validity even, are immaterial. "If one having an estate in fee in remainder or reversion releases to the tenant for life without words of inheritance, it would give him no more than a life estate." Washburn on Real Property, *58.

The deed from Valentine M. Pinkham and Lindley M. Pinkham, dated December 8, 1868, which is the only other conveyance to the defendant from the heirs, does not purport to release their interest in the personalty—and the Clark farm was purchased partly with the proceeds of the personalty sold, and, in addition to that, it is only a conveyance to the defendant in trust for the other heirs; not extinguishing the trust, but simply excluding themselves from the benefit of it.

We think, therefore, the interest of the defendant in the demanded premises has not been enlarged by purchase, that his estate for life under the will, and nothing more, was subject to the levy.

Upon proper terms, in the discretion of the judge at *Nisi Prius*, the declaration may be amended, to describe such an estate, and in that event judgment may be entered for the demandant. *Howe* v. *Wildes*, 34 Maine, 566; *Parker* v. *Murch*, 64 Maine, 54; R. S., c. 76, § 7.

Otherwise judgment for the defendant.

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

CHARLES R. PARKS *vs.* DAVID W. MOSHER and another.

Kennebec. Opinion August 3, 1880.

Judgments, as admissions of record, open to explanation.

When judgments, rendered upon default, are offered in evidence to show the fact of partnership of the defendants, they do not, as to that fact, have the effect of judgments, but are received only as admissions of record; and it is competent for the defendants to state in explanation all the circumstances under which the admissions were made. The case of *Cragin* v. *Carleton*, 21 Maine, 492, is considered in the opinion.

APPLETON, C. J., BARROWS and LIBBEY, JJ., dissenting, as to the admissibility of evidence here offered.

ON EXCEPTIONS.

ASSUMPSIT on an account annexed against David W. Mosher and William K. Lancey, as co-partners, under firm name of D. W. Mosher & Co. The only question presented at the trial was whether the defendants were partners. The plaintiff introduced in evidence three judgments of this court, rendered on default against these defendants as partners. The defendants then offered evidence to show, that those judgments were rendered upon claims against Mosher alone, and that they were settled and disposed of without the knowledge of Lancey, who appeared by counsel in these suits, and it was rejected, as follows:

David W. Mosher. *Question.*—Whether in the three suits, *Munsey* v. *Mosher et al.*, *H. L. Mosher* v. *Mosher et al.*, and *Patterson* v. *Mosher et al.*, settlements were made with the parties and default entered by compromise made by yourself, to which Mr. Lancey was no party and without his knowledge? [Objected to and excluded.] *Question.*—Whether you paid the amount yourself for which the actions were defaulted and execution issued? [Objected to and excluded.]

William K. Lancey. *Question.*—After the three suits were brought,—the writs which have been put in,—whether you had any conversation with Mosher in relation to them? [Objected to and excluded unless offered to contradict Mosher.] *Question.*—Whether Mosher stated to you that these suits were concerning his own matters and that he would take care of them, adjust

them, and that you need not trouble yourself about them? [Objected to and excluded.] *Question.*—Whether you had any knowledge of their being defaulted, and whether you have ever been called upon to pay anything upon them? [Objected to and excluded.] The defendants excepted to the exclusion of the testimony offered.

Herbert M. Heath, for the plaintiff.

The evidence offered was properly excluded. *Cragin et al.* v. *Carleton et al.* 21 Maine, 492.

It is not for me to defend a decision that has stood in our reports for thirty-six years. It is conclusive of this question: "The effect of judgments is never to be explained by parol; and surely not by the declarations of the parties to them in opposition to what is obviously imported by them."

W. S. Choate, for the defendant, cited: *Ellis* v. *Jameson*, 17 Maine, 235; 1 Greenl. Ev. § 527, *a; Id.* § 211; *Heane* v. *Rogers*, 9 B. & C. 577; *Parsons* v. *Copeland*, 33 Maine, 370.

SYMONDS, J. The rulings, to which exceptions are taken in the present case, find some support in the opinion of the court in *Cragin* v. *Carleton*, 21 Maine, 492, and perhaps they do not go further than that authority warrants, although the two cases are not precisely the same. It is clear, too, that they have some advantages in point of practice;—affording no opportunity to do away with the effect of record admissions by ingenious explanations.

But, however that may be, we think they cannot be reconciled, in their full scope, with correct and well settled principles of evidence.

The question here is whether the defendants were in fact partners at a particular time, not whether they so held themselves out. "The only question presented to the jury was whether the defendants were partners, or not."

The earlier judgments were received in evidence, not as judgments, but as admissions of record on the part of defendants that they were partners at the date when such judgments were rendered on default, or rather when the liability in those cases was assumed, and as tending, therefore, to prove that they were

partners at the date of the transactions involved in this issue. If they were received as admissions only, why is it not competent to state in explanation all the circumstances under which the admissions were made?

If the fact was, that, as between Mosher and Lancey, the debts sued in the former actions were due only from Mosher, and were defaulted without Lancey's knowledge, and settled by compromise to which he was not a party, or if Lancey suffered himself to be defaulted on Mosher's agreement to pay the judgments, admitting them to be his individual debts, which agreement was carried out in good faith, no reason appears why these facts might not be shown in a subsequent suit in which the record is offered in evidence by another plaintiff;— as tending to explain the admission contained in the record. To hold otherwise would give to the former judgment, between other parties, the weight of a judgment in evidence in this case, to which it is not entitled. It is only received here as an admission.

Suppose, for instance, the earlier judgments had been rendered against the defendants as partners on the ground that, while not partners in fact, they had so held themselves out to the plaintiffs in those suits; or suppose this was the reason for submitting to a default.

In such case, in a subsequent suit by another plaintiff, it is clear that the judgments, when offered as admissions of the fact of partnership, must be open to explanation; and when explained according to the fact they might have little or no tendency to serve the purpose for which they were introduced.

"When admissions in deeds are offered in evidence by a stranger, ... the adverse party is not estopped, but may repel their effect in the same manner as if they were only parol admissions." 1 Greenl. on Ev. § 211. "When a record is admitted in evidence in favor of a stranger, against one of the parties, as containing a solemn admission, or judicial declaration, by such party, in regard to a certain fact, it is received not as a judgment conclusively establishing the fact, but as the deliberate declaration or admission of the party himself that the fact is so. It is therefore to be treated according to the principles governing admissions, to which class of evidence it properly belongs." 1 Greenl. on Ev. § 527, *a*.

"The qualities of an estoppel, which are imputable to a party's pleas, so far as concerns the particular case in which they are pleaded, are not imputable to such pleas when offered in evidence collaterally." 2 Wharton on Ev. § 1117.

"The pleadings of a party in one suit may be used in evidence against him in another, not as estoppel, but as proof open to rebuttal and explanation, that he admitted certain facts." 2 Wharton on Ev. § 838.

In the case *City Bank of Brooklyn* v. *Dearbon*, 20 N. Y. 244—not unlike this in many respects—the court say: "The judgment, being by default, did not conclusively establish, in another suit, the fact of a partnership. Nevertheless, that very default was some evidence that they both considered themselves liable to pay another note given by the same partnership name and at about the same time with the one in question."

In *Cragin* v. *Carleton*, *supra*, WHITMAN, C. J., says, delivering the opinion of the court: "The effect of judgments is never to be explained by parol; and surely not by the declarations of the parties to them, in opposition to what is obviously imported by them."

This is undoubtedly true where the record offered has the effect of a judgment in the case on trial; but if for the word, judgments, as used in this sentence, the words, admissions of record, be substituted—and that is to state correctly the character of the evidence in the present case—the language employed by the learned Chief Justice would at once be seen to be inapplicable. *Parsons* v. *Copeland*, 33 Maine, 370–374.

Although the character of the evidence offered at the trial, does not make this a very strong case against the ruling as given, still it seems that logically and on the best authority some of the testimony excluded was admissible, in explanation of the effect of the judgments as admissions of the defendants.

Exceptions sustained.

WALTON, VIRGIN and PETERS, JJ., concurred.

DISSENTING OPINION BY

APPLETON, C. J. The defendants were sued as partners. They submitted to a default. By the default they admitted the

allegations in the writ. The judgments recovered in suits against them as partners, were properly receivable to establish the fact of partnership in the present case. *Fogg* v. *Green*, 16 Maine, 282; *Ellis* v. *Jameson*, 17 Maine, 235; *Cragin* v. *Carleton*, 21 Maine, 492; Collyer on Partnership, § 773.

Assuming that the judgments introduced made only a *prima facie* case of partnership, the question arises whether the evidence offered was admissible to do away with their effect.

The defendant, Mosher, was asked whether in the suits in which judgments were rendered against the defendants as partners by default, he had entered into a compromise with the plaintiffs without the knowledge of Lancey, and had paid the amount. The answer was excluded. If the answer had been in the affirmative, it would not negative the fact of partnership. As a partner, he might compromise a debt of the firm and pay the same and such facts would afford no legitimate inference against the existence of such partnership. Sill less would an answer in the negative tend to disprove the existence of the alleged partnership.

The defendant, Lancey, was asked, if he had had any conversation with Mosher in relation to the suits in which the judgments had been received in evidence and whether he had stated to him that they related to his (Mosher's) affairs and that he need not trouble himself about them as he would adjust them. The answers to these questions were excluded and properly. The conversations of the partners *inter sese* in relation to past pending suits is not admissible. The defendants were witnesses and might deny the existence of a partnership, but they cannot strengthen that denial by giving proof of statements to each other not under oath.

The fact that Lancey had no knowledge of the defaults in the judgments introduced, is entirely immaterial. He knew of the suits and whether he knew of the defaults or the payments of the judgments in which defaults had been entered does not disprove or tend to disprove the fact of partnership.

The answers to the questions were properly excluded.

Exceptions overruled.

BARROWS and LIBBEY, JJ., concurred.

ADDISON MONK *vs.* WILLIAM PACKARD and others.

Oxford. Opinion August 4, 1880.

Nuisance. Burial ground.

A burial ground which does not affect the physical health of the occupants of of a dwelling house near which it is located, nor their olfactories by any effluvia from the graves, is not in law a nuisance. The human contents of graves cannot offend the senses in a legal point of view. To become a nuisance the graves or their contents must be such in their effect as naturally to interfere with the ordinary comfort physically of human existence, and the inconvenience must be something more than fancy, delicacy or fastidiousness.

ON MOTION.

The facts appear in the opinion.

O. H. Hersey and *Enoch Foster*, for the plaintiff.

In the defendants' burial ground the nearest grave is two rods and nine links from the plaintiff's sitting room window. The close proximity of the cemetery renders the enjoyment of the plaintiff's dwelling house and well of water offensive and uncomfortable, constantly exciting apprehensions of disease; and it greatly injures the value and sale of plaintiff's property.

Nuisance is "anything which worketh hurt, inconvenience or damage." 3 Blackstone, 213.

That which is offensive to the senses and renders the enjoyment of life or property uncomfortable is a nuisance. *Begein* v. *Anderson*, 28 Ind. 79; *Catlin* v. *Valentine*, 9 Paige, 575; *Brady* v. *Weeks*, 3 Barb. 157; *Barnes* v. *Hathorn*, 54 Maine, 124.

Upon the question of disturbing the verdict counsel cited: *Googins* v. *Gilmore*, 47 Maine, 9; *Williams* v. *Buker*, 49 Maine, 427; *Peabody* v. *Hewett*, 52 Maine, 33; *Farnum* v. *Virgin*, 52 Maine, 576; *Gleason* v. *Bremen*, 50 Maine, 222; *Drown* v. *Smith*, 52 Maine, 141; *Stone* v. *Augusta*, 46 Maine, 127; *Darby* v. *Hayford*, 56 Maine, 246; *Gould* v. *White*, 26 N. H. 189.

Black & Holt, for the defendants.

VIRGIN, J. This is an action on the case for an alleged nuisance, consisting of a private burying ground, containing seven or eight graves, situated near the plaintiff's dwelling house.

Prior to 1850, the father of two of the defendants, and of the wives of the other defendants, owned about fourteen acres of land on the east side of the county road, in a sparsely settled part of Hebron. The northeast (back) corner of the lot, bounded on the east by the high bank of a brook, was appropriated for a private burial place, in which, at various times from fifteen to forty years ago, some nine or ten bodies had been buried in a somewhat promiscuous manner. It was never inclosed, and it had no definite boundaries; but it was separated from the remaining portion of the lot, by a board fence extending from the road easterly near the graves to the brook, leaving about an acre north, and the remainder south of the fence.

In 1850, one of the defendants came into possession of the larger parcel, erected thereon a small house, the front of which was about thirty-three feet from the road, with the north end about the same distance from the board fence; and in the rear of the house, but quite near to it, a small stable with its north end flush with the fence.

In 1868, the plaintiff purchased the larger parcel of land with the buildings thereon, dug a well some thirteen feet in depth, and about seventy feet from the fence, between the house and the road, and has occupied the premises most of the time since.

In 1875, the defendants fenced off the southwest (front) corner of the small lot, inclosing a parcel thereof, thirty-three feet on the road, and extending back nearly to the northeast (back) corner of the stable for a new burying ground; and into this they removed the remains of all the old graves except two, one of which being included within the new inclosure, and the other not removable on account of water in the grave. One of the reasons for removing the graves was the caving off of the bank of the brook as it was worn away by spring and fall freshets, which had nearly reached the graves nearest the bank. The old board fence was removed, and a double wall, faced on the side next the plaintiff's premises, was substituted; the new cemetery was

tastefully graded and suitable headstones erected at the several graves, the nearest being about forty feet from, and opposite to the window of the plaintiff's sitting room, and also in plain view from his front windows and door. As first located, the graves were only visible from the back rooms of his house.

The plaintiff claimed this new grave yard to be a nuisance, for the reason that its proximity and relative position render his residence uncomfortable and the enjoyment of his property disagreeable; and that it has rendered the water in his well unpalatable and unwholesome, and has lessened the market value of his property.

The jury, under instructions not excepted to, returned a verdict for the plaintiff and assessed damages in the sum of twenty-five dollars; which the defendants ask us to set aside as being against law and the weight of evidence.

There is no pretense that the plaintiff's physical health, or his olfactories have in any degree, been affected by any effluvia from the new graves; for the undisputed testimony is overwhelming that they contained nothing which could render such a result possible. And if the verdict was based upon testimony of the plaintiff, that the water in his well (which is closely covered about the pump, and has never been cleaned out) "tastes bad and smells bad," on account of a few dry bones buried seventy feet distant therefrom, with level ground intervening, it would be so manifestly erroneous and against the weight of evidence, we should not hesitate to set it aside.

Nor can the verdict be sustained upon the sole ground of the cemetery's proximity to the plaintiff's premises, and the consequent depreciation of the market value of his property. For a repository of the bodies of the dead is as yet indispensable, and wherever located, it must *ex necessitate* be in the vicinity of the private property of some one who might prove its market value injuriously affected thereby. *New Orleans* v. *Wardens, etc.*, 11 La. An. 244.

But assuming that the jury, in respect to these matters, found in behalf of the defendants and concluded that there was no injury to the plaintiff's property, or to his physical health or comfort, and based their verdict solely upon the ground that, on account of its relative position with the plaintiff's house, the cemetery

inevitably meets his immediate view whenever he looks from the north window of his sitting room or steps from his door, and that thereby the comfortable enjoyment of his dwelling house is interfered with—then the defendants contend that the verdict is against law—upon the ground that such discomfort is one purely mental, and is not a cause of action.

It cannot be doubted that the law recognizes that to be a nuisance which is naturally productive of sensible personal discomfort, as well as that which causes injury to property. *St. Helens Smelting Co.* v. *Tipping*, 11 Ho. L. Cas. 642. But it must injuriously affect the senses or nerves. Thus sound, whether caused by a locomotive blowing off steam, the ringing of bells or the barking of dogs, whenever it becomes sufficient to injuriously affect residents in the neighborhood, is actionable. *First Baptist Church* v. *R. R. Co.* 5 Barb. 79, and cases there cited. To become actionable, the effect of sound must be such as naturally to interfere with the ordinary comfort, physically, of human existence, and the inconvenience must be "something more than fancy, delicacy or fastidiousness." Cooley Torts. 600.

Cemeteries are not necessarily even shocking to the senses of ordinary persons. Many are rendered attractive by whatever appropriate art and skill can suggest, while to others of morbid or excited fancy or imagination, they become unpleasant and induce mental disquietude from association, exaggerated by superstitious fears. The law protects against real wrong and injury combined, but not against either or both when merely fanciful.

The human contents of these graves cannot, as they lie buried there, offend the senses in a legal point of view. The memorial stones alone affect the senses, and the same would result to the superstitious, though nothing human lay beneath them. If this burial ground is under the circumstances a private nuisance, then is it also a public nuisance to every traveller who passes on that road, as well as every soldiers' monument in the country. See Cooley Torts. 602 *et seq.*; *Barnes* v. *Hathorn*, 54 Maine, 124.

We think the verdict is against law, and it must be set aside.

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

CHARLES P. MATTOCKS, Assignee of George E. Ward, Bankrupt, *vs.* GEORGE H. CHADWICK.

Cumberland. Opinion August 4, 1880.

Statute of limitations. New promise.

When a new promise is relied on to take a debt out of the operation of the statute of limitations, and the new promise is a conditional one, the plaintiff cannot recover unless he proves performance of the condition. Proof of promise only is not sufficient.

A promise to settle a demand "when I was [am] able" is not sufficient to take the case out of the operations of the statute of limitations without proof of the defendant's ability to pay.

EXCEPTIONS from superior court, Cumberland county.

ASSUMPSIT on the note given below, commenced November 19, 1878, entered at the December term, 1878, and tried by the justice without the intervention of a jury, at the March term, 1879, subject to exceptions in matters of law. Plea, the general issue, with brief statement that the alleged cause of action did not accrue within six years before the date of plaintiff's writ.

(Note.)

"$191.42. "Portland, October 25, 1870.

Sixty days after date I promise to pay to the order of G. E. Ward, one hundred ninety-one forty-two one hundredths dollars.

At Value received.

GEO. H. CHADWICK."

Upon a demand being made by the plaintiff, upon the defendant, for payment of the note, the defendant sent the plaintiff the following communication in writing:

"Portland, June 17, 1878.

C. P. Mattocks, Dear Sir:—I received a notice from you Saturday, stating that a demand against me had been left in your office. I presume it is Mr. Ward's claim. I would say now, as I did before, and also told Mr. Ward, that when I was able I should most certainly settle the demand. I am not now, nor have I been, in a condition to settle it. It will be a great satisfaction to myself when I find my business will permit me to liquidate the demand, for being in debt, with me is not at all

agreeable, and to be free from such embarrassments is equally pleasant. I should have called in person on you, but shall be occupied all my leisure moments in the examinations of the public schools. Very respectfully,

GEO. H. CHADWICK."

At the trial the defendant admitted that the demand referred to in the above letter was the note in suit.

Upon the foregoing facts, the presiding justice ruled as a matter of law, that "the defendant is liable to the plaintiff for the amount of the note;" and the defendant excepted to that ruling.

C. P. Mattocks, for the plaintiff.

This action is brought under the provisions of R. S., c. 81, § 93. "In actions of debt or on the case founded on any contract, no acknowledgment or promise shall be allowed to take the case out of the provisions hereof, unless the acknowledgment or promise is an express one, in writing, signed by the party chargeable thereby."

To take the contract out of the operation of the statute of limitations it is not necessary that the admission of indebtedness should be in any very precise or set terms. "It is sufficient if the evidence be such, that it can satisfactorily be deemed, that the party to be charged meant to be understood to concede, that he owed the debt." *Dinsmore* v. *Dinsmore*, 21 Maine, 433; *Barrett* v. *Barrett et al.* 8 Maine, 353; *Whitney* v. *Bigelow*, 4 Pick. 110.

In *Cummings* v. *Gasset*, 19 Vt. 308, the court held a promise to pay "as soon as the debtor could do so," sufficient to take the case out of the statute of limitations. See also, *Homer* v. *Starkey*, 27 Ill. 13; *Sennett* v. *Homer*, *Id.* 429; *Bliss* v. *Allard*, 49 Vt. 350.

Josiah H. Drummond, for the defendant.

WALTON, J. When a new promise is relied on to take a debt out of the operation of the statute of limitations, and the new promise is a conditional one, the plaintiff cannot recover unless he proves performance of the condition. Proof of the promise

only is not sufficient. Thus, a promise to pay "as soon as I can," (*Tanner* v. *Smart*, 6 B. & C. 273; 9 D. & R. 549); or, "when able," (*Davies* v. *Smith*, 4 Esp. 36); or, "I shall be most happy to pay you both interest and principal as soon as convenient," (*Edmunds* v. *Downes*, 2 C. & M. 459; 4 Tyr. 173); or, "when of ability," (*Scales* v. *Wood*, 3 Bing. 648; 11 Moore, 553); or, "I will pay as soon as it is in my power to do so," (*Haydon* v. *Williams*, 4 M. & P. 811); or, "I should be happy to pay it if I could," (*Ayton* v. *Bowers*, 12 Moore, 305; 4 Bing. 105); or, "I am going to H. in the course of the week, and will help you to 5 *l.* if I can," (*Gould* v. *Shirley*, 2 M. & P. 581); or, "If E. will say I had the timber I will pay for it," or, "prove it by E. and I will pay for it," (*Robbins* v. *Otis*, 1 Pick. 368; 3 Pick. 63); or, "I have not the means now, but will pay as soon as I can," (*Tompkins* v. *Brown*, 1 Denio, 247); will not take a case out of the statute, except upon proof of performance of the condition. Proof of the promise only is not sufficient. *Read* v. *Wilkinson*, 2 Wash. C. C. 514; *Lonsdale* v. *Brown*, 3 Wash. C. C. 404; *Kampshall* v. *Goodman*, 6 McL. 189.

In the case now before us, the defendant's promise was conditional. He said, "I would say now as I said before, and also told Mr. Ward, that when I was able I should most certainly settle the demand; but I am not now, nor have I been, in a condition to settle it." Such a promise is not sufficient to take a case out of the operation of the statute of limitations, without proof of the defendant's ability to pay. There was no such proof, and the determination of the justice of the superior court that the evidence was sufficient to entitle the plaintiff to recover, was erroneous.

Exceptions sustained.
New trial granted.

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

CHARLES E. MINOR *vs.* E. C. STAPLES.

Cumberland. Opinion August 4, 1880.

Innkeeper. Bath house.

One who keeps an inn, and also, separate from the inn, keeps a bath house where persons bathing in the sea change their garments and leave their clothes, is not chargable as innkeeper for property stolen from the bath house.

ON REPORT from superior court, Cumberland county.

An action to recover of the defendant, the proprietor of the Old Orchard House, at Old Orchard beach, as inn keeper, for money, watch, chain and ring of the plaintiff, of the agreed value of two hundred and eighty-seven dollars and seventy-five cents, stolen August 20, 1877, from a bath house, kept by the defendant on the sea shore, where persons, bathing in the sea, change their garments and leave their clothes, and where the plaintiff left his clothes, and the money and jewelry which were stolen while he was absent bathing. The plaintiff was at that time a guest at defendant's inn.

C. P. Mattocks, for the plaintiff.

W. L. Putman, for the defendant.

WALTON, J. The question is whether one who keeps an inn, and also keeps a bath house separate from his inn, is chargable, as innkeeper, for property stolen from the bath house. We think he is not. It seems to us that the keeping of the inn and the keeping of the bath house are separate and distinct employments, and involve separate and distinct duties and liabilities. One may be an innkeeper without being a bath house keeper, or he may be a bath house keeper without being an innkeeper; or the same person may engage in both employments; just as a livery stable keeper may also be a common carrier of passengers; but we do not think his doing so will make him responsible in the one capacity for liabilities incurred in the other. We are not now speaking of bath rooms attached to or kept within hotels, but of separate buildings, erected upon the sea shore, and used, not as bath rooms, but as places in which those who bathe in the sea

change their garments and leave their clothes, and other valuables, while so bathing. It seems to us that such an establishment is as distinct from an inn as a wharf or a boat house would be; and that an innkeeper, as such, can no more be made responsible for property stolen from such a bath house than he could be for property stolen from a wharf, or a boat house, if he happened to be the keeper of the latter as well as the former.

This suit is against the defendant as innkeeper. The declaration avers that he kept a common inn, and received the plaintiff into said inn, together with his money, and a watch, and a chain, and a ring; and that while the plaintiff was a guest therein, with his said money, watch, chain and ring, said property was wrongfully taken and carried away and wholly lost to him. Such are the material averments in the declaration. But the evidence shows that the property was taken from a bath house, standing upon the sea shore, or beach, at a considerable distance from the inn, while the plaintiff was absent bathing in the sea. We think there is a fatal variance between the allegations and the proof; and that under such a declaration, and with such evidence, the plaintiff cannot recover. We do not find it necessary to consider, and, of course, we do not undertake to determine, what the rights and liabilities of the parties would be under a different declaration. All we mean to decide is that under such a declaration, and with such evidence, the action is not maintainable.

Judgment for defendant.

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

CHARLES J. MCCARTHY, by his next friend, *vs.* SECOND PARISH IN THE TOWN OF PORTLAND.

Cumberland. Opinion August 4, 1880.

Negligence. Master and servant. Independent business. Slater.

The employment of one who carries on an independent business, and who, in doing his work, does not act under the direction and control of his employer, but determines for himself in what manner it shall be carried on, does not create the relation of master and servant; and the employer would not be responsible for the negligence of a person thus employed nor that of his servants.

A slater by trade, who carried on the business of slater in Portland and had done so for more than twenty years, keeping a shop, and a slate on which to receive orders, and men constantly in his employ to assist in executing such orders as he should receive, was held to be carrying on what the law denominates an independent business.

ON MOTION AND EXCEPTIONS from the superior court, Cumberland county.

The verdict was for $3000.

The facts appear in the opinion.

Nathan & Henry B. Cleaves, for the plaintiff.

The *law* of the case is now well settled.

"The question in these cases, whether the relation be that of master and servant, or not, is determined mainly by ascertaining from the contract of employment whether the employer retains the power of directing and controlling the work or has given it to the contractor." *Forsyth* v. *Hooper et als.* 11 Allen, 422; *Hilliard* v. *Richardson*, 3 Gray, 349; *Linton* v. *Smith*, 8 Gray, 147.

The true principle governing these cases is very clearly defined in Sherman on Negligence, § 77, page 86.

The power to control the work, and the manner of its execution, is the guiding principle in cases of this kind. *Peck* v. *Mayor et als.* 8 N. Y. 222; *Kelley* v. *same*, 11 N. Y. 432; reversing S. C. 4 E. D. Smith, 291.

The case of *Brackett* v. *Lubke el al.* 4 Allen, 139, is so directly in point, that the court will pardon us for referring to it with unusual particularity.

A carpenter was employed by the lessee of a building on Washington street, Boston, to repair an awning. He was told, as in the case at bar, what was wanted, without further directions, and neither the owner or lessee was present at the time the work was done. The carpenter received thirty-eight cents for the work. While the repairing was going on, a portion of the awning fell upon the head of a passer by. Suit for damages was brought against the lessee and a verdict rendered for plaintiff, and the defendants alleged exceptions.

The court says, BIGELOW, C. J.:

"This seems to us to be a very clear case. The defendants are liable, because it appears that the negligent act which caused the injury was done by a person who sustained towards them the relation of servant. There was no contract to do a certain specified job or piece of work in a particular way for a stipulated sum. It is the ordinary case where a person was employed to perform a service for a reasonable compensation. The defendants retained the power of controlling the work. They might have directed the time and manner of doing it. If it was unsafe to make the repairs at an hour when the street was frequented by passers, it was competent for the defendants to require the person employed to desist from work until this danger ceased or was diminished. . . The defendants were bound to see that in removing or altering a portion of the awning over the street no injury should be occasioned to travelers."

If a servant employs another to assist in his master's business, and the person so employed is guilty of negligence therein, the master is liable. *Suidam* v. *Moore*, 8 Barb. 358; *Althorf, Adm'r*, v. *Wolfe*, 22 N. Y. 355.

"The fact that there is an intermediate party, in whose general employment the person whose acts are in question, is engaged, does not prevent the principal from being held liable for the negligent conduct of the under-servant, unless the relation of such intermediate party to the subject matter of the business in

which the under-servant is engaged, be such as to give him exclusive control of the means and manner of its accomplishment, and exclusive direction of the persons employed therefor." *Kimball* v. *Cushman*, 103 Mass. 198.

W. W. Thomas, Jr. and *George E. Bird*, for the defendants, cited: *Peachey* v. *Rowland*, 13 C. B. (76 E. C. L.) 182; *Roberts* v. *Plaisted*, 63 Maine, 335; *Sadler* v. *Henlock*, 4 El. & Bl. 578; Wood on Master and Servant, p. 620; *Corbin* v. *American Mills*, 27 Conn. 274; *Reedie & Hobbit* v. *London & N. W. R. R. Co.* 4 Websly, H. & G. 256; *Eaton* v. *E. & N. A. R. R. Co.* 59 Maine, 531; *Quarman* v. *Burnett*, 6 M. & W. 497 (1840); *Laugher* v. *Pointer*, 5 B. & C. 554; *Blake* v. *Ferris*, 5 N. Y. 48; *Milligan* v. *Wedge*, 12 Ad. & El. 177 (1840); *Allen* v. *Hayward*, 7 Ad. & El. N. S. 960; *Butler* v. *Hunter*, 7 H. & N. 826; *Steel* v. *S. E. R. R.* 81 E. C. L. 550; *Murray* v. *Currie*, 6 C. P. (Law Rep.) 24; *Gaylord* v. *Nichols*, 9 Exch. 702; *Blake* v. *Ferris*, 1 Seld. 48; *Park* v. *Mayor*, &c. New York, 8 N. Y. 226, 227; *McMullin* v. *Hoyt*, 2 Daly, 271; *DeForrest* v. *Wright*, 2 Mich. 370; *Kellogg* v. *Payne*, 21 Iowa, 575; *Clark* v. *V. & C. R. R.* 28 Vt. 103; *Schwartz* v. *Gilmore*, 45 Ill. 455; *Painter* v. *Pittsburg*, 46 Pa. St. 213; *Ardesco Oil Co.* v. *Gilson*, 63 *Ib.* 146; 82 Pa. St; *Boniface* v. *Relyea*, 5 Abb. (N. S.) 259; *Du Pratt* v. *Lick*, 38 Cal. 691, cited in Wh. on Neg. § 181, note 4; Sh. and Red. on Negligence, §§ 76, 79; *Corbin* v. *American Mills*, 27 Conn. 274; *Burke* v. *N. & W. R. R. Co.* 34 *Ibid.* 474.

The following, apparently in conflict with the authorities cited, have been overruled, or apply to facts altogether different from the case at bar, or are by courts holding to a different rule than that adopted by this court. *Cush* v. *Steinman*, 1 B. & P. 400; *Randleson* v. *Murray*, 8 Ad. & El. 109; *Rapson* v. *Cubitt*, 9 M. & W. 710; *Hilliard* v. *Richardson*, 3 Gray, 362; *Conners* v. *Hennessey*, 112 Mass. 98; *Clapp* v. *Kemp*, 122 Mass. 481; *Earle* v. *Hall*, 2 Met. 358; *Burgess* v. *Gray*, 1 C. B. 578; *Sadler* v. *Henlock*, 4 El. &. Bl. 570; *Pickard* v. *Smith*, 10 C. B. 470; *McCleary* v. *Kent*, 3 Duer, 27; *Smith* v. *Milne*, 2 Dow, 290.

WALTON, J. Some men at work upon the roof of the Second Parish church in Portland, carelessly allowed a ladder in use by them to be blown down by the wind, and it fell upon the plaintiff and injured him. The question is whether the parish is responsible for the injury. We think not. True, the law makes a master responsible for the negligence of his servant, but the employment of one who carries on an independent business, and in doing his work does not act under the direction and control of his employer but determines for himself in what manner it shall be carried on, does not create the relation of master and servant, and this responsibility does not attach.

The general rule, says Judge Thomas, in *Linton* v. *Smith*, 8 Gray, 147, is that, he who does the injury must respond; that the well known exception is that, the master shall be responsible for the doings of the servant whom he selects, and through whom, in legal contemplation, he acts; but when the person employed is in the exercise of a distinct and independent employment, and not under the immediate supervision and control of the employer, the relation of master and servant does not exist, and the liability of a master for his servant does not attach.

In *DeForrest* v. *Wright*, 2 Mich. 368, the court say that where an employee is exercising a distinct and independent employment, and is not under the immediate control, direction, or supervision of the employer, the latter is not responsible for his employee's negligence. In that case a drayman was employed to haul a quantity of salt from a warehouse, and deliver it at the store of the employer at so much per barrel, and while in the act of delivering the salt, one of the barrels, through the carelessness of the drayman, rolled against the plaintiff and injured him, as he was passing upon the sidewalk, and it was held that the employer was not liable for the injury. In another case in the same volume, *Moore* v. *Sanborne*, 2 Mich. 519, the court held that where one was employed to cut and haul all the logs on certain land of the employer, and deliver them at a place named, the employer to have nothing to do with the cutting or hauling, the relation of master and servant was not thereby created, and

that the employer would not be liable for the carelessness of his employee in performing the labor.

"Although, in a general sense, every one who enters into a contract may be called a 'contractor,' yet, that word, for want of a better one, has come to be used with special reference to a person who, in the pursuit of an independent business, undertakes to do specific jobs of work for other persons, without submitting himself to their control with respect to all the petty details of the work. . . . . The true test, as it seems to us, by which to determine whether one, who renders service to another, does so as a contractor or not, is to ascertain whether he renders the service in the course of an independent occupation, representing the will of his employer only as to the *result* of his work, and not as to the means by which it is to be accomplished." . . . "One who contracts to do a specific piece of work, furnishing his own assistants, and executing the work either entirely according to his own ideas, or in accordance with a plan previously given him by the person for whom the work is done, without being subject to the latter with respect to the details of the work, is clearly a contractor, and not a servant." S. & R. on Negligence, §§ 76–77.

"The difficulty always is to say whose servant the person is that does the injury; when you decide that, the question is solved. . . . When the person who does the injury exercises an independent employment, the party employing him is clearly not liable." WILLIAMS, J., in *Milligan* v. *Wedge*, 12 Ad. & E. 177. In that case a butcher employed a drover to drive a beast home for him, and the drover employed a boy, and through the boy's negligent driving, the beast ran into the plaintiff's premises and damaged his property, and the court held that the boy was the servant of the drover, and not the servant of the butcher, and that the latter was not liable for the injury.

"I understand it to be a clear rule in ascertaining who is liable for the act of a wrong-doer, that you must look to the wrong-doer himself, or to the first person in the ascending line who is the employer and has control of the work; that you cannot go further back and make the employer of that person liable." WILLES, J., in *Murray* v. *Currie*, L. R. 6 C. P. 24. In that case a

stevedore was employed to unload a vessel, and the plaintiff was injured by the carelessness of one of the vessel's crew, who, at the time of the injury, was working for and under the direction of the stevedore, and the court held that the employer of the stevedore was not liable for the injury.

In *Reedie* v. *Railway Co.* 4 Exch. 244, a contractor's workmen, in constructing a bridge over a public highway, negligently allowed a stone to fall upon one passing beneath, and it was held that the railway company was not responsible for the injury. Platt, B., put this significant inquiry: "Suppose the occupier of a house were to direct a bricklayer to make certain repairs to it, and one of his workmen, through clumsiness, were to let a brick fall upon a passer by, is the owner to be liable?" The decision shows that, in the opinion of the court, the question should be answered in the negative.

In *Murphey* v. *Caralli*, 3 Hurl. & C. 461, the plaintiff was injured by the falling of a bale of cotton, which had been negligently piled by persons employed by the defendant; but it appearing that the piling was done under the direction of one Jones, who was employed by the owner of the warehouse in which the cotton was stored, the court held that this fact relieved the defendant from responsibility. "The bales which caused the mischief," said Pollock, C. B., "having been stowed under Jones' directions, I think that he and his master alone are responsible."

In *Pearson* v. *Cox*, 2 C. P. Div. 369, a tool, called a straightedge, was jostled out of the window of a house that was being built, and fell upon the plaintiff and injured him; but it appearing that the act which caused the straightedge to fall was the act of one of the men employed by the mason, a sub-contractor, the court held that the builders of the house were not liable.

In *Forsyth* v. *Hooper et al.* 11 Allen, 419, the defendants had contracted to cast a chime of bells and place them in the tower of the Arlington street church, in Boston. The plaintiff was injured by a chain carelessly thrown from the tower by one of the men engaged in hoisting the bells. The jury returned a verdict for the defendants, and the court sustained it upon the ground that the defendants had employed one Leonard to do this part of the

work, and that the evidence, though conflicting, was sufficient to justify the jury in finding that the defendants had relinquished to Leonard the management and control of the manner of doing the work.

In *Wood* v. *Cobb et al.* 13 Allen, 58, the court say it is too well settled to admit of debate that the employer of one who exercises an independent employment is not responsible for the negligence of one in the latter's service. In that case the defendants, who were dealers in fish, had employed a truckman to deliver fish to their customers each Friday, for a dollar a day, he furnishing his own team and taking such route as suited his convenience. On one occasion, being sick, he told his servant to get help, and the defendants allowed a boy in their employ to drive one of the teams; and he, while doing so, drove against the plaintiff, and caused the injury complained of; and the court held that at the time of the injury, the boy was the servant of the truckman, and not the servant of the defendants, and that the latter were not responsible for the injury.

In *Eaton* v. *E. & N. A. Railway Co.* 59 Maine, 520, the question we are now considering was fully examined, and the doctrine of the foregoing cases affirmed.

Assuming, therefore, that the law is now well settled that an employer is not responsible for a contractor's negligence, nor for the negligence of a contractor's workmen; and that one who carries on an independent business, and, in the line of his business, is employed to do a job of work, and in doing it, does not act under the direction and control of his employer, but determines for himself in what manner it shall be done, is a contractor, within the meaning of the law, let us apply it to the case before us.

The case shows that Canselo Winship was a slater by trade, and carried on the business of a slater, and had done so, in Portland, for more than twenty years, keeping a shop, and a slate on which to receive orders, and men constantly in his employ to assist in executing such orders as he should receive. He was, therefore, carrying on what the law denominates an independent business. The case also shows that he had been employed to slate the Second Parish church, in Portland, then

being built, and to do other work upon it; that the roof afterwards leaked and he was requested to repair it; that he took two men, then in his employ, and went into the tower of the church and assisted them in putting out a ladder to enable them to get on and off the roof, and to carry on the materials needed to make the necessary repairs; that the men continued to use the ladder (taking it into the tower when they went to their dinners, and putting it out again upon their return) till about three o'clock in the afternoon, when it was blown down and fell upon the plaintiff, as already stated. No officer or agent of the parish interfered with the men, or gave them any directions whatever. On the contrary, the chairman of the parish committee, by whom Winship was employed, testifies that he entrusted the matter entirely to him, as he had been in the habit of doing; and this is confirmed by the men and contradicted by no one. Winship paid his men but a dollar and a half a day, while he charged and received from the parish four dollars a day for their labor.

Here, then, we have a case, where a man who is carrying on an independent business, is employed, in the regular course of his business, to do a job of work; he is left entirely free to do the work as he pleases; he sets two of his own servants at work upon the job, charging his employer a much larger sum for their labor than he pays them; they so negligently place a ladder in use by them that it is blown down by the wind and injures a passer by. Now, if it be a rule of law that one who carries on an independent business, and, in doing jobs of work for others, acts independently, so far as the manner of doing it is concerned, is a contractor, and not the servant of his employer, can there be a plainer case for the application of the rule than this? We think not. If Winship and his workmen can, under these circumstances, be regarded as the servants of the parish, so as to make the parish liable for their negligence, we fail to see why the same rule would not apply to the expressman, who is employed to carry a trunk to a depot, or to the hackman who is employed to drive one about town, or to the scissors-grinder who stops in front of a house and is employed to sharpen the knives and the scissors of its occupants, or to the plumber and the gas fitter; and why it

would not have applied to the drover, and the stevedore, and the truckman, and the drayman, in the cases cited. We think it would. In principle the cases are not distinguishable.

Our conclusion is that, the verdict in this case is clearly wrong, and must be set aside.

Motion sustained. Verdict set aside.
New trial granted.

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

HENRY D. HALL, Administrator, in equity, *vs.* JOHN H. OTIS and others.

Androscoggin. Opinion August 4, 1880.

Will — construction of. Life estate.

The testator in his will gave his estate to his wife, during her life, to hold and use the same to her benefit "the same as if absolutely hers," and at her death whatever was left to be divided equally among the surviving brothers and sisters of the testator, and added "I wish it distinctly understood that I place no restriction upon my said wife in regard to her use of my estate, desiring and intending that she shall use and expend every dollar of the same, if necessary, for her care, comfort or support." *Held*, that the will secures to the surviving brothers and sisters of the testator all that was left of his estate at the decease of his widow.

BILL IN EQUITY, to obtain a construction of the will of Daniel E. Hall, and to obtain property claimed to belong to that estate.

(Will.)

"Know all men by these presents, that I, Daniel E. Hall, of Auburn, county of Androscoggin and State of Maine, do hereby make, publish, and declare this my last will and testament:

"First. I give and bequeath unto Emeline Annie Hall, daughter of my brother Ivory F. Hall, the sum of fifty dollars, if she be living at the time of my decease.

"Second. I give and bequeath unto the town of Kenduskeag, in the county of Penobscot, the sum of three hundred dollars, in trust for the following purposes, viz: to improve and keep in repair my burial lot in the cemetery near the village of said

Kenduskeag. It is my direction that the income of said three hundred dollars be applied each year for said care and improvement by the municipal officers of said town, and if any part of said three hundred dollars is needed therefor more than the income thereof, then said officers are authorized to use and apply such amount as they deem necessary.

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

"Fourth. The first and second clauses of this will are not to be operative unless my estate shall amount to at least ten thousand dollars ($10,000).

"Fifth. I hereby constitute and appoint my said wife, Annie E. Hall, sole executrix of this will, without being required to give bond."

Duly signed, &c., August 31, 1874.

On the fifth day of September, 1875, Daniel E. Hall died, and his will was duly probated and allowed on the third Tuesday ot October, 1875, and letters were issued to Annie E. Hall as executrix. Annie E. Hall died January 27, 1876, and the

plaintiff on the third Tuesday of March, 1876, was duly appointed administrator on the estate of Daniel E. Hall with the will annexed.

Will of Annie E. Hall.—"I, Annie E. Hall of Auburn, county of Androscoggin and State of Maine, do hereby make, publish and declare this my last will and testament as follows, to wit:"

[After giving directions as to the interment of her remains and the removal of those of her husband and the erection of a monument, and making bequests of specific articles of apparel, furniture, &c.]

"Fifth. All the residue and remainder of my estate of whatever name and nature not hereinafter disposed of, together with such portion of the estate bequeathed to me by my said husband, as may remain unexpended by me for my support, or by my said executor in paying my debts, funeral expenses and other charges hereinbefore provided for, I hereby give, bequeath and devise as follows, viz: One-third part thereof to the brothers and sisters of my said deceased husband who may be living at time of my decease, in equal proportions; one-third part thereof less the sum of six hundred dollars, to my brother Samuel F. Clark, if living; otherwise to his heirs; and the other third part, together with the six hundred dollars before named, as taken from the third given my said brother, I give and bequeath unto said Martha Jane Clark in accordance with my promise hereinbefore mentioned.

"Sixth. I hereby constitute and appoint John H. Otis of Auburn, my sole executor of this will.

"Witness my hand this ninth day of December, A. D. 1875.

ANNIE E. HALL."

This will was duly probated and allowed on the third Tuesday of March, 1876, and letters issued to the defendant, Otis, as executor.

Pulsifer, Bolster & Hosley, for the plaintiff, cited: *Shaw* v. *Hussey*, 41 Maine, 495; *Hall* v. *Preble*, 68 Maine, 100; Redfield on Wills, part 2. c. 13, § 6.

Nahum Morrill, for John H. Otis and Martha J. Clark, two of the defendants.

The plaintiff has set forth in his bill that said Otis is executor of the last will and testament of Annie E. Hall, the sole legatee, as we contend the case shows, in the will of Daniel E. Hall. We claim, that having given bond, if the plaintiff has any claim against him for the property alleged to be in his, said Otis' possession, if not surrendered on demand, the value thereof can be recovered by a suit at law on said bond, and further, jurisdiction in equity is not conferred upon this court by R. S., c. 77, § 5, in matters alleged in said bill and demurrer, as is apparent on inspection.

When there is a plain, adequate and sufficient remedy at law, a bill in equity cannot be sustained for relief or discovery. Eastman's Dig. Equity, 1, § § 7, 9.

By the terms of the will, Annie E. Hall, the wife of said testator, took a life estate in all his property, as held by this court, in *Hall et als.* v. *Preble*, 68 Maine, 100.

The language of the will gave Mrs. Hall the power to appropriate every dollar of the testator's estate for her care, comfort and support.

If that is so, then no valid trust was created by the will; for it is laid down as a rule of law that legacies of what shall be left at the decease of a prior legatee, when the estate is indeterminate, and when the prior legatee has the power to exhaust the whole, are not sufficiently certain to create a valid trust. Red. on Wills, part. 1, c. 11, § § 1, 18, 19; 2 Story Eq. Juris. (12th ed.) § 1070; 2 Washburn R. P. (4th ed.) 505, 506.

Mere precatory words of desire or recommendation will not in general, convert the devise into a trust unless it appears affirmatively that they were intended to be imperative. 2 Washburn R. P. (4th ed.) 505, 506.

Any words by which it is expressed or from which it may be implied that the first taker may apply any part of the subject to his own use, are held to prevent the subject of the gift from being certain. Red. on Wills, part 1, c. 11, § § 2, 3; 2 Story Eq. Juris. (12th ed.) § 1073, and cases there cited.

A gift of what shall be left or what shall remain, preceded by a power of disposition or appropriation reserved to the trustee, naturally refers to what shall be unappointed and unappropriated by the trustee under the power reserved in her. Red. on Wills, part 1, c. 11, § § 1, 21.

The construction here placed upon the testator's will as it regards the rights of Annie E. Hall by virtue thereof, and her power over the property bequeathed to her, seem to be in acordance with the opinion of this court in the case of *Hall et als.* v. *Preble*, 68 Maine, 100.

WALTON, J. It is the opinion of the court that the will of Daniel E. Hall secures to his surviving brothers and sisters all that was left of his estate at the decease of his widow, Annie E. Hall. That such was the intention of the testator will not admit of doubt; for while he was careful to secure to his widow the right to use so much of his estate as she should deem necessary for her comfort and support, he was equally careful to say that it was his wish that whatever should be left at her death should be equally divided among the survivors of his brothers and sisters. We think effect must be given to this clearly expressed intention of the testator, and that his administrator is entitled to the possession of all that portion of Daniel E. Hall's estate (including the proceeds of property sold by his widow,) which had not been expended at the time of her decease.

Decree accordingly. No costs for respondents. Plaintiff's costs to be charged in his administration account, and audited by the judge of probate.

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

JOHN WEBBER and another *vs.* REUBEN B. DUNN and others.

Kennebec. Opinion August 4, 1880.

Recission. Burden of proof. Contract; change of; construction of. Practice. Evidence. Compromise offers. Exceptions.

When it is proved or admitted that a contract, upon which suit is brought, was made as declared by the plaintiff, and the defendant claims that it was afterwards rescinded, the defendant takes the affirmative of that issue, and the burden is upon him to prove it.

The defendants for good and sufficient consideration agreed with the plaintiff to pay the assessments upon thirty-eight and one-half shares of capital stock in a corporation, out of one hundred shares subscribed for by the plaintiffs; this subscription was afterwards cancelled and the plaintiffs subscribed for a like number of shares upon a different subscription agreement. *Held*, that if the change in the subscription was made by agreement between the plaintiffs and the corporation and assented to by the defendants, they, the defendants, would be liable under their agreement to pay the assessments upon thirty-eight and one-half shares of the new subscription; and instructions, which thus submitted the question to the jury were correct.

The defendants agreed in writing to pay the plaintiffs a commission of five per cent. upon stock taken and paid in on subscriptions made by the plaintiffs in a corporation, or obtained of others and guaranteed by them, not exceeding $20,000 (not including a subscription then made;) and a commission of two per cent. upon stock taken and paid in beyond such sum of $20,000 upon subscriptions made or obtained by the plaintiffs. *Held*, that by the terms of the contract the plaintiffs were entitled to five per cent. on such sums as they might guarantee not exceeding $20,000, and two per cent. on the sums subscribed and paid in which they did not guaranty.

It is the duty of counsel to call the attention of the presiding judge to a point which he desires to raise, but did not raise during the trial, when he was present and presented requests for instructions upon such other points as he desired to raise, and heard the charge to the jury and knew the judge did not allude to this point. It is too late for him to raise it for the first time in the law court.

When the parties were at issue as to the fact, whether or not certain admissions and offer testified to were made while the parties were trying to compromise the question of facts, should be submitted to the jury with instructions not to consider the evidence, if they found that the parties were thus trying to compromise when the admissions and offer were made.

Exceptions "to the rejection of evidence offered . . . and the admission of evidence . . . objected to . . . in the several instances mentioned in the official report of the case," are irregular and ought not to be encouraged.

ON EXCEPTIONS AND MOTION.

The facts appear in the opinion.

E. F. Pillsbury and *E. F. Webb*, for the plaintiffs, cited: *Utely* v. *Donaldson*, 94 U. S. 49; *Murray* v. *Harway*, 56 N. Y. 347; *Storm* v. *U. S.* 94 U. S. 83; *Cole* v. *Cole*, 33 Maine, 542; *Rowell* v. *Montville*, 4 Greene, 270; *Plummer* v. *Currier*, 52 N. H. 287; *Snow* v. *Bachelder*, 8 Cush. 517; Greenl. on Ev. § 192; *Perkins* v. *Railroad*, 44 N. H. 225.

O. D. Baker, for the defendants.

On the questions raised by the exceptions:

I. Upon the issue as to whether the contract between the parties was rescinded, the burden is on the plaintiffs, and does not shift. It is for them to show that the contract they rely on not only was once made, but was existing and in force when sued on. We say it never has been, and no longer could be performed, but was rescinded by its own limitations. Where the plaintiff disables himself from performing his contract, or assents to the acts of third persons which make its performance impossible, and the defendant is without fault, the defendant alone may abandon and rescind the contract on notice, whether the plaintiff assents or not. Chitty Contracts, 672, (10th edition). See *Hoare* v. *Remins*, 5 H. & N. 19; Coke Lit. (206, a) (206, b); Leake Contracts, 366. "And generally when one fails to perform his part of the contract, or disables himself from performing it, the other party may treat the contract as rescinded." 2 Pars. Contracts, 678; *Keys* v. *Harwood*, 2 C. B. 905; *Planche* v. *Colburn*, 8 Bing. 906. "If the act of one party be such as necessarily to prevent the other from performing on his part according to the terms of his agreement, the contract may, I think, be considered as rescinded." *Dubois* v. *Canal Co.* 4 Wend. 285.

II. When the first subscription of this plaintiff was cancelled that was an end to the defendants' agreement to pay the assessments on thirty-eight and one-half shares. It may be said that the defendants have received the $3,850, and that would be a continuing consideration. But a past and executed consideration can never support an express promise. *Hopkins et ux.* v. *Logan*, 5 M. & W. 241; *Per Lord Denman, C. J. in Roscorla* v. *Thomas*, 3 Q. B. 234; *Per Maule, J. in Elderton* v. *Emmons*, 4 C. B. 496.

III. The plaintiffs seek to recover commissions here on an express promise, that is, a promise to pay for their services not a reasonable but a contract rate. Acts in the nature of estoppel can never raise an express promise but only such as the law will imply, and that, if anything, would be to pay not specific commissions, but a reasonable compensation for the plaintiffs' time and services.

IV. The instruction that the guaranty was a valid guaranty of existing subscriptions was erroneous. If the contract at this time applied only to new subscriptions, the guaranty was not valid, because it applied only to the old. If the contract still applied to the old subscriptions, then the guaranty was void because not given till subscriptions lapsed or cancelled. Even if the guaranty applied to existing subscriptions, it is not valid because without consideration, and therefore not enforceable by the company. A guaranty like every other promise must have a consideration to support it. *Ware* v. *Adams*, 24 Maine, 177; *Tenney* v. *Prince*, 4 Pick. 385. And this consideration must move from the plaintiff. Leake Contracts, 221, 313; *Crow* v. *Rogers*, Strange, 592; *Price* v. *Easton*, 4 B. & Ad. 433; *Smart* v. *Chell*, 7 Dowl. 781; 2 Williams' Saunders, 137, (g.)

The plaintiffs did not notify the defendants that they had given the guaranty. The rule as established by the cases is that where the defendant contracts to pay on doing of some act by the plaintiff, which when done, lies peculiarly or more properly in the knowledge of the plaintiff, notice thereof must be given or no liability attaches. 1 Chitty Pleading, 360; 2 Williams' Saunders, 62 (a); Leake on Contracts, 339; *Dawson* v. *Wrench*, 3 Exch. 359; *Rippinghall* v. *Lloyd*, 5 B. & Ad. 742; *Lent* v. *Padelford*, 10 Mass. 230; *Colt* v. *Root*, 17 Mass. 229; *Gabb* v. *Morse*, 1 Bulstrode, 44; *Holmes* v. *Twist*, Hobart, 51; *Towle* v. *Hoggan*, Cro. James, 492; *Bradley* v. *Toder*, Cro. James, 228; *Hobart* v. *Hilliard*, 11 Pick. 143; *Babcock* v. *Bryant*, 12 Pick. 132; *Dix* v. *Flanders*, 1 N. H. 246; *Watson* v. *Walker*, 23 N. H. (3 Fost.) 471. The defendants object to that part of the charge relating to the admissibility of an offer made by the defendants to reassign the mortgage and notes and to pay $1,000, as leaving

to the jury a question of law. Whether the offer was by way of compromise and therefore not competent evidence is a question of law for the court, and not of fact for the jury. *Davis* v. *R. R.* 11 Cush. 506; *Snow* v. *Batchelder*, 8 Cush. 513; Lord Mansfield, 1 Buller, N. P. 236; *Marsh* v. *Gold*, 2 Pick. 284; *Gerrish* v. *Sweetser*, 4 Pick. 377; *Dickinson* v. *Dickinson*, 9 Met. 471; *Snow* v. *Bachelder*, 8 Cush. 516; *Emerson* v. *Boynton*, 11 Gray, 395.

Joseph Baker, for the defendants, argued the questions arising on the motion to set aside the verdict as against evidence.

LIBBEY, J. A statement of the leading facts of this case is necessary for a just understanding of the questions of law raised by the exceptions.

On the 11th of February, 1874, the defendants and seven others were incorporated a manufacturing corporation by the name of the Lockwood Cotton Mills, with power to manufacture cotton, wool and flax, in Waterville and Winslow; to purchase and hold real and personal estate, not exceeding two millions dollars in value, and to build and erect such buildings and machinery as their convenience may require.

The corporation was organized, and on the 23d of February, 1874, the capital stock was fixed at $600,000, in shares of $100 each, and on the same day, by vote of the directors, books were opened for subscriptions to the stock, with the proviso "that no assessments shall be laid until four thousand shares shall have been subscribed for."

On the 30th of June, 1874, the plaintiffs and defendants made the following agreement:

"This agreement between Webber & Haviland of Waterville, Maine, of the first part, and Reuben B. Dunn & Sons of said Waterville, this thirtieth day of June, A. D. 1874, witnesseth, that said Webber & Haviland have this day assigned and caused to be assigned, certain notes and mortgages against Daniel M. Stevens, a part of them given to said Webber & Haviland, and a part to Webber, Haviland & Co. valued in all at $3850, and have this day subscribed for $10,000 of the capital stock of the Lockwood Cotton Mills.

"The said Dunn & Sons in consideration of the above, agree to pay for said Webber & Haviland the assessments on thirty-eight and a half shares of said stock subscription up to its par value, when and as fast as said stock shall be assessed.

"It is further agreed that for what further subscriptions to the stock of said cotton mills, said Webber & Haviland may make in their own names or obtain and guarantee in the names of others, not exceeding twenty thousand dollars, in addition to the aforesaid ten thousand dollars, said Dunn & Sons shall pay them as commission at the rate of five dollars for each and every hundred dollars further as aforesaid subscribed and paid in.

"And for all further subscriptions said Webber & Haviland may make or cause to be made beyond the said further sum of twenty thousand dollars, said Dunn & Sons shall pay them as commission at the rate of two dollars for each and every hundred dollars further as aforesaid subscribed and paid in.

R. B. DUNN & SONS."

The plaintiffs at that time subscribed for $10,000, and proceeded under said agreement to procure other subscriptions on one of the books delivered them by the defendants for that purpose, and prior to February 9, 1875, had procured $27,100 besides their own subscription.

February 9, 1875, the requisite number of 4000 shares not having been subscribed for, the directors voted that the books be closed, and that the subscribers be released from all liability upon their subscriptions, and then voted that new books be opened for subscriptions to the capital stock "for purchasing the real estate of the Ticonic Company for the purpose of this company, and for erecting and operating a cotton mill, provided that no assessment shall be laid until 6000 shares shall have been subscribed for."

The plaintiffs then subscribed $10,000 on one of the new books, and one of the defendants delivered to one of the plaintiffs one of the new books, requesting him to get the subscriptions which the plaintiffs had procured on the old book transferred to the new, and to procure other subscriptions to the stock; and the plaintiffs proceeded to do so, procuring the transfer of most of the old subscriptions, and a large amount of new ones.

On the 16th of April, 1875, the plaintiffs made and sent to the treasurer of the corporation the following guaranty:

"Waterville, April 16th, 1875.

A. D. Lockwood, Esq., treasurer of Lockwood Co., Dear Sir: When we commenced to get the stock of the Lockwood mills subscribed for we were to have the privilege of guaranteeing the payment of subscriptions to the amount of $20,000 if we chose to do so, for which we were to have an additional per centage. In accordance with such an agreement (with Mr. Dunn) we send you the following names and amounts set against their respective names that we will guarantee. These names and amounts are on the old books. Yours truly,

WEBBER & HAVILAND."

The schedule of subscriptions annexed amounted to $16,600.

These facts were not in controversy, but the great contention between the parties, as to the facts of the case, was, whether the parties made a new contract, by parol, by virtue of which the plaintiffs made their new subscription to take the place of the old, and procured the transfer of the old subscriptions of others, and the new subscriptions which they obtained, under the terms and stipulations of the agreement of June 30, 1874.

We shall consider the questions of law raised in the order they are presented by the defendants' counsel in their argument.

1. It is contended that the requests 14, 15, 16 and 17 should have been given; and that the charge of the judge upon the question of rescission of the contract is erroneous. As to the requests it is sufficient to say that they were given in substance. The judge instructed the jury, in substance, that the new subscriptions were not within the terms of the contract of June 30, 1874, unless by virtue of a new agreement between the parties; and the rule given to the jury, as to the rescission of the contract by the parties, related to a rescission by agreement, and was based on the evidence introduced by the defendants, tending to prove that the contract was rescinded after the new agreement was made as claimed by the plaintiffs. The rule of law given to the jury upon this point was full and accurate. The burden of proof was on the defendants. When it is proved or admitted

that the contract was made as claimed by the plaintiff, and the defendant claims that it was afterwards rescinded, he takes the affirmative of the issue, and the law casts the burden upon him to prove it. In such issue the defendant does not deny that the contract was made as claimed, but he says, by a subsequent agreement between the parties, it was annulled. The subsequent agreement is set up by him and he must prove it.

2. It is objected that the rule given to the jury by the judge upon the question of the liability of the defendants to pay $3850 of the assessments on the plaintiffs' subscription is erroneous. We think the instruction upon this point is correct, and that it fully covered this part of the case. It required the jury to find affirmatively that, when the first subscription books were called in and the new books were opened, the plaintiffs' subscription of $10,000 on the first book was cancelled, and the same amount subscribed by them on the new book to take its place by agreement between the plaintiffs and the corporation, and that this was assented to by the defendants. This was all that the plaintiffs were legally required to prove to fix the defendants' liability. The defendants held the notes and mortgage for the $3850. This was a good and sufficient consideration for their undertaking. The change of the subscription from the first book to the second in no way increased their liability. It may be said that they may have had a greater interest in the first subscription than in the second, but their consent to the change is a full answer to this suggestion. The case is the same, in principle, as if A. for a good consideration, agrees to pay $500 on B.'s note to C. for $1000 in six months, and when the note matures, B. and C. agree to renew it for six months, and a new note is given for that purpose which is assented to by A. In such case there can be no doubt of A.'s liability to pay the $500 on the new note.

It is unnecessary to consider further the several objections so ingeniously urged by the defendant's counsel on this branch of the case.

3. It is next objected that the rule of law given to the jury as to the liability of the defendants for commissions is incorrect. The judge instructed the jury that the defendants were not liable

for commissions by the contract of June 30, 1874, alone; and further instructed them that, "if you find that the defendants passed to the plaintiffs the new book, requesting them to get the old subscriptions renewed upon it, and requesting them to procure further new subscriptions, with the agreement or understanding between the parties that the subscriptions were to be regarded as under this contract, then I instruct you that the plaintiffs are entitled to recover." Again, "if it was the understanding of the parties, or if the acts of the defendants were such as reasonably to induce the plaintiffs to believe that those subscriptions, so renewed, were to be within the terms of the contract, then the plaintiffs are entitled to commissions upon them according to the terms of the contract." The jury was further instructed that the burden of proof was upon the plaintiffs.

The only objection made to this part of the charge is that the last clause quoted, authorized the jury to find an express contract between the parties by estoppel. It is claimed that an express promise can never be raised by acts in the nature of estoppel. The answer is that the contract is not created by the estoppel, but the defendants by their acts are estopped from denying that the plaintiffs performed the services under the terms of the express contract which had previously been made between the parties. We see no error in this instruction.

4. If liable for commissions, the defendants claim that they are not liable for the five per cent. commission claimed by reason of the alleged guaranty by the plaintiffs, and that the judge erred in his charge upon this branch of the case. Several objections are interposed. 1. It is claimed that the guaranty by its terms does not apply to the subscriptions on the new book. We think it must be held to apply to them. The new book had been called in, and subscriptions closed by the corporation before the guaranty. The subscriptions on the schedule were all on the new books. They had ceased to be valid subscriptions on the old books. It must be held to be the intention of the parties, by the contract, to guaranty existing subscriptions, unless the terms of the guaranty are inconsistent with such construction. It is said that the recital at the bottom of the instrument, that "those names

and amounts are on the old book" excludes the construction that it was intended to apply to the new. We think not. The names and amounts were on the old books, but had been transferred to the new. The language used distinguishes the subscriptions guaranteed from the new subscriptions obtained by the plaintiffs. 2. It is claimed that there was no valid consideration for the guaranty, and that it is void for that reason. The promise by the defendants to pay the five per cent. commission was a good consideration. It was not necessary, as claimed by counsel, that the consideration should move from the corporation. 3. It is further claimed that the guaranty does not render the defendants liable because they had no notice of it. This objection, if tenable, is not open to the defendants here. It was not raised at the trial. No instruction was given in regard to it. The case was not argued by counsel, but the defendants' counsel presented twenty requests for instructions on such points as they desired to raise. None of them relates to this objection. They heard the charge and knew that the judge did not allude to it. It was their duty to call his attention to the point if they desired to raise it. It is too late for them to raise it for the first time in this court. *Eaton* v. *N. E. Tel. Co.* 68 Maine, 63.

Again, the exception is to all of the charge relating to the guaranty as a whole. It is not claimed that that part of the charge does not contain some correct legal propositions. For this reason the exception is not well taken. *Macintosh* v. *Bartlett*, 67 Maine, 130; *Harriman* v. *Sanger*, 67 Maine, 442; *Bacheller* v. *Pinkham*, 68 Maine, 253.

5. It is further claimed that if the defendants are liable for the two per cent. commission at all, they are not liable for such commission on the difference between the $16,600 guaranteed, and $20,000. This construction of the contract would give the plaintiffs no commission on the first $20,000 procured, if they guaranteed no portion of it. We do not think this is the true construction of the contract. Taking all the terms of the contract together and applying them to the subject matter of it, we think the meaning of the parties was that the plaintiffs should be entitled to five per cent. on such sum as they might guaranty, not

exceeding $20,000; and two per cent. on the sums subscribed and paid in, which they did not guaranty.

6. Exception is taken to the direction given to the jury in regard to the testimony of Webber as to certain alleged admissions and offer made by one of the defendants to him. After the witness answered, objection was made to his testimony on the ground that the admissions and offer were made during an effort to compromise. It did not then appear that such was the fact. The judge remarked in substance, that the answers might stand, but if it should appear that the offer was made during negotiations for a settlement, the evidence would be incompetent. It was the privilege of the defendants' counsel to cross examine the witness in regard to the matter at that point in the case, and if it was made to appear that the parties were trying to compromise, he could have renewed his objection. This he did not do; nor did he, at any subsequent stage of the case, renew the objection. It was not the duty of the judge to take any further action in regard to the matter without request, and no further objection being made, the defendant has no ground of exception.

The defendants introduced evidence tending to prove that when the admissions and offer were made, the parties were negotiating for a settlement; but the parties were still at issue as to the fact. In such case, the evidence having been properly admitted when given, the question of fact should be submitted to the jury, with direction not to consider the evidence if they found that the parties were trying to compromise when the admissions and offer were made. This was done.

7. "The defendants except to the rejection of evidence offered by them, . . . in the several instances mentioned in the official report."

While we think this mode of exception irregular, and ought not to be encouraged, still we will proceed and examine the alleged errors pointed out in the arguments.

R. Wesley Dunn, one of the defendants, testified that he was present when the contract of June 30, 1874, was executed. He was asked by his counsel, "Do you recollect what, if anything, was said to them by you in reference to the circumstances under

which you proposed to enter into that contract." This was objected to and excluded. The purpose for which the evidence was offered was not disclosed. There was no contention between the parties as to the due execution of the contract; nor was there any ambiguity in it which the evidence was offered to explain. It was properly excluded.

The defendants offered a deed from Ticonic W. P. Mg. Co. to Ticonic Co. of land and water power; a deed from Ticonic Co. to Lockwood Cotton Mills; also subscription book of the Ticonic Co. to show that the defendants owned all but three shares of its stock. They were objected to and excluded.

The exceptions do not show the purpose for which this evidence was offered. It certainly had no tendency to prove any direct issue involved in the case. If offered for any collateral purpose, the exceptions should show that the attention of the court was called to it; otherwise the exceptions should not be sustained. *Lee* v. *Oppenheimer*, 34 Maine, 181.

But it is claimed in argument that this evidence, taken in connection with other evidence in the case, tends to show, that it was not contemplated by the corporation, under the scheme for the first subscription for its stock, to purchase the land and water power, but to lease it only; but by the scheme for the second subscription, the land and water power were to be purchased, and that the defendants, being the principal owners of the land and power, had a greater interest in the success of the first scheme, by which they might hold the real estate for its prospective value, than in the second, by which they were to sell it; and it is claimed that the evidence was admissible for that purpose, to corroborate the testimony of R. Wesley Dunn in regard to what took place between him and the plaintiff Haviland, when he gave him the second subscription book. We think it clear that it was inadmissible for such purpose. There is no evidence in the case of the price which the defendants were to receive for the real estate, and none offered tending to show that the property had a prospective value greater than the sum for which it was to be sold. The issue attempted to be raised was collateral, speculative and intangible; and the jury would not have been

authorized to find that the property had a prospective value greater than its value at that time.

If the property was to be taken for public uses, the law would not sanction such a rule of damages; and evidence tending to show its prospective value would not be admissible. The future has too many vicissitudes and uncertainties to render it safe to set a jury speculating as to what it may develope to man or property.

The evidence offered to show what took place between R. Wesley Dunn and his father, in the absence of the plaintiffs, was properly excluded. They were both defendants, and it was not competent for them to prove what was said between them, to strengthen their evidence. They were permitted to show everything that was said or done in regard to the matter in controversy, in the presence of either plaintiff.

It is unnecessary to notice further the requests for instructions. So far as they were sound law, applicable to the case, they were given in substance. This was all the defendants were entitled to.

The motion to set aside the verdict, because it is against the evidence, must be overruled. There was evidence tending to support the theory of each side. It was conflicting. The plaintiffs had rendered the services, for which they seek compensation. The credibility of the witnesses, and the weight to be given to their evidence, were for the jury. There is not such a preponderance of evidence against the verdict as to authorize the court to disturb it.

Exceptions and motion overruled.

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

ELI EDGECOMB *vs.* CITY OF LEWISTON.

Androscoggin. Opinion August 4, 1880.

Salary of city physician of Lewiston. City ordinance. Vote. Contract of city marshal.

A vote of the city council of Lewiston, that "the salary of city physician shall be at the rate of $200 per annum, in full for all fees for services rendered to paupers," in compliance with a city ordinance, which also provides that no salary shall be altered during the year, establishes the salary of the city physician for the year to which it relates, and his compensation for the performance of all official duties.

The city marshal has no authority to make any new contract with the city physician, or to pay him an extra compensation for performing services which he was under official obligations to render, nor could the overseers of the poor enlarge his salary.

ON REPORT.

Assumpsit to recover $285 and interest since March, 1873, for services rendered by the plaintiff to patients afflicted with small pox or varioloid, in the city pest house, and elsewhere, at the call of the marshal, from December, 1872, to March 1, 1873. Writ was dated January 24, 1879. The material facts appear in the opinion. If the action could be maintained, the defendant was to be defaulted, and the law court assess damages; otherwise, the plaintiff to be nonsuit.

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

Municipal duties, having relation to the health of inhabitants, are three-fold,—

1. In cases of contagious diseases the duties to be performed by the municipal officers, R. S., c. 14, § 1, *et seq.*

2. In the removal of filth, &c., the duties to be performed by the health committee or officer, R. S. c. 14, § 14, *et seq.*

3. In cases of the pauper sick—the duties to be performed by the overseers of the poor, R. S., c. 24.

The services rendered to the city of Lewiston, to recover the value of which this suit is brought, were rendered in cases falling under the first class, that is, contagious diseases.

Plaintiff's salary as city physician was "$200 per annum, in full for all fees for *services rendered to paupers*," that is, in cases

falling under the third class. For all other services he is entitled to recover what they were reasonably worth.

Plaintiff was properly employed by the municipal officers.

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

APPLETON, C. J. The plaintiff was duly elected city physician. The duties of the office are prescribed by chapter 4, section 7, of the city ordinances, which is as follows:

"It shall be the duty of the city physician to attend, under the general direction of the overseers of the poor, upon all patients under the care of the city authorities, at the almshouse or elsewhere, to render all the services by law incumbent upon physicians appointed by boards of health, to report annually, on the first of March, to the city council, a bill of mortality or list of deaths of the previous year, stating the age, sex and disease of the person deceased. In case of an alarm of any contagious or infectious disease, to give to either branch of the city council, or any committee thereof, all such professional advice and counsel as they may require of him; to vaccinate all scholars of the public schools that may be sent to him by the school committee for that purpose, and generally to perform such other professional services as may reasonably be required of him by the mayor and aldermen or the city council."

By c. 3, § 6, it is provided that no salary shall be altered during the term for which a physician is elected.

No services have been rendered except such as fall within the requirements of the ordinance determining the duties of the city physician. He was obliged to attend upon all patients at the almshouse or elsewhere, under the care of the city authorities, upon the general direction of the overseers of the poor. He did no more.

The salary act for the year in which the plaintiff was chosen city physician is in these words: "February 5, 1872, 'The salary of the city physician shall be at the rate of $200 per annum, in full for all fees for services rendered to paupers.'" That takes effect for the year ending in March, 1873. This vote does not relate to the duties of the city physician. It relieves him from no official obligation. It only negatives the possibility of any additional claims for services rendered paupers.

No vote of the city government is shown sanctioning the plaintiff's claim. The city marshal was not authorized to make any new contract with the city physician or to pay him an extra compensation for performing services which he was under official obligation to render. The overseers of the poor in what is shown to have been said or done by them or any of them were simply performing their duty, but they could not, if they would, enlarge the plaintiff's salary.

The plaintiff has only rendered the services he was bound to render and must content himself with the salary which the city government deemed sufficient compensation for his services.

Plaintiff nonsuit.

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

BURGAMI F. DUNHAM *vs.* JOHN M. RACKLIFF.

Penobscot. Opinion August 4, 1880.

Way. Law of the road. Exceptions. Evidence.

It is the right of every one to travel on any part of a highway that may suit his taste or convenience not occupied by another, provided no one is meeting him with teams and carriages having occasion or a desire to pass.

Exceptions are to instructions given or to the refusal of requested instructions. When additional instructions are not requested exceptions because they are not given, will not be sustained though they might properly have been given.

The reputation of the driver of a horse and carriage is inadmissible in an action by the owner of another horse killed by a collision therewith, to recover its value.

ON EXCEPTIONS.

Writ dated August 4, 1877. Plea, general issue.

Verdict was for the defendant.

At the trial, William H. Deaborn, called by plaintiff, testified in part as follows:

Question.—How long have you known this Dearborn boy who was driving Mr. Rackliff's team? *Answer.*—I have always known him. *Question.*—Do you know what his reputation is as a manager of horses, as a driver?—[Objected to.]

Mr. Davis, attorney to plaintiff.—The great point we make is, that this collision happened through the carelessness and bad management of the boy, and if we can prove what his reputation is as manager of horses it seems to me to be material. *Court.* —I will exclude it.

Charles Deaborn, called by defendant, testified in part as follows:

Answer.—I was most eighteen when the accident happened; I had been at work for Rackliff; came there in April, after my school was done. *Question.*—What had been your business before? *Answer.*—Farming. *Question.*—Had you ever driven stage any?—[Objected to; admitted.] *Answer.*—Yes. *Question.* —When? *Mr. Davis.*—We object to this testimony as to his being used to horses, as we were not permitted to show his reputation in that respect. *Court.*—He may answer. *Answer.*— About four years ago, five years ago, when I lived at Newport. *Question.*—Where did you drive? *Answer.*—From Newport to Palmyra, about five miles. *Question.*—At what time did you drive? *Answer.*—I started as soon as the mail train came in at night, and went out and back at night. *Question.*—How many horses? *Answer.*—Sometimes I had one and sometimes three. *Question.*—How long did you continue to drive? *Answer.*—I drove about four years, off and on.

Other questions raised by the exceptions appear in the opinion.

Josiah Crosby, for the plaintiff, contended that the evidence offered to show the reputation of the defendant's servant as a driver of horses, should have been admitted, and cited: *Gilman* v. *Eastern R. R. Co.* 13 Allen, 433; *Denny* v. *Dana*, 2 Cush. 160; *Lee* v. *Kilburn*, 3 Gray, 594.

If this evidence was not admissible then certainly the defendant ought not to have been permitted to show the experience of his servant as a driver of horses. The exclusion of the evidence offered by the plaintiff and the admission of that offered by the defendant operated with a double force to the injury of the plaintiff.

In the contemplation of law, a party is negligent in traveling upon the wrong side of the road in the main thoroughfare of a

village or city in the night time. When a collision occurs at such a time and place, between teams one of which is on the right side, and the other on the wrong side, it is absurd to say that neither party is in fault. R. S., c. 19, §§ 2, 6; Angell on Highways, §§ 333, 337; *Brooks* v. *Hart*, 14 N. H. 307.

Darkness. This element affords the defendant no excuse. He was under the greater necessity to keep on his own side of the road, and negligent if he left it without cause.

V. A. & M. Sprague, for the defendant, cited: R. S., c. 19, § 2; *Palmer* v. *Barker*, 11 Maine, 339; *Foster* v. *Goddard*, 40 Maine, 64; *Parker* v. *Adams*, 12 Met. 415; *Kennard* v. *Burton*, 25 Maine, 39; *Moore* v. *Abbot*, 32 Maine, 46; 2 Greenl. Ev. § 219; *Bigelow* v. *Reed*, 51 Maine, 325; *Crosby* v. *M. C. R. R.* 69 Maine, 418; Angell on Highways, 412; 1 Greenl. Ev. § 54; Stevens Ev. 56.

APPLETON, C. J. This is an action for damages alleged to have been caused by a collision between the plaintiff's and the defendant's teams, each being driven by one in their respective employment, and the collision taking place in consequence of the negligence of the defendant's servant.

The court instructed the jury that "both parties had the right to travel. They had a right to travel in the middle of the road, or one side or the other if there was nothing in the way to prevent them. The right of way as prescribed by the statute, applies only when one person is going one way and another the other, and gives the rule by which they shall pass; but if no person is in sight, no person obstructing the way, a man has a right to travel on either side, as he finds convenient."

These are general remarks. They are in perfect accord with the decisions of this and other courts. In *Palmer* v. *Barker*, 11 Maine, 339, MELLEN, C. J., says, "a man may travel in the middle or on either side of the road, when no person is passing or about to pass in an opposite direction." In *Brooks* v. *Hart*, 14 N. H. 310, a case specially relied upon by the learned and able counsel for the plaintiff, the law on this subject is thus stated by WOODS, J.: "It is the right of every one to travel on any part of a highway that may suit his taste or convenience, not

occupied by another, provided no one is meeting him with teams and carriages, having occasion or a desire to pass." "If there is no carriage to intercept the driver, he may pass on what part of the road he may think most convenient." Angell on Highways, § 332. In a recent case in this State, *Foster* v. *Goddard*, 40 Maine, 66, TENNEY, J., uses this language: "A party having before him the entire road, free from carriages or other obstructions, and having no notice of any carriage behind him, in season to stop or to change his course or position, is at liberty to travel upon such parts of the way as suits his convenience or pleasure, and no blame can be imputed to him. This is properly inferable from R. S., c. 26, § 3." In the case at bar there was no carriage in the rear attempting to pass.

The instructions given were unquestionably correct. If additional instructions were deemed desirable, they should have been requested. "In reviewing a case upon a bill of exceptions, it is to be presumed correct instructions on matters of law were given," observes MORTON, J., in *Smith* v. *Livingston*, 111 Mass. 344, "unless the contrary appears." Exceptions are to instructions given, not those that might have been given, but were not requested. *Hunter* v. *Heath*, 67 Maine 507.

The collision took place in the night. In reference to the darkness the charge was as follows: "The accident occurred in the night; it was more or less dark; the testimony varies upon that point; how dark it was, is a matter for you to determine. A greater care should be exercised by both parties if the night was dark. Neither party is responsible for the darkness. The darkness existing, each was respectively and equally bound to exercise care and prudence under the circumstances. Each exercising care and prudence, each must bear the inevitable result of darkness if that alone was the cause. If the accident was caused by the darkness, there being no neglect on the part of the defendant nor on the part of the plaintiff, the plaintiff cannot recover, and as I have already said, in the night greater care is required of one party and of the other in proportion to the greater or less degree of light, and the risk consequent upon the darkness." To this there seems no objection. The darkness was the act of God, and each must abide the consequences arising therefrom.

As to the light from Brown's stable, the instruction was correct. It is not alleged or pretended that either the plaintiff or defendant had anything to do with Brown's stable or the light therein. It is obvious enough that neither party can be held responsible for the acts of a stranger over whom they had no control.

The plaintiff offered to show that the person by whom the defendant's team was driven was reputed to be a careless driver but the evidence was excluded and properly. The issue was as to the negligence of the defendant's servant, at the time when, and the place where the injury occurred. It mattered not how negligent he may have been in the past, if at the time of the collision, there was no negligence nor want of care. The jury were fully instructed that the defendant was responsible for the negligence of his servant, if the collision was the result of such negligence, if not the defendant would not be liable howsoever great may have been his antecedent negligence. The reputation of the servant for skill or want of skill, was not admissible as relevant testimony to the issue tried. *Hays* v. *Millar*, 77 Penn. 238. Reliance is placed upon *Gilman* v. *Eastern Railroad Co.* 13 Allen, 433. But that is not a case in point. That was an action by a servant against the employer for the negligence of a fellow servant. The law is well settled that the master is not liable in such case, unless guilty of negligence in the selection of the servant, negligently causing the injury complained of, and this negligence of the master must be averred in the declaration, and established by proof. *Blake* v. *Maine Central Railroad*, 70 Maine, 63. The negligence in 13 Allen, 433, was the negligence in selecting an unfit servant, not the negligence which occasioned the injury, for which compensation was sought. That could only be proved by what took place at the time of its occurrence. The evidence there offered, was that the employee was reputed to be a common drunkard, for the purpose of showing negligence in the officers of the railroad in employing in a responsible situation, a person of such a character, not to prove the specific act of negligence causing the injury. Here it was offered to prove a specific act of negligence, which it neither proved nor tended to prove.

The evidence of Dearborn that he had previously driven horses, was the evidence of a fact, not of a reputation, which is but hearsay. The defendant however was liable whether he was a skillful or unskillful driver, if on the occasion of the injury he was its negligent cause.

Exceptions overruled.

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

SARAH E. BARTLETT and others *vs.* WASHINGTON T. GOODWIN.

Franklin. Opinion August 5, 1880.

Non-joinder of parties. Abatement. Replevin.

The non-joinder of tenants in common, either as defendants or plaintiffs, can only be taken advantage of by plea in abatement.

In replevin the question is which of the parties, the plaintiff or defendant, as between themselves, had the better right to the possession of the property at the date of the writ.

In case of the neglect of persons in possession of personal property to comply with the terms and conditions of the delivery to them of such property, as shown by the receipt held by those holding the same interest, such trustees are entitled to the immediate possession of such property and may maintain replevin therefor.

ON EXCEPTIONS AND MOTION.

At the trial the following receipt was put in evidence, and so much of the judge's charge as is given below was excepted to by the defendent. The other material facts appear in the opinion.

(Receipt.)

"Farmington, December 5th, 1876.

This certifies that in case the Farmington Reform Club should cease to exist and have no use for the furniture now in the hall which they occupy, the same which was furnished by the Ladies' Aid Society of Farmington, the following named ladies which was appointed as special committee in trust by the Aid Society, shall have the right to take charge of the same, and appropriate to

some benevolent purpose: Mrs. S. E. Bartlett, Mrs. F. J. Austin, Mrs. H. L. Whitcomb, Mrs. T. F. Davis and Mrs. Wm. Tarbox.

"Furniture as follows: Carpet on the floor, 1 organ, 1 speaker's table, 1 reading table, 1 wash stand and fixtures, 1 mirror, 4 officers' chairs, 1 small oval table, 5 settees, four checkerboard stands, 44 wood chairs, 1 organ stool, 12 spittoons, curtains and whatever pictures and ornaments were furnished by them. Now therefore we as officers and members of said club, (and our successors), relinquish all right and claim to said goods and deliver them up peaceably when done using them as stated above.

J. F. WOODS,
W. T. GOODWIN,
LEE B. STOYELL,
O. W. ROGERS.

Attest: A. E. JONES, Sec'y."

(Extract from the charge.)

"The suit is not brought by one association against the other, but by certain individuals against the defendant. So that in the first instance in order to entitle the plaintiffs to maintain the action it is necessary for them to show not only that they act in their own behalf as individuals, but also that they act by authority of their associates in the society to which they belong; that is to say, that they are persons who have been delegated in some form or other by that society to take and hold for the purpose of the society the possession of this property, so that in them as individuals and as representatives of their associates the right of possession of the property belongs.

"Because in an action of replevin it is often more a question of the right of possession to the property than of the absolute title to the property.

"The question here is, which of these parties, the plaintiffs or the defendant, at the date of the writ, as between themselves, had the better right of possession to the property. So that in order for this action to be properly brought in the names of the plaintiffs, instead of in the names of all the individuals who constitute the Aid Society, it must appear that these five act not

only for themselves as members of the society, but by authority of the others who constitute the society, so that in the five the right of possession in behalf of the society belongs."

H. L. Whitcomb, for the plaintiffs, cited: *Pierce et al.* v. *Robie*, 39 Maine, 205; *Clap* v. *Day*, 2 Maine, 280; *Howe* v. *Shaw*, 56 Maine, 291.

S. Clifford Belcher, for the defendant.

The plaintiff in replevin must prevail if at all on the strength of his own title or claim, and not on the weakness of that of the defendant. *Cooper* v. *Bakeman*, 32 Maine, 192; *Lewis* v. *Smart*, 67 Maine, 206; *Johnson* v. *Neale*, 6 Allen, 229; *Stanley* v. *Neale*, 98 Mass. 343; *Quincy* v. *Hall*, 1 Pick. 360.

These plaintiffs on their own showing have no title. They say themselves that the Ladies' Aid Society own the property, and they are the agents of the society. But an agent cannot sue in his own name. A party cannot appoint an agent to sue. In fact neither the plaintiffs nor the society had the right to immediate possession and so cannot maintain replevin. *Ingraham* v. *Martin*, 15 Maine, 373: *Pierce* v. *Stevens*, 30 Maine, 184. Counsel further argued the motion to set aside the verdict.

APPLETON, C. J. This is an action of replevin brought by the plaintiffs, members of the Ladies' Aid Society, against the defendant, treasurer of the Reform Club, a temperance organization in Farmington. The articles replevied are various articles of furniture purchased by the Ladies' Aid Association, and furnished to the Reform Club on the terms and conditions specified in a receipt signed by the defendant and others, under date of December 5, 1876.

The case comes before us upon exceptions and a motion for a new trial.

The suit is brought by a portion of the Ladies' Aid Society. No plea in abatement has been filed. The non joinder of other tenants in common should have been taken advantage of by plea in abatement. The defendant cannot take advantage of such non joinder under the general issue. *McArthur* v. *Lane*, 15 Maine, 246; *Lothrop* v. *Arnold*, 25 Maine, 136.

The plaintiffs claim to act as trustees of the association of which they are members. The instructions given as to their right to maintain this action were correct. The plaintiffs were persons delegated to take and hold the property replevied for the purposes of their society. The defendant with others contracted with them as such, and are bound by the terms of that contract. Nothing has been offered to show its invalidity. But whether valid or not, the defendant having filed no plea in abatement cannot take exception to the non joinders of other parties who may be joint owners with the plaintiffs.

The receipt signed by the defendant and others, dated December 5, 1876, shows the terms and conditions upon which the Reform Club received the articles replevied. The general title was to remain in the Ladies' Aid Association. In case of a neglect on the part of the Reform Club to comply with the conditions upon which the articles were delivered, the plaintiffs had at once a right to possession. The selling of part and the attempt to sell the remainder was an obvious conversion.

The plaintiffs proved the terms and conditions upon which the articles replevied were placed in the possession of the defendant and others. This contract was not denied. It was valid and binding for aught apparent. It was further shown to be in accordance with the facts by parol evidence. The record of the Ladies' Aid Association was received and objection is now urged to its reception. The ground of the objection, as stated at the trial, was "that any business they might do would not have any effect on (defendant's) our furniture." But it shows the terms and conditions upon which the plaintiffs authorized their committee, or trustees, to deliver the property into the keeping of the Reform Club, and that the receipt given was in accordance with the previous vote of the Ladies' Association. This was unnecessary, because, this was shown by the receipt, but it could not harm the defendant. No other objection was taken to this evidence, and the one taken cannot avail.

It was matter of discretion whether the deposition of Albert E. Jones should be received or not. To the exercise of that

discretion there can be no valid exception. The parts objectionable were excluded.

The motion for a new trial must be overruled. The verdict is in conformity with the weight of evidence.

Motion and exceptions overruled.

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

STATE *vs.* PATRICK HURLEY.

Cumberland. Opinion August 5, 1880.

Indictment. "Then and there."

The rule is that when one fact is alleged in an indictment with time and place, the words "then and there," subsequently used, as to the occurrence of another fact, refer to the same point of time, and necessarily import that the two were co-existent.

ON EXCEPTIONS from superior court, Cumberland county.

After verdict against the defendant, he filed a motion in arrest of judgment for reasons which sufficiently appear in the opinion. The motion was overruled by the presiding justice, and the defendant excepted.

(Indictment.)

"State of Maine. Cumberland, ss. At the superior court, begun and holden at Portland, within and for the county of Cumberland, on the first Tuesday of September, in the year of our Lord one thousand eight hundred and seventy-nine, the grand jurors for said State, upon their oath present, that Patrick Hurley, of said Portland, laborer, on the twenty-eighth day of June, in the year of our Lord one thousand eight hundred and seventy-nine, at Deering, in said county of Cumberland, with force and arms, the dwelling house of one Catherine Connors there situate in the night time feloniously, willfully and maliciously did set fire to with intent to burn the same, and the said dwelling house was thereby then and there burnt and consumed against the peace of said State, and contrary to the form of the statute in such case made and provided.

A true bill, JAS. N. READ, Foreman."

T. H. Haskell, attorney for the State for said county.

Henry B. Cleaves, Attorney General, for the State, cited: *State* v. *Taylor*, 45 Maine, 322; *State* v. *Hill*, 55 Maine, 365; *State* v. *Watson*, 63 Maine, 128.

Clifford & Clifford, for the defendant.

The indictment starts with a description of the highest grade of the offence, the setting fire in the night time, but does not continue it by an allegation, or its equivalent, that the burning was in the night, and so is not complete and sufficient. Heard Crim. Pl. 87; *Edwards* v. *Commonwealth*, 19 Pick. 124; *Davis* v. *The Queen*, 10 B. & C. 89. "Then and there" relate to day of the month and place.

APPLETON, C. J. This is an indictment for arson under R. S., c. 119, § 1.

The indictment alleges that the defendant at Deering, &c., on twenty-eighth day of June, 1879, with force and arms the dwelling house of one Catherine Connors, there situate, in the night time felonously, willfully and maliciously did set fire to with intent to burn the same and the said dwelling house was thereby then and there burnt and consumed.

The setting fire to the dwelling house is alleged with time, —the night time of the twenty-eighth of June, 1879, and with place, — Deering. The rule is, that when a single fact is alleged with time and place, the words "then and there," subsequently used as to the occurrence of another fact, the burning thereby, refer to the same point of time, and necessarily import that the two were co-existent. *Com.* v. *Butterick*, 100 Mass. 12. Where more times than one have been mentioned in the indictment, it is not sufficient to use the words "then and there," because it is uncertain to which of the times previously named they refer. 1 Bishop's Criminal Procedure, (2d ed.) § 414; *State* v. *Hill*, 55 Maine, 365. But in this indictment but one time is named.

But if the indictment was held not sufficiently to describe an offence in the night, then it must be regarded as describing one in the day time, according to the argument of defendant's counsel,

and as the punishment now is the same, whether committed by day or night no reason is perceived for arresting judgment.

Exceptions overruled.
Judgment on the verdict.

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

DURA WESTON *vs.* ALBERT C. CARR.

Kennebec. Opinion August 6, 1880.

Intoxicating liquors. Seizure without warrant. Reasonable time to procure warrant. R. S., c. 27, § 34. Trover.

When no sufficient reason is given for longer delay, the time during which an officer may keep intoxicating liquors seized without a warrant, before making a complaint and procuring a warrant, should not exceed twenty-four hours.

A demand for intoxicating liquors upon an officer, who is holding it without legal authority, and a refusal to deliver it upon the demand, is sufficient evidence of a conversion to maintain trover.

ON REPORT from superior court, Kennebec county.

The case is stated in the opinion.

F. E. Bean, for the plaintiff, cited: *Preston et al.* v. *Drew*, 33 Maine, 558; *Jones* v. *Fletcher*, 41 Maine, 254; *Robinson* v. *Barrows*, 48 Maine, 186; *Vining et al.* v. *Baker et al.* 53 Maine, 544; *Webber* v. *Davis et al.* 44 Maine, 147; *State* v. *Patten et als.* 49 Maine, 383; *Moody* v. *Whitney*, 34 Maine, 563; *Fernald* v. *Chase*, 37 Maine, 289; *Smith* v. *Colby*, 67 Maine, 169; *Freeman* v. *Underwood*, 66 Maine, 229; *State* v. *Howley*, 65 Maine, 100; *State* v. *Erskine*, 66 Maine, 360; R. S., c. 27, § § 34, 35.

J. H. Potter and *A. C. Otis*, for the defendant, contended that what would be a reasonable time within which to procure a warrant for liquors seized without a warrant depended upon the circumstances of each case. In this case it was procured within a reasonable time. If a warrant is issued it affords full and complete protection to the officer. That was done in this case.

Robinson v. *Barrows*, 48 Maine, 186; *Guptill* v. *Richardson*, 62 Maine, 257; *Nowell* v. *Tripp*, 61 Maine, 426; *Seekins* v. *Goodale*, 61 Maine, 400; *Erskine* v. *Helmback*, 14 Wallace, 613; *State* v. *Miller*, 48 Maine, 576; *Heath* v. *Farnham*, 53 Maine, 172.

LIBBEY, J. This is trover for a barrel containing seventy-two bottles of lager beer.

It appears by the evidence reported, that the defendant, being a deputy sheriff for Kennebec county, on the 29th day of September, 1877, seized the beer at the depot of the Maine Central Railroad Co. in Readfield, without a warrant therefor, and kept it till the 5th day of October, 1877, when he made complaint to a trial justice, at Winthrop, where the defendant then resided, and obtained a warrant for the seizure of the beer.

The plaintiff demanded the beer of the defendant on the second day of October, 1877, and he refused to deliver it to him on the next day. The plaintiff was never arrested on the warrant, and it was never returned to any court, but kept by the defendant, till the last of March, 1878, when in some way, it came into the hands of the trial justice who issued it.

On the fifth of October, 1877, the defendant libeled the beer and a monition was thereupon issued and duly served. It does not appear that any decree of confiscation of the beer was ever made on the libel, nor that there was any order for its return.

The defendant gives no reasons for the delay in procuring the warrant.

By R. S., c. 27, § 34, in all cases where, by the provisions of the chapter "an officer is authorized to seize intoxicating liquors or the vessels containing them, by virtue of a warrant therefor, he may seize the same without a warrant, and keep them in some safe place for a reasonable time until he can procure such warrant."

The question arises, what is a reasonable time during which an officer, who has seized intoxicating liquors without a warrant, may keep them before making complaint and procuring a warrant for their seizure?

The power given by this statute to an officer to seize property at pleasure, without a warrant, is an extraordinary one, and can

only be justified on the ground that the public good and the prevention of crime require it. The statute should be construed strictly. The words of the statute imply that the officer cannot keep the liquors longer than is necessary, in the use of due diligence, for the procurement of a warrant. The language is, "for a reasonable time *until he can procure such warrant.*" Here "reasonable time" is defined and limited by what follows, and the officer must use due diligence, if he would protect himself in the discharge of his duty. What is a reasonable time to enable the officer to procure a warrant, must be determined by the facts of the case; but when no sufficient reason is given for longer delay, we think it should not exceed twenty-four hours from the time of seizure.

Intoxicating liquors may be lawfully kept and owned. While so kept they may be seized by an officer under the provisions of this statute. Any deterioration in value while lawfully kept by the officer must be borne by the owner, although he is guilty of no violation of law. *Robinson* v. *Barrows*, 48 Maine, 186.

Some kinds of intoxicating liquors depreciate in value by being kept, and especially lager beer in bottles, in the hot summer weather, soon becomes stale and valueless. The statute requires ten days' notice on the monition. If the officer may keep the liquors six days before procuring a warrant, without good reasons therefor, he may keep them ten or fifteen days; and the owner of lager beer, although guilty of no crime, before he can be heard, would thus be deprived of the value of his property without remedy.

When the plaintiff demanded of the defendant his beer, the defendant was holding it without legal authority, and his refusal to deliver it was sufficient evidence of conversion.

The evidence shows that the cost of the barrel and beer was $15.85. This is the only evidence of value at the time of conversion. The plaintiff should recover that sum with what is equivalent to interest.

Judgment for plaintiff for $15.85, and interest from October 3, 1877.

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

ANN H. PERRY, Administratrix, *vs.* NEW BRUNSWICK RAILWAY COMPANY.

Aroostook. Opinion August 7, 1880.

Plea in abatement.

A plea in abatement for want of sufficient service of a writ, should contain a direct and positive averment of what the service was, and that no other service was in fact made. An averment, that "it appears that the only service of said writ was," &c., is not sufficient.

ON REPORT.

The question presented by the report is the sufficiency of the defendant's plea in abatement, which was as follows:

"And now on the second day of said February term, to wit: February 25, 1880, said defendant corporation, by Nicholas Fessenden, their attorney, come and defend when, etc., where, etc., and file this plea in abatement and pray judgment of the writ in aforesaid action, that the same may abate for want of service thereof, because said defendant corporation say it appears that the only service of said writ, was the delivering by R. L. Baker, sheriff, of an attested copy thereof to William C. Burpee, the alleged agent of said company, in the alleged depot and place of business of said company at Fort Fairfield in said county, on the second day of January, A. D. 1880. And said corporation say that on said second day of January, 1880, they were a non resident, foreign or alien company or corporation, established under the laws of another state or country, to wit: under the laws of the Province of New Brunswick, doing no business within the State of Maine, and having no office, place of business, attorney, tenant nor agent within said State; said Burpee not being then and there their agent, and said depot not then and there being their place of business or office. And this said defendant company or corporation is ready to verify. Wherefore they pray judgment of said writ, and that the same may be quashed."

Subscribed and sworn to by the attorney of the company.

Powers & Powers, for the plaintiff.

Nicholas Fessenden, for the the defendant.

LIBBEY, J. The defendants plead in abatement that the service of the writ is defective and insufficient. In pleas like this, which is a dilatory one, the greatest accuracy and precision are required; they should be certain to every intent and must not be argumentative; they should be direct and positive, and not by way of rehearsal, reasoning, or argument. 1 Chit. Pl. 395; *Severy* v. *Nye*, 58 Maine, 246.

If the defendants had a place of business in this State, or were doing business therein when the action was commenced, service of the writ is sufficient if made by leaving an attested copy thereof with the president, clerk, cashier, treasurer, agent, director, or attorney of the corporation, or by leaving such copy at their office or place of business. Acts of 1877, c. 155.

The only allegation in the plea in regard to the service of the writ is as follows: "Because said defendant corporation say *it appears* that the only service of said writ was the delivering by R. L. Baker, sheriff, of an attested copy thereof to William C. Burpee, the alleged agent of said company, in the alleged depot or place of business of said company, at Fort Fairfield, in said county, on the second day of January, A. D. 1880." Here is no direct and positive averment of what the service of the writ in fact was, or that no other service was in fact made. This essential part of the plea rests only on the averment that "*it appears*," not on a clear, direct and positive averment of facts, but on what appears somewhere else, with no intimation of where or how it appears.

As the plea in this respect is clearly bad, it is not necessary to point out other grounds on which it should be held insufficient.

Plea in abatement bad. Defendants to answer over.

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

WILLIAM L. PRINCE *vs.* WILLIAM B. SKILLIN.

Cumberland. Opinion August 10, 1880.

Stat. 1880, c. 198. Judicial notice. Legislature of 1880 legal. Canvassing board—decision of, only prima facie evidence of right to office. "Scattering" votes.

All offices, except when legislative authority is limited or restricted by constitutional provisions, are subject to the will of the legislature. There is, with this exception, no vested right in an office, or its salary.

Stat. 1880, c. 198, gives a speedy and effectual remedy to a party duly elected to an office, in case of an erroneous or fraudulent count, by the canvassing board. It accomplishes by one process the objects contemplated by two—*quo warranto*, and *mandamus*. It was enacted by a lawful legislature and approved by the governor.

The court is bound to take judicial notice of the doings of the executive and legislative departments of the government, and of historical facts of public notoriety passing in our midst.

The decision of the governor and council, as a canvassing board, does not constitute an estoppel upon other branches of the government. The board, so far as relates to county officers, are limited and restricted to what appears by the return, and such inquiries as are authorized by R. S., c. 78, § 5, and stat. 1877, c. 212. Their judgment is not made conclusive, it is only *prima facie*.

The real title to an elective office depends upon the votes cast. The underlying principle is, that the election, and not the return, is the foundation of the right to such an office.

Where by the decision of the canvassing board, six thousand three hundred and eleven voters were disfranchised, because two ballots were returned as "scattering," which, if added to the number received by any of the persons voted for would not change the result, and which from an amended return were shown to have been thrown for William B. Skillings; *Held*, that such decision was at war with the law of the land, the rights of parties, the will of the people and the principles upon which alone a republican government can rest.

The opinion states the case.

Ardon W. Coombs, for the petitioner, cited: High on Ex. Leg. Rem. §§ 624, 625, 638, 639; *People* v. *Holden*, 28 Cal. 123; *People* v. *Cook*, 8 N. Y. 67; *People* v. *Vail*, 20 Wend. 12; *People* v. *Jones*, 20 Cal. 50; *Commonwealth* v. *Co. Com.* 5 Rawle, 75; Opinion of the Justices, 54 Maine, 602; *Morgan* v. *Quackenbush*, 22 Barb. 77; *People* v. *Van Slyck*, 4 Cow. 297; *Ex parte Heath*, 3 Hill, 47; *Thompson* v. *Ewing*, 1 Brewst. 77; *State* v. *Governor*, 1 Dutch. 348; *Brower* v.

O'Brien, 2 Ind. 423; *State* v. *Jones*, 19 Ind. 356; *People* v. *Hilliard*, 29 Ill. 422; *State* v. *Cavers*, 22 Iowa, 343; Opinion of the Justices, 25 Maine, 568; *Id.* 38 Maine, 597; *Id.* 54 Maine, 602; *Id.* 64 Maine, 591, 596; *Id.* 68 Maine, 587; *Bacon* v. *Co. Comr's*, 26 Maine, 494; *Dennett, Pet'r*, 32 Maine, 508; *Jones* v. *State*, 1 Kansas, 279; *Strong, Pet'r*, 20 Pick. 484; *People* v. *Cook*, 14 Barb. 293; *People* v. *Schemerhorn*, 19 Barb. 540; *Dickey* v. *Hurlburt*, 5 Cal. 343; McCrary's Law of Elections, § 166; *Skerrett's Case*, 2 Parsons, 509; *Commonwealth* v. *Meeser*, 44 Pa. St. 343; *Juker* v. *Commonwealth*, 20 Pa. St. 493; *Piatt* v. *People*, 29 Ill. 72; *Taylor* v. *Taylor*, 10 Minn. 107; *People* v. *Bates*, 11 Mich. 362; R. S., c. 3, § 8; *Low* v. *Dunham*, 61 Maine, 566; *Milford* v. *Orono*, 50 Maine, 529; *Blake* v. *R. R.* 39 N. H. 437; *Rogers* v. *Bowen*, 42 N. H. 102; 1 Greenl. Ev. c. 2, § 6.

Bion Bradbury, *L. D. M. Sweat* and *Clifford & Clifford*, for the respondent.

The constitution is that instrument agreed on by the people as the absolute rule of action and decision for all departments and officers of the government, in respect to all the points covered by it. By it, the legislature holds all the powers of the people, except those expressly withheld; but the executive and judiciary, none except those expressly given. Cooley Con. Lim. 139, n. 1.

We deny the doctrine that the provisions of the constitution are directory and not mandatory. If mandatory then the Portland return was fatally defective as it did not contain the names of all persons voted for as county commissioners.

The counsel contended in a very elaborate and able argument that the act, by the authority of which this proceeding was brought, has not the force of law because it was not enacted by a lawful legislature, nor approved by a lawful governor, and cited: Hon. Geo. F. Hoar, U. S. senator from Massachusetts, in the Kellogg-Spofford debate in U. S. senate; the decision of the *quo warranto* to the House in 1604, in the dispute between King James and the British House of Commons; Fischel's British Constitution, 442; Haversham Cox on Institution of the English Government; *Goodwin* v. *Fortescue*, 2 State Trials; *Cæsar*

Griffin's Case, Chase's Decisions, 364; *Fitchburg Co.* 1 Allen, 557; *Coolidge* v. *Brigham*, *Id.* 333; *Denny* v. *Mattoon*, 2 Allen, 384; *Hooper* v. *Goodwin*, 48 Maine, 79; Opinion, KENT, J., 58 Maine, 572; Opinion of Justices, 126 Mass. 556; Opinion of Justices, 120 Mass. 602; 16 Maine, 483; *State* v. *Brown*, 5 R. I. 1; High, Ex. Rem. §§ 620, 625, 627, 638, 639; *State* v. *Hunton*, 28 Vt. 594; *People* v. *Cook*, 8 N. Y. 67; *People* v. *Pease*, 30 Barb. 588; Cooley's Con. Lim. pp. 786, 787, 623; 35 Maine, 590; 38 Maine, 599. Opinion of Majority of Electoral Commission on the Louisiana Electoral Vote; *Hadley* v. *Mayor of Albany*, 33 N. Y. 603; *Clarke* v. *Buchanan*, 2 Minn. 346.

A certificate or summons coming from the canvassing board, held by a member, to attend and take a seat, entitles him to the seat until he is ousted on contest. *Dennett, Petitioner*, 32 Maine, 508; Opinion, 117 Mass. 600; *People* v. *Miller*, 16 Mich. 56; *Ross* v. *Baxster*, 35 Penn. St. 263; *Hulseman et al.* v. *Rems et al.* 41 Penn. St. 401; *Kerr* v. *Trego*, 47 Penn. St. 292; *People* v. *Cook*, 4 Selden, 68; *Headly* v. *Mayor*, 33 New York, 606; *State* v. *Clerk Passaic*, 1 Dutcher's Reports, (N. J.) 354; *Briggs* v. *Churchill*, 15 Minn. 455; *State* v. *Wharton*, 25 La. 3; *Collins* v. *Knobloch*, 25 La. 263; *Bonner* v. *Lynch*, 25 La. 267; *Overseers* v. *Yarrington*, 20 Vt. 473; *Morgan* v. *Quackenbush*, 22 Barb. 72; *Coolidge* v. *Brigham*, 1 Allen, 335; *Patterson* v. *Miller*, 2 Met. (Ken.) 497.

His title is so far good that a court, in absence of proof to the contrary, is bound to presume him to be a *de jure* incumbent. *Poell* v. *McDonald*, 7 Kans. 426; *Willis* v. *Sproule*, 13 Kans. 257; *Eiggs* v. *State*, 49 Ala. 32.

It is settled in numberless cases, that in *quo warranto*, the court will go behind a certificate and ascertain the fact of election. *People* v. *Van Slyck*, 4 Cow. 297; *People* v. *Ferguson*, 8 Cow. 102; *Jeter* v. *State*, 1 McCord, 233; *People* v. *Vail*, 20 Wend. 12; *Bashford* v. *Barstow*, 4 Wis. 567; *Hill* v. *State*, 1 Ala. (N. S.) 559.

The entire body of authorities is an admission that the possession of a certificate is a legal title which requires judicial

investigation to set aside. It never was contradicted till now. This is too great an oversight to be allowed to stand.

The summons is a title to the seat, coming from the authorized body who issue it in the first instance. A title, it is true, capable of being overthrown, but the legal title *till* overthrown, and in the prescribed way. The way is, the question being judicial in its nature, that the appointed judges must try it, the house.

It has never been tried, for there can be no trial, in a legal sense, where there is no hearing. All that has taken place has occurred by an opinion. And it can never be said that there were never any members legally placed in the disputed seats except those certificated by summons. They have never been legally ousted. *Com.* v. *Jones*, 10 Bush. 726. When the inquiry to be made involves questions of law as well as fact, when it affects a legal right, and the decision may result in terminating or destroying that right, the power to be exercised and the duties to be discharged are essentially judicial. A summons is issued by the constitutional authority to take a seat. By means of it, the holder acquires a legal title till disputed. The disposal of this right is, in its nature, a judicial proceeding, by trial of fact and law. The house tries it. The court never, anywhere, but if it could, not in an opinion; yet under this advisory process, the court did adjudge seats to persons and against others by means of questions, numbers three and four of second series.

Any process to try right of office is essentially similar to *quo warranto*. *Jury trial*, 22 How. 182. Incumbent properly elected, but not being sworn into office may be ousted. High's Extraordinary Legal Remedies, § 760. *In re Mayor of Penryn*, Stra. 582. Office cannot be held at the same time by a *de jure* and a *de facto* incumbent. *Boardman et al.* v. *Halliday*, 10 Paige, Ch. 223; *Morgan* v. *Quackenbush*, 22 Barb. 79; *King* v. *Mayor of Colchester*, 2 Term R. 260; *Gardner* v. *Collector*, 6 Wallace, 499. Act of passing and of approving a law in an official capacity.

APPLETON, C. J. The plaintiff, claiming to have been duly elected county commissioner for the county of Cumberland, brings this bill against the defendant whom he alleges to have

been wrongfully declared elected to that office, when, in fact, he was not so elected.

This proceeding is under and by virtue of c. 198 of the acts of 1880, entitled "an act providing for the trials of causes involving the rights of parties to hold public offices."

The processes by which rights are to be established and wrongs redressed are within and subject to legislative control. Old forms and modes of procedure may be abolished and new ones established.

All offices, except when legislative authority is limited or restricted by constitutional provisions, are subject to the will of the legislature. There is, with the above exception, no vested right in an office or its salary. The office may be abolished. The mode of appointment may be changed. The length of time of official existence may be shortened. The compensation for official services may be diminished. *Farwell* v. *Rockland*, 62 Maine, 298; *Butler* v. *Pennsylvania*, 10 How. (U. S.) 403; *Parker* v. *Pittsburgh*, 4 Barr. 51; *Connor* v. *New York*, 1 Selden, 291; *Taft* v. *Adams*, 3 Gray, 126.

The act, c. 198 of the acts of 1880, was passed to enable parties duly elected to office but not declared to be so elected, to contest their rights before a judicial tribunal. The defendant was declared elected to the office in controversy by the canvassing board of the State. The allegations in the bill are, that errors occurred in the doings and proceedings of the board, and that upon a fair and honest count the plaintiff was duly elected, but that the defendant has usurped the office to which he was so elected. "When one is charged with usurping an office in the commonwealth, there must be," remarks the court in *Com.* v. *Fowler*, 10 Mass. 290, "authority in this court to inquire into the truth of the charge." This act gives a remedy in case of an erroneous or fraudulent count by the canvassing board. It will hardly be contended that if by errors of computation, throwing out legal returns or counting illegal ones, a candidate not duly elected is wrongfully declared to be elected, there should not be some remedy provided for the party actually elected, by which the wrong done may be corrected. If the error is not subject

to correction, then the canvassing board, in the exercise of irresponsible power have full and absolute control of the government and may effectually stifle the voice of the people, according to their sovereign will and pleasure.

Before the passage of the act under consideration, the only existing process by which right of one unlawfully holding an office could be inquired into, was by *quo warranto*. This writ issues in behalf of the State against one who claims or usurps an office to which he is not entitled, to inquire by what authority he supports his claim or sustains his right. The proceeding is instituted by the attorney general on his own motion or at the relation of any person, but on his official responsibility. It lies against an officer appointed by the governor and council or elected by the people. It removes the illegal incumbent of an office, but it does not put the legal officer in his place. It is insufficient to redress the wrongs of one whose rights have been violated.

To restore a person to an office from which he has been unjustly removed or unlawfully excluded, the proper process is by *mandamus*. By this, the rights of one lawfully entitled to an office, which has been illegally withheld, may be enforced. *Strong, Petitioner*, 20 Pick. 497.

By *quo warranto* the intruder is ejected. By *mandamus* the legal officer is put in his place. The act c. 198, accomplishes by one and the same process the objects contemplated by both these results. It ousts the unlawful incumbent. It gives the rightful claimant the office to which he is entitled. It affords a speedy and effectual remedy instead of the tedious and dilatory proceeding of the common law.

It is insisted that this bill for various reasons cannot be sustained. The grounds of objection to its maintenance we propose to examine.

1. The respondent contended "that the legislature which passed the act authorizing this and the governor approving it, could not rightfully do so, because there was a prior *de facto* legislature with a *de facto* governor, as set forth in the respondent's answer, not ousted by any competent tribunal."

The act in question was passed by an organized and acting legislature, approved by the governor and comes before us with

all the *indicia* of validity by which any act of any past legislature is or can be evidenced.

When there are two conflicting legislatures, each claiming of right to exercise legislative functions, it is for the court to determine by which body legislative authority can be lawfully exercised. In answer to inquiries made by certain gentlemen claiming official position under date of January 23, 1880, (70 Maine, 582,) this court used the following language: "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 titles 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?"

We are bound to take judicial notice of the doings of the executive and legislative departments of the government, when called upon by proper authorities to pass upon their validity. We are bound to take judicial notice of historical facts, matters of public notoriety and interest passing in our midst. These views are in full accord with the decisions of our highest tribunals. In *Swinnerton* v. *Columbian Ins. Co.* 37 N. Y. 188, it was objected that there was no evidence of a civil war. "This objection," observes HUNT, J., "I do not consider a sound one. The rule I take to be this: That matters of public history, affecting the whole people, are judicially taken notice of by the courts; that no evidence need be produced to establish them; that the

court in ascertaining them, resort to such documents of reference as may be at hand and as may be worthy of confidence. Thus in the prize cases already cited, (2 Black, 667,) the court use this language: 'The actual existence of civil war is a fact in our domestic history which the court is bound to notice and to know.' There the general facts connected with the history of the case, seem to have been assumed as within the judicial cognizance of the court. Greenleaf in his work on evidence, vol. 1, § 6, says, courts 'will also judicially recognize the political constitution or frame of their own government; its essential political agents or public officers, sharing in its regular administration; and its essential and regular political operations, powers, and actions. Thus, notice is taken, by all tribunals of the accession of the chief executive of the nation or state, under what authority they act; his powers and privileges, &c. . . the sittings of the legislature and its established and usual course of proceedings. . . In fine, courts will take notice of whatever ought to be generally known within the limits of their jurisdiction. In all these and the like cases, when the memory of the judge is at fault, he resorts to such documents of reference as may be at hand; and he may deem worthy of confidence.' It is the duty of the court to know county officers. *Farley* v. *McConnel*, 4 Lans. 428; much more the governor and legislature. *State* v. *Minnick*, 15 Iowa, 123."

After a careful consideration of the grave and important questions proposed by the governor, the rightful legislature and a body of gentlemen claiming, but without right, to be a legislature, this court in its several answers of January last, announced the result to which it had arrived; that the legislature by which the act under discussion was passed, was the legislature to whose acts the obedience of the people is due. In the correctness of the conclusions which were then reached, and in the principles and reasons upon which those conclusions are based, we rest in perfect confidence.

To the same general effect are the cases of *Wood* v. *Wilder*, 43 N. Y. 164; *Cuyler* v. *Ferrill*, 1 Abb. U. S. 169; *Rice* v. *Shook*, 27 Ark. 137; *Killebrew* v. *Murphy*, 3 Heisk. (Tenn.)

546; *Division of Howard Co.* 15 Kansas, 194; *Turner* v. *Patton*, 49 Ala. 406; *Ashley* v. *Martin*, 50 Ala. 537; *Smith* v. *Speed*, 50 Ala. 276; *Andrews* v. *Knox Co.* 70 Ill. 65; *Douthitt* v. *Sinson*, 63 Mo. 268; *Foscue* v. *Lyon*, 55 Ala. 440.

The body of men which the counsel for the defendant terms by courtesy a *de facto* legislature, though its house was composed of men who were and who were not elected, both classes not constituting a quorum, and of a senate a part of whom, less than a quorum, were duly elected, and a part were not elected, could not legally act as legislative bodies. While this condition of affairs remained there was no legal legislature. The greater portion of the members of the bodies thus illegally constituted subsequently took their seats respectively in the rightful house and senate—a house and senate composed of members unquestionably elected. They participated in its legislative action until its final adjournment. They received and acknowledged the receipt of the compensation to which by law they were entitled as members of the legislature. There was no other body claiming to exercise legislative functions. What the counsel calls the *de facto* legislature became merged into the rightful legislature, by which a governor was chosen in the accustomed manner, who entered upon and is now discharging, without interference or obstruction, the duties of that office. All this is well known as matter of current history, as well as by the legislative journals.

The offered proof was properly excluded. It is immaterial whether or not at some past time there was a *de facto* legislature or a *de facto* governor—inasmuch as neither was such *de jure*—and as the rightful legislature was not interfered with in the exercise of its legitimate powers, and the rightful governor is not disturbed in the discharge of his official duties. The acting legislature and the acting governor are both *de facto* and *de jure* the legislature and governor of the State and to be recognized as such.

2. It is claimed that the decision of the governor and council acted as a final canvassing board, and that their final action constitutes an estoppel upon all other branches of the govern-

ment, except the houses of the legislature in regard to the membership of those bodies.

This is not so. The object of all investigations is to arrive at true results. The canvassing board so far as relates to county commissioners are limited and restricted to what appears by the returns, except that by R. S., c. 78, § 5, and c. 212 of the acts of 1877, "they may receive testimony on oath to prove that the return from any town does not agree with the record of the votes of such town or the number of votes or the names of the persons voted for and to prove which of them is correct; and the return when found to be erroneous may be corrected by the record," and the governor and council are required to "count and declare for any person all votes intentionally cast for such person, although his name upon the ballot is misspelled or written with only the initial or initials of his christian name or names; and they may hear testimony upon oath in relation to such votes in order to get at the intention of the electors and decide accordingly." But they are no where authorized to extend their inquiries beyond these limits—to inquire into the validity of meetings—whether or not votes were cast by aliens or minors or any of the various questions involving the validity of the result. Their judgment is not made conclusive. In case of senators and representatives, the final determination rests with the senate and house. So in reference to county officers, the courts in the last resort, must determine the rights of the parties. If it were not so, if the canvassing board erred in their computations,—if they should willfully or ignorantly disregard the law—rejecting legal and valid returns and receiving and acting upon illegal and invalid returns, there would be no remedy for the party duly elected. "If," say the court, in their opinion, 25 Maine, 570, "the legislature had deemed it expedient, and had actually intended to constitute the governor and council judges generally of the election of county officers, it would have been easy for them to have been explicit to that effect; not having done so, it must be presumed that nothing of the kind was intended." It is abundantly obvious this must be so, since the right of full investigation is withheld from them.

County commissioners hold their office by popular election. If one not legally elected, is erroneously declared to be elected, the will of the people is disregarded. An usurper holds an office to which he has no right. "The usurpation of an office is not an invasion of executive prerogative," observes NOTT, J., in *State* v. *Deliesseline*, 1 McCord 52, "but of the rights of the people; and the only method by which these rights can be protected, is through the instrumentality of the courts of justice."

In accordance with these views it has been uniformly held by this and all other courts where the question has arisen, that the decision of the canvassing board is only *prima facie* evidence, that the real title to an office depends upon the votes cast, and that the tribunal before which the question arises, will investigate the facts of the election, the votes cast, and the legality of the action of the canvassing board. *People* v. *Cook*, 8 N. Y. 67; *People* v. *Vail*, 20 Wend. 12; *State* v. *Governor*, 1 Dutch. 348; *People* v. *Judson*, 55 N. Y. 525. The series of opinions of this court from that of 25 Maine, 568, to the present time, concur in the conclusion that the action of the governor and council, so far as relates to all matters pertaining to the case under consideration, in canvassing the returns, is purely ministerial, and is to be confined strictly within the bounds of the constitution and the statutes enacted in furtherance of the constitution.

The underlying principle is that the election and not the return is the foundation of the right to an elective office, and hence it has been held competent to go behind the ballot box, and purge the returns by proof that votes were received and counted, which were cast by persons not qualified to vote. *People* v. *Pease*, 27 N. Y. 45, "Freedom of inquiry in investigating the title to office," observes ANDREWS, J., in *People* v. *Judson*, 55 N. Y. 531, "tends to secure fairness in the conduct of elections, faithfulness and integrity on the part of returning officers, and it weakens the motive to fraud or violence by diminishing the chances that they may prove successful in effecting the objects for which they are usually employed."

3. The ground is taken "that the vote of the city of Portland was rightly rejected as illegal by the governor and council, the

return thereof not being in accordance with the statute, in that it did not contain the names of all the candidates voted for with the number of votes set against them."

It is conceded that if the vote of Portland is to be counted, the plaintiff was duly elected. The whole number of votes cast was six thousand three hundred and thirteen, of which two were returned as scattering.

None of the votes of the city of Portland were counted. They were all thrown out. Why? Because the ward meetings were not regularly notified? Because the ward meetings were not legally organized? Because those not qualified electors were permitted to vote? Because there was fraud or intimidation at the meeting? Because the votes of qualified voters were rejected? Because the votes were not received, sorted, counted and declared in open ward meeting? Because a fair record of the result was not seasonably made? Because the returns duly sealed and attested were not transmitted to the secretary of State within the time required? Because of any informality, great or small? No. None of these causes were pretended,—much less proved, but because of the number of votes cast, two were returned as scattering, that is, because two wrote "scattering" on their ballots or because two voted for candidates not voted for by anybody else, and the clerk returned them as scattering instead of giving the names of persons for whom the votes were cast. Thus, and for such cause, 6311 voters, being over a third of the voters of the county of Cumberland, were disfranchised—for they were equally disfranchised whether they voted for one candidate or the other. This disfranchisement was for no neglect or omission of theirs.

This is a government of the people. Their will as expressed by the ballot is what is to be ascertained and declared. To disfranchise six thousand three hundred and eleven voters because two ballots were returned as scattering, is a novel mode of giving expression to the popular will. If the citizens voting can have their votes nullified for such cause, any voter by writing "scattering" on his ballot or any clerk by returning a vote or votes under this head, may annihilate a majority however large. No man can be sure his vote will be effective.

The word "scattering" written on a ballot indicates the name of an individual or it does not. If a name, then it should be counted. If it is not the name of an individual, then perhaps it may be regarded as a blank vote. It is, at any rate, a ballot. It is provided by R. S., c. 4, § 32, as amended by c. 212 of the acts of 1877, that "in order to determine the result of any election by ballot, the number of persons who voted at such election, shall first be ascertained by counting the *whole* number of ballots given in, which shall be distinctly stated and recorded." The *whole* number of ballots counted, including the votes returned "scattering," the petitioner was most assuredly elected; for in the case under consideration, these votes however added or subtracted, would not have changed the result.

The office of county commissioner is one created by the statute, not by the constitution. As a canvassing board, the governor and council act in relation to this office under R. S., c. 78, § 5, as amended by c. 212 of the acts of 1877, and by that act the *whole* number of ballots given should have been counted. Had they been so counted the plaintiff's election was assured.

The rule obtains in every state, that an election is not to be set aside and declared void, merely because certain illegal votes were received, which do not change the result of the election. *The People* v. *Tuthill et als.* 31 N. Y. 550; *Judkins* v. *Hill*, 50 N. H. 140; *School District* v. *Gibbs*, 2 Cush. 30. In *ex parte Murphy*, 7 Cow. 153, two ballots were put in the box on the names of two persons who were formerly voters, but who had died some weeks before the election. "To warrant the setting aside the election," the court observes, "it must appear affirmatively, that the successful ticket received a number of improper votes, which, if rejected, would have brought it down to a minority. The mere circumstance that improper votes were received, will not vitiate an election." The extra vote should never be rejected, when it is possible to ascertain the fraudulent vote. *Mann* v. *Cassidy*, 1 Brewster (Penn.), 32. In an action to determine the right to an office, the court may look beyond the returns and even the ballot boxes, if necessary, to ascertain the truth. *The People* v. *Cook*, 14 Barb. 259.

Now there is no allegation whatever that illegal or fraudulent votes were cast. Whether the votes returned as scattering were cast by persons not authorized to vote, or fraudulently cast, or for a candidate ineligible, or erroneously returned as scattering by mistake or fraud, is immaterial, inasmuch as they did not change the result, the petitioner having a plurality of over six hundred votes should have been declared elected.

It is proper to add that the amended return shows the names for whom the votes counted as scattering were given — to wit: William B. Skillings. So that in truth, there remains no conceivable ground upon which the respondent can claim to hold over.

The decision of the canvassing board was at war with the law of the land, the rights of parties, the will of the people and the principles upon which alone a republican government can rest.

Judgment for the petitioners.

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

FIRST NATIONAL BANK OF SALEM

vs.

HENRY H. GRANT, Adm'r on the estate of WILLIAM MCGILVERY.

Waldo. Opinion August 11, 1880.

Accommodation note. Commissioners of insolvency.

One who lends his note, without limitation as to the time of its use, cannot in law be presumed to have limited such time to that before its maturity.

The holder of a note against an insolvent estate is not to suffer from the wrongful or negligent act of the commissioners of insolvency.

ON REPORT.

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

The report shows that William McGilvery died March 9, 1876.

Other facts appear in the opinion.

Wm. H. Fogler, for the plaintiff, cited: 2 Pars. Bills & Notes, 39; Story, Promissory Notes, § 194; *Charles* v. *Marsden*, 1

Taunt. 224; *Sturtevant* v. *Ford*, 4 M. & G. 101, (43 E. C. L. 61); *Lazarus* v. *Cowie*, 3 A. & E. 459, (43 E. C. L. 819); *Parr* v. *Jewell*, 16 C. B. (81 E. C. L. 684); *Carruthers* v. *West*, 11 Q. B. (63 E. C. L. 143); *East River Bank* v. *Butterworth*, 45 Barb. 476; *Harrington* v. *Dorr*, 3 Rob. (N. Y.) 275.

Joseph Williamson, for the defendant.

As to the $900 note, Gilmore, Kingsbury & Co., held it with power to sell or negotiate it for their own use. This was a power not coupled with an interest, and therefore revoked by the death of the maker. It is only when coupled with an interest that it is irrevocable. Chitty on Contr. 198; *Hunt* v. *Rousmanier*, 8 Wheat. 174; *Knapp* v. *Alvord*, 10 Paige, 205.

In this case the power of the payees of the note to use it could be revoked at the pleasure of the maker. They held it at the time of the death of the maker. It was then no claim against the estate. They could not subsequently negotiate it and thus create a claim against the estate. The fact that it was over due was enough to put the plaintiffs on their inquiry. See Byles on Bills, 135, 100, and cases cited; *Lancaster Nat. Bank* v. *Taylor*, 100 Mass. 18; *Clark* v. *Thayer et al.* 105 Mass. 216; *Swift* v. *Tyson*, 16 Pet. 15; *Bramhall* v. *Beckett*, 31 Maine, 205. Upon the question raised by the second note, counsel cited: *Judson* v. *Corcoran*, 17 How. 614; Perry on Trusts, § 438, and cases cited.

APPLETON, C. J. This is an action brought under R. S., c. 66, § 13, upon an appeal by the plaintiff from the decision of commissioners of insolvency upon the estate of defendant's intestate, William McGilvery, to recover the amount of two notes of hand signed by said McGilvery as maker.

The facts in relation to these notes differ and they will be separately considered.

1. The note for $900, dated January 12, 1876, on four months, payable to the order of Gilmore, Kingsbury & Co., at any bank in Boston, was an accommodation note of McGilvery, and was indorsed by the payees in June, 1876, as collateral security for their note of $2000 renewed at that time.

This note was for the accommodation of the payees. Instead of a loan of money, McGilvery loaned his credit. When the note was given there was no restriction as to its use, and no limitation as to the time of such use. The payees had full authority to dispose of it for any legitimate purpose. It was given to enable the payees to obtain credit thereby. The holder for value would hold the note by as firm a title as if founded on a real business transaction. That it was indorsed after due, without some equity in the maker, will not defeat the rights of the holder. The maker of an accommodation note holds himself out to the public to be absolutely bound to every person who shall take the same for value. "A party, who lends his note without limitation as to the time of its use," observes ROBERTSON, C. J., in *Harrington* v. *Dorr*, 3 Rob. 283, "cannot therefore be presumed in law to have limited such time to that before its maturity." The authorities are decisive on this question. Story on Promissory Notes, § 194: *Dunn* v. *Weston*, 71 Maine, 270; *Brown* v. *Mott*, 7 Johns. 362; *Sturtevant* v. *Ford*, 4 M. & G. 101; *Parr* v. *Jewell*, 81 E. C. L. 684; *Maitland* v. *Citizens' National Bank*, 40 Maryland, 540. The plaintiff is a holder for value, and is entitled to recover.

2. The note of McGilvery of January 13, 1876, for $1703.88, on four months, payable to Gilmore, Kingsbury & Co. or order, at any bank in Boston, was given for a good consideration and was indorsed June, 1876, after its maturity, to the plaintiff, as collateral security for the payee's liability to the bank, and it has remained in its possession and under its control to the present time. The amount due on the note was allowed by the commissioners of insolvency on McGilvery's estate to Gilmore, Kingsbury & Co. But that cannot affect the bank. It is nothing to the plaintiff that it had been wrongfully allowed to Gilmore, Kingsbury & Co. They had long before parted with its possession. They had ceased to be its owners. It was the duty of the commissioners to require proof of any claim presented for allowance. Had that been done, the allowance would not have been made. But the plaintiff is not to suffer from their neglect of duty.

Judgment for plaintiff for both notes.

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

ABNER LUNT *vs.* RACHAEL M. LUNT.

Hancock. Opinion August 11, 1880.

Deed of mortgagee, before entry of foreclosure without assignment of mortgage debt, conveys no title.

A quit claim deed of mortgaged premises, made by the mortgagee, before entry under his mortgage or foreclosure of the same, and not accompanied by an assignment of the mortgage debt or any portion of the same, will not convey any title to the real estate.

The interest in the land is inseparable from the mortgage debt, to which it is incident, and from which it cannot be detached.

ON REPORT.

The court to render such judgment as the rights of the parties require.

The opinion states the case.

A. P. Wiswell, for the plaintiff, cited: Jones on Mortgages, § 808; *Dockray* v. *Noble*, 8 Maine, 278; *Dixfield* v. *Newton*, 41 Maine, 221; *Johnson* v. *Leonards*, 68 Maine, 238.

L. A. Emery, for the defendant.

In this State where the mortgagee takes the legal title, a deed which conveys his interest, must pass the title.

As to the effect of a prior deed, without delivery of mortgage deed notes, see: *Connor* v. *Whitmore*, 52 Maine, 185; *Johnson* v. *Leonards*, 68 Maine, 237; *Welch* v. *Priest*, 8 Allen, 165. There is no objection to a conveyance of a part of the land by the mortgagee. *Johnson* v. *Leonards*, *supra*; *Wyman* v. *Hooper*, 2 Gray, 141; *McSorley* v. *Larissa*, 100 Mass. 270; Jones on Mortgages, § 811. To maintain the contrary is to maintain that the legal owner of a lot of land must convey the whole or none.

APPLETON, C. J. This is a real action to recover a tract of land in Mt. Desert. Plea, *nul disseizin*.

On October 5, 1859, Mary S. Carter, deeded the plaintiff the Noble lot, the demanded premises, particularly describing the same, taking back a mortgage of the same, which on April 30, 1864, she assigned to Sally Lunt.

On August 22, 1863, the plaintiff by deed of warranty, conveyed to Joseph M. Lunt, the husband of the tenant, two-ninths of the demanded premises, but the deed was not recorded.

Subsequently, on February 15, 1864, the plaintiff mortgaged the demanded premises to H. & S. K. Whiting, who on April 18, 1864, assigned their mortgage to Jacob Lunt, by whom the same was assigned on March 25, 1865, to Timothy G. Lunt.

Joseph M. Lunt after obtaining his deed of two-ninths of the Noble lot in common, went into possession of, and occupied the western two-ninths of the same.

On January 25, 1868, Sally Lunt, then being the assignee of the plaintiff's mortgage of the Noble lot, to Mary S. Carter and Timothy G. Lunt, the assignee of the plaintiff's mortgage to H. & S. K. Whiting, by deed of quit claim, conveyed to Rachel M. Lunt, the wife of Joseph M. Lunt, and the tenant in this suit, "two-ninths of the Noble lot so called . . being the western part of said lot, next the shore, now occupied by Joseph M. Lunt."

On September 29, 1870, Sally Lunt, the assignee of the Carter mortgage, and Jacob Lunt, her husband, by deed of quit claim, conveyed to James Flye the Carter mortgage, and on June 16, 1877, said Flye quit claimed the same to the plaintiff, who paid him the full amount of the notes given by him to Mary S. Carter when he purchased the demanded premises.

At the time of the quit claim deed from Sally Lunt and Timothy G. Lunt to the tenant, viz: January 25, 1868, Joseph M. Lunt, her husband, was in the possession and occupancy of the western two-ninths of the Noble lot. But his two-ninths was subject to the Carter mortgage, then held by his mother, Sally Lunt, and to the Whiting mortgage, held by Timothy G. Lunt, the warranty deed to him not having been recorded.

This quit claim deed to the tenant was given to her by the procurement of her husband, who was then in the occupancy of the western two-ninths, under his deed of two-ninths in common and undivided. The apparent object would seem to have been not to convey any title to additional land, but to relieve the title to the husband from the superincumbent mortgages. In that event the plaintiff would be entitled to seven-ninths of the demanded premises.

But it is claimed that by the quit claim deed of Sally Lunt and Timothy G. Lunt to the tenant, of January 25, 1868, an

interest in real estate of two-ninths of the Noble lot passed to her. But such is not the law. The interest of a mortgagee before entry, is not real estate but a personal chattel. The interest in land is inseparable from the debt. It is an incident to the debt and cannot be detached from it. *Ellison* v. *Davids*, 11 N. H. 275. The mortgages were not foreclosed. No assignment was made of the mortgage debt or of any portion of the same. The Carter mortgage has been paid in full by the plaintiff. The assignee of the Whiting mortgage was never in possession under his mortgage. The quit claim deed, did not, under these circumstances, convey any title to the real estate, or to a specific portion of the Noble lot.

The most the tenant can claim is that she be regarded as equitable assignee of the Carter and the Whiting mortgages, to the extent of the purchase money she has paid. *McSorley* v. *Larissa*, 100 Mass. 270. But this would not, in a court of law, be any defence to the legal title, which to the extent of seven-ninths is in the plaintiff.

Any equities which the tenant may have to the western two-ninths of the Noble lot, in case of partition, are protected by R. S., c. 88, § 16. *Allen* v. *Hall*, 50 Maine, 253.

Judgment for plaintiff for seven-ninths of the demanded premises.

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

CHARLES B. ROUNDS, Petitioner, *vs.* EPHRIAM K. SMART.

IGNATIUS SARGENT, Petitioner, *vs.* JOSEPH WILDER, JR.

ROBERT F. CAMPBELL, Petitioner, *vs.* HENRY L. WATTS.

Washington. Opinion August 19, 1880.

Stat. 1880, c. 198. Vested rights. State canvassing board — duties of. Election returns, correction of. Stat. 1877, c. 212. Ward officers. Title to office.

A suit under stat. 1880, c. 198, is in the nature of a proceeding in equity. When the petition is made returnable in term time, the justice holding that term is the justice having jurisdiction. It is not necessary that the petition allege that the petitioner was eligible to the office to which he claims to have been elected. It is sufficient if it alleges that the petitioner was lawfully elected to that office.

Vested rights are not impaired by stat. 1880, c. 198. That statute only provides a new process to determine the rights of parties — a speedy remedy for the redress of a grievous wrong.

The Governor and Council, as a canvassing board, are bound to obey the requirements of stat. 1877, c. 212. That statute does not violate any of the provisions of the constitution. The same power which creates a canvassing board may determine the limits within which it may act, and prescribe its rules of action.

Where the return of votes is defective by reason of any informality, for instance, for want of the signature of the city clerk, and a duly attested copy of the record is offered as a substitute, the canvassing board are under a legal obligation to receive the substitute.

The same authority, which required them to receive and act upon the record first furnished, requires their action upon the corrected and substituted record. The will of the legislature is expressed with equal clearness in each case.

Ward clerks in cities hold their offices until their successors are chosen.

An election will not be vitiated because one of the officers of a ward was not sworn.

The title to an elective office is derived from the popular expression at the ballot box. It is the manifest duty of all holding official positions, to give full effect to the will of the people as thus expressed.

APPEAL from the judgments upon petitions under stat. 1880, c. 198.

The petition of *Charles B. Rounds* v. *Ephriam K. Smart*, related to the office of county attorney for Washington county; *Ignatius Sargent* v. *Joseph Wilder, Jr.*, to the office of county treasurer for same county; and *Robert F. Campbell*, v. *Henry L. Watts*, to the office of county commissioner. The respondents

joined in the appeal, severally appealing from the several judgments, and the three cases were heard together.

E. B. Harvey, for the petitioners, cited: *Lovell* v. *Farrington*, 50 Maine, 239; Opinion, 25 Maine, 569; Brightly's Election Cases, 381, 382, 383, n. and cases cited, 436, 437; *People* v. *Vail*, 20 Wend. 12; *Com.* v. *Co. Comr's*, 5 Rawle, 77; *People* v. *Van Slyck*, 4 Cow. 297; *People* v. *Ferguson*, 8 Cow. 102; 1 Brewst. 69; 43 Pa. St. 384; 17 Ark. 407; 45 Mo. 453; High on Ex. Rem. 638.

E. K. Smart, for the respondents.

By the statute under which these petitions are brought, the justice of this court who orders the notice, is the one and only one before whom they should be returnable—the only one who has jurisdiction. The petitions for that cause should have been dismissed.

The petition should allege and the evidence prove the eligibility of petitioner. The statute of 1878 says, "no person ineligible shall be declared elected." The petitioner neither alleges nor proves that fact.

The whole matter of election is controlled by the constitution and laws *in existence at the time the election is called and held.* The determination of the election to the offices in question, is left by the constitution and laws with the executive branch, with no right of appeal to any other tribunal. (See 3 Maine, 477, 484.) Opinion, 25 Maine, 567. The Governor and Council could not go behind the returns.

The respondents were duly certificated, and qualified and entered upon their duties. The rights thus vested and enjoyed the petitioners claim are affected, impaired and destroyed, not by any law in existence on the day of the election nor at the commencement of their several terms of office, but by a law passed March 6, 1880. (Stat. 1880, c. 198.) That law in its application to past events is unconstitutional. 23 Maine, 308; 2 Maine, 275; 3 Maine, 326.

The return from the city of Calais was defective and could not be counted by the Governor and Council. See opinion of the

court, 68 Maine, 587, upon defective returns. See also 64 Maine, 590; Opinion of January 3, 1880, (70 Maine.)

Throwing out Calais the respondents were elected.

APPLETON, C. J. This is a proceeding under c. 198 of the acts of 1880, being "an act providing for the trial of causes involving the rights of parties to hold public offices," in which the petitioner claims that he has been elected county attorney for the county of Washington, and that the respondent has unlawfully and wrongfully usurped that office and prevented him from holding and exercising the same.

Numerous objections are made to the petitioner's right to maintain this process.

1. The suit is in the nature of a proceeding in equity. By the statute it is "to be commenced by petition, returnable before any justice of the Supreme Judicial Court, in term time or vacation in the county where either of the parties resides or where the duties of such office are to be performed," &c. The petition was made returnable at the April term, 1880, of the Supreme Judicial Court, to be holden at Calais in and for the county of Washington. The notice ordered was such as is usually given in equity cases, and it was duly served.

The objections taken are that the justice holding the April term had no jurisdiction, and that the time of hearing was not indorsed on the petition, and for these causes it was moved that the petition should be dismissed.

This motion was overruled and properly. The petition was made returnable in term time. The justice holding that term, is the justice having jurisdiction. The time of hearing was the term at which the petition was made returnable, and that was stated in the order of notice and indorsed on the petition.

2. It is urged that the petition does not state that the petitioner was eligible to the office to which he claims to have been lawfully elected. The petitioner alleges he was lawfully elected to the office in controversy. The petition follows the precise words of the statute, which was enacted to protect the rights of such as were lawfully elected. If the petitioner was so elected he is within the words and spirit of the act.

3. The point is taken that by this act vested rights are impaired. But such is not the case. There is no vested right in an office, which the legislature may create or destroy, as it judges most consonant to the public interest. This was settled in *Farweil* v. *Rochland*, 62 Maine, 296, in accordance with the decisions of the highest tribunals of the several states where the question has arisen. Such, too, was the conclusion to which the Supreme Court of the United States arrived in *Butler* v. *Pennsylvania*, 10 How. (U. S.) 403.

This act only provides for a new process to determine the rights of parties. The rules of evidence remain unchanged. Before, as after its passage, the rights of the parties litigant are determined by the greater or lesser number of votes they respectively receive.

But there can be no vested right in any particular mode of procedure. The forms of process are subject to legislative discretion. The object of this particular change was two-fold—to give a summary remedy to parties aggrieved and to diminish the expenses of litigation by accomplishing by one process what before required two processes—both dilatory and expensive—the writs of *quo warranto* and *mandamus*. But what right is taken away? As was well said by WOODWORTH, J., in *The People* v. *Tibbetts*, 4 Cow. 384, in reference to a statute passed for a similar purpose: "Are the defendants divested of their defence upon the merits? Their saying that the proceeding is hastened in point of form makes nothing for them. They have no right to complain of this. It is complaining that he is put upon his defence to-day, whereas he has a right to delay till to-morrow; a singular kind of vested right; *a right to delay justice*. Are not the legislature competent to take away or abridge such an evil? It is most important that they should possess this power. The pretence of the defendants does not merit the name of a *right*. It relates to the remedy." In the case cited, the act applied at once to all suits. So in New Hampshire, the rules of evidence were changed, but it was claimed that the change did not affect pending suits, but the court in *Rich* v. *Flanders*, 39 N. H. 304, held that no one could acquire a vested right in the

testimony of a particular witness, or in its exclusion. In *Ewing* v. *Filley et al.* 43 Penn. 384, a statute like the one under consideration, passed for the purpose of expediting decisions in cases of contested elections, was held constitutional. All this statute does is to provide a speedy remedy for the redress of a grievous wrong.

4. The office of county attorney is the creature of the legislature. It exits only by virtue of the statute, which fixes its tenure, prescribes its duties and determines its compensation. Whether the office shall be holden under appointment of the Governor and Council or by election are alike matters dependent on the legislative will. So, that will may change its duties, diminish its compensation or repeal the statute by force of which alone it exists, and no vested rights will thereby be impaired.

In 1845 in answer to inquiries proposed by the Governor as to the powers of the Governor and Council as a canvassing board in relation to county officers, this court in their answer held that they should not receive any other evidence in relation to the votes, than what the certificates so prepared, transmitted and received according to the constitution may contain. 25 Maine, 568. In other words, that they were limited to what should *appear* of record.

At that time, the statute of 1842, c. 3, was in force by which it was provided that the votes to be collected in the different towns, for the choice of county officers "shall be received, sorted, counted and declared in like manner as the votes for representatives," that is, as is provided in the constitution as to those officers. This decision was in strict accordance with the then existing statute, and has ever been followed by this court while that statute remained in force.

But since the opinion of this court in 25 Maine, 568, the statute on the subject has been materially changed. So that the opinion is entirely inapplicable to the statute law now in force.

By c. 212 of the acts of 1877, enacted to amend R. S., c. 78, § 5, as amended by c. 62 of the public laws of 1876, it is provided that "the Governor and Council on or before the first day of December in each year, shall open and compare the votes

so returned, and may receive testimony on oath to prove that the return from any town does not agree with the record of the vote of such town in the number of votes, or the names of the persons voted for, and to prove which of them is correct; and the return when erroneous may be corrected by the record. . . But, in order to ascertain what persons have received the highest number of votes, the Governor and Council shall count and declare for any person all votes intentionally cast for such person, although his name upon the ballot is misspelled or written with only the initial or initials of his christian name or names; and they may hear testimony upon oath, in relation to such votes, in order to get at the intention of the electors, and decide accordingly. . . In all cases where a return is defective, by reason of any informality, a duly attested copy of the record may be substituted therefor."

This act is in terms made applicable in determining the election of all county officers. The Governor and Council as a canvassing board are bound to obey its requirements. They cannot do otherwise without a manifest violation of law. Nor can it for a moment be pretended that this statute violates any provisions of the constitution. The same power which creates a canvassing board may determine the limits within which it may act and prescribe its rules of action.

That the canvassing board is not a judicial body, and that in election cases the contestants for elective county offices may have their rights determined by appropriate processes, was fully settled in *Prince* v. *Skillin*, (*ante*, p. 361,) and the cases there cited. The decision of the canvassing board, is only *prima facie* evidence, and not conclusive in direct proceedings to try the right by *quo warranto*. "But," remarks BRONSON, J., in *The People* v. *Vail*, 20 Wend. 12, "to hold it conclusive in this proceeding (*quo warranto*) would be nothing less than saying that the will of the electors plainly expressed in the forms prescribed by law, may be utterly defeated by the negligence, mistake or fraud of those who are appointed to register the results of an election."

5. By the tabulation of the Governor and Council, the votes of seven towns were thrown out by them acting as a canvassing board. But no objection is now taken to their being counted and no reason shown why they should not be counted, save in the case of Calais. It would seem to be conceded, that with this exception named, they were wrongfully thrown out. Indeed, the respondent in the tabulation presented by him, places his right to the office in question upon the exclusion of the votes of Calais, admitting thereby, that if the vote of that city is counted, the the petitioner is undoubtedly elected.

The return of the votes of the city of Calais, was in due form, save that it wanted the signature of the city clerk. It could not be legally counted without his attestation. 68 Maine, 587. But by the act of 1877, (c. 212,) subsequently passed,* it was provided that "in *all* cases when a return is defective, by reason of any informality, a duly attested copy of the record may be substituted therefor." The evidence shows that a corrected copy of the record duly authenticated was offered, but the canvassing board declined even to receive it.

This statute is of the highest equity. The will of the people should not be defeated by the negligence or fraud of municipal officers. If their error or mistake is not correctible, any town clerk, by omitting intentionally his signature, might nullify the votes of his town without possibility of correction. The corrected copy should have been received. The canvassing board were equally under legal obligation to receive the substituted as the original, but defective record. The same authority which required them to receive and act upon the record first furnished, required their action upon the corrected and substituted record. The will of the legislature is expressed with equal clearness in each case.

But whether the canvassing board were bound to receive and act on the substituted copy or not is immaterial, for it is properly in evidence before us. It is conceded, that, if not impeached, it establishes the fact of the petitioner's election to the office claimed for taking defendant's tabulation, and counting the vote for Calais,

* The opinion of the court in 68 Maine, 587, was of the date of December 22, 1876, the mistake in date being an error of the printer.

he has a plurality of two hundred and seventy-six. It is for the respondent to show cause if any exists, why this return is not valid and in accordance with the truth.

It is not alleged, still less proved, that illegal votes were cast—that legal votes were rejected—that the count was not fair, or that the number of votes returned by the city clerk as cast were not cast. There is no allegation of fraud, intimidation or bribery. The question is, whether there are such neglects or omissions as necessitate the disfranchisement of the voters of Calais without fraud or neglect on their part.

A copy of the record of the votes of Calais, as canvassed by the aldermen and recorded by the city clerk was produced. This was competent evidence to prove the vote of the city.

In two wards, the objection is taken that the ward clerks of the preceding year continued to act without a new election. But this is in strict accordance with R. S., c. 3, § 26, which provides that a warden and clerk duly elected "shall hold their offices one year therefrom, and until others are chosen and qualified in their places."

The statute is in accordance with the common law as decided in *Brown* v. *Lunt*, 37 Maine, 423, where the acts of a justice of the peace, whose commission had expired, were held valid as the acts of a justice of the peace *de facto;* Mr. Justice HOWARD in his opinion, deciding that town officers holding over, were to be regarded as officers *de facto*.

It may not be amiss to add that the acting clerk was called by the respondent, and testified that the return truly stated the number of votes cast for the several candidates.

The objection is taken that in one of the wards one of its officers was not sworn.

A poll is not to be rejected because officers have been illegally chosen. *Thompson* v. *Ewing*, 1 Brewster, 69. The neglect of the inspectors or clerks to take any oath, will not vitiate an election, nor will its irregular administration, if sworn upon a book other than the Holy Evangelists as on Watts' Psalms and Hymns. *People* v. *Cook*, 8 N. Y. 68. The office of canvassers is purely ministerial, and the fact that some of the judges of

election do not appear to have been properly sworn, is no objection to the validity of their returns. *People* v. *Hilliard*, 29 Ill. 413. The rules for conducting an election contained in the statute, are directory and not jurisdictional in their character. They are intended to afford all citizens an opportunity to exercise their right to vote, to prevent illegal votes, and to ascertain with certainty, the true number of votes, and for whom cast. The decisions are, that the acts of public officers, being in by color of an election or appointment, are valid so far as the public are concerned. *The People* v. *Cook*, 8 N. Y. 84.

But if there should be found an irregularity in the ward, in which a ward officer was not sworn, and if it were to be held that the voters in that ward were to be deprived of the right of suffrage for no fault of their own, still the result would not be changed. The whole vote of the city is not thereby lost. By rejecting the ward in which the irregularity occurred, no matter which ward, the petitioner would still be elected. But little reason exists for rejection, as all the witnesses called by the respondent testify to the correctness of the return, and the fairness of the proceedings, and there is no evidence to the contrary.

It seems that the city clerk at the time the aldermen met to sum up the ward returns, entered on his record the names of all the aldermen, supposing they would all be present, but as all were not he erased the names of the absent. The erasure made the record conform to the fact, and in so doing, the clerk only did his duty.

So, it appears that errors occurred in the copying of ward returns, but they are trivial and do not change the result. In any event they show the election of the petitioner.

The evidence shows in some instances, carelessness and negligence in some of the city officials—but nothing indicating intentional fraud or affecting the result. The witnesses of the respondent testify in every instance where the inquiry is made to the correctness of the returns.

This court in 68 Maine, 588, use the following language: "It is to be regretted that votes are lost by the negligence or ignorance of town officers, but the obvious remedy is to choose such

as know their duty, and knowing it will legally perform it." To provide ample means for the correction of errors, provision was made the next year after this answer by the act of 1877, c. 212. The wisdom of the act is apparent. It enables the canvassing board within certain limits, to give effect to the will of the people and to disregard the captious quibblings by which the attempt is sometimes made to deprive citizens of their most important political rights without an opportunity to be heard.

The title to an elective office is derived from the popular expression at the ballot box. It is the manifest duty of all holding official positions, to give full effect to the will of the people as thus expressed. "Courts of justice," remarks the court in *Mann* v. *Cassiday*, 1 Brewster, 60, "would deserve to lose all confidence and respect if they were astute in devising technical rules under which the dearest rights of the people could be destroyed by unworthy men. We will not consent to be a party to such a system."

Judgment affirmed. Judgment for the petitioner with costs.

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

In re Cassius C. Roberts.

Waldo. Opinion August 3, 1880.

Stat. 1878, c. 74. Insolvent debtor. Petition of creditors; service of; amendment of. Jurisdiction of insolvent court.

The service of an attested copy of the creditors' application and the warrant of the judge, provided in stat. 1878, c. 74, § 15, of the insolvent laws of Maine, upon the debtor, is sufficient if left at his last and usual place of abode.

It will be sufficient to give the court jurisdiction in the absence of fraud, if the creditors in their petition allege that they believe that their aggregate debts provable under the insolvent laws of Maine amount to more than one-fourth part of the debts provable against their debtor, and that they further believe and have reason to believe that such debtor is insolvent, and that it is for the best interest of the creditors that the assets of the debtor should be divided as provided by the insolvent law.

Where an insolvent debtor, after an adjudication in insolvency, on examination upon his petition to this court to have such adjudication and proceedings in insolvency declared void because the requisite amount of his creditors did not join in the petition for insolvency, admitting his insolvency and that a large proportion of his creditors are willing to become parties to the insolvency proceedings, declines to answer proper inquiries, his petition will be dismissed — especially when it appears that the only purpose of his petition is to give effect to preferences in fraud of the insolvent law.

It seems that creditors not originally parties to the petition may by leave of court become parties thereto and prosecute the original application the same as the petitioning creditors could have done.

An amendment to the creditors' petition by adding new creditors, it seems would relate back to the commencement of the proceedings in insolvency.

The case is stated in the opinion.

Wm. H. Fogler, for the petitioner.

The authority to annul and vacate proceedings in insolvency, has been exercised by the court in Massachusetts under similar statutory provisions. *Thompson* v. *Thompson*, 4 Cush. 127; *Buck* v. *Sayles*, 9 Met. 459; *Cheshire Iron Works* v. *Gay*, 3 Gray, 531; *Claflin* v. *Beach*, 4 Met. 392; *Dearborn* v. *Keith*, 5 Cush. 224; *Phillips* v. *Parker*, 2 Cush. 175; *Kimball* v. *Morris*, 2 Met. 580.

I contend that one condition in proceedings *in invitum* is that the debts due the petitioning creditors, shall amount to more than one-fourth the debts provable against the debtor. They must

make oath that that is their belief. After notice to the debtor, the judge must "find the allegations of such application to be true and proved." To hold that the jurisdiction of the court depends upon the belief of applicants, rather than upon facts, would be an anomaly in jurisprudence. Under the bankrupt act it was a matter of inquiry for the court, and the admission of the debtor was not always sufficient. Bump, Bankruptcy, 440, 441.

Joseph Williamson, for the respondent.

APPLETON, C. J. This is a petition under c. 74, § 11, of the acts of 1878.

The petitioner was adjudged an insolvent debtor, upon the petition in due form of certain creditors, alleging their belief, that their aggregate debts amounted to more than one-fourth of the debts provable against the debtor.

The judge of insolvency adjudged that the allegations in the petition were true. The statute notice was given the debtor by leaving it at his residence. He failed to appear at the time designated for a hearing, and was adjudged an insolvent debtor. A meeting of creditors was had, and an assignee appointed. He now seeks to contest these proceedings on two grounds.

1. That he had no notice. But the statute does not require notice in hand. It was left at his residence. True, he was, absent at the time. That, however does not affect the jurisdiction of the court. The notice given was in compliance with the statute.

2. That the petitioning creditors do not represent one-fourth part of the debts provable against the debtor.

The petitioning creditors allege their belief that their aggregate debts, provable under the insolvent laws of Maine, amount to more than one-fourth part of the debts, provable against such debtor, and that they further believe and have reason to believe, that said debtor is insolvent, and that it is for the best interests of the creditors, that the assets of the debtor should be divided as provided by the act of 1878, c. 74, and as amended by the act of 1879, c. 131. The petition contains all the allegations necessary to give jurisdiction. It is sufficient to state upon belief without averring knowledge or information, that the

petitioning creditors constituted the required number, and that their debts constituted the required amount. *In re Mann*, 13 Blatchf. 401, the judge of insolvency found the allegations true, and acted thereon. He then had jurisdiction.

The petitioner admits his hopeless insolvency, and that the greater part of the creditors have come in, and propose to prove their claims.

Under the bankrupt act of the United States, unless fraud or bad faith is alleged, an adjudication cannot be set aside on the ground that the proper proportion of creditors did not unite in the petition. *In re Butler et al.* 14 Nt. B. R. 14. *In re Funkenstein*, 14 N. B. R. 213. It is not necessary to determine, in this case, whether the same rules apply under the statute relating to insolvents.

In answer to an inquiry relating to a preference given to certain creditors, which the court held, and correctly, to be proper, the petitioner says, "in case of an extended examination on this matter, I should withdraw the petition, and submit to the proceedings in insolvency without any thing further, that point being settled. I base my petition upon that point; if that point is settled, I should withdraw the petition, and submit to the proceedings without any further question."

The point referred to, relates to preferences given to certain creditors in regard to which he is unwilling there should be, "an extended examination." Accordingly, the question proposed was not answered. Refusing or declining to answer pertinent questions, and preferring to withdraw his petition to answering them, he offers to show that the creditors petitioning, do not represent one-fourth of the provable debts against him. Whereupon the court ruled that upon the case presented, the petitioner was not entitled to have the proceedings declared void. In other words, that an insolvent debtor who preferred to have his petition dismissed to answering pertinent interrogatories as to his affairs, and who declined answering such inquiries, was not entitled to have a standing in court.

The ruling was correct. The obvious and avowed purpose of this petition is to make effectual by delay, certain preferences in

regard to which "an extended examination" was deemed undesirable. Proceedings in insolvency, are for the benefit of all the creditors. The effect of sustaining this petition would be to defeat the very object of the statute under which all these proceedings are had.

Besides, the admission is made that the greater part of the creditors are assenting to these proceedings and propose to prove their claims. In the matter of *Oren Hawkes*, 70 Maine, 213, it was held that persons not originally parties to the petition, may by leave of court, become parties to pending proceedings, and intervene for their own protection and that of the creditors generally. The application of a creditor to have the debtor declared a bankrupt, inures to the benefit of all the creditors, any one of whom may come in and prosecute the application if he thinks proper. *In re Freedley & Wood*, Crabbe, 544. He can prosecute the original application in the same manner as the petitioning creditor could have done. *In re Lacey, Downs & Co.* 12 Blatchf. 322.

If the other creditors desire to become parties, there would seem to be nothing to prevent their intervention. An amendment relates back to the commencement of proceedings, and gives effect to the action of the court upon an imperfect petition. *In re Williams & McPheeters*, 6 Bis. 233.

The object of the petition is to defeat the equal rights of all the creditors. It is against the very purpose and intention of the statute.

Petition dismissed.

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

HELEN B. NOYES *vs.* JOANNA B. GILMAN.

Kennebec. Opinion September, 1880.

Exceptions. Evidence. Surveyor's plan. Stenographer's minutes.

Exceptions to the exclusion of record and documentary evidence cannot be sustained when they do not disclose sufficient data to enable the court to decide that the ruling excluding the evidence was erroneous.

It is discretionary with the presiding justice to allow or disallow the representation of a monument upon the court plan after it had been returned by the surveyor.

When for the purpose of contradicting a witness one party offers extracts from the testimony of such witness at a former trial, the other party is entitled to put in so much of the remainder as is relevant, and for that purpose may call the stenographer and have him read his original minutes.

ON EXCEPTIONS AND MOTION.

Writ of entry to recover possession of land in Waterville, dated October 13, 1877.

Plea, general issue.

(Exceptions.)

The defendant excepts to the admission of evidence offered by the plaintiff and objected to by the defendant; and to the rejection of evidence offered by the defendant and excluded by the court in the several instances hereinafter named.

1. Defendant's counsel offered in evidence certified copy of record of laying out and acceptance of the two rod road, from a record of a town meeting held May 2, 1808, which was objected to and excluded.

Description. — Beginning at a stake and stone on the westerly side of the way as now traveled, near Timothy Boutelle's office, and on the line between lots Nos. 104 and 105; thence west northwest on said line sixty-six rods to easterly side of the burying ground; said road to be two rods wide and lay on the north side of the aforesaid line.

2. Defendant's counsel requested the court to allow the surveyor to locate upon his plan a stone monument claimed by defendant to be in the north line of said "two rod road," which stone had been located by said surveyor in his survey, prior to the trial, which request was refused, and to this refusal the defendant excepts.

3. Defendant's counsel also offered in evidence certified copy of record of laying out and acceptance of Temple street, at a town meeting held September 8, 1823, which was objected to and excluded.

Description.—Beginning at a stake in the north line of the front lot numbered 104, commonly called the Williams lot and in the east line of the county road which leads from Timothy Boutelle's barn to James Crommett, Jr.'s dwelling house; thence running south about eighty-six degrees east to a post in the angle of the roads, one of which leads from Daniel Cook's store to the dwelling house of James Hasty, and the other from said store to the east burial ground near said barn; said road to be three rods wide and to lie on the south side of the above described line. Timothy Boutelle and Nathaniel Gilman were notified and were present at the laying out of said road. We know not of any other person interested in the lands over which said road passes.

4. Also certified copy of record of laying out and acceptance of Temple street at a town meeting held September 20, 1819, which was objected to and excluded.

Description.—Beginning at a stake in the west line of the aforesaid town road about five rods and eight links northwardly from T. Boutelle's office; thence running south 84 degrees west 40 rods to the point of intersection of the east line of the county road, and the north line of a town road leading from the south side of T. Boutelle's office to said county road. This line to be the north line of the intended road, which is to be on the south side of said line, and to keep and be the width of three rods, and to extend from said town road to said county road.

N. B. That part of the last above described road which lies north of Nathaniel Gilman's north line, was accepted by vote of the town; that part which crosses said Gilman's land was not accepted.

5. Defendant's counsel also offered following certified copy of deed from Nathaniel Gilman to Lemuel Stilson, which was objected to and excluded.

Description.—A piece of land situated in said Waterville and bounded and described as follows, to wit: Beginning at a point

twenty-five feet westwardly of the west side of Timothy Boutelle's ice house and in the south line of the road leading from Dr. Daniel Cook's store by J. M. Haines' blacksmith shop; thence westwardly on said line of said road seven rods; thence southwardly at right angles with said road seven rods; thence eastwardly at right angles with said last described line seven rods; thence northwardly at right angles seven rods to the point begun at. Excepting therefrom a small piece of land in the northeast corner of said described tract estimated to contain about one square rod, belonging to Timothy Boutelle.

6. Defendant's counsel again offered copy of record of laying out and acceptance of said "two rod road," for the purpose of contradicting with testimony the other side as to its location, which was objected to and excluded.

7. Defendant's counsel offered in evidence deed from Lemuel Stilson to the First Congregationalist Society of Waterville, dated and acknowledged July 13, 1837, recorded July 14, 1837, for the purpose of contradicting the testimony of Stilson, which was objected to and excluded, which deed was of the following tenor:

Description. — Beginning at a point twenty-five feet westwardly of the west side of Timothy Boutelle's ice house, and on the south side of the road leading from Doctor Daniel Cook's store by J. M. Haines' blacksmith shop; thence westwardly on said line of said road seven rods; thence southwardly, at right angles with said road, seven rods; thence easterly, at right angles with said last described line, seven rods; thence northerly, at right angles, to the point begun at, seven rods; excepting therefrom a small piece of land at the northeast corner of said described tract estimated to contain about one square rod, belonging to Timothy Boutelle; being the same conveyed me by Nathaniel Gilman June 29, A. D., 1835, and the same on which is erected the meeting house owned and occupied by said society.

8. Defendant's counsel offered in evidence a plan made by the surveyor for the defendant, which on objection was excluded. Subsequently plaintiff's counsel offered a plan made by the surveyor for the plaintiff. This plan upon objection was excluded.

Both plans had been used during the trial. The presiding justice remarked that if one went to the jury, both must; whereupon both plans went to the jury by consent. Said plans may be referred to.

9. The defendant further excepts to the admission of evidence offered by the plaintiff, and objected to by the defendant, and to the rejection of evidence offered by the defendant and excluded by the court in the several instances mentioned in the official report of the evidence, and prays that these exceptions may be allowed.

By *E. F. Pillsbury* and *Foster & Stewart*, her attorneys.

E. F. Webb and *Joseph Baker*, for the plaintiff.

Foster & Stewart, for the defendant.

VIRGIN, J. The issue was the true dividing line between the adjoining parcels of land of the parties, the plaintiff's land being part of the river lot 105, and the defendant's a part of 104. The decision of this issue did not depend necessarily upon the original location of the line between the original lots as made by McKechnie in 1763, or even of the line as settled between Temple and Williams by the commission in 1797; for there is no evidence that the original monuments of that line are known to be standing upon the face of the earth. But much of the mass of testimony, oral and documentary, upon both sides, relates to alleged recognized lines between the parties and their predecessors in title, and to their respective occupation under claim of ownership. We do not consider it profitable or practicable to put into this opinion an analysis of the six hundred and twenty pages of evidence. It is sufficient to say that after a most careful examination of it, we cannot declare that the jury, with their superior facilities for weighing the credibility of the witnesses, have committed an error. There is no doubt that wherever may be the actual weight of evidence the verdict is founded upon the unqualified testimony of a very large number of disinterested and apparently intelligent witnesses, who, to all appearances, based their testimony upon their knowledge in the premises. We therefore overrule the motion to set aside the verdict.

The first, third and fourth exceptions complain that certified copies of the laying out and acceptance of the two rod road, in 1808, and similar records of the laying out and acceptance of Temple street in 1819 and 1823 respectively were excluded. But the copies offered are not made a part of the bill of exceptions; on the contrary the only portion of the record disclosed, (and that is not certified), contains simply what purports to be a description of the several roads. These paper descriptions alone unattended by connecting facts could not be admissible. The certificate may have been insufficient; the paper location may never have been fixed upon the face of the earth, or the roads never opened as located, or traveled as opened. *Sproul* v. *Foye*, 55 Maine, 163. In a word, sufficient facts do not appear to show the exclusion erroneous. *Woodcock* v. *Calais*, 68 Maine, 244.

The second exception is not tenable. It was discretionary with the presiding justice to allow or disallow the representation of the stone monument upon the court plan after it had been returned to court by the surveyor. Were it otherwise, it does not appear that the defendant was aggrieved by the ruling. The ruling in no wise excluded any evidence offered in relation to the monument, which the evidence located two rods north of any line claimed by either party.

The fifth exception does not disclose sufficient data to enable us to decide that the ruling, excluding the deed was erroneous. A literal construction of the exception shows that only the premises of the deed was offered. Nothing appears to connect its recitals with the line in question. The deed of strangers may become evidence in cases of this kind as in *Sparhawk* v. *Bullard*, 1 Met. 95; but the bill of exceptions does not bring this case within the rule of the one cited.

Neither can the sixth exception be sustained. It does not appear what testimony of the other side the record of the location was offered to contradict, or what the testimony accompanying the record was. *Fuller* v. *Ruby*, 10 Gray, 285.

The seventh exception, related to the exclusion of the deed from Lemuel Stilson to the First Congregational Society of Waterville. It was offered for the specific "purpose of contra-

dicting the testimony of Stilson"—not the grantor but his son, L. A. Stilson. What part of the testimony of L. A. Stilson this was offered to contradict we are not informed. Nor upon a careful perusal of the ten pages of L. A. Stilson's deposition do we find any testimony which the description of the premises offered tends to contradict. If otherwise admissible, (which is denied) the defendant was not injured by the exclusion.

The eighth exception discloses no cause of grievance on the part of the defendant. Both the plaintiff's and the defendant's plans went to the jury by consent of the parties; saving a few lines not upon these plans, they were copies of the court plan made for parties by the surveyor.

Under the *omnibus* clause in the bill of exceptions, the defendant makes but two complaints; and without meaning to sanction this very summary mode of filing exceptions, we pass upon these two instances of alleged grievances:

1. The exclusion of Silas Berry's testimony was undoubtedly correct. Having testified that he carried on the Waterville town farm six years, commencing eleven years ago, and that Amasa Starkey (since deceased,) was there then, the defendant asked Berry "whether Starkey told him what Peavey has told here." Peavey's testimony was a recital of what Starkey and Peavey did in relation to the well in 1844. The testimony elicited by the question was clearly hearsay.

2. The other complaint relates to the admission of the witness Noyes' testimony given at another trial. The only purpose for which it was admissible, was to contradict Noyes' present testimony. Instead of producing a copy of Noyes' entire testimony elicited on being recalled and reading extracts, the defendant produced only a copy of the extracts. Thereupon the plaintiff was entitled to put in evidence so much of the remainder as was relevant. But he had no copy. Necessity compelled him to call the stenographer and have him read his original minutes, some of which was relevant but most of which was not. So much as was not, it was the duty of the presiding justice to instruct the jury to disregard; and the presumption is that he did so instruct them. If the defendant had done his duty, this case

would not have been lumbered with irrelevant testimony. We do not think the defendant was injured, as the irrelevant testimony had no reference to the acts of this defendant or to anything which could affect her rights.

Motion and exceptions overruled.

APPLETON, C. J., WALTON, LIBBEY and SYMONDS, JJ., concurred. PETERS, J., concurred in the result.

GEORGIA BARDEN *vs.* WILLIAM DOUGLASS.

Oxford. Opinion September 25, 1880.

Trespass. Sheriff; acts of deputy. Withdrawal of pleadings. Practice.

An action of trespass will not lie against a sheriff for the act of his deputy in taking possession of property attached by him on a writ while acting as deputy of a former sheriff, no judgment having been rendered on the writ, and the possession being demanded and received, by virtue of a receipt taken of the plaintiff and another at the time of the attachment, in which they agreed to safely keep the property attached, and deliver it to the officer on demand.

The presiding justice has discretionary power to allow a defendant to withdraw his brief statement, even after the plaintiff has rested his case.

ON REPORT.

TRESPASS. The opinion states the case.

D. Hammons, for the plaintiff.

R. A. Frye, for the defendant.

VIRGIN, J. On September, 30, 1878, A. B. Godwin, then a deputy of J. W. Whitten, sheriff of the county, on a writ against one Barden, (plaintiff's husband,) attached a piano-forte, stool and covering, as the property of the husband, but claimed by the plaintiff. Without removing the property, the officer left it in the possession of the plaintiff and her mother, on receiving their written agreement (reciting the attachment) to safely keep the same, and deliver it to him on demand. The writ on which the property was attached was duly returned and entered at the succeeding December term.

On January 1, 1879, sheriff Whitten's term of office expired, and as a consequence his deputy Godwin's. The former was succeeded by the defendant who appointed Godwin as his deputy.

On July 25, 1879, before judgment on the writ, Godwin presented the receipt and agreement to the plaintiff, demanded and received the property attached, canceled and surrendered the receipt. The case does not show what became of the property, but we presume from the brief statement that it is still in Godwin's possession awaiting judgment and execution in the original action.

The plaintiff has brought this action against this defendant for the act of Godwin in taking the property on July 25, when he surrendered the receipt, contending that he acted as the deputy of the defendant.

The defendant pleaded the general issue with a brief statement that the property was attached by Godwin, as the deputy of the defendant, on a writ against the plaintiff's husband, and that the property was the husband's. But when the testimony was nearly out, and the foregoing facts were disclosed, the defendant was allowed, against the objection of the plaintiff, to withdraw his brief statement. Thereupon the case was withdrawn from the jury, and continued on report for the law court to render judgment according to the legal rights of the parties.

It was within the discretion of the presiding justice to allow the withdrawal of the brief statement.

The action is not on the receipt and it is immaterial whether it was founded on a consideration or not. But if material the recital of the attachment would have been a sufficient consideration. *Foss* v. *Norris*, 70 Maine, 117.

The main question is, whether this defendant who became sheriff in January, 1879, is liable for the act of Godwin in taking possession of the property in July, 1879. If Godwin, in taking the possession, acted as the deputy of the defendant under a precept issued after his appointment, the defendant might be liable. But he did not. When he made the attachment, he acted as the deputy of the defendant's predecessor, Whitten.

Having made the attachment, it became his official duty to preserve it or take some security for it in lieu of it. If he chose the latter course, he could have delivered the property to a receiptor, taking from him a receipt in the alternative, to redeliver the property, *or* pay a certain sum of money. Then the attachment would have been dissolved, and the receipt substituted as security therefor. *Waterman* v. *Treat*, 49 Maine, 309; *Waterhouse* v. *Bird*, 37 Maine, 326. In such case, the receiptor cannot be regarded as the servant of the officer, for he relies on the contract for security, and not on the property. Cases *sup.* If, however, he elected to preserve the attachment, the officer could do so only by retaining control of it himself, or by his agent. *Nichols* v. *Patten*, 18 Maine, 231, 238; *Weston* v. *Dorr*, 25 Maine, 176, 181–2. In the case at bar, instead of taking a receipt in the alternative and thus dissolving the attachment, the officer appointed the plaintiff one of the keepers of the property, to preserve the attachment, and took from her an agreement that she would keep it safely, and deliver it to him on demand. She thereby became his agent.

When Godwin attached the property as the deputy of Whitten, it was his duty to keep it, whether he continued in office or not, until thirty days after judgment, or until some officer having the execution called for it. *Morton* v. *White*, 16 Maine, 53; *Tukey* v. *Smith*, 18 Maine, 125. And if he had done so, whether he continued in office or not, the sheriff, whose deputy he was when he made the attachment, would have been liable for the property.

The fact that Godwin had been appointed deputy of the defendant when he took the property into his immediate possession on July 25, is immaterial; for he did not then act under any precept which had come into his hands for service after that appointment, but was simply taking care of responsibilities which he had incurred as the deputy of Whitten. He did nothing in taking possession of the property attached from his keepers, which he could not lawfully have done, and which it was his duty to do, if he had not been commissioned by the defendant. Whether or not the defendant would have been liable if Godwin

had taken the property under an execution issued on the judgment recovered on the writ after his second appointment, we need not now inquire.

Judgment for the defendant.

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

INHABITANTS OF BELFAST *vs.* WM. H. FOGLER, Assignee.

Waldo. Opinion September 29, 1880.

Taxes. Insolvency; proceedings in, not an "action."

Stat. 1879, c. 154, § 15, requiring "city taxes to be paid in full," is applicable to an insolvent's estate, in which no dividend had been made until after that statute took effect, although proceedings in insolvency were commenced prior to the enactment of the statute.

Proceedings in insolvency do not constitute an "action" within the meaning of that word, as used in the statutes, which provide, that actions pending at the time of the passage or repeal of an act, shall not be affected thereby.

ON AGREED STATEMENT OF FACTS.

The opinion states the case.

R. F. Dunton, city solicitor, for the plaintiffs.

W. H. Fogler, for the defendant.

It is a settled rule in construing statutes, that they are to be considered prospective, unless the intention to give a retrospective operation is clearly expressed. *Hastings* v. *Lane*, 15 Maine, 134; *Rogers* v. *Greenbush*, 58 Maine, 397; *Whitman* v. *Hapgood*, 10 Mass. 439; *Gerry* v. *Stoneham*, 1 Allen, 319; *Dash* v. *VanKleeck*, 7 Johns. 502.

Proceedings in insolvency may be considered an action pending and not to be affected by legislation. R. S., c. 1, § 3. In involuntary insolvency, like the case at bar, creditors in determining whether to institute proceedings, consider the amount of preferred claims, by the law in force. By the commencement of proceedings, the creditors make a legal demand of their rights before a court having jurisdiction. And this court in *Webster*

v. *Co. Comr's*, 63 Maine, 30, adopted Coke's definition of "action." "An action is a legal demand of a man's right."

VIRGIN, J. This is an action of debt brought under the provisions of stat. 1874, c. 232, as amended by stat. 1879, c. 158, to recover a certain sum assessed by the city of Belfast, as a city-tax, against one Mitchell, who, on January 29, 1879, was duly adjudged an insolvent, and the defendant duly appointed his assignee.

When the proceedings in insolvency were commenced, the only taxes which the insolvent act required to be "paid in full" were "taxes due to the State and the United States." Stat. 1878, c. 74, § 36. Prior to June, 1879, when the first and only dividend was declared, to wit, on March 3, 1879, the amendment to the insolvent act took effect which gave like priority to "county, city or town taxes." Stat. 1879, c. 154, § 15. The only question is, Does the amendment apply to this case and require the defendant to pay the city-tax sued on in full?

Our opinion is that it does; that the proceedings in insolvency are not an "action" within the meaning of that word as used in the last clause of R. S., c. 21, § 3, which provides that actions pending at the time of the passage or repeal of an act, shall not be affected thereby. We think the case of *Webster* v. *Co. Com.* 63 Maine, 27, and S. C. 64 Maine, 434, decisive of this.

Judgment for plaintiff for $98.56.

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

SAMUEL S. JONES *vs.* ISAAC P. EMERSON and others.

Penobscot. Opinion September 29, 1880.

Poor debtor's bond. Surrender to jailer. Copy of the bond or of the execution and return to be given jailer.

To save the penalty of his bond by performing its last condition, a poor debtor must seasonably "deliver himself into the custody of the jailer" and be received into jail, or deliver himself to the jailer at the jail in such a manner as will make it the duty of the jailer to receive him into custody in the jail. To make it the duty of the jailer to receive a debtor the latter should not only seasonably offer to deliver himself, but at the same time to deliver to the jailer a copy of the bond, or of the execution and return thereon, at the jail.

ON EXCEPTIONS AND MOTION.

The case is stated in the opinion.

V. A. & M. Sprague, for the plaintiff.

Josiah Crosby, for the defendants.

VIRGIN, J. Debt on a bond given on July 3, 1877, in accordance with R. S., c. 113, § 24, to procure the release from arrest on execution of the defendant Emerson, the execution debtor.

The defense set up before the jury was that Emerson performed the last condition in his bond, by "delivering himself into the custody of the jailer" on January 3, 1878. If he sustained that defense, he has done everything he obligated himself to do, and thus saved the penalty of his bond. *Rollins* v. *Dow*, 24 Maine, 123; *White* v. *Estes*, 44 Maine, 21.

The jury, under instructions of the court, returned a verdict for the defendants, thereby finding that Emerson did perform his obligation; and the plaintiff has brought the case before the court on motion and exceptions.

At the trial, the plaintiff contended that to constitute performance Emerson should have delivered himself in such a manner as would make it the duty of the jailer to receive him into custody in the jail; and to that end Emerson should have offered not only to deliver himself, but at the same time, to deliver to the jailer a copy of the bond as some written evidence of identity,

and of authority to the jailer to receive and detain him in jail. The presiding justice, however, instructed the jury that if Emerson "went to the jail or jail house, and there offered to deliver himself into the custody of the jailer, the bond was discharged, although he might not have a copy of the bond." Was this ruling correct?

The statute authorizing the debtor thus to save the penalty of his bond does not prescribe the mode and manner of doing it. Nothing is said of filing any written evidence with the jailer when he delivers himself, as it does in the case of bail surrendering their principal before a trial justice. In the latter case, the statute expressly provides that if the principal is surrendered before final judgment, the bail shall deliver to the officer an attested copy of the writ and return thereon; if after judgment, an attested copy of the entry of surrender; and in either case, the officer shall deliver it to the jailer with the prisoner; and it shall be a sufficient warrant to the officer for receiving and conveying him to jail, and to the jailer for holding him in custody. R. S., c. 85, § 15.

So when a tax payer is committed to jail for non payment of his tax, (R. S., c. 6, § 106), the collector or other officer making the commitment is required to give an attested copy of his warrant to the jailer, and certify the sum he is to pay as his tax, and the costs of arrest and commitment, &c.; and "such copy and certificate shall be a sufficient warrant to require the jailer to receive and keep such person in custody till he pays," &c. R. S., c. 6, § 143.

Neither does the statute require or expressly permit an officer, when he arrests on original writs (R. S., c. 81, § 2), or on *scire facias* (c. 81, § 4), to commit the arrested party. The specific duty of the officer is left to the mandate of the writ to take and safely keep, under which he must receive bail or commit. And it necessarily results from the delivery of a prisoner from one officer to another that there should pass with the prisoner some precept or copy thereof, as the authority by which such custody is to be sustained. *Atherton* v. *Gilmore*, 9 N. H. 185. So when committing a defendant on mesne process (c. 113, § 2), or on

execution (§ 20), there is no provision requiring any precept or copy to be filed with the jailer. But it is the universal practice, otherwise what justification would the jailer have on *habeas corpus?* How could he escape the penalty imposed in R. S., c. 99, § 25, or prevent his prisoner being discharged on that writ? The *habeas corpus* statute seems to take it for granted that the jailer or other officer shall be able to furnish the written evidence of his authority for depriving a citizen of his liberty. *Com.* v. *Waite*, 2 Pick. 445.

So R. S., c. 80, § § 28 and 29, defining the duties of the jailer in relation to keeping and exhibiting a calender and keeping files of the official papers or copies thereof specified therein, seem to be predicated upon the practice of having in his possession written evidence of the cause of each prisoner's detention. It is also essential to enable the jailer to make requisition on the creditor for payment of poor prisoner's board (R. S., c. 113, § 55), and to enable the town to recover expenses incurred. R. S., c. 24, § 26.

The universal practice has been for the debtor to deliver to the jailer, at the jail, when he delivers himself up to custody, either an attested copy of the execution and return thereon, or of the bond. In *White* v. *Estes*, 44 Maine, 21, the debtor delivered both. If the jailer receives him without either, the delivery would undoubtedly be sufficient, but he would not be bound to receive him without one or the other.

Even if this were otherwise, we have no doubt the verdict cannot stand; for the reason that, disregarding the express testimony of the jailer and his brother, and giving to that of Emerson its full probative force, it fails to show that he in fact offered to deliver himself to the jailer. At most he informed the jailer what he came to do and asked for information. He might as well claim to make a tender of money by telling the person to whom it was due that he came to make a tender, and asking how much was due without offering any money in fact.

Motion and exceptions sustained.

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

JENNIE A. ROWELL, in equity, *vs.* HENRY S. JEWETT and another.

Somerset. Opinion October 18, 1880.

Conditional deed. Forfeiture; effect of. Objections to bill in equity; when made.

The grantee in a conditional deed, if he refuses to perform the conditions upon which his title depends, forfeits his estate none the less, because he may have paid some portion of its value by way of consideration, or to relieve it from incumbrance. The estate reverts to the grantor as a matter of legal right, and, if he sees fit to enter for the breach of condition and to claim a forfeiture, the estate reverts to him to all intents and purposes, without regard to the outlays which the conditional grantee may have made on account of it.

Where the respondent in a bill in equity fully understood the facts and causes of complaint as detailed in evidence taken at a previous hearing, including that offered by the respective parties, in a suit at law between the same parties, and signed an agreement making all such evidence a part of this case, it is too late after that to criticize the bill for want of minuteness of detail, even if in the outset he could have successfully urged that the case was not clearly, succinctly and precisely set forth in the bill.

Rowell v. *Jewett*, 69 Maine, 293, affirmed.

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

In accordance with the opinion and order of the court in this case, reported 69 Maine, 293, Fifield Mitchell was summoned in and made a party to the suit. The opinion discloses the material facts not already reported in 69 Maine, 293.

D. D. Stewart, for the plaintiff, cited: *Richardson* v. *Woodbury*, 43 Maine, 206; *Rogers* v. *Saunders*, 16 Maine, 92; *Jones* v. *Robbins*, 29 Maine, 351; *Hall* v. *Sturdivant*, 46 Maine, 34; *Chamberlain* v. *Black*, 55 Maine, 87; *Snowman* v. *Harford*, 55 Maine, 197; *Goldsmith* v. *Guild*, 10 Allen, 239.

J. H. Webster, for Fifield Mitchell, one of the defendants.

A bill in equity should set out specifically all the facts intended to be proved by the plaintiff at the hearing, and proof of facts not alleged or set out in the pleading is not admissible, and if by chance, such proof gets into the record, the court cannot regard it. Rule 1st, in Chancery; *Hunt* v. *Daniel*, 6 J. J. Marsh. 399; 3 Greenl. Ev. 7th ed. 355; *Sidney* v. *Sidney*, 3 P. Wms. 269, 276; *Scudder* v. *Young*, 25 Maine, 153; *Boynton* v.

Brastow, 38 Maine, 577; *Lovell* v. *Farrington*, 50 Maine, 239; *Stover* v. *Poole*, 67 Maine, 217.

No evidence of any specific act or omission on the part of Fifield, which is claimed to constitute a breach of the conditions in the deed, can be considered by the court. *Hunt* v. *Daniel*, 6 J. J. Marsh, 399.

One who asks equity must do equity. Fifield was compelled to pay $1050 debt, interest and costs, by reason of the title his mother gave him being tainted with fraud, that she should be compelled to pay.

Fifield Mitchell took from his mother a title tainted with fraud so far as she was concerned, but without fraud on his part. Of that fraud on her part, he has paid the penalty. The question is, shall a party, having nothing but a fraudulent title, prevail against one who holds by a title not tainted?

BARROWS, J. The question which this plaintiff has to settle with her brother, Fifield Mitchell, who has been made a party here in compliance with the requirement of the court made known when this case was before us last year, is one of simple legal right and title, arising incidentally in this bill in equity, for the redemption of the farm from the mortgage given to Scammon Burrill and now held by Henry S. Jewett, the other respondent.

It is the same question which would have been determined in the suit at law formerly brought by this plaintiff against these respondents had it not turned out that the plaintiff had at best, only the title of a mortgager, while Jewett had that of a mortgagee in possession, and Mitchell was his tenant; and hence the plaintiff could not maintain an action at law, but her remedy must necessarily be sought in equity for the redemption from the mortgage. *Rowell* v. *Mitchell et al.* 68 Maine, 21. In that suit, Mitchell having sheltered himself under the superior title of the mortgagee, the question whether he or the plaintiff had the better right remained undetermined. But when her bill in equity claiming the right to redeem against Jewett was presented and heard, it was seen that in order to settle in one suit the conflicting claims of all parties concerned in the subject matter, inasmuch as Fifield Mitchell was in possession, apparently himself

claiming the right to redeem and denying the right of the plaintiff, he must be made a party to this suit, and the title to the right of redemption as between him and the plaintiff definitively settled before a decree for redemption in her favor could be made. *Rowell in eq.* v. *Jewett*, 69 Maine, 293, 304.

If he would prevail against her, he must show the better title as in a suit at law. Did he break the conditions of his mother's deed to him? Did his mother make a proper entry to revest the title in herself? If these questions are answered in the affirmative, then the estate passed under the will of Eliza Mitchell to the plaintiff, and Fifield Mitchell has no right in it as against her.

It was necessary for the plaintiff to establish these propositions in order to give herself a standing in court, either in the suit at law, or in the bill to redeem against Jewett; and the evidence, *pro* and *con* has been before us accordingly. It is now by agreement of parties presented again as originally taken. There is some additional evidence, but nothing to change the character of the case as heretofore exhibited and considered.

His counsel present now the fact that he paid something on account of a previously existing debt of his father to relieve the undivided half of the farm which was conveyed by his mother's conditional deed to him from liability to be taken for that debt.

But according to his own story, he knew of this debt when he received the conditional deed from his mother, and even when it was conveyed to her, though mostly paid for by David Mitchell. The grantee in a conditional deed, if he refuses to perform the conditions upon which his title depends, forfeits his estate none the less, because he may have paid some portion of its value by way of consideration or to relieve it from incumbrance. The estate reverts to the grantor as matter of legal right, and if he sees fit to enter for the breach of condition, and to claim a forfeiture the estate revests in him to all intents and purposes, without regard to the outlays which the conditional grantee may have made on account of it. The respondent Mitchell, might with as much reason claim to have any, and all the other sums which he paid in the course of the transactions respecting his mother's undivided half of the farm refunded, as this upon

which he bases a claim. The reasons why the court did not see fit to use its discretionary power to relieve Mitchell and his grantee from the forfeiture claimed by his mother, are adverted in the discussion of this branch of the case, 69 Maine, 301, where the power of the court to grant relief in cases where the forfeiture is, in a certain sense, accidental, by reason of an unintentional breach of condition, or at least, one which is not wanton, and willful and long continued, and which is capable of computation and compensation, is fully recognized. The character and proper application of this power, are quite largely discussed in *Henry* v. *Tupper*, 29 Verm. 358; and *Dunklee* v. *Adams*, 20 Verm. 421.

Moreover, were the case one which would justify the application of the broadest principles of natural equity, to limit the rights of the party having the legal estate, we do not see why the result would not be the same. The testimony shows that having regard to the rents and profits of the property which he has held under the conditional deed, and to what he has sold of its products, and received from the insurance of the buildings upon it, and to the valuable services rendered by his father, Fifield Mitchell is at all events no loser by the family arrangement. It is clear that he has been more than repaid for all his outlays in consequence of it.

No doubt, had he faithfully performed the conditions stipulated for, in the deed, he would have realized greater gains. The loss of them he must attribute to his own unfilial conduct.

There is no occasion now, to determine whether the course he has pursued for the last few years has destroyed the right which he once had to redeem from his conveyance to Jewett. However that may be, it is clear that by the breach of the conditions of the deed under which, alone, he has title to the half of the farm originally conveyed to Eliza Mitchell, he has forfeited it, and by the entry of Eliza Mitchell for that purpose, the legal title to the same was revested in her, and passed by her devise to this plaintiff; and the case not being such that equity will interfere to relieve against the forfeiture, full effect is to be given to the plaintiff's title.

In illustration of the caution which will be exercised by courts of equity before they interfere against a legal claim, or fail to give it its full effect, see *Lloyd* v. *Passingham*, 16 Ves. 59; also the remarks of Sir J. Jekyll in *Cowper* v. *Cowper*, 2 Peere Wms. 753; and *Burgess* v. *Wheate*, 1 W. Blacks. Rep. 123.

The objection taken by the respondent Mitchell, that the bill does not specifically charge the various breaches of the conditions in the deed, nor properly allege the entry to revest the estate, if it ever had any force, would be obviated by the written agreement of counsel, to make all the evidence at the previous hearing, including that which had been offered by the respective parties in the suit at law, a part of this case. The parties perfectly understood "the facts and causes of complaint," as detailed in the evidence before they reached the stage in this litigation, at which this agreement was made, and they deliberately present that evidence for us to pass upon. It is too late after that, to criticize the bill for want of minuteness of detail, even if in the outset it could have been successfully urged that the case was not "clearly, succinctly and precisely" set forth in the bill. We do not say that it was not so set forth. For reasons given more at length in the former opinion, and inasmuch as we see nothing in what Fifield Mitchell has to offer to incline us to reverse or revise the conclusions reached upon the evidence as then presented, a decree should be entered, that the plaintiff is entitled to redeem in the manner and with the effect set out in *Rowell* v. *Jewett*, 69 Maine, 305, and to have her costs, equitably apportioned against the respondents, by the judge, to whom the final decree is transmitted for signature, who will also fix the time within which such redemption must be made when the amount to be paid shall have been ascertained by a master in chancery, to be appointed at *nisi prius*, if the amount is not agreed on by the parties.

Decree accordingly.

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

RUFUS DYER *vs.* JOSIAH TILTON.

Somerset. Opinion October 18, 1880.

Practice. Preparing cases for law court. Sheriff; not liable for unofficial acts of deputy.

It is not good practice to cumber a case prepared for law court by printing *in extenso* the formal parts of documents upon which no question arises. In making up a case counsel can often save money, time and trouble, and it is a duty which they fairly owe to their clients and the court.

No officer is required to arrest a debtor on an execution unless written directions to arrest, signed by the creditor or his counsel, is indorsed on the execution.

In any proceeding to "fix up" an execution, in the hands of a deputy sheriff for collection, by taking an indorsed note from the judgment debtor under the instruction of the creditor, the deputy would be acting as agent for the creditor and not in his official capacity.

The sheriff is not liable on the contracts of his deputy though such contracts grow out of and are connected with his official duties, so long as they are not a part thereof.

ON MOTION.

The case is stated in the opinion.

J. J. Parlin, for the plaintiff.

Walton & Walton and *C. L. Jones*, for the defendant.

BARROWS, J. On motion to set aside verdict as against law and evidence. The plaintiff declares in case against the sheriff for the misconduct of his deputy, setting forth his claim in two counts, in the first of which the misdoing alleged is a willful refusal and neglect to take the bodies of the plaintiff's judgment debtors in default of other satisfaction, and a neglect to return the plaintiff's execution into the clerk's office according to its precept. The second count sets out the recovery of judgment by the plaintiff at the March term, 1875, against two debtors, the issuing of sundry executions thereupon, and, finally, of a *pluries* on the thirteenth day of July, 1877, which it is averred was placed in the hands of the defendant's deputy in August of the same year. Yet the deputy neglected to serve, execute and return it according to the command therein given, by means of

which the plaintiff has lost his debt, the debtors having since become insolvent and worthless.

We remark here that the needless expense of printing the first three executions (in the ordinary form and differing only in date) which were issued upon this judgment might have been saved, and the report of the evidence improved by substituting three lines of admission of counsel describing the documents and stating that they were put into the case.

It is not good practice to cumber a case by printing *in extenso* the formal parts of documents upon which no question arises. A little judicious attention on the part of the respective counsel to the making up of a case would often save money, time and trouble, and it is a duty which counsel fairly owe to their clients and the court.

A verdict for the plaintiff under the first count for anything more than the nominal damages, caused by the failure to return the execution into the clerk's office cannot be sustained for want of the written direction to arrest, signed by the creditor or his attorney and indorsed on the execution, without which according to c. 116, § 5, R. S., no officer is required to arrest a debtor on execution.

Under the second count, the testimony tends to show that during the time the execution was in the deputy's hands, before its expiration, one of the judgment debtors was worthless, and the property of the other heavily encumbered by mortgage and attachment; but that vigorous measures might probably have resulted in securing payment from him rather as an indirect consequence than as a direct result of any levy upon real estate that might be made. But he had also unincumbered attachable personal property (five or six horses, wagon, sleigh, &c.), which for aught that appears might have been taken to satisfy the execution.

If the case stopped here the verdict might be sustained.

For, when an execution is put into an officer's hands for collection, and he neither requests nor receives special instructions as to his mode of proceeding, he is bound to use reasonable diligence to execute his precept, and will be answerable for not

seizing and selling the debtor's goods when he might have done it, if the creditor is injured by his neglect. *Bond* v. *Ward*, 7 Mass. 123, 126.

It is true that Walker, the defendant's deputy, testifies that when the plaintiff gave him the execution he asked plaintiff how it was to be collected, and plaintiff promised to show him property but never did, and told him to keep the execution till he called for it. But the plaintiff denies this; and there is nothing in the case which would require us to set the verdict aside, because the jury chose to believe the plaintiff rather than the officer touching these matters. But the defendant, together with the general issue, pleads by way of brief statement that his deputy acted in conformity throughout with oral directions from the plaintiff; and this, if established, will be a good defence. *Rice* v. *Wilkins*, 21 Maine, 558; *Jenney* v. *Delesdernier*, 20 Maine, 182. Still further, it is not necessary that the defendant should establish all that is asserted in the brief statement, if enough is shown to constitute a good defence. *Clark* v. *Foxcroft*, 6 Maine, 296.

Now the testimony on both sides tends strongly to show that the plaintiff ever after he had recovered his judgment in 1875, and during the life of this execution as well as those that had previously been issued, was, for some reason, reluctant to levy upon, or sell the property of Steward. As Steward, who is the plaintiff's witness, testifies respecting the numerous conferences which the plaintiff and Steward had, — "I don't know as he (plaintiff) called on me for pay, but called to see about it; wanted it fixed up some way." It seems to be very clear that whatever the talk about levying or arresting might have been, it all ended in a specific direction from the plaintiff to the deputy sheriff to take Steward's note signed by one Moore in discharge of the execution, and that the damages found by the jury were for the deputy's neglect to attend to the procurement of this note. It is made a prominent topic of inquiry throughout. Little stress seems to be laid upon the other matters either by way of charge or exculpation, except as they bear upon this. The plaintiff and Walker both agree that there was a bargain that the note should

be given and received. The plaintiff says Walker made the negotiation; Walker says the plaintiff did it. It is of no importance which, provided the plaintiff directed Walker to close the business that way. The plaintiff's version is that upon being informed by Walker that Steward said that if he was arrested he could give bond and get delay, but if not arrested, "he would settle the debt by his note and Albert Moore's. I asked him why he didn't take it, and he said he didn't know as I would like the security; I told him I didn't want any better, and he said he would go down the next day and get it." The plaintiff relates another interview with the officer, commencing with an inquiry whether he had got the note, and ending with a promise on the officer's part to go down the next Monday and get it; and the plaintiff says instead of doing it the next day he went off buying stock.

But in any such proceeding for the "fixing up" of an execution, the deputy sheriff would be acting, not in his official capacity, but as the agent of the plaintiff; and he only would be answerable to the plaintiff for any neglect which he might be guilty of in the business thus undertaken. Touching the sheriff's liability the rule is that he is not responsible for the neglect of any act or duty which the law does not require the deputy officially to peform. *Harrington* v. *Fuller*, 18 Maine, 277. "The sheriff is answerable *civiliter* for the defaults of his deputies by nonfeasance or malfeasance in the duties of their office, enjoined upon them by law; but not for a breach of a contract made with a plaintiff, obliging themselves to do what by law they were not obliged to do," says PARSONS, C. J., in *Marshall* v. *Hosmer*, 4 Mass. 63.

Where the plaintiff in an execution gives to the deputy sheriff a power over it not given by the law, or gives directions for the management of it otherwise than as required by law, the sheriff is not responsible. *Samuel* v. *Commonwealth*, 6 Monroe, 174. See also, *Strong* v. *Bradley*, 13 Verm. 9; and discussion by SHAW, C. J., of what will and what will not constitute an official neglect or misfeasance on the part of a deputy sheriff, in the two cases of *Lawrence, Adm'r*, v. *Rice*, 12 Met. 531, 534, 535, 537, 540.

The sheriff is not liable on the contracts of his deputy, though such contracts grow out of and are connected with his official duties, so long as they are no part thereof. Thus, before the passage of the statute, making it the duty of an officer levying upon real estate to cause the levy to be recorded in the registry of deeds, it was held that although the deputy sheriff, making the levy, had agreed with the creditor to get it recorded, and received the fees therefor, the sheriff was not liable for his neglect to fullfil his agreement. *Tobey* v. *Leonard*, 15 Mass. 200, 202. *Waterhouse* v. *Waite*, 11 Mass. 207.

Hence too, in *Gorham* v. *Gale*, 7 Cow. 739, it was held that the sheriff is not amenable for the acts of his deputy, unless they are performed in the ordinary course of his official duty, as prescribed by law; and where the plaintiff had given the deputy special directions as to the manner of execution, respecting enlarging the time and giving credit to a purchaser and prescribing the effect of the purchase, and the time and conditions of its completion, the sheriff was not held liable for the money received by his deputy under the special arrangements; and it was said that the sureties of the deputy would not be liable to the sheriff for such moneys, and that the sheriff ought not to be held responsible for any acts of his deputy as to which he could not have redress against the deputy and his sureties on his bond. See also, S. P. 31 Maine, 165, and 37 Maine, 305.

So here; it is clear from the whole evidence that the plaintiff did not really want a levy or an arrest. He relied upon Steward's promises "to fix it up." The neglect he complained of and for which the damages were given was the neglect of the deputy to go down and get the note according to his repeated promises. But that was not a neglect for which the sheriff is properly chargeable. The plaintiff's remedy is against the deputy as his agent to accomplish an adjustment out of the ordinary course of his official duty, as prescribed by law. His neglect and failure to attend to this could not justify a verdict against the sheriff. But as the jury were not satisfied that the plaintiff gave the deputy the further direction to keep the execution till called for,

the verdict should stand for nominal damages. *Laflin* v. *Willard*, 16 Pick. 64; *Gallup* v. *Robinson*, 11 Gray, 25.

Motion sustained unless the plaintiff will remit all but $1.00 damages. If he so remits, motion to be overruled.

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

INHABITANTS OF SOLON *vs.* INHABITANTS OF EMBDEN.

Somerset. Opinion October 18, 1880.

Pauper settlement. Change of residence. Necessity for pauper supplies.

The question of the intent of a person in removing from one town to another, whether it was a change of residence — an abandonment of it in one town and taking it up in another, or a pretence — removing with intent to return, is for the jury in an action for pauper supplies subsequently furnished to such person.

The fact that there was a small sum due a pauper, when supplies were furnished is not conclusive, that the verdict for the plaintiffs, in an action to recover for such supplies, was against evidence upon the question of necessity.

ON REPORT.

The case is stated in the opinion.

Walton & Walton and *Turner Buswell*, for the plaintiffs.

D. D. Stewart, for the defendants.

BARROWS, J. The pauper whose settlement is here in dispute, was born and brought up in the defendant town, and lived there constantly, on the farm formerly owned by his father, and afterwards by his brother, until he was about sixty years old. His testimony shows that though always disabled from performing much work through defective eyesight, he is more intelligent than paupers ordinarily are, and quite capable of entertaining lively sentiments and fixed purposes. Among these, he seems to have cherished a strong attachment to his birth place, and a determination not to acquire a pauper settlement elsewhere.

The defence fails, unless the defendants prove that, notwithstanding this determination, he did acquire a settlement in Solon, by a residence there, for five consecutive years, from March 4, 1872, when the home which he had had for twenty years after his father's death, in his brother's family, was broken up, and he went to live with a nephew, (one Rice) in Solon. That he left Rice's, removing his goods and wearing apparel, all that he had, to a house in Anson, about the middle of February, 1877, is certain; and also that he returned there in a little more than three months, and remained there until he called upon the town of Solon for the supplies which are the subject of this suit, is also clear. The vital question for the jury was, did he intend to abandon his residence in Solon when he left there in February, or was it his intention to return? Was he merely making a pretence of removing, in order to satisfy those citizens of Solon who seem to have become anxious lest he should gain a settlement there, or did he in fact leave, without intending to return?

The question was one of fact, for the jury. *Fitchburg* v. *Winchendon*, 4 Cush. 190, 194.

The defendants strongly urge that the fact that the pauper held Rice's note for $100 which, according to an agreement between them, was to be paid by Rice in boarding the pauper, taken in connection with the further fact, that in a little more than three months after his removal to Anson, he did return to Rice's, and remained there a year, before receiving the supplies here sued for, is conclusive that the removal was but a pretence, to save talk and ill feeling among the people of Solon, and that he never really abandoned his home there.

But it must be remembered, that the only man who really knows what his intention in making the removal was, is the pauper himself; and he testified positively to an abandonment of his home at Rice's, when he removed to Anson. He is fortified by his evident determination not to live long enough anywhere out of Embden, to gain a settlement, and by his persistent efforts during a large part of the time while he was living at Rice's to find another home, in Embden or elsewhere; and the argument of the defendants is weakened by testimony indicating that the return to Rice's was brought about by the advice and interference of one of their own town officers.

The case does not seem to differ in its essential facts from *Ripley* v. *Hebron*, 60 Maine, 379, 394, 395, and *Burnham* v. *Pittsfield*, 68 Maine, 580. It is by no means demonstrated that the jury erred in crediting the pauper's own statements as to his intentions. We think another jury would be very likely to do the same.

The fact that there was still a small sum due the pauper from Rice, when the supplies were furnished, is not conclusive that the verdict was against evidence upon the question of necessity. *Norridgewock* v. *Solon*, 49 Maine, 385.

Motion overruled.

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

DANIEL ALLEN and another *vs.* FREEMAN F. GOODNOW and another.

Androscoggin. Opinion November 11, 1880.

Chattel mortgage, with privilege to mortgager to sell and with proceeds to purchase goods to replace. Estoppel.

The defendants executed and delivered to the plaintiffs a chattel mortgage of a furniture store, stock in trade, &c., "with the right and privilege of selling the furniture and stock in trade now in said store and with the proceeds to buy other furniture and stock and so on forever, all of which shall be subject to this lien. And it is hereby agreed and made a part of this instrument that said stock in trade shall not be reduced in value to a less amount, at any time, than $6500;" *Held*, that if the defendants sold from time to time portions of the goods embraced in the mortgage, and with the proceeds of sales purchased other goods to take their place and thereby keep up the stock in the store, as it was their duty to do, the title to the goods so purchased and put into the store as between the parties to the mortgage vested in the plaintiffs.

Also held, if the defendants by words or conduct willfully caused the plaintiffs to believe that the defendants used the proceeds of sales of goods covered by the mortgage in the purchase of other goods to keep up the stock, as they had agreed, and thereby induced the plaintiffs to act upon that belief, so as to alter their previous position, or omit to assert some right which they otherwise would have asserted, — for instance, to take possession as they had the right to do before the stock was so greatly reduced, — the defendants would be estopped from saying that the additions to the stock, after the mortgage was given, were purchased on credit and not with such proceeds of sales.

ON REPORT.

Replevin of a stock of furniture in a store on Lisbon street, Lewiston. The plaintiffs claimed under a chattel mortgage, the material portions of which are given in the opinion. The defendants did not deny the plaintiffs' title to a portion of the goods replevied, but claimed that since the execution of the mortgage, they had purchased on credit, and not with the proceeds of any portion of the goods mortgaged, other goods, which at the time of the trial had not been paid for, and that such goods purchased on credit and not yet paid for, could not be held under the mortgage, and were improperly included in the replevin writ. Plea was the general issue, with brief statement claiming title to a portion of the goods replevied.

Plaintiffs offered to prove that they were led by defendants to believe that the stock in the furniture store at the time of replevying the same was the stock covered by mortgage, that plaintiffs had no knowledge of purchases of furniture by defendants upon credit; that no notice had ever been given by defendants to plaintiffs that they claimed the stock or any part of it until this case was opened for trial; that no articles at any time were pointed out by defendants as owned by them or any other person until this case was opened to the jury, and until that time no statement or schedule of goods claimed by defendants or any person besides them was made known to the plaintiffs; that plaintiffs had no knowledge until service of replevin writ, September 12, 1876, that the stock had been reduced in value below $6,500; that defendants had always represented to them that the stock was kept up to value of $6,500, but in fact, on the day of service of replevin writ, September 12, 1876, the value of the stock was only $4,400; that the furniture and stock replevied was put into the store in the ordinary way for sale, and that the defendants put into the stock the articles after the date of the mortgage up to time of replevin for the purpose of keeping up the stock in trade, and that plaintiffs had relied upon the facts offered; that the value of the stock at time of sale from plaintiffs to defendants, November 15, 1875, was $7,822, and September 12, 1876, at time of replevying, there was due on the mortgage about $3,700, and that note of $500 falling due

August 17, 1876, had not been paid, and that there was a breach of the conditions of the mortgage.

The presiding judge was of the opinion that goods purchased on credit after the execution of the mortgage and still unpaid for, would not be covered by the mortgage, and could not be held thereunder in this action by the plaintiffs against defendants, who claim title to them, and that the defendants could not be precluded by the mortgage and facts offered to be proved from showing that the goods claimed by them were not covered by the mortgage. Thereupon a verdict was taken, *pro forma*, that defendants did not take the goods shown to have been purchased upon credit by defendants after the execution of the mortgage, and still remaining unpaid for, comprising about two hundred articles of the value of about $2,000, and that defendants did take the remaining articles named in the officer's return of the value of about $2,300; and it was agreed that the case should be reported to the full court. If in the opinion of the full court the facts proved and offered to be proved by the plaintiffs, do not show claim to secure their debt upon the whole stock replevied, then judgment to be entered on the verdict; otherwise new trial granted.

M. T. Ludden, for the plaintiffs, cited: *Sylvester* v. *Staples*, 44 Maine, 496; *Braman* v. *Dowse*, 12 Cush. 227; *Hooker* v. *Hubbard*, 97 Mass. 175; 1 Greenl. Ev. § 22; *White Mountain Bank* v. *West*, 46 Maine, 15; *Tapfield* v. *Hillman*, 46 E. C. L. 245; *Morrill* v. *Noyes*, 56 Maine, 458; *Rowan* v. *M'f'g. Co.* 29 Conn. 328; *Holly* v. *Brown*, 14 Conn. 255; *Walker* v. *Vaughn*, 33 Conn. 583; *Abbott* v. *Goodwin*, 20 Maine, 408; *Noon* v. *Salisbury Mills*, 3 Allen, 340.

Frye, Cotton & White, for the defendants.

The cases of *Tapfield* v. *Hillman* and the Connecticut cases cited by counsel hold the opposite rule to that laid down and settled in this State in *Morrill* v. *Noyes*, 56 Maine, 458. Counsel cited: *Burnard* v. *Eaton*, 2 Cush. 294; *Moody* v. *Wright*, 13 Met. 17; *Jones* v. *Richardson*, 10 Met. 481; *Chapin* v. *Cram*, 40 Maine, 561; *McCaffrey* v. *Woodin*, 67 N. Y. 459,

(22 Am. 644); *Williams* v. *Briggs*, 11 R. I. 176, (22 Am. 653); *Cook* v. *Corthell*, 11 R. I. 482, (23 Am. 518).

The doctrine of estoppel does not apply to this case because it does not appear from the evidence offered that the plaintiffs acted or omitted to act upon the belief which they offered to prove. It is only upon the evidence offered not the conclusions therefrom that plaintiffs must rely. It is to be noticed plaintiffs offered to prove that the defendants had always represented to them, the stock was kept up to the value of $6,500. But they do not offer to prove that the defendants represented they were not purchasing on credit.

LIBBEY, J. The plaintiffs claim the property replevied by mortgage from the defendants to them, dated November 15, 1875. The defendants claim a portion of the property, on the ground that it is not embraced in the mortgage. The clauses in the mortgage to be considered in determining the rights of the parties are as follows: It conveys "the building and appurtenances owned and occupied by us as a furniture store . . . being the same lately owned and occupied by said Allen & Maxwell; and all the stock in trade, fixtures and property of every name and nature now in said store, with the right and privilege of selling the furniture and stock in trade now in said store, and with the proceeds to buy other furniture and stock, and so on forever, all of which shall be subject to this lien. And it is hereby agreed and made a part of this instrument that said stock in trade shall not be reduced in value to a less amount, at any time, than $6,500." . . . . "Provided also that if the said stock shall at any time be reduced in value to a less amount than $6,500, the said Allen & Maxwell may enter and take possession of the same without notice. Provided also, that it shall and may be lawful for said Freeman F. and Frank" (the defendants) "to continue in possession of said property, without denial or interruption by said Allen & Maxwell, until condition broken."

The case as presented to us raises two questions which it is necessary to decide to determine the rights of the parties.

1. If the defendants, from time to time, in their business, sold portions of the goods on hand when the mortgage was given,

and with the proceeds purchased other goods, to take their place so that the value of the stock should not be reduced below $6,500, as they agreed to do; was the title to the goods thus purchased and put into the store vested in the plaintiffs by the mortgage?

2. If the goods claimed by the defendants were not purchased with the proceeds of goods sold, but by them on credit, are they estopped by the facts not controverted, and those which the plaintiffs offered to prove, from setting up that fact in defence?

In determining the first question it is unnecessary to consider the much controverted question, upon which there is so much disagreement among the courts, whether in a mortgage of all the goods then in a certain store, and all that the mortgagor might afterwards purchase and put into it, the title to goods afterwards purchased and put into the store would pass by the mortgage. It was fully considered by this court in *Morrill* v. *Noyes*, 56 Maine, 466, and settled in the negative. But in the case before us a different question is presented. It is not a question of title between the mortgagees and an attaching creditor or subsequent purchaser for value, but between the parties to the mortgage, and it must depend upon the conditions and stipulations contained in the mortgage. By these conditions and stipulations the defendants had the right to sell, from time to time in the ordinary course of their business; but their duty to use the proceeds of sales in purchasing other goods to take the place of those sold, and to be subject to the mortgage, so that the stock at no time should be reduced in value below $6,500, was co-extensive with their right to sell. The mortgagees were not to lose their lien on the proceeds of sales, but the mortgagors agreed to use such proceeds for them in purchasing other goods to take the place of those sold, so that the security might not be lessened. By those stipulations the mortgagors were made the agents or trustees of the mortgagees, with power of sale, and charged with the duty of using the proceeds of sales for their benefit. We know no principle of law which prevents the parties from making such a contract; and if honestly executed by the mortgagors by using the proceeds of sales in purchasing other goods which were put into the store to take the place of those sold, the title to such

goods is in the mortgagees, precisely the same as if they had made the sales and purchases themselves by the consent of the mortgagors. *Abbott* v. *Goodwin*, 20 Maine, 408.

But if the defendants may deny that the goods claimed by them were purchased with the proceeds of sales and put into the store to take the place of those sold, as it was their duty to do; and prove that they were purchased on credit, then it would seem that those goods are not embraced in the mortgage; because it is only goods afterwards purchased by such proceeds that were to be subject to the mortgage lien.

We have seen that by the terms of the mortgage the defendants were to act as the agents or trustees of the plaintiffs, charged with the duty to use the proceeds of sales, in purchasing other goods to be subject to the mortgage. They had the proceeds of the sales made by them in their hands. They purchased the goods and put them into the stock in the store. It is a general rule in equity that, when a trustee has in his hands trust funds, charged with the duty of investing them in certain property, and he purchases the property, it shall be presumed that he purchased it with the trust funds in the performance of his duty.

But this is an action at law, and we prefer to place our decision on well established rules recognized by courts of law. When one by his words or conduct, willfully causes another to believe the existence of a certain state of facts, and induces him to act on that belief, so as to alter his own previous position, or to omit to assert some right which he otherwise would have asserted, he shall not afterwards be permitted to set up a different state of facts to the injury of him thus deceived.

We think that, from the terms of the mortgage, the facts not controverted by the defendants, and those which the plaintiffs offered to prove, the jury would be authorized to find that, for the purpose of retaining possession of the goods and selling them for their own benefit, the defendants induced the plaintiffs to believe that they were acting in good faith, as it was their duty to do, in purchasing and putting into the store, from time to time, new goods, with the proceeds of the old; and were keep-

ing the stock up to the value required by their covenant; and thereby induced them to delay taking possession of the stock as they had a right to do, and would have done if they had known the facts, till the goods covered by the mortgage, according to the defendants' theory, were reduced in value from $7,822 to $2,400.

Under such a finding the law will not permit the defendants to set up and prove in defence, that, while they had received from sales of the goods on hand at the time the mortgage was made, more than $5000, they had not used it to buy the new goods put into the store, as it was their duty to do, but had appropriated it to their own use and bought the goods on credit so that they would not be subject to the mortgage. The law will not sustain a defence so manifestly unjust.

Verdict set aside. New trial granted.

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

ANN J. GRANT *vs.* WILLIAM H. LIBBY.

Kennebec. Opinion November 17, 1880.

Evidence. Exceptions. Practice. Cross-examination. Collateral inquiries.

In a suit against a sheriff who justifies under process against the plaintiff's vendor, proof of the insolvency of the plaintiff's agent, who was also her husband, and of former and distinct transactions between him and the vendor, of which plaintiff had knowledge and which were fraudulent against creditors, is not admissible to show fraud on the part of the plaintiff in the transaction which is the subject of investigation.

While the proof of fraud will necessarily, in general, consist of circumstantial evidence, and he, on whom the burden of proof rests, should be allowed to show all the circumstances connected with the case, from which a fair inference may be drawn, he cannot be permitted to consume time and raise collateral issues respecting independent transactions in former years. No one can be expected to come prepared to defend or explain all the transactions of his own life — still less those of others within his knowledge in which he was not concerned, and over which he had no control. No safe or legitimate influence can be drawn from such matters though they might tend to prejudice and confuse a jury.

Neither can exceptions be sustained for the exclusion of testimony on cross-examination unless they set forth enough of the previous testimony to show that the exclusion was erroneous.

As to all collateral inquiries, the determination of the presiding judge in the exercise of his discretion to exclude them is final.

No complaint is now made of the instructions to the jury. The requested instruction was rightly refused; for if there was any testimony upon which it could be based, it called for an instruction as matter of law when the question was rather one of fact for the jury.

ON EXCEPTIONS from superior court, Kennebec county.

TROVER against the defendant, sheriff of the county of Kennebec, for the alleged wrongful act of his deputy in attaching and selling, on mesne process, a small stock of goods in Pittston. Plea, general issue.

The plaintiff claimed title under a bill of sale from one Overlock, who, a short time prior to the attachment, made a transfer to her. Prior to the sale, Overlock had occupied the store in which the goods were when attached, and retailed therefrom.

It was admitted by plaintiff and Overlock, that at the time of the transfer, both Mrs. Grant and Overlock were confined in

their houses by sickness, and that William Grant, plaintiff's husband, transacted all the business relating to the transfer for plaintiff.

It was in evidence that Overlock was at the time of the sale, hopelessly insolvent.

Other material facts appear in the opinion.

Orville D. Baker, for the plaintiff, cited: Stephen Ev. 3d. ed. art. 95, n. 5: *State* v. *Lawrence*, 57 Maine, 582; *Ballou* v. *Prescott*, 64 Maine, 305; *Stewart* v. *Thomas*, 15 Gray, 171; *Elliott* v. *Stoddard*, 98 Mass. 145; 1 Greenl. Ev. § 74, n. 1; *Central Bridge Corp.* v. *Butler*, 2 Gray, 130; *Blanchard* v. *Young*, 11 Cush. 345; *Spaulding* v. *Hood*, 8 Cush. 605; *French* v. *Holmes*, 67 Maine, 186; *Blodgett* v. *Chaplin*, 48 Maine, 322; *Webster* v. *Folsom*, 58 Maine, 232; *Laughton* v. *Harden*, 68 Maine, 210.

H. G. White and *J. H. Potter*, for the defendant.

Under the rule laid down by WHITMAN, C. J., in *Ingersoll* v. *Barker*, 21 Maine, 474, we claim we have a right to show all the circumstances connected with the case; and fraudulent transaction of business of a similar character between the parties involved, although that transaction took place previous to the one which is the subject of litigation; and especially when these transactions have been often repeated; and we submit that the previous fraudulent transfer from Grant to Overlock, and from Overlock to Grant, providing the plaintiff had knowledge of these transactions, were clearly admissible.

Embarrassment, says Bump, (Bump Fraud Con. p. 36,) and heavy indebtedness, are badges of fraud, as furnishing a strong motive to make a fraudulent transfer. And if the indebtedness was known to the vendee, it is evidence of his participation in the fraud. *Glenn* v. *Glenn*, 17 Iowa, 498.

And in accordance with the above rule and decision, the questions propounded to the plaintiff were clearly admissible.

Although fraud is not to be presumed, yet it can and generally must be proved by circumstantial evidence, and it may be established by inference like other facts. *Blodgett* v. *Chaplin*, 48 Maine, 322.

BARROWS, J. To sustain exceptions to the admission or exclusion of testimony, there must be enough of the context and of the history of the case to enable the full court to determine that, in the position presented, when the testimony was offered, the ruling was wrong — not merely that it might be wrong if the testimony were offered with some supposable accompanying evidence, or under some possible phase of the case which may or may not have existed.

"They are not to prevail merely because they do not show that it was rightly admitted or excluded." *Parmenter* v. *Coburn*, 6 Gray, 510, and cases there cited. That the exception here urged, must fail for this, if there were no other reason, is obvious. It could not be supposed that the insolvency of the plaintiff's husband and agent could have any possible connection near or remote with the question, whether the plaintiff purchased these goods in fraud of Overlock's creditors, until we come to the wholesale offer by defendant's counsel to prove, if permitted to pursue his cross examination of the plaintiff, "that whenever Grant has failed, he has got Overlock to cover his property, and when Overlock has failed, if Grant was in position, he would get Grant to cover it, but under the circumstances then existing, he got the wife to cover it, and that there had been a sort of interchange of transactions between these parties, to cover up property in order to effect an easy settlement with their creditors."

It would have been a perfect answer to the plaintiff's case, to show that *this* transaction was of the character spoken of, and the judge may well be excused for declining to go into the proposed collateral inquiries, upon the ground that if settled, they would add nothing to the defence. But, confining our remarks now to the first point, the exceptions state that "the plaintiff was asked on cross examination, about previous dealings within her knowledge of her husband and Overlock, and whether her husband failed two or three years ago." What her answers were or whether the ruling forbidding the defendant further to pursue this course of cross examination was predicated on them, does not appear. Previous answers may have demonstrated that it was futile for the defendant to "pursue this testimony." The ruling

may have been made to save a waste of time, or to prevent the reiteration of imputations which had no foundation in the proof. In any event the exceptions do not show that the ruling was wrong, and hence they cannot avail according to the cases above referred to. Much must be trusted to the discretion of the judge presiding at the trial, in the regulation of cross examinations, upon collateral topics; otherwise they would be well nigh endless. Seldom do they subserve a just and legitimate purpose; and parties forbidden to protract them, have ordinarily more cause for thankfulness, than complaint.

The limits of collateral cross examination, are to be determined by the presiding judge, and his determination is not subject to revision or exceptions. *State* v. *Benner*, 64 Maine, 288; *Com.* v. *Shaw*, 4 Cush. 593; *Morrissey* v. *Ingham*, 111 Mass. 66. But aside from simple technical considerations, the evidence which the defendant proposed to draw out (to say nothing of the fact that it concerned the doings, not of the plaintiff, but of her agent at times when he was not acting for her), seems to fall within the scope of the decisions of this court in the cases of *Flagg* v. *Willington*, 6 Maine, 386; and *Blake* v. *Howard*, 11 Maine, 203. See also remarks of JACKSON, J., in *Somes* v. *Skinner*, 16 Mass. 360, to the effect that "it is not competent to a party imputing fraud to another, to offer evidence to prove that the other has dealt fraudulently at other times and in transactions wholly disconnected with that which is on trial. This would tend to prejudice the minds of the jury by impeaching the general character of the party charged with the fraud, when he had no right to expect such an attack, and could not be prepared to defend himself, however unimpeachable his conduct might have been." The above cited cases are but practical applications in civil suits of the rule, which relieves a man charged with some particular offence, from being subjected to imputations which might often be fatal to him, without requiring him at his peril, to come prepared to defend or explain every action of his life. See *Rex* v. *Cole*, Per. Cur. Mich. Term, 1810, cited in 1 Phil. Evid. 137; *State* v. *Lapage*, 57 N. H. 245. It does not establish the quality of the beer sold by a brewer to a particular publican, to

show that he sold beer of the quality alleged to others about the same time. *Holcombe* v. *Hewson*, Camp. 391. Nothing short of proof, that it was of the same brewing, and put up in the same manner would suffice to make it relevant.

It is quite true that proof of fraud must ordinarily be made by circumstantial evidence, and that the party upon whom rests the burden of proof, should be allowed to show all the circumstances connected with the case from which a fair presumption may be deduced.

But we think no safe or legitimate inference can be drawn as to the character of this transaction between the plaintiff and Overlock, from the evidence offered by the defendant, and excluded by the court, (so far as its probable tenor can be guessed), while it would doubtless have tended to prejudice her case in the minds of the jury, and to raise collateral issues to confuse them. It was rightly rejected.

Defendant does not insist in argument upon the exceptions to the instructions to the jury. The refusal of the requested instruction, is justified by the absence of any testimony on which it could be based, and because it relates rather to a question of fact than one of law.

Exceptions overruled.

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

JOSHUA P. MADDOX *vs.* WILLIAM W. BROWN.

Cumberland. Opinion November 19, 1880.

Father and son. Master and servant. Liability of master for torts of the servant.

A son for purposes of his own, in the absence of his father and without his knowledge, took his father's horse and carriage, and left the horse unfastened in the street, and the horse being frightened ran away, and the carriage collided with the plaintiff's, and injured the same; *Held*, that the father was not liable.

The master is liable for every wrong of his servant, committed in the course of his service, and for the master's benefit, though no express command or privity of the master be proved. Otherwise, if the servant is acting on his own account, and not executing the commands or doing the work of his master.

ON EXCEPTIONS from superior court, Cumberland county.

The case is stated in the opinion.

M. P. Frank, for the plaintiff, contended that if there was an express or implied assent on the part of defendant for his son to use the horse and carriage at the time when the damage was done, or if the defendant intrusted his son with the use, management and control of his teams whenever the son wished, then the defendant would be liable. Wharton on Negligence, § 166; *Sleath* v. *Wilson*, 38 Eng. C. L. 249; *Goodman* v. *Taylor*, 24 Eng. C. L. 385; *Lashbrook* v. *Patten*, 1 Duvall, (Ky.) 316.

Strout & Holmes, for the defendant, cited: *Beaver* v. *Taylor*, 93 U. S. 46; *State* v. *Reed*, 62 Maine, 139; *State* v. *Pike*, 65 Maine, 111; *McIntosh* v. *Bartlett*, 67 Maine, 130; *Harriman* v. *Sanger*, *Idem*, 442; *Hawks* v. *Charlemont*, 107 Mass. 414; *Howe* v. *Newmarch*, 12 Allen, 49; *Levi* v. *Brooks*, 121 Mass. 501; *Barden* v. *Felch*, 109 Mass. 154; *Chandler* v. *Deaton*, 37 Tex. 406; *Wilson* v. *Garrard*, 59 Ill. 51; *Paulin* v. *Howser*, 63 Ill. 312; *Edwards* v. *Krume*, 13 Kansas, 348.

APPLETON, C. J. The defendant's son, a minor of the age of seventeen years, took his father's horse and carriage, which he had been allowed to use without restriction, and drove to a store for the purpose of depositing money, which as treasurer of a

Sabbath school, he had received the day before. Entering the store to make the deposit, he left his horse unfastened and unattended, and the horse so left started, and running away, the defendant's carriags collided with the plaintiff's team and occasioned an injury, to recover compensation for which this action is brought.

The horse and carriage were taken by the son in the absence of the defendant, and without his knowledge.

It is not pretended that the son was an unfit person to be entrusted with the use of the horse, or that the horse was unsafe or unsuitable. The plaintiff claims to recover, not on the ground of the parental and filial relation, but because the son in the management of the defendant's team was his servant, and engaged in his business, and that the defendant was liable for his negligence.

The master is liable to third persons for all damages resulting from the negligence of his servants, acting under his orders, or in the course of his business. Specific directions are not required. It is sufficient if the act was one within the range of the servant's employment. The general rule, as judicially declared in England, is that the master is answerable for every wrong of his servant committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. Wharton on Negligence, § 161; *Mitchell* v. *Crassweller*, 76 Eng. C. L. 236.

A master is not liable for his servant's torts when not in his employ. If a master gives his servant liberty for a day to go to a fair and to take his horse and wagon, he is not liable to third persons for an injury done by the servant during the day with his horse and wagon. *Bard* v. *Yohn*, 26 Penn. 482. The owner of a horse and carriage is not liable for an injury caused by the negligent driving of a borrower, to a third person, if not being used at the time in the owner's business. *Herlihy* v. *Smith*, 116 Mass. 265. So in *Sheridan* v. *Chadwick*, 4 Daly, 338, a coachman, after having used his master's horse and carriage in going upon an errand for his master, instead of taking them to the stable, used them in going upon an errand of his own, without

his master's knowledge or consent, and, while so doing, negligently ran into and injured the plaintiff's horse; it was held that the master was not liable. If a servant does a wrongful or negligent act without the authority, and not for the purpose of executing the orders or doing the work of his master, the latter is not responsible in damages therefor. *Howe* v. *Newmarch*, 12 Allen, 49.

The relation of master and servant must exist at the time of the injury.

It cannot be pretended, that, under the circumstances stated, the boy was engaged in the business of his father or acting for him. The jury could not have drawn the inference that he was so engaged or was so acting. It would have been unauthorized from the evidence.

The instructions given were correct, and those requested, so far as proper and applicable, were given.

Exceptions overruled.

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

EUGENE F. COLLINS *vs.* COLUMBUS CHASE, and KENNEBEC LOG DRIVING COMPANY, as Trustees.

Somerset. Opinion November 19, 1880.

Insolvent act. Attachments. Trustee process. Exemption of twenty dollars. Second service upon trustee.

Proceedings under § 59 of the insolvent act of 1878, (in the cases of persons whose debts do not exceed $300,) do not dissolve attachments. Such assignments only as are provided for in § 30 will have that effect.

Statute provisions, unless absolutely conflicting, should be construed so as to make them operate harmoniously as a whole, giving each its appropriate effect, not using one section to evade or abrogate another.

The provision in R. S., c. 86, § 6, authorizing a further service upon trustees, may have its full and fair effect without applying it to cases in which the garnishee's indebtment would have been securely held by the first service, had it not been specially exempted from attachment by another section of the same statute; thus, a creditor who has procured the detention of a laborer's wages in the hands of his employer, by the first service of a trustee process, cannot, by making a second service after the lapse of a month, deprive the laborer of the exemption of some portion of his wages, granted in c. 86, § 55.

ON EXCEPTIONS.

By the disclosure of the trustees it appeared that they were indebted to the defendant for his personal labor in April and May, (ending May 14th,) 1878, in the sum of $60. His wages were $2 per day, and $6 had been paid. The writ was served upon the trustees May 11, 1878, and a second service was made June 21, 1878. Other material facts appear in the opinion.

D. D. Stewart and *B. S. Collins*, for the plaintiff.

A. G. Emery, for the defendant.

BARROWS, J. The exceptions state that the presiding judge ruled that the insolvency of the defendant (declared upon his petition filed within four months after the service upon the trustee), dissolved the attachment, notwithstanding the admitted facts that the debts of the petitioner were less than $300, and the proceedings were under § 59 of the insolvent law; and also that the trustees should stand charged for $40 less costs. The plaintiff tenders exceptions to both rulings; to the latter on the ground that it gave the defendant the benefit of the $20 deduction allowed in cases coming under the sixth specification in § 55, c. 86, R. S. There is no certificate of the allowance of the exceptions; but the case is signed by the presiding judge. The inconsistency of the two rulings shows that there was a misunderstanding between the judge and counsel as to the form in which the case should be presented here; counsel supposing that there was a *pro forma* ruling, and the judge, that the case was to go forward on his report. The judge's signature shows his intention that the questions should be saved for this court. The form is of no importance, and as the docket shows the entry of "Law on exceptions," we will consider the case as if exceptions had been certified as allowed.

The exception to the first *pro forma* ruling must be sustained.

We hold that proceedings under § 59 of the insolvent act of 1878, in the cases of persons whose debts do not exceed $300, do not dissolve attachments. Such assignments only as are provided for in § 30 will have that effect.

The second exception presents the question, whether a creditor who has procured the detention of a laborer's wages in the hands

of his employer by the first service of a trustee process, can, by making a second service under R. S., c. 86, § 6 after the lapse of a month, deprive the laborer of the exemption of an amount not exceeding twenty dollars, out of the wages due him for his personal labor for a time not exceeding one month next preceding the first service.

We think he can not.

Statute provisions, unless absolutely conflicting, are to be construed so as to make them operate harmoniously as a whole, giving each its appropriate effect—not using one section to evade or abrogate another. The provision authorizing further service upon trustees may have its full and fair effect without applying it to cases in which the garnishee's indebtment would have been securely held by the first service had it not been specially exempted by another section of the same statute. We are not willing to hold that a creditor, whose demand though otherwise valid is not for necessaries furnished the debtor or his family, may take away the small sum which the legislature has granted to the laborer's necessities, by manipulations of legal process under another section designed to accomplish other and legitimate ends. We think on the contrary that what would have been lawfully attached under the first service on the trustee, had it not been specially exempted by statute from attachment, ought not to be held under a further service, merely because it was detained in the garnishee's hands by means of the first.

The trustee was rightly charged for $40, out of which he may retain his taxable costs.

First exception sustained. Second exception overruled. Trustee charged for $40, less his costs.

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

JAMES F. FERNALD, Appellant, *vs.* GEORGE E. JOHNSON, Assignee.

Waldo. Opinion November 25, 1880.

Insolvent law. Provable debts. Contingent liabilities.

A contract given by one partner to another to assume all the debts of the firm, and save him harmless therefrom, is not such a claim as may be proved against the estate of the obligor in insolvency until there has been a breach. It is not a contingent debt nor a contingent liability, for until the breach, there is no liability. The contingency is whether there ever will be a debt or liability.

Nor is there any claim for unliquidated damages, for until the breach there are no damages to be assessed.

A contingency, depending upon a breach of a contract by one of the parties, is not such as is required under the insolvent law to make a contingent debt or liability.

ON EXCEPTIONS.

An appeal from the decision of the judge of the insolvent court, Waldo county, disallowing the claim of appellant.

The opinion states the case.

Wm. H. Fogler, for the appellant.

The language of the insolvent law, stat. 1878, c. 74, § 22, as amended by stat. 1879, c. 154, § 9, in relation to contingent debts and contingent liabilities, is identical with § 5068, U. S. bankrupt act. Clark entered into a contract with Fernald, to indemnify the latter for the payment of debts of the firm. If he is obliged to pay any of these, he has his remedy against Clark. This claim is a contingent liability within the meaning of the statute. *Woodard* v. *Herbert*, 24 Maine, 358; *Ellis* v. *Ham*, 28 Maine, 385; *Dole* v. *Warren*, 32 Maine, 95; Bump Bankruptcy, 569, *et seq.*; *Fisher* v. *Tifft*, (R. I.) 18 Am. Law Reg. N. S. 9; *Merrill* v. *Schwartz*, 68 Maine, 514.

If the claim is not a contingent liability, then is it not a liability for unliquidated damages growing out of a contract, and provable under the same statute?

George E. Johnson, for the appellee.

DANFORTH, J. Prior and up to November 27, 1878, the claimant in this case and Andrew E. Clark, were partners in

business. On that day, the firm was dissolved, and the parties entered into a written agreement, by which the partnership effects were disposed of, and Clark became bound to pay certain individual liabilities against Fernald, and assume all liabilities, debts and demands outstanding against said firm, and save the said Fernald harmless from all cost, or damage on account of the same. So far there has been no breach of this contract.

Clark having applied for a discharge from his debts under the insolvent law, Fernald seeks to prove his claim under this contract, against his estate.

Whether the claimant could prove the partnership debts, as being holden therefor "as surety, guarantor, or otherwise" is not a question now before the court. There is no action pending on the contract, defended on the ground that the claim was so provided for under the law; nor is it proposed to prove the debts in any such capacity; but the simple and only question presented is, shall the claimant be allowed to prove his own claim under and by virtue of the contract of dissolution?

The practical difficulties apparent from an affirmative answer, are so great, that it cannot be allowed unless the terms of the statute require it.

If allowed at all, it must be in one of the two ways suggested in the argument; as "a contingent debt, or liability," or "a claim for unliquidated damages."

The provision of the statute is, "When the insolvent is liable for unliquidated damages, arising out of any contract or promise . . . . . the court may order such damages to be assessed . . . . . and the sum so assessed may be proved against the estate." It will be seen at once that the claim in question fails entirely to come within this description. The case finds that there has been no breach of the contract, nor does it contain any promise to pay a sum of money either definite or indefinite. In legal contemplation, there can be no damages to assess, either unliquidated, or otherwise.

The other provision is that, "In all cases of contingent debts and contingent liabilities, contracted by the insolvent, . . . the creditor may make claim therefor, and have his claim allowed

with the right to share in the dividends if the contingency happens before the order for the final dividend; or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, . . . and he shall be allowed to prove for the amount so ascertained."

It is evident that no claim can be proved under this statute, the amount of which cannot be made certain. Without that, the present value cannot be ascertained, nor can any dividend be declared if the contingency should happen, nor can the assignee fix upon any amount to be reserved "which shall be equal to the dividend which would be due upon such claim, if finally allowed." The contract in this case is not confined to any one demand, nor any specific number of demands. It covers all the partnership debts without specifying any one as to amount, or to whom due. Shall he be permitted to prove all if he can? But some of them have already been proved, and it is not the policy of the law to allow dividends to different individuals upon the same demand. Is he to receive a dividend only upon such amounts as he has paid? Then who is to decide what that amount is? Shall it be left with the assignee, or is he a second time to go through with the process of proving his claims?

The contingency is not such a one as is contemplated by the law. The words of the statute, "contingent liabilities, contracted by the insolvent," surely cannot refer to such a contingency as, whether the insolvent will keep, or break his own contract. It must be something more definite. Some event more reliable and upon which some calculation can be based. In this case there is not only one, but several contingencies, all of which are equally uncertain. There is not only the uncertainty as to the neglect of the contractor to pay, but there must also be a demand by the creditor, and payment by the claimant, who may or may not be able to respond.

But without referring further to the numerous difficulties in the way of the claimant's proposition, it is enough to say that so far as the case shows, up to the present time, the insolvent is under no liability to him either contingent or otherwise, and the contingency whatever that may be, is whether he ever will be.

It is evident that under this statute, there is nothing which can be proved unless there is a debt or liability. If none exists, there can be no contingency attached to it. In this case, there is an obligation perhaps to do certain things, but no liability to the obligee until there has been a neglect and an injury resulting from it. Here there has been none. There is in the contract no promise to pay any sum of money and no liability to do so can arise except by a breach of it. Until that time, no relation of debtor and creditor exists between the parties, and then only to the extent of payments made in consequence of such breach; and the contingency is not whether a debt existing shall become absolute, but whether any shall ever exist. A contingent liability is one thing, a contingency, the happening of which may bring into existence a liability, is another, and a very different thing. In the former case there is a liability which will become absolute upon the happening of a certain event; in the latter there is none until the event happens. The difference is simply that which exists between a conditional debt or liability, and none at all.

This distinction has been fully recognized and sustained in the following cases decided under similar statutes, viz: *Woodard* v. *Herbert*, 24 Maine, 358; *Ellis* v. *Ham*, 28 *Id.* 385; *Dole* v. *Warren*, 32 *Id.* 94; *Reed* v. *Pierce*, 36 *Id.* 455; *Fowler* v. *Kendall*, 44 *Id.* 448; *French* v. *Morse*, 2 Gray, 111; *Bennett* v. *Bartlett*, 6 Cush. 225; *Riggin* v. *Magwire*, 15 Wallace, 549.

The case of *Fisher* v. *Tifft*, 18 Am. Law Reg. N. S. 9, we think is more than answered by the elaborate and learned note which follows it.

Exceptions overruled.

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

JOHN LARRABEE *vs.* JOHN S. WALKER, and MELVIN P. FRANK, Trustee.

Cumberland. Opinion November 22, 1880.

Trustee service. Contingent debt. Drafts.

When the indebtedness of the trustee to the principal defendant is not absolutely due, but is contingent, and is to be paid, when due, by drafts payable to the trustee and indorsed by him to the defendant, the trustee will be discharged.

If the trustee had received the drafts with which he was to pay the defendant he would not be chargeable, much less is he chargeable when he has received nothing, and it is contingent whether he ever will.

EXCEPTIONS from superior court, Cumberland county.

The opinion states the case.

Benjamin F. Chadbourne, for the plaintiff.

M. P. Frank, for the trustee.

APPLETON, C. J. The alleged trustee is a mail contractor. He contracted with the defendant to carry the mail on his route, for which he was to pay him seventy-five dollars per quarter, provided he should fulfill all the requirements, conditions and stipulations contained in his contract with the Postmaster General, and should perform said service faithfully and according to all the rules, regulations and conditions imposed by the government or the Postmaster General. . . and he (the trustee) should receive his pay from government, the defendant to receive his compensation from moneys to be collected by him from the various post offices, on the route, on drafts sent him (the trustee) by the department on said offices.

The defendant has been paid for his services up to October 1, 1877.

By the contract of the trustee with the postoffice department his payments for services are to be made quarterly—*provided* the required evidence of service be received by the department. At the time of the service of the plaintiff's writ, that evidence had not been received nor had the trustee been paid.

It is contingent whether the required evidence of service will ever be furnished the department, and if not furnished there is

nothing due the trustee or the defendant. The claim of the defendant against the trustee is contingent. It is not absolutely due. But the trustee is not to be charged where his liability rests upon a contingency. *Davis* v. *Davis & Trustee*, 49 Maine, 282; *Bryant* v. *Erskine & Trustee*, 50 Maine, 296; R. S., c. 86, § 55.

The defendant was to be paid by drafts payable to the trustee and indorsed by him to the defendant and which he was to collect from the various post offices on the route. But by R. S., c. 86, § 55, "no person shall be adjudged trustee by reason of a negotiable bill, *draft*, note or other security drawn, accepted, made or indorsed by him, except in the cases provided in the sixty-third section." But the trustee is not within the exception. If the trustee had received the drafts by which he was to be paid and with which he was to pay the defendant, he would not be chargeable. Much more is he not chargeable when he had received nothing and it is contingent whether he ever will.

Trustee discharged.

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

MARGARET WILLIAMSON *vs.* JOHN WILLIAMSON.

Oxford. Opinion November 24, 1880.

Grantor and grantee. Estoppel. Covenant broken—damages in.

The grantor cannot claim that his grantee should have recorded his deed in order to guard against a subsequent wrongful transfer of the same title to another by the grantor himself. Nor can he urge a defense, in an action of covenant broken, which starts with his own violation of the rights of his grantee, under whose will the plaintiff claims, and includes no other element except that and the results which flowed from it. The doctrine of estoppel applies.

Where the defendant in an action of covenant broken had notice of the pendency of the real action against the plaintiff, and was cited in under his covenant, but refused to defend, and judgment was for the plaintiff in such real action, the costs of that suit, the expense to which the present plaintiff was subjected in defending it, with interest from the time of payment, and the value of the premises at the date of eviction with interest therefrom, are the legal elements of damage.

ON REPORT.

COVENANT BROKEN.

The opinion states the case.

Enoch Foster, for the plaintiff, cited: 4 Kent Com. 9*, 471*, 472*; *Bell* v. *Twilight*, 26 N. H. 401; *Blanchard* v. *Brooks*, 12 Pick, 47; *Loomis* v. *Bedel*, 11 N. H. 86; *Sweet* v. *Brown*, 12 Met. 177; *Kimball* v. *Blaisdell*, 5 N. H. 533; *Miller et als.* v. *Ewing*, 6 Cush. 40; *Coe* v. *Persons unknown*, 43 Maine, 436; 2 Wash. R. P. 660*, 667*; *Curtis* v. *Deering*, 12 Maine, 499; *Hill* v. *Bacon*, 110 Mass. 388; *Cole* v. *Lee*, 30 Maine, 397; *Thayer* v. *Clemence*, 22 Pick. 494; 5 Am. Rep. 149; 1 Chit. Pl. 17*, 19*, 21*; *Griffin* v. *Fairbrother*, 10 Maine, 91; *Wendell* v. *Abbott*, 43 N. H. 73; *Abbot* v. *Banfield*, *Idem*, 155; *Freeman* v. *Atwood*, 50 Maine, 474; *Crooker* v. *Jewell*, 29 Maine, 530; *Chase* v. *Weston*, 12 N. H. 413; *Wheeler* v. *Sohier*, 3 Cush. 222; *Russ* v. *Perry*. 49 N. H. 551; *Clark et al.* v. *Swift*, 3 Met. 392; *Ballard* v. *Child*, 34 Maine, 356, and many other authorities.

Hammons, for the defendant, contended that the action could not be maintained, but if it could, only nominal damages would follow.

The plaintiff's devisor lost his title some three years before his death and before he made his will. At that time he had no interest in the premises which he could devise or will. And no title nor interest in the premises passed to the plaintiff and the covenants in the defendant's deed did not pass to her. Her devisor was a mere tenant at sufferance after April, 1863. 4 Kent Com. 116; *Sanders* v. *Richardson*, 14 Pick. 522; *Kinsley* v. *Ames*, 2 Met. 29; *Hollis* v. *Pool*, 3 Met. 350; *Creech* v. *Crockett*, 5 Cush. 133; *Hamilton* v. *Cutts*, 4 Mass. 352; *Comings* v. *Little*, 24 Pick. 266.

The measure of damages is not the value of the land but the the value of the defendant's right, title and interest. *Coe* v. *Persons unknown*, 43 Maine, 432.

SYMONDS, J. On January 11, 1862, the defendant, holding a mortgage on a tract of land in Newry, which included the twelve acres to which this suit relates, gave a quitclaim deed of all his right, title and interest in and to the twelve acres to David Williamson, the plaintiff's husband and devisor, with the usual covenant to warrant and defend against all persons claiming by,

through or under him. This deed was not recorded till May 10, 1871.

On January 14, 1862, Reuben F. Eames and others, who owned the equity of redemption, gave a warranty deed of the same premises to the same David Williamson; the two deeds investing him at that time with full title to the twelve acres.

On January 21, 1863, the defendant, without mention of the release of the twelve acres, assigned the whole mortgage (proceedings to foreclose the same by publication, having been begun on April 20, 1860,) to Melicent J. Newton, from whom by mesne conveyances the interest of the mortgagee passed in 1868 to Robert G. Wiley, who on a writ of entry recovered judgment against this plaintiff and evicted her in 1878 from the twelve-acre lot, which she claimed to hold as devisee of her husband; such assignment of the whole mortgage to Melicent J. Newton, having been recorded on April 21, 1863, before the record of the quitclaim deed from the defendant to David Williamson, and being held effective, therefore, to convey, to one who had no notice of the earlier, unrecorded deed, the mortgagee's entire interest; in the twelve acres, as well as in the rest of the mortgaged tract. *Wiley* v. *Williamson*, 68 Maine, 71.

David Williamson, having remained in undisturbed possession of the twelve acres during his life, died in February, 1866. His will was approved in May, 1866, giving all his real estate to the plaintiff, so long as she remained his widow, her heirs and assigns. This qualified estate has never been terminated by a subsequent marriage, and for the present purpose may properly be treated as an estate in fee;—if the husband had such an estate to devise.

Having been evicted by a superior title, created by the defendant himself after his warranty contained in the quitclaim deed, the plaintiff brings this action of covenant broken.

I. On one branch of the case, it is claimed by the plaintiff that no legal foreclosure of the mortgage to the defendant is proved;—inasmuch as the only evidence of the contents of the notice of foreclosure, of the fact or manner of its publication, of the name of the newspaper in which the notice was given, or the

place or date of its issue, is the recorded certificate of one who signs as James Nutting, publisher of Bethel Courier; — without oath, or any official standing to give the certificate effect in evidence. R. S., c. 90, § 5.

The answer to this objection is, that the fact and the validity of the foreclosure are averred in both counts of the plaintiff's declaration. The plaintiff is not in position to deny what is claimed by the defendant and what her own pleadings assert. It cannot be known that other evidence of the publication of notice would not have been offered by the defendant, had the pleadings raised this issue. We shall, therefore, regard the foreclosure of the mortgage as complete in April, 1863, nearly three years before the death of David Williamson.

II. The defendant claims that the plaintiff cannot maintain this action, because she never had seizin of the twelve-acre lot; that by the earlier registration of the assignment of the mortgage to Newton, and the foreclosure, David Williamson in his lifetime had lost all title to the premises, nothing passed to the plaintiff by the will, and she has no right to invoke to her use or in her aid even the covenants which ran with the land; — in other words, that the plaintiff is a stranger to the title, to whom the obligation of the covenant does not extend.

The plaintiff has a clear title under her husband's will to this land, except for the wrongful act of the defendant in assigning his interest therein as mortgagee to a stranger, after he had once released it to the plaintiff's devisor. The eviction by superior title — that is to say, by a title which on account of earlier registry took precedence — which constitutes the breach of such a covenant to defend, occurred after the death of the husband, and was rendered possible by the defendant's assigning to Newton his entire interest as mortgagee, after he had released a part to David Williamson; — and by the foreclosure of the mortgage upon the whole mortgaged estate. During the husband's life, the covenant was not broken. He had till his death the full and quiet enjoyment of the estate.

If we assume the facts alleged in defence to be proved, the direct question is, whether the defendant can be heard to say, in

order to protect himself from the damages resulting from his breach of covenant, that by his own act during his grantee's life he created the superior title by which after the death of the grantee his devisee was evicted in violation of the covenant. This seems to be for the defendant to deny the plaintiff's seizin on grounds which impute his own wrong, and which rest solely for support upon the defendant's breach of covenant. The plaintiff's seizin, her interest in this covenant running with the land, and right to security of title under it as against the mortgage, are manifest, except to the extent to which effect, to deprive her of them, must be given to the wrongful act of the defendant. As to Wiley who held the mortgagee's interest by the elder record title, without notice of the release of the twelve acres from the lien of the mortgage, such effect must be given to the wrongful assignment; and thereby the plaintiff was evicted. But as to those in privity of interest with his grantee, whom he covenanted to defend against the mortgage, we think the defendant is not in position to claim the same result. This would be to ignore the wrong, or to treat it as valid and effective in the interest of the wrongdoer, and to give the defendant the same advantage resulting therefrom which Wiley derived only from the fact that he was an innocent purchaser for value without notice of a prior deed unrecorded. The defendant cannot claim that his grantee, the plaintiff's devisor, should have recorded his deed, in order to guard against a subsequent wrongful transfer of the same title to another by the defendant himself. He cannot urge a defence which starts with his own violation of the rights of his grantee under whose will the plaintiff claims, and includes no other element except that and the results which flowed from it. The doctrine of estoppel applies.

"Upon the question of damages, it has been argued that the grant or quitclaim being only of the right, title and interest of the defendant, the covenant to warrant and defend cannot be construed to extend beyond that, and that the damages therefore must be restrained to the value of the defendant's interest. . . . . Such a construction of the covenant is not warranted by the language of it, or by the apparent

intention of the parties. The grantor engages to warrant and defend the premises against all lawful claims arising by, from or under him, and the term premises here refers to the lands described in the deed. He conveys his right to the lands, and agrees to warrant and defend them against his own acts, leaving the grantees to judge for themselves what title, if any, he formerly had in them." *Loomis* v. *Bedel*, 11 N. H. 86; see *Cole* v. *Lee*, 30 Maine, 397.

The defendant had notice of the pendency of the real action brought by Wiley against the present plaintiff, and was cited in under his covenant but refused to defend. The costs of that suit, the expense to which the plaintiff was subjected in defending it, with interest from the time of payment, and the value of the land,—which the plaintiff has lost by the injurious act of the defendant, resulting in the breach of his warranty to defend,—at the date of eviction with interest, are the legal elements of damage.

Defendant defaulted. Damages assessed at four hundred and seventy-three dollars and twenty seven cents, ($473.27,) with interest from May 31, 1878.

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

SETH M. CARTER, Administrator,

vs.

MANUFACTURERS' NATIONAL BANK OF LEWISTON.

Androscoggin. Opinion November 27, 1880.

Executors; powers of to procure loans and pledge the property of the estate.

As a general rule, an executor has an absolute control over all the personal effects of his testator—his title being fiduciary and not beneficial.

An executor may pledge the personal property of his testator, for the general purposes of the will. If the person receiving a pledge from an executor has at the time knowledge or notice that the executor intends to misapply the money, or is, in the very transaction, applying it to his own private use, the pledge is not valid.

Where an executor pledged certain stock belonging to the estate to a bank to secure his note for money loaned in good faith by the bank, and upon the affirmation of the executor, that the money was wanted for the settlement of the estate, the pledge was valid.

ON REPORT.

This is an action brought by the plaintiff in his capacity as administrator *de bonis non*, with the will annexed, of the estate of Asa Redington, deceased, for the conversion of fifty shares of the capital stock of the Little Androscoggin Water Power Company.

It was admitted that the stock in question was the property of Asa Redington in his life time; that John G. Cook was duly qualified as executor of the estate; that Cook after his appointment and qualification had the stock transferred on the books of the company into the name of "John G. Cook, Executor;" that Cook on the seventh day of September, 1876, made a loan from the defendant bank of $500, giving a note therefor; that at the time of procuring said loan Cook transferred the fifty shares of stock to the bank as collateral security for the loan; that Cook assumed to transfer the stock and make the loan in his capacity as executor; that the money was loaned in good faith by the defendant, and upon the statement made by Cook that the same was wanted in the settlement of said estate of Asa Redington.

Wm. P. Frye, *John B. Cotton*, *Wallace H. White*, *Seth M. Carter*, for the plaintiff.

The note which Cook gave September seventh, had no validity against the estate, but was the personal and individual note of John G. Cook. *Davis* v. *French*, 20 Maine, 21; *Forster* v. *Fuller*, 6 Mass. 58.

When the officers of the bank made the loan and accepted the note, they knew it was a loan to John G. Cook individually, or were chargeable in law with such knowledge. An executor or administrator has no right to pledge any part of the trust estate to secure his own debt or the performance of his personal obligation. Perry on Trusts, vol. 1, § 225, and cases there cited.

An administrator or executor has no power of charging the effects in his hands to be administered by any contract originating with himself. The estate is to be subjected to no hazards or risks except those growing out of the transactions of the deceased. *Sumner, Adm'r,* v. *Williams et al.* 8 Mass. 199; *Lucht* v. *Behrens*, 22 American R. 383; *Austin* v. *Munroe*, 47 N. Y. 360.

The defendant having taken the stock without ascertaining, as it readily might have, whether Cook had authority to dispose of it in such a manner, it cannot now complain if it is held accountable to the parties for whose benefit Cook held it. *Ashton* v. *Atlantic Bank*, 3 Allen, 217.

Ludden & Drew, for the defendants, cited: 2 Redfield Wills, 290, 213, 214, 215; *Hicks* v. *Chapman*, 10 Allen, 463; *Moore* v. *Moore*, 127 Mass. 22; *Beecher* v. *Buckingham*, 18 Conn. 120; *Johnson* v. *Com. Bank*, 21 Conn. 156; *Valentine* v. *Jackson*, 9 Wend. 302; *Bank of Troy* v. *Holm*, 9 Wend. 273; *King* v. *Green*, 6 Allen, 139; *Myers* v. *Meinrath*, 101 Mass. 366; *Sampson* v. *Shaw*, 101 Mass. 145; *Hunt* v. *Nevers*, 15 Pick. 500.

VIRGIN, J. The main question is, whether the bank obtained a valid title to the shares of stock pledged to it by the executor as collateral security for the payment of his note.

The interest which an executor, as such, has in the personal estate of his testator is not the absolute title of an owner, else it might be levied on for his personal debts; but he holds in *auter*

droit—as the minister and dispenser of the goods of the dead. Wentw. Off. Ex. (14th ed.) 196; *Pinchon's Case*, 9 Coke, 86, *b*; *Dalton* v. *Dalton*, 51 Maine, 171; *Weeks* v. *Gibbs*, 9 Mass. 76; *Hutchins* v. *State Bank*, 12 Met. 423. As soon as he is clothed with a commission from the probate court, the executor is vested with the title to all the personal effects which the testator possessed at the instant of his decease; but the title is fiduciary and not beneficial, (*Peterson* v. *Chemical Bank*, 32 N. Y. 21,) and his office is not that of an agent, but of a trustee. *Dalton* v. *Dalton*, *supra*; *Sumner* v. *Williams*, 8 Mass. 198; *Shirley* v. *Healds*, 34 N. H. 407.

As a necessary incident to the execution of the will and the administration of the estate, the power to dispose of the personal estate is given to the executor. And no general proposition of law is better established than that an executor has an absolute control over all the personal effects of his testator. *Peterson* v. *Chemical Bank*, *supra*; 1 Williams Exr's, (6th Am. ed.) 709; 2 Williams Exr's, 998; 1 Perry Trusts, § 225, and cases in notes. And this rule prevails where no statute intervenes. R. S., c. 64, § 49.

While it is the duty of an executor to use reasonable diligence in converting assets into money for the general purposes of the will, the law permits him to exercise a sound discretion as to the time, within a limited period, when he will sell. And high authority has declared that circumstances may exist in which it is certainly not wrong in him, although it may not be a positive duty, to make advances for the benefit of the estate and reimburse himself therefrom. *Munroe* v. *Holmes*, 13 Allen, 110. If he may advance his own money for the general purposes of the will, and may sell the personal effects for the like object, it is difficult to see why, in the absence of any prohibitory provision in the will, he may not mortgage or pledge the assets for the same purpose, and the great weight of authority so holds. 2 Williams Exr's, 1001, and cases cited. *McLeod* v. *Drummond*, 17 Ves. 154; *Andrew* v. *Wrigley*, 4 Br. Ch. Cas. 125. In *Earle Vane* v. *Rigden*, (L. R.) 5 Ch. App. Cas. 663, Lord HATHERLY said: "Lord THURLOW expressed his opinion clearly to be that the

executor is at liberty either to sell or pledge the assets of the testator. *Scott* v. *Tyler*, 2 Dick. 712, 725. In fact he has complete and absolute control over the property, and it is for the safety of manhood that it should be so; and nothing which he does can be disputed, except on the ground of fraud or collusion between him and the creditor." And Sir W. M. JAMES, in the same case, said: "It seems to be settled on principle, as well as by authority, that an executor has full right to mortgage as well as sell; and it would be inconvenient and very disastrous if the executor were obliged immediately to convert into money by sale every part of the assets. It is a very common practice for an executor to obtain an advance from a banker for the immediate wants of the estate by depositing securities. It would be a strange thing if that could not be done." See also, 3 Redf. Wills, c. 8, § 32, pl. 4 *et seq.*

In considering the question whether an executor had followed a specific power in a will, Ch. BUCHNER made the general remark: "It is certain that an executor, as such, has no power to pledge the estate of his testator for a loan of money." *Ford* v. *Russell*, 1 Freem. (Miss.) Eq. 42. If the learned chancellor meant that an executor has no authority to pledge the assets of his testator for a contemporaneous advance of money for the use of the estate—for a purpose connected with the administration of the assets, he is not sustained by the great current of modern authority. 1 Perry Trusts, 270, and cases there cited, and cases *supra*.

Although the general proposition mentioned is so well established, nevertheless like most others, it is not without an exception. For while it is of the greatest importance that the disposal of a testator's effects should be made reasonably safe to the purchaser, still it is the bounden duty of the executor to faithfully appropriate the assets to the due execution of the will; and a misapplication thereof is a breach of duty for which he is liable. And all the authorities concur in holding that if the purchaser, mortgagee or pledgee know or have notice, that the transfer to him is made for the purpose of misapplying the assets, his title cannot be upheld, and he thereby becomes involved and

is made liable to all persons beneficially interested in the will, except the executor. 2 Williams Exr's, 1002, and cases in note *(x)*. 1 Perry Trusts, 270, and cases in note 1; 1 Story Eq. § § 400, 402 and cases; *McLeod* v. *Drummond*, 17 Ves. 153, where the cases are critically reviewed by Lord ELDEN. *Collinson* v. *Lister*, 7 De G. M. and G. 633. *Gerger* v. *Jones*, 16 How. 30, 37, 38; *Hutchins* v. *State Bank*, *supra*.

It also now seems to be well settled in equity at least, that an executor can make no valid sale or pledge of his testator's effects for the payment or security of his own private debt (2 Sugd. Vend. 372, and cases in note *o*); 1 Perry Trusts, 270, and cases in note 3; 2 Williams Exr's, 1004, and cases in note *d;* on the ground *res ipsa loquitur*, giving the purchaser, mortgagee or pledgee such notice of the misapplication as necessarily to involve him in the breach of duty.

Chancellor KENT concludes a critical examination of the cases which had then been decided as follows: "I have thus looked pretty fully into the decisions of a purchaser from an executor of the testator's assets and they all agree in this: that the purchaser is safe, if he is no party to any fraud in the executor and has no knowledge or proof that the executor intended to misapply the proceeds, or was in fact by the very transaction, applying them to the extinguishment of his own private debt. The great difficulty has been, to determine how far the purchaser dealt at his peril, when he knew from the very face of the proceeding that the executor was applying the assets to his own private purposes, as the payment of his own debt. The later and better doctrine is, that in such a case, he does buy at his peril; but that if he has no such proof or knowledge, he is not bound to inquire into the state of the trust, because he has no means to support the inquiry and he may safely repose on the general presumption that the executor is in the due execution of his trust." *Field* v. *Schieffelin*, 7 Johns. Ch. 150, 160.

So Ch. J. TANEY said: "An executor may sell or raise money on the property of the deceased, in the regular execution of his duty; and the party dealing with him is not bound to inquire into his object, nor liable for his misapplication of the money.

. . But it is equally clear, that if a party dealing with an executor, has at the time, reasonable ground for believing that he intends to misapply the money, or is, in the very transaction, applying it to his own private use, the party so dealing is responsible to the persons injured." *Lowry* v. *Com. & Farm. Bank*, Taney's C. C. 310, 330.

The law recognizes a distinction between an ordinary trustee and an executor. The former has possession for custody and the latter for administration. The latter has a necessary incidental power of disposal which the former does not. And as a consequence when one purchases of the latter stocks or other securities bearing on their face the revelation of a trust, he may do so safely in the absence of notice or knowledge of any intended breach of trust on the part of the executor; but if he purchase like trust property of an ordinary trustee, the law imposes upon him the duty of inquiring into the right of the trustee to change the securities. *Duncan* v. *Jaudon*, 15 Wall. 165, 175; *Shaw* v. *Spencer*, 100 Mass. 388; *Pendleton* v. *Fay*, 2 Paige, Ch. 205; *Atkinson* v. *Atkinson*, 8 Allen, 15; 1 Perry Trusts, § 225, p. 271.

In the case at bar the certificate of stock was changed by the corporation and issued to Cook, executor, thus revealing to the bank the trust. But this alone would not imperil the bank in the transaction, for the executor had the presumptive right to sell or pledge the stock. But the executor gave to the bank his note for the security of which the pledge was made. The note could not be collected against the estate for it was the personal note of the executor. *Davis* v. *French*, 20 Maine, 21. He could not create a debt in that manner against the estate. And if the money was thereby procured for his own private use and the bank knew it at the time, the transfer of the stock would be a *devastavit* and could not be upheld. If the note had been given to the bank for a private debt due to the bank from the executor, created before or during his executorship, but independent thereof, it would come within the principle of the numerous cases before cited where the transaction itself would speak and conclude the bank. But if given as a voucher for money

obtained for a legitimate purpose connected with a *bona fide* administration of the will, then though the executor alone was made liable for its payment, the transaction would be legitimate and the estate would have no reason for complaint. The case finds "that the money was loaned in good faith by the bank and upon the statement made by Cook that the same was wanted in the settlement of the estate." The presumption is that he was acting faithfully. There is no evidence to the contrary and the presumption must stand. The doctrine of this case is recognized in *Pettingill* v. *Pettingill*, 60 Maine, 412, 425.

Plaintiff nonsuit.

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

NOTE. — To the same purport see *Smith* v. *Ayer*, 101 U. S. 320, decided since the foregoing opinion was announced. REPORTER.

STATE OF MAINE *vs.* DAVID F. MURDOCH and others.

Cumberland. Opinion November 29, 1880.

Participators in misdemeanors.

It is a rule of the common law of universal application that all participators in a misdemeanor are principals. Each is severally liable.

EXCEPTIONS from the superior court, Cumberland county.

The case is stated in the opinion.

Ardon W. Coombs, county attorney, for the State.

C. P. Mattocks, for the defendants.

APPLETON, C. J. This is a search and seizure process under R. S., c. 27, § 35.

The presiding justice instructed the jury that "if the respondent was present aiding in the keeping and depositing of the liquors, rendering assistance to his principal, in the keeping and depositing of the liquors intended for unlawful sale, then he would be a principal himself in the transaction."

The instruction given was correct. The offence charged is a misdemeanor. It is a rule of the common law of universal

application, that all participators in a misdemeanor are principals. Each is severally liable. *Com.* v. *Drew*, 3 Cush. 284; *Com.* v. *Ray*, 3 Gray, 448.

The reading of the last paragraph of § 28, by which the rule of the common law is made specifically applicable when its provisions were violated could not have harmed the defendant. That clause was inserted by way of unnecessary caution. The rule of the common law applies unless abrogated. That has not been done.

Exceptions overruled.

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

CITY OF ROCKLAND *vs.* INHABITANTS OF MORRILL.

Knox. Opinion December 1, 1880.

Fundamental objections to an action. R. S., c. 24, § 1. Pauper. Settlement. Private laws 1861, c. 70, § 2.

When, for fundamental reasons, a plaintiff cannot maintain his action, his motion to set aside the verdict against him and his exceptions to the ruling of the presiding justice at the trial become immaterial. And it seems that the defendant may raise such fundamental question at the hearing on the motion and exceptions although he did not raise it at the trial.

A person who had deceased prior to the division of a town, a part of which is incorporated into a new town, cannot be considered as "absent at the time" of the division, within the provision of R. S., c. 24, § 1, cl. IV; neither can he be considered as having his "home in the new town" within the last clause in that section.

A person who was not chargeable and supported as a pauper in the town of Belmont, on the third day of March, 1855, and whose legal settlement as defined by R. S., c. 24, was on that day in the town of Morrill, not remaining a pauper on March 9, 1861, is not within the provisions of private laws 1861, c. 70, § 2.

ON MOTION AND EXCEPTIONS.

The opinion states the case as considered by the law court.

D. N. Mortland, for the plaintiffs.

A. P. Gould and *J. E. Moore*, for the defendants.

VIRGIN, J. The plaintiffs seek to recover the value of certain pauper supplies furnished by them to J. F. Crockett and family, as paupers. The only question was the settlement of the paupers.

The plaintiffs claim and at the trial introduced much evidence tending to prove that J. F. Crockett was the legitimate son of Tristram and Experience Crockett; that Tristram never acquired any settlement in his own right, but derived one from his father whose settlement, at the time of his decease, was in Belmont, but in that part thereof, which, on the division of the town, in 1855, was incorporated as the town of Morrill; and that J. F. Crockett never acquired any settlement in his own right, unless it was in the plaintiff town, which the plaintiffs strenuously denied. Assuming these facts claimed to be true, the settlement of these paupers was once in Belmont, and is there now, unless it can be made to appear that it has been changed by operation of some provision of law. R. S. c. 24, § 2. For, while an original town, a part of the territory of which has been set off and incorporated as a new town, still retains all its property, powers, rights and privileges, it also remains subject to all its obligations and duties; unless some general or special law otherwise provides. *Windham* v. *Portland*, 4 Mass. 384; *Veazie* v. *Howland*, 47 Maine, 127, 131; *North Yarmouth* v. *Skillings*, 45 Maine, 133; *Frankfort* v. *Winterport*, 54 Maine, 250. The new town is likened to a child, leaving the old homestead and setting up for himself, portionless, but free from all the contracts, debts and obligations of the parent.

The general statute provides that upon division of a town, a person having a settlement therein "and absent at the time," has his settlement in that part of the town which includes his last dwelling place in the town divided. R. S., c. 24, § 1, cl. IV. But this provision does not apply to Tristram; for he was not "absent at the time" of the division. Having gone to sea some time between the years 1836 and 1839, sixteen years at least before the division on March 3, 1855, and never having been heard from thereafter, the law presumes he was dead nine years before the division. *White* v. *Mann*, 26 Maine, 361; *Stevens*

v. *McNamara*, 36 Maine, 176; *Loring* v. *Steineman*, 1 Met. 204. And being dead, he could not be considered "absent." This provision, therefore, did not relieve Belmont. And being dead when Morrill was incorporated, his home was not there then, and the latter provision in the fourth clause of § 1, cited, is not applicable.

J. F. Crockett being a minor at the time of his father's decease, then had the settlement of his father, which was in Belmont. Whether or not he was absent at the time of the division, is immaterial, since his last dwelling place was in that part of Belmont which remained Belmont. The evidence is undisputed that he was struck off from the list of paupers in the spring of 1851, went to live with Mr. Elwell, in what is now Belmont, and continued to live there continuously, until July, 1856, when he went to Belfast for a short time and then returned to Elwell's in December following, where he remained until the next spring. When Elwell removed to Belfast, Mt. Chase and Patten, Crockett either went with him or soon followed. In a word, the pauper made it his home at Elwell's, which was never in the territory, now Morrill, from 1851 to 1869, during all which period he received no aid from any town.

Nor by any special statute was he made one of the paupers of Morrill.

Section 3, (priv. laws 1855, c. 466,) of the act incorporating the defendant town, which provided what paupers the new town should support, was repealed by priv. laws 1861, c. 70, § 1, and a different provision relating thereto was substituted; § 2. This section provides that Morrill shall take and support "all persons chargeable as paupers and supported as such in said town of Belmont, on March 3, 1855, the day of the approval of act aforesaid, whose legal settlement as defined by R. S., c. 24, was on said March 3, in said town of Morrill, and who now remain paupers."

It is evident that this pauper does not come within the conditions of this section; for, as before seen, he was not supported as a pauper in Belmont, on March 3, 1855, his legal settlement was not on March 3, 1855, as defined by R. S., c. 24, in said

town of Morrill, and did not "remain a pauper" March 9, 1861, when the latter act took effect. The result is, he and his family are not to be "taken and supported by Morrill," but their settlement remains in Belmont.

Therefore, inasmuch as the plaintiffs cannot in any event maintain this action against these defendants, it is unnecessary to consider the motion or exceptions. *Wyman* v. *Banton*, 66 Maine, 171.

Motion and exceptions overruled.

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

ISAAC S. BANGS and another *vs.* SAMUEL S. PARKER.

Kennebec. Opinion December 6, 1880.

Devise. Easement. Right of way. Parol agreement.

By the devise of a house and lot, a right of way, held and enjoyed by the devisor, to and from the same over adjoining premises, will pass to the devisee, although it is not named in the will.

Where the grantor in a deed reserved a right of way across the premises conveyed, without fixing its locality, and at the time of the conveyance two ways were in use, one of which was afterwards closed by the grantee with the assent of the grantor; *Held*, that the grantor retained a right over the other and remaining way, and if it is conceded that a grantee may designate the locality for a way, thus reserved, he has not a right to build a fence across the only path where passage was practicable.

Where a deed contained this clause: "reserving a pass way from the road aforesaid, over or by said lot to the barn standing on the adjoining lot, being said Mary's [grantor's] dwelling house lot;" *Held*, that it contained a reservation of a right of way to the dwelling house lot for such purposes as a way to the barn appurtenant to the dwelling house might properly be used, and that it was not lost by the destruction of the barn standing thereon at the time of the reservation.

ON REPORT.

The opinion states the case.

E. F. Webb, for the plaintiff, upon the questions considered in the opinion, cited: *Lansing* v. *Wiswall*, 5 Denio, 213;

Underwood v. *Carney*, 1 Cush. 285; *Atkins* v. *Bordman*, 2 Met. 465; *Tudor Ice Co.* v. *Cunningham*, 8 Allen, 139; *Farley* v. *Bryant*, 32 Maine, 485; 2 Hilliard, R. P. c. 61, § 18; *White* v. *Crawford*, 10 Mass. 183; *Kent* v. *Waite*, 10 Pick. 138; *Barnes* v. *Lloyd*, 112 Mass. 224; *Smiles* v. *Hastings*, 24 Barb. 44; *Dyer* v. *Sanford*, 9 Met. 395; *Arnold* v. *Stevens*, 24 Pick. 106; *Ballard* v. *Butler*, 30 Maine, 99; *Corning* v. *Gould*, 16 Wend. 531; 3 Kent's Com. 448; *Leggins* v. *Inge*, 20 Eng. C. L. 287; *Morris* v. *Robinson*, 10 Eng. C. L. 99; *Pope* v. *Devereux*, 5 Gray, 409; *Barst* v. *Empire*, 5 N. Y. 33.

Joseph Baker, for the defendant, contended that the right of way reserved by the deed was closed by the grantee in 1842 or 1843 permanently, and the right of action for damages for thus closing it ceased in six years thereafter — that another way could not be substituted by parol, none had been acquired by prescription, and if there was a way it was for a specific purpose — for the use of the barn — and ceased and terminated when the barn was destroyed in 1876, fifteen months before the defendant built the fence complained of.

Counsel cited: *Salisbury* v. *Andrews*, 19 Pick. 250; *Atkins* v. *Bordman*, 2 Met. 457; *Ballard* v. *Butler*, 30 Maine, 94; Wash. on Easements (*200–*204) 270–274; *Dyer* v. *Sanford*, 9 Met. 395; *Morse* v. *Copeland*, 2 Gray, 302; *Smith* v. *Lee*, 14 Gray, 473; *Blake* v. *Clark*, 6 Maine, 436; *Gayetty* v. *Bethune*, 14 Mass. 49; Wash. on Easements, 94, 253, 654–657; *French* v. *Marstin*, 4 Foster, 440; *Davenport* v. *Lamson*, 21 Pick. 72. The *obiter dictum* in *Smith* v. *Lee*, 14 Gray, 473, to the effect that a right of way may be changed by parol is not good law.

SYMONDS, J. The plaintiffs are owners of a lot of land with the buildings thereon in Waterville, and claim a right of way therefrom over the defendant's premises to the street. To recover damages of the defendant for obstructing this way by building a fence across it in November, 1877, this action is brought.

The two lots are adjacent and till October 30, 1841, were both owned by one person, Mary Dalton. On that date the lot now

occupied by the defendant was conveyed to him by Mary Dalton by deed containing this reservation: "reserving a pass way from the road aforesaid, over or by said lot to the barn standing on the adjoining lot, being said Mary's dwelling house lot."

This dwelling house lot was subsequently devised by Mary Dalton to Laura H. Nudd, in terms which were without doubt sufficient to give to the devisee the right of way reserved in the defendant's deed. By this reservation, in the deed of the lot over which the way passed, the right of way was established as appurtenant to the dominant estate and passed to the devisee thereof without express terms. *White* v. *Crawford*, 10 Mass. 187; *Barnes* v. *Lloyd*, 112 Mass. 232. It is a devise of a house and lot, not a conveyance by metes and bounds referred to in *Stevens* v. *Orr*, 69 Maine, 323. Compare, *Warren* v. *Blake*, 54 Maine, 286.

The plaintiffs claim under deeds from the heirs of Laura H. Nudd, which expressly convey whatever right of way the heirs had over the adjacent lot owned by the defendant.

We find from the evidence that at the time of the conveyance to Parker, in 1841, there were two ways in use; one, perhaps the more frequently used, just north of the Nudd house—now the plaintiffs'—in nearly a straight line from the barn to the street; the other, where the plaintiffs now claim, turning more directly toward the north and passing by the easterly side of the defendant's house to the street. When the defendant, after purchasing, began to repair his house and grade his grounds, in 1842 or 1843, he desired to close the way first named by building a wall across it and filling in the lot against the wall, so as to prevent access to either lot at that point. This was done with the assent of Mary Dalton, and from that time to the present the only way in use by the occupants of the Nudd house across the defendant's premises has been where the plaintiffs now claim. It was used by them without interruption from 1842 or 1843, till 1861, when the defendant undertook to obstruct it, but those under whom the plaintiffs hold asserted and enforced their claim to it and continued to use it as before, till about the time of the obstruction in November, 1877.

The cases of *Larned* v. *Larned*, 11 Met. 421; *Pope* v. *Devereux*, 5 Gray, 409; *Smith* v. *Lee*, 14 Cray, 480 and *Smith* v. *Barnes*, 101 Mass. 275, have been cited as sustaining the doctrine that an existing easement may be exchanged by parol for another easement of the same kind, and the owner thereby acquire the same property in the new one that he had in the former; even before the use alone would give a prescriptive right. According to these decisions, it is clear that the plaintiffs had acquired a permanent right in the way along the easterly side of the defendant's house, even if it were conceded not to be the way intended by the deed. If it is not the one mentioned in the deed, it is one which was substituted for it by an executed parol agreement of the parties, and had been used as such with but a single interruption from 1842 or 1843 till 1877.

These cases have been criticised as not in harmony in their full scope with principle or authority; as opposed to the general rule that individuals can acquire an easement only by grant or by prescription. 2 Wash. Real Prop. 340, note. *Lovell* v. *Smith*, 3 C. B. N. S. 120. The facts of the present case do not require a consideration of that question. The full force of those opinions is not needed to sustain the plaintiffs' claim. The deed to the defendant merely reserved a right of way for certain purposes across his lot, without fixing its location. It may be questioned whether the defendant himself would not have a right to determine the location and limits of the way, provided he made it suitable and convenient for the purposes stated. "Where a grantor of a messuage reserved 'a right to pass over the yard,' he had no right of action against his grantee for stopping the way then in use, the grantee having opened a new and convenient one, because the reservation was undefined in its terms." 2 Wash. Real Prop. 336, and cases.

Two ways were in actual use when the deed to the defendant was given. One was permanently closed by consent. The other was designated and used for a long period for the purposes for which the way had been in the first instance reserved. More than this, it appears by the plans and report that when the defendant built the fence in November, 1877, it closed the only

existing way, or means of passage, across the defendant's to the plaintiffs' land. To obstruct permanently the only remaining way over the lot, across which the right of passage had been reserved, was wrongful. If the defendant had a right to say where the travel should go, he had not a right to build a fence across the only path where passage was practicable.

It is claimed that as this was a reservation only of a way to the barn standing on the lot, and as the barn was removed in 1876 and not rebuilt in 1877, the plaintiffs' right was extinguished or suspended, and the obstruction was rightful. Our construction of the language of this clause is, that it contains a reservation of a right of way to the dwelling house lot, for such purposes as a way to the barn appurtenant to the dwelling house might properly be used, or was accustomed to be used. It is not merely a way to a barn, but to a barn standing upon a dwelling house lot; to a building which is itself an appurtenance of the dwelling house. The dwelling house is the principal thing, for the benefit of which the way is reserved, although it is limited to the specific uses to which a way to the barn attached to the house would properly be assigned. The way was a means of access to the lot for whatever purposes a passage way, appurtenant to a barn standing on the lot, would naturally and ordinarily be used. We think the right was not lost by the destruction of the building.

Judgment for plaintiffs. Damages assessed at $1.00.

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

GEORGE BOWEN and another *vs.* ARAVESTA H. PETERS and others.

Penobscot. Opinion December 7, 1880.

Shipping. Part owners' liability for materials and supplies. Managing owner; authority of.

Where necessary materials and supplies for a vessel are ordered by one who is the agent, for that purpose, of the part owner in possession and control, they will be considered as ordered by such part owner. It is the act of the part owner by his servant.

The part owner of a vessel in undisputed possession will be regarded as having implied authority to bind the other owners for things necessary for the vessel and its employment, unless the evidence discloses something to indicate that such implication of agency is contrary to the fact.

As to one who furnishes materials to make the vessel seaworthy, upon the order of a part owner in possession, the presumption of the authority of such part owner to bind all the owners for such goods remains, even if it be in the home port, unless there is something more than the single fact of the place of registry or enrollment, or of the owner's residence to remove it.

The ground of the liability of the owners under such circumstances is the possession and management of the vessel by one part owner without dissent by the others, and without anything to show that his conduct of the business was not, and was not understood to be, for all.

ON EXCEPTIONS.

The opinion states the case.

Barker, Vose & Barker, for the plaintiffs, cited: 16 Conn. 12; 36 N. Y. 26; 23 Maine, 461; 2 Paine, C. C. 202; 17 Maine, 147; 45 Maine, 590; Abbott on Ship. 4th Am. ed. 76, 69; *Putnam* v. *Wood*, 3 Mass. 485; 50 Maine, 447; 5 Selden, (9 N. Y.) 235; *Elder* v. *Larrabee*, 45 Maine, 590; 8 Wend. 144; 1 Parsons on Ship. 101.

Wilson & Woodward, for the defendants, Francis Gibbs and William Robinson.

The vessel was in a home port where the master could not bind the owners. *Jordan* v. *Young*, 37 Maine, 276. Charles Peters, the husband of the other owner, was not the ship's husband; two of the owners never knew of his acting or assuming to act in the affairs of the vessel.

1 Parsons on Ship. & Adm. 109, 111, 112; 3 Kent's Com. (12th ed.) 152. And Mrs. Peters, in making her husband her agent to transact the ship's affairs, made him the agent of the other owners without their knowledge or consent. This she could not do. If she had any authority herself she could not delegate it to another. Story on Agency, § § 13 and 14.

But a part owner has not a general authority to bind his co-owners and no authority to bind those who are not absent. 3 Kent's Com. 156, n. 1, on p. 155; *Brodie* v. *Howard*, 17 C. B. 109 (33 Eng. L. & Eq. 146); 1 Pars. on Ship. & Adm. 101.

Before a party can be holden for want of a dissent—because he has not objected, he must have an opportunity to dissent, to make objections. *Elder* v. *Larrabee*, 45 Maine, 590, seems to be decisive of this case upon this point.

SYMONDS, J. Assumpsit for the price of articles furnished to the schooner Globe, by the plaintiffs, ship chandlers in Bangor. The articles were necessary to make the schooner seaworthy; they were delivered on board and became a part of the vessel and outfit. They were ordered by the master and by Charles Peters, husband and agent of the first named defendant, a resident of New York, and the owner of thirteen-sixteenths of the schooner, who admits her liability by default. The defendant, Gibbs, a resident of Bangor, from which port the vessel hailed, was then the owner of two-sixteenths, and Robinson, the owner of the remaining sixteenth, resided in the town of Brewer, adjoining Bangor. The articles were charged to the vessel Globe, and owners, the plaintiffs not knowing who owned her, nor where she hailed from, nor how she was sailed. The question is not upon the quantity or price of the articles sued for, nor upon the necessity for them, but upon the liability of Gibbs and Robinson for repairs or materials which were in fact needed to make the schooner seaworthy.

The admission that Charles Peters, who with the master gave the order to the plaintiffs, was the agent of his wife in this respect is equivalent to an admission that the goods were ordered by her. It was the act of the principal by her agent, and the principal was then the owner of the larger interest in the schooner,

and in possession and control; neither of the other defendants assuming to interfere with the direction or management. The effect of the admission is, we think, that in this particular transaction the husband was the agent of the wife, and acted by her direction; not that he proceeded under a general authority to act for her in all matters pertaining to the management of the vessel. The case does not show an attempted delegation by one part owner of the power to bind another. It shows rather the act of the principal, the part owner, by her servant. A guardian, or an executor, cannot delegate his authority, but in many respects either may act by attorney. It is not necessary that everything done by them should be done personally. *Hutchins* v. *State Bank*, 12 Met. 427. In this case, if the husband was—as the case states—the agent of the wife for that purpose, and ordered the goods, then they were ordered by the wife through means which she employed.

The vessel was at the home port; where she was registered or enrolled, where one of the owners lived, and another was then represented by an agent; and the home of the third was near by. No difficulty of communication with the resident owners appears, nor necessity for immediate haste. The authority of the master, then, as such, did not extend to the ordering of these supplies on the credit of the owners. *Jordan* v. *Young*, 37 Maine, 276; *Dyer* v. *Snow*, 47 Maine, 254. Nor would the plaintiffs out of possession have any lien upon the schooner for materials so furnished, even if it was upon the order of persons having authority to bind all the owners;—except to the extent that such a lien is given by the statute. R. S., c. 91, § 7. *Read* v. *The Hull of a New Brig*, 1 Story, 244; *The General Smith*, 4 Wheat. 438; *Peyroux* v. *Howard*, 7 Peters, 324; *The Edith*, 4 Otto, 518.

But in the present instance the majority-owner and the master acted together; and no lien is claimed. The question, then, is, what authority had the owner of thirteen-sixteenths, or the master acting with her, to use the personal credit of the other owners to procure such repairs or outfit?

If one part owner, without authority from the others, repairs a vessel in a home port, he cannot recover of them any part of the money expended. *Benson* v. *Thompson*, 27 Maine, 470; *Hardy* v. *Sproule*, 31 Maine, 71.

When repairs are made in a home port, and the person making them by order of one owner knows who the other owners are, and, having the opportunity, neglects under certain circumstances stated to consult them, he must prove their assent to the repairing upon their credit in order to hold them. *Elder* v. *Larrabee*, 45 Maine, 590.

But in *Hardy* v. *Sproule*, *supra*, the court expressly reserves from decision the question whether recovery can be had, "where one part owner orders repairs or necessaries for the employment of the ship, on the credit of all, and they are furnished by third persons, without any dissent of a part owner made known to them, and an action is brought for the price by such third persons against all the owners."

In *Elder* v. *Larrabee*, *supra*, too, confining the decision to the facts of the case, that the non-assenting owner was known to the creditor at the time of the delivery of the articles charged, and that other matters affecting the relations between the owners and having a tendency to put the creditor upon his guard were then within his knowledge, the court adds, "whether the relation which subsisted between these parties, that of part owners, would enable a stranger to recover against the defendant (one owner) for repairs or necessaries for the use of the schooner ordered by Cushing (the other owner), on the ground of implied authority, we do not deem it necessary now to determine."

"It has been said that a part owner of a vessel is not liable to another for repairs made at a home port, without his consent. If made against his prohibition he would not be liable, but we should suppose his consent would be generally inferred, if the repairs were reasonable and proper and he made no objection. A considerable distinction exists in respect to all the powers of a part owner, a master, or a ship's husband, between the exercise of them abroad and in a home port. The reason is obvious. A ship far from its home might perish for want of aid which was

delayed until all the owners could be consulted. But if at home all who will have to pay have an unquestionable right to be consulted. It is not, however, quite certain whether the fact that a vessel is in the home port, which certainly limits these powers, goes so far as to destroy them. In other words, the question whether one part owner can bind another in a home port without specific authority may be regarded as still open." 1 Parson's Ship. and Adm. 101.

The cases cited indicate that our own decisions do not answer definitely the precise question proposed in this case; and the foregoing passage from Parsons, cited by the defendants, apparently leaves it neither beyond dispute nor free from doubt in all its phases on general authority.

We think it is true, as a general proposition, that a part owner of a vessel, in undisputed possession, will be regarded as having implied authority to bind the other owners for things necessary for the vessel and its employment, unless the evidence discloses something to indicate that such implication of agency is contrary to the fact. From the fact that a vessel, like any other chattel, is in the possession and management of one part owner, that the business in which the vessel is engaged is conducted by his authority, and that this state of things is acquiesced in by the other owners, a certain presumption arises that such possession of the common property, and conduct of the business pertaining to it, are in the interest and for the benefit of all; that the others assent to such use of their property, and expect to share the burdens and the gains. Under any state of facts which leaves this presumption in full force, the plaintiff is entitled to recover against all, for debts so incurred by the direct authority of one upon the credit of all. The authority of one, whose possession is acquiesced in, to act to this extent for all, is the proper inference from existing facts, unless in a particular instance something appears to limit or disprove it. As to one who furnishes materials to make the vessel seaworthy, upon the order of a part owner in such possession, even if it be in the home port, the presumption remains, unless there is something more than the single fact of the place of registry or enrollment,

or of the owner's residence to remove it; something to indicate that the controlling owner was not acting and managing the vessel for all, with their at least tacit assent, but on the contrary was proceeding independently of the others, in his own behalf, either in disregard of the rights of his associates and against their will, or by arrangement with them; so that his assumption of authority to bind them was wrongful. If the residence of the owners, not consulted, at the port of supply, was a fact not known to the creditor; but particularly if nothing was within his knowledge which tended to remove the *prima facie* presumption of authority and to put him upon inquiry; and more especially, still, if the case when presented shows at least by fair inference, that the possession and management of one had been acquiesced in by all without dissent,—all of which conditions are met by the present case,—then by the direction of the one so in possession, such necessary repairs and outfit may be charged to all, and recovery may be had against them. The goods charged were ordered by the authority of one who represented thirteen-sixteenths of the schooner, and was in undisputed possession. It is just to assume from the facts stated in the report, that such possession was not without the knowledge or against the will of the other defendants. We understand the statement in the report that "they have always protested against said bills and against the authority of any person to contract them upon their account or credit," relates only to the period subsequent to the contraction of the debts. Neither Gibbs nor Robinson assumed to manage the vessel. The presumption is not that they were entirely ignorant of what was done with their property, or indifferent to it, but on the contrary that they assented to it and expected to share in any profits derived from the business. For ships to be idle is a common loss. Public policy and private interest are alike promoted by their employment. It must be within the contemplation of all the owners that to use them will require repairs and renewal and replacement of furniture. Upon the facts disclosed in the report, we think the conclusion must be, that the two defendants last named took no part in the conduct of the business of the schooner, because they regarded the

management of the principal owner as their management, in the interest and for the profit or loss of all; and that the plaintiffs had a right to rely upon her authority to act for all to the extent of such needed furnishing. There is nothing to overcome the presumption arising from the circumstances and the relations of the parties, and the fact of agency within such limits is established.

"The part owners who employ a vessel are presumed to do so for the benefit and at the expense of all the owners who do not make known their dissent or disapprobation of the voyage. They may procure the necessary repairs, equipment and outfits for the vessel upon the credit of the owners." *Hall* v. *Thing*, 23 Maine, 463; *King* v. *Lowry*, 20 Barb. 532; *Stedman* v. *Feidler*, 25 Barb. 605; and 20 N. Y. 437. Compare, *Hardy* v. *Sproule*, 29 Maine, 258; *Robinson* v. *Stuart*, 68 Maine, 61.

In *Call* v. *Houdlette*, 70 Maine, 312, the plaintiff's part ownership was held to be *prima facie* evidence of his right to share in the earnings of the vessel, notwithstanding the recovery of a judgment therefor in the name of the other owner alone, just as here we hold it to be under the circumstances *prima facie* evidence of liability.

The case of *Brodie* v. *Howard*, 17 C. B. 109, cited *contra*, and similar cases, may be easily distinguished. In that case, the defendant in June, before the repairs were begun in August, had notified Lewis, the part owner by whose order the repairs were made, that he did not intend to sail her again, and Lewis had agreed to purchase his share, but the agreement was not carried into effect.

We regard the case of *Elder* v. *Larrabee*, *supra*, as exceptional, limited by a particular state of facts, rather than as indicating a general rule. Facts were there within the knowledge of the plaintiff, which tended to remove the presumption that the part owner who gave the order was authorized to act for the other. "The plaintiff knew that the schooner had been in the defendant's charge and under his sole control, as ship's husband, until within a few days of the time of making the repairs, that he had repaired her that spring, and sent her to sea." At that time the plaintiff and defendant each owned half of the

vessel; the plaintiff conveyed his interest to Cushing, who ordered the repairs soon after he had displaced the captain appointed by the defendant, without the latter's consent. It was the knowledge of these and other facts appearing in the case, tending to show that the owner in possession was not the agent of his associate in title, together with the knowledge of the place of the defendant's residence, which in the view of the court rendered it "the duty of the plaintiff under such circumstances, before attempting to charge the defendant, to ascertain whether he desired the repairs to be made, or at least to see that he had knowledge that they were to be made."

But we do not intend in this opinion to go at all beyond the facts and requirements of the present case. The ground of liability is the possession and management by the principal owner, without dissent by the others made known even to her and without anything to show that her conduct of the business was not, and was not understood to be, for all.

Exceptions overruled.

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

GEORGE BOWEN and another *vs.* DAVID WARREN and others.

Penobscot. Opinion December 7, 1880.

Shipping. Part owner; evidence of title.

Where a person, who is sued as part owner, admits that one-sixteenth of the vessel was enrolled in his name at the time the bill in suit was contracted, and had been for about twenty-five years, and that he has received some of the earnings; *Held*, that the evidence is sufficient *prima facie* that the title of one-sixteenth the vessel is in such person, though he claimed that the enrollment was without his authority and that he received the earnings in payment of a bill which he held against the vessel.

ON REPORT.

Assumpsit against the owners of schooner Hudson, for supplies and materials furnished to the vessel.

It appeared from the testimony of J. R. Grover, that he was master of the vessel, sailed her on shares, contracted the bill in suit in behalf of the owners, and by their authority, and that it did not belong to him while sailing the vessel on shares, to furnish any of the articles sued for, at his own expense.

Joseph Partridge, one of the defendants, testified in substance that he never had any bill of sale or instrument in writing, of any part of the schooner, never authorized any one to enroll any of her in his name, never exercised any acts of control or ownership over her, never gave any one authority to contract bills on her, had no interest in the vessel except that he helped repair her some twenty-five years or more ago and took the earnings for his pay—"what I got." At the time of making the repairs, his father told him that he had put his (defendant's) name into the papers for one-sixteenth of that vessel. No price was mentioned and he had never made any conveyance of that sixteenth. Never authorized any one as his agent to incur any liabilities on account of the schooner.

Barker, Vose, & Barker, for the plaintiffs, cited: U. S. R. S., § § 4131, 4141, 4142, 4319; 26 Maine, 428; 4 Pick. 300.

Charles P. Stetson, for Joseph Partridge, one of the defendants.

The master was sailing on shares and couldn't bind the owners for such supplies. *Urann* v. *Fletcher*, 1 Gray 125.

The vessel was in a home port and the articles were furnished without the knowledge or consent of this defendant. *Howard* v. *Odell*, 1 *Allen*, 85; *Blanchard* v. *Fearing*, 4 Allen, 118; 100 Mass. 511; *Elder* v. *Larrabee*, 45 Maine, 590.

SYMONDS, J. This is similar to the previous case of *Bowen* v. *Peters*, and the opinion in that disposes of one, and perhaps the principal, ground of defence.

We think the evidence is sufficient, *prima facie*, that the title to one-sixteenth of the schooner, at the date of the charges, was in Joseph Partridge, the only defendant who contests the claim; and that the articles charged were such as, under the agreement between master and owners about the manner of sailing the vessel, the owners were to furnish and the master was

accustomed to purchase on their credit. *Lyman* v. *Redman*, 23 Maine, 289; *Chadbourne* v. *Duncan*, 36 Maine, 89; *McLellan* v. *Reed*, 35 Maine, 172; *Swanton* v. *Reed*, 35 Maine, 176; *Bonzey* v. *Hodgkins*, 55 Maine, 98; *Wickersham* v. *Southard*, 67 Maine, 595.

The item for interest prior to the date of the writ cannot be allowed.

Judgment for plaintiffs for $164.17, and interest from date of the writ.

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

WILLIAM H. BAILEY *vs.* TRUSTEES OF METHODIST EPISCOPAL CHURCH OF FREEPORT.

Cumberland. Opinion December 3, 1880.

Trustees of Methodist Episcopal Church, authority of. Ultra vires. Corporation.

By the provisions of R. S., c. 12, § 19, "the trustees of the Methodist Episcopal church, are so far a corporation as to take, in succession, all grants and donations of real and personal estate, made to their churches or to them and their successors."

Such a corporation has no authority to create a debt for the erection of a meeting house.

Any contract made by such a corporation for materials which entered into the construction of a meeting house is *ultra vires* and cannot be enforced against it.

ON EXCEPTIONS from the superior court, Cumberland county.

The opinion states the case.

H. G. Sleeper, for the plaintiff.

The defendants are so far a "corporation as to take in succession all grants and donations of real and personal estate made to their churches or to them and their successors." R. S., c. 12, § 19.

In *Stebbins* v. *Jennings*, 10 Pick. 171, the court speak of a similar body who are authorized to take "grants and donations, real or personal," and say that these terms "seem comprehensive

enough to embrace any mode by which property can be acquired."

Upon the same principle these trustees, the defendants, can take, under any mode in which property may be acquired, a meeting house for the benefit of their church, and as incident thereto make contracts for the land, labor and materials.

The authorities cited by counsel on the powers and limitations of corporations are not in point.

Even if the contract sued was *ultra vires*, the defendants having received the benefit of it are liable to the extent of that benefit. *Franklin Co.* v. *Lewiston Savings Bank*, 68 Maine, 43; *The Episcopal Charitable Society* v. *The Episcopal Church in Dedham*, 1 Pick. 372.

John J. Perry, for the defendants, cited: *Winslow* v. *Kimball*, 18 Maine, 308; *Coffin* v. *Rich*, 45 Maine, 507; *Penobscot Boom Co.* v. *Lamson*, 16 Maine, 224; *Andrews* v. *Union M. F. Ins. Co.* 37 Maine, 256; *Plummer* v. *Penobscot Lumb'g Ass'n*, 67 Maine, 363; *Franklin Co.* v. *Lewiston Ins. for Savings*, 68 Maine, 43; *Penn. R. R. Co.* v. *Canal Comr's*, 21 Pa. 9; 9 Howard, 172; *Knowles* v. *Beatty*, 1 McLean, 41; *Beaty* v. *Knowler*, 4 Peters, 152; *Farnham* v. *B. C. Co.* 1 Sum. 46; *Bangor Boom Corp.* v. *Whiting*, 29 Maine, 123; *Berry* v. *Yates*, 24 Barb. 199; *Epis. Char. So.* v. *Epis. Church*, 1 Pick. 371; *Salem Mill Dam Corp.* v. *Ropes*, 6 Pick. 32; *Bank of Augusta* v. *Earles*, 13 Peters, 519; *T. R. R. Co.* v. *Kneeland*, 4 How. 16; *Stebbins* v. *Jennings*, 10 Pick. 171; *Silsby* v. *Barlow*, 16 Gray, 329; *Weld* v. *May*, 9 Cush. 181; *Pearce* v. *M. & I. R. R.* 21 Howard, 441; 1 Md. Ch. Decisions, 542.

VIRGIN, J. This bill of exceptions is exceedingly succinct, and no paper *dehors*, except the writ and pleadings, is made a part of the case.

Confining our attention to the case as it is made up and certified by the presiding justice (*Allen* v. *Lawrence*, 64 Maine, 175), the action is assumpsit on an account annexed for lumber furnished in April, May, June and July, 1875, for the construction of a meeting house for the Methodist Episcopal church of Freeport.

The judge of the superior court tried the case without the intervention of a jury, subject to exceptions in matters of law, and found: 1. That, during the months above mentioned, the persons named in the bill of exceptions were the duly constituted trustees of that church; 2. That they were then erecting a meeting house there for the use of that society, on a lot of land which had been granted to the trustees; 3. That the plaintiff, on the order of the trustees, furnished the lumber sued for which was used in the construction of the meeting house; and 4. That since that time, the meeting house has been occupied by the society as a place of worship and has been under the control of the trustees—the defendants.

Upon these facts thus conclusively established (*Mosher* v. *Jewett*, 63 Maine, 84), the presiding judge ruled: 1. That the trustees were a corporation for the purposes indicated in R. S., c. 12, § 19; and 2. That they had authority to erect a meeting house and contract the debt sued for. Thereupon he decided that the defendants did promise, and ordered judgment in behalf of the plaintiff for the value of the lumber remaining unpaid.

In their brief statement, the defendants distinctly set up the defence of *ultra vires*, and now contend that the second ruling is in direct conflict with that doctrine, and they cite numerous authorities which reiterate, in various modes of expression, the general principle, so frequently decided, that it has become elementary, that the powers of a corporation are limited to those expressly or impliedly conferred by its charter or the statutes under which it is instituted; and that every one dealing with a corporation is presumed to know the full extent of its powers.

On account of the rapid multiplication of corporations, their vast resources and the immense influence which they exert upon the business of the country, the subject of *ultra vires* has elicited much discussion in the courts throughout the country within the past few years. And while many courts have protestingly followed the strict construction of the general rule, others, so far as trading and business corporations generally are concerned, have very materially relaxed the strictness of the rule by the liberal interpretation given to charters and statutes creating

corporations and have thus allowed the classes of corporations mentioned, to enter into contracts, and engage in transactions which are simply auxiliary to its main business.

So a manufacturing corporation which had given, without authority, an accommodation note, was held estopped to set up the defence of *ultra vires* in an action by a *bona fide* indorsee; the reason assigned being that such a corporation had power to make negotiable notes for the transactions of its legitimate business, and that the indorsee could not be presumed to distinguish between the *intra vires* and the *ultra vires* notes. *Monumental Nat. Bank* v. *Globe Works*, 101 Mass. 57. But it would be otherwise provided the corporation was not authorized to give its notes for any purpose, for the reason that all persons dealing with a corporation, are bound to take notice of the extent of its chartered powers. The same principle is applicable to contracts not negotiable. *Mon. Nat. Bank* v. *Globe Works*, *supra; Bissell* v. *Mich. S. & N. Ind. R. Co.* 22 N. Y. 289, 290.

Moreover there is another class of cases where courts, to avoid the harshness of the general rule, have enforced recovery where money or other property has been received by corporations through executed contracts which were *ultra vires*, among which is *Morville* v. *Am. Tr. Soc.* 123 Mass. 129,137, and cases there cited. Also *Epis. Char. Soc.* v. *Epis. Church*, 1 Pick. 372.

But in cases where there is an entire want of power to make a particular contract under any circumstances, or for any purpose, as distinguished from those mentioned in next the last paragraph, all concur in declaring the doctrine of *ultra vires* a valid defense, even by regular business corporations. And such contracts cannot be made valid by ratification. *Thomas* v. *West Jersey R. R. Co.* 21 Alb. L. J. 409 (U. S. S. C.), and cases there cited. In *Eastern R. Co.* v. *Hawkes*, 5 H. L. Cas. 331, 373, Lord ST. LEONARD expressed himself as disposed "to restrain the doctrine of *ultra vires* to clear cases of excess of power, with the knowledge of the other party, express or implied from the nature of the corporation and of the contract entered into."

If this view be correct in relation to railroads, manufacturing and other corporations, *a fortiori*, should it be applied to simple

quasi corporations like the defendant, which is not a body corporate acting under a charter, or organized under a general statute, but a few officers of an unincorporated religious society, upon whom, *ex officiis*, the statute has conferred a single attribute of a corporation, that of succession, and in the language of Mr. Justice MILLER (in 13 Wall. 720), making "the trustees merely the title holders and custodians of the church property;" or in the language of the statute, constituting them "so far a corporation as to take, in succession, all grants and donations of real and personal estate made to their church or to them and their successors." R. S., c. 12, § 19. That such a *quasi* corporation, even, has the incidental power to sue and be sued in the protection and defense of the church property, notwithstanding the clause in the original statute conferring such power expressly was dropped out in the revision of the statute, there can be no doubt; (Greene's Brice's *Ultra Vires*, 6); but that such a corporation has any power, under any circumstances, to create a debt for the purpose of erecting a meeting house, we cannot believe was contemplated by the legislature. CH. J. SHAW speaking of a similar statute in Massachusetts must have entertained the same view when he said: "And although the deacons are vested by statute with limited corporate powers to take gifts and donations, and hold property in succession, for the benefit of the church, yet we are not aware of any authority they have to issue promissory notes, to bind their successors or the church, or to enter into executory contracts, negotiations, or speculations, although they may hope and expect that they will prove profitable to the church." *Jefts* v. *York*, 10 Cush. 394–5.

This view will further appear when the object of the statute is considered in what follows, much of which is in the language of the same learned jurist.

The statutes relating to this subject differ in the various states. In some a large majority of such societies are incorporated, while in others, as in this State, the societies themselves, (using church and society as synonymous), are incorporated bodies with certain officers, on whom is conferred by statute, a corporate succession, holding the legal title of the property. In the Methodist Episcopal Church such officers are called trustees.

The object of the statute is to prevent property belonging to the church, but held by the trustees, from descending, at the decease of the latter, to their heirs, and save the trouble and expense of causing new trustees to be appointed by the courts, and conveyances made to the new trustees. This the law effects by clothing the persons holding the office of trustees for the time being, though frequently changing by death, removal or otherwise, with the character of perpetuity and unbroken continuance, which is the peculiar attribute of a corporation. *Weld* v. *May*, 9 Cush. 186. And they take not only property given to the trustees in terms but as such may be given to their church in terms. R. S., c. 12, § 19. The statute does not declare what constitutes a church, who are its trustees, or how they shall be chosen and qualified to take and hold the estate in succession — these matters being left to the well known, established and recognized discipline and usage of the denomination. *Parker* v. *May*, 5 Cush. 346. In other words, the theory of the law is not that churches or other aggregate bodies, corporate or incorporate, select persons to be a corporation, but being chosen to offices recognized by law and usage, the law annexes, *propriore vigore*, the corporate capacity to the office. They hold *ex officiis* and not otherwise. No conveyance is necessary to transmit the property, when once vested, from the incumbent to his successor, whenever and however the change of trustees may occur, those going out ceasing to hold while those coming in becoming forthwith invested; so that in contemplation of law, the title always remains in the trustees for the time being. *Earle* v. *Wood*, 8 Cush. 451–2. *Parker* v. *May*, *supra*.

Such being the character of the defendant corporation, we entertain no doubt that the statute never contemplated that it should possess the power to create any debt for any such purpose, and we doubt very much if the plaintiff himself contemplated running up such a debt when he furnished the lumber and undertook to build the house. Being one of the trustees, he knew all the facts and circumstances, and should have been warned by the statute.

And the fact that the society has occupied the house cannot avail the plaintiff. *Ruby* v. *Abyssinian Soc.* 15 Maine, 306.

Morville v. *Am. Tr. Soc. supra*, and *Epis. Char. Soc.* v. *Epis. Church*, are entirely different in principle from the case at bar, among other things the defendants there being regularly chartered corporations.

Exceptions sustained.

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

DANIEL H. BRACKETT *vs.* GEORGE BREWER.

Cumberland. Opinion December 3, 1880.

Exceptions. Statute of frauds. Requested instructions. Practice.

The plaintiff and certain others advanced a sum of money to the defendant for the purpose of paying a mortgage on a certain meeting house, upon an alleged oral promise of the defendant to appropriate the money to that purpose and to cause the meeting house to be conveyed to the plaintiff and his associates, which latter promise the defendant refused to fulfill, alleging in defence that he was acting as agent of the Methodist Episcopal Society of the place and that the plaintiff knew it. In assumpsit by the plaintiff to recover the money advanced by him; *Held*, that an exception "to that part of the charge which connects the 'trustees of that church' with the case at bar," is too general, when eight of the eleven pages of the charge mentions the subject matter of the exception.

Also held, that the refusal to instruct the jury, that if the defendant at any time, had become a party to an agreement with the plaintiff and others, that the church property should be conveyed to the plaintiff in consideration of money paid to him by the plaintiff and others, and the defendant as trustee or otherwise, held the property under his control, the verdict should be for the plaintiff, if the defendant neglected to make such conveyance, affords no ground to the plaintiff for exception, especially when there is no evidence that he held the property under his control as trustee or otherwise.

An oral contract to execute and deliver a deed of real property is within the statute of frauds.

An exception to the refusal to give a requested instruction will not be sustained, when the request is not based on some specific evidence in the case.

ON EXCEPTIONS from superior court, Cumberland county.

The facts appear in the opinion.

At the trial the attorney for plaintiff requested the presiding judge to give the jury the following instructions:

"3. That if the defendant by fraudulent representations induced the plaintiff to sign papers, he is estopped from claiming any different construction of said papers from that represented to the plaintiff to induce him to sign the same.

"4. That if the plaintiff, relying upon representations made to him by the defendant, signed certain papers without reading the same at the request of the defendant, the defendant is afterwards estopped from claiming a different construction than that given the plaintiff at the time of signing the same.

"5. That a party who contracts to execute a deed is bound to prepare and deliver the deed, and a deed, to be effectual to pass the title, must be acknowledged and delivered.

"6. That if the defendant at any time had become a party to an agreement with the plaintiffs and others, that the church property in Freeport should be conveyed to the plaintiff and others in consideration of money paid to him by them, and said defendant as trustee, or otherwise, held said property under his control, if he refused to give a deed making such conveyance, then he is liable to the plaintiff, and the verdict should be for the plaintiff."

John J. Perry, for the plaintiff.

The agreement of the defendant to convey the property upon the reception of the money to discharge the Whitmore mortgage, and, after the money was furnished, his refusal to carry out the agreement and convey the estate though demanded, the jury must have found, and that made out a case for the plaintiff. *Richards* v. *Allen*, 17 Maine, 297; *Bassett* v. *Bassett*, 55 Maine, 127; *Calais* v. *Whidden*, 64 Maine, 249; *Cook* v. *Doggett*, 2 Allen, 439.

But the jury were misled by the erroneous rulings and refusals to rule. The presiding judge in his charge to jury gave defendant the benefit of a defense not in the case, either by the pleadings or testimony. He said all the way through the charge that the defendant was an agent of the trustees; and the instructions, in so far as they related to the trustees and the agency of the defendant, were erroneous. R. S., c. 12, § 19; *Yarmouth*

v. *No. Yarmouth*, 34 Maine, 411; *P. B. Corp* v. *Lamson*, 16 Maine, 224; *Andrews* v. *Ins Co.* 37 Maine, 256; *Plummer* v. *P. L. Ass'n*, 67 Maine, 363; *F. Company* v. *Lewiston I. Savings*, 68 Maine, 43; *P. C. Company* v. *C. Com's*, 21 Pa. 9; *Persine* v. *C. & D. C. Co.* 9 *How.* 172; *Knowles* v. *Beaty*, 1 McLean, 41; *Farnum* v. *B. C. Company*, 1 Sum. 46; *B. B. Corp* v. *Whiting*, 29 Maine, 123; *Berry* v. *Yates*, 24 Barb. 199; *S. M. D. Corp* v. *Ropes*, 6 Pick. 32; *Bank of Augusta* v. *Earles*, 13 Pet. 519; *T. R. R. Co.* v. *Kneeland*, 4 How. 16.

The court should have given the sixth requested instruction, it was of vital importance and material to the issue. The fifth request should have been given. *Tinney* v. *Ashley*, 15 Pick. 546. The fourth request should also have been given.

In the closing argument, counsel cited: *Patterson* v. *Snell*, 67 Maine, 559; *Parker* v. *Hill*, 8 Met. 447; *Hawkes* v. *Pike*, 105 Mass. 560; *Brown* v. *Brown*, 66 Maine, 316; *Stebbins* v. *Jennings*, 10 Pick. 171; *Weld* v. *May*, 9 Cush. 181.

H. G. Sleeper, for the defendant, cited: *State* v. *Reed*, 62 Maine, 129; *Macintosh* v. *Bartlett*, 67 Maine, 130; *Harriman* v. *Sanger*, 67 Maine, 442; *Boothby* v. *Woodman*, 66 Maine, 387; *Foye* v. *Southard*, 64 Maine, 389; *Ins. Co.* v. *Hodgkins*, 66 Maine, 109; *Sanderson* v. *Brown*, 57 Maine, 308; *Rumrill* v. *Adams*, 57 Maine, 565; *Kilpatrick* v. *Hall*, 67 Maine, 543.

VIRGIN, J. The case finds that in September, 1874, one Lapham conveyed to the defendant and one Senter, a parcel of land in Freeport, upon which the grantees, in the following spring and summer, erected, and so far finished, a meeting house that it was dedicated according to the rites and usages of the Methodist Episcopal Church, and has ever since been used and occupied by the Methodist Episcopal Church of Freeport, as their place of worship; that the purchase money for the land was of the funds contributed by different individuals towards the building of the meeting house; that in August, 1875, the grantees mortgaged the premises to one Whitmore to secure their note to him for $800, money loaned for the construction and completion of the house; and that, at the date of the deed from Lapham, no trustees of the church had been appointed.

The plaintiff introduced testimony tending to prove that he and seven other persons named advanced to the defendant money enough to discharge the Whitmore mortgage, in consideration of the express verbal promise of the defendant to appropriate it for that purpose, and cause the mortgaged premises to be conveyed to the plaintiff, his seven co-contributors, and E. P. Oxnard and W. H. Bailey, the last two of whom held claims for materials which entered into the construction of the meeting house; that the plaintiff advanced $100, and his associates the balance, of the sum necessary to discharge the mortgage; that the defendant paid and caused the mortgage to be discharged; and that the plaintiff before the commencement of this action, demanded of the defendant a fulfillment of his promise—to cause a conveyance of the premises to be made to the persons named—and that he refused.

To this action (brought for recovering back the sum advanced by the plaintiff to the defendant, upon the ground that the defendant refused to convey the premises to the plaintiff and others in accordance with his alleged agreement), the defendant, in addition to the general issue, pleaded by way of brief statement that he received the money as agent and for the use of the Methodist Episcopal Society of Freeport, and that the plaintiff knew it.

In support of these issues on the part of the defendant, there was evidence tending to show that the defendant never promised or agreed with the plaintiff to convey to the latter or to him and others the church property, as security for the money paid by them for raising the mortgage; that the defendant and Senter—no trustees then having been selected—took the conveyance of the land from Lapham in their own names, but in fact in trust for the church, which was well known by the plaintiff and other members of the society; that they mortgaged the same with the meeting house thereon to Whitmore by direction of the society; that the plaintiff was appointed by the society a committee to raise money by subscription for the purpose of paying off the mortgage; that the defendant was the active business man of the society, and never received the money from the plaintiff in any

other capacity than agent of the society, which the plaintiff well knew; that the defendant and Senter, in May, 1875, executed and acknowledged a deed of the meeting house property to George Brewer and three others, regularly appointed trustees of the Methodist Episcopal Church, which remained in the defendant's possession until November, 1877, when it went into a scrivener's hands to enable him to make another deed, and was finally recorded in January, 1879; that in the absence of the preacher, the defendant was the proper and authorized custodian of all the papers of the church and board of trustees; that on October 10, 1877, the plaintiff and ten others signed an obligation under seal, thereby agreeing to accept a conveyance of all the property of the church in full for their respective claims, provided the conveyance is made within thirty days, and not to commence any action against the property within the thirty days, but to sell the property for the payment of their claims, as shall be determined by the major part of the demands; that on November 10, 1877, the defendant and two others—then the duly constituted board of trustees of the church—signed a deed of the meeting house property to the persons mentioned in the obligation above named, to hold the same in proportion to their respective claims; that this deed bears the name of no witness or certificate of acknowledgment, and has always remained in the hands of the defendant's attorney, who wrote it, until it was brought to court and put into a case as evidence at the time this case was tried. The defendant also put into the case a power of attorney of the defendant and three others of the parties named in the two preceding papers, to the defendant, and another purporting to authorize the attorneys named to sell the meeting house property to such persons and for such price as they shall see fit and make deed, thereof. The power of attorney was not witnessed or acknowledged, or signed by any of eleven owners, except four, and bore no date.

Upon the issues raised by the pleadings, the jury returned a verdict for the defendant, which may have been based upon the evidence bearing upon the general issue or the allegation in the brief statement that the defendant received the plaintiff's money as the agent of the Methodist Episcopal Society.

But while the plaintiff has submitted no motion to set aside this verdict as being against the evidence, he does seek a new trial through his exceptions, the first of which, in the order of argument, is, "to that part of the charge which connects the trustees of the Methodist Episcopal church of Freeport, with the case at bar."

We might properly dismiss this exception on the authority of *Harriman* v. *Sanger*, 67 Maine, 442; for on eight of the eleven pages of the charge, the trustees are mentioned, and we might well say that such an exception is altogether too general. But if we understand the plaintiff's complaint in this connection it is, that, while the defendant claimed in his brief statement that he acted as the agent of the "society," the judge's charge proceeds throughout upon the theory that the defendant claimed to act as agent of the "church," or "trustees," and that the jury were thereby misled; and those early cases in Massachusetts, especially *Stebbins* v. *Jennings*, 10 Pick. 182, in which the laws and usages of the congregational churches, parishes and societies are so lucidly explained by C. J. SHAW, are invoked, showing among other things the distinction between a religious society and a church, etc. Our own statute (R. S., c. 12), in relation to parishes and religious societies, were derived from the Massachusetts stat. of 1751, 1785–6, and in similar cases the opinions cited would be high authority. But there is a marked difference between the congregational and methodist episcopal rights and usages. While the church in both denominations is the real party behind their corporation, the members of the corporation are not selected in the same manner. The Methodists do not necessarily have religious parishes or societies in connection with their churches, but distinct therefrom; but the statute furnishes them with a corporation to hold their property whenever the members of such corporation are appointed in accordance with their usages and customs, as it does every other protestant denomination including the Shakers. *Anderson* v. *Brock*, 3 Maine, 243.

There is no evidence in this case of the existence of any Methodist Episcopal "Society" of Freeport, distinct from the

church of that name; and it is perfectly evident that all the paper evidence in the case signed by the plaintiff as well as by the defendant, and the testimony of all the witnesses use the words "church" and "society" interchangeably.

2. The sixth request was properly declined. The language of the request will apply to a past consideration which will not support a contract; and there is no evidence that the defendant "as trustee or otherwise held the property under his control" when the demand for the deed was made, to sustain the request. Neither could the deed be lawfully delivered without the consent of a majority of the trustees who executed, and there is no evidence of their will in the matter. If the defendant had no authority to make the contract alleged, the only remedy against him for making it, is an action on the case. *Noyes* v. *Loring*, 55 Maine, 408, and cases there cited. *Bartlett* v. *Tucker*, 104 Mass. 336, and cases. Requests should be made applicable to the facts in evidence; and the plaintiff's counsel says, "the defendant never by pleadings or testimony or otherwise pretended that he was acting in the capacity of trustee." (Opening argument, p. 61.)

3. The first clause of the fifth request was not given in its terms, for it is not sound as a legal proposition. "A party who contracts to execute a deed is bound to prepare and deliver it" only when such contract is in writing as required by the statute of frauds. R. S. c. 111, § 1. The case in 15 Pick. 546, relied upon by the plaintiff, was where the party gave a bond to convey. But the judge did give the jury the substance of what the plaintiff had a right to ask when he charged, that if the defendant "gave his individual promise that he would secure the subscribers by a conveyance of the meeting house, and they relied upon it when they parted with their money, then upon failure to convey on demand, the plaintiff would be entitled to recover the amount of his subscription from the defendant."

4. The third request was given in relation to the alleged fraudulent representations of the defendant. This was all the plaintiff could rightfully ask; and the fourth was rightfully declined. It is not limited to any papers in the case, and if it were it cannot be sustained. Estoppel cannot be applied to such facts alone.

These are the only requests concerning which the plaintiff complains.

The paper evidence to which the plaintiff entered a general objection was the strongest evidence in favor of the plaintiff's theory, of the alleged agreement; and the plaintiff's attorney well says in his brief (p. 5,): "It corroborates the testimony of the plaintiff and his six other witnesses and flatly contradicts the defendant." We fail to see how he could be prejudiced by such evidence.

Upon a careful examination of this case, so far as the facts reported will allow, we think the plaintiff has no cause of complaint against the charge.

Exceptions overruled.

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

CHARLES JEWETT and another *vs.* CHARLES H. BROWN.

Kennebec. Opinion December 3, 1880.

Contract. Orders. Certificate. Agreement.

Where J. agreed with B. to take the orders of H. in payment of goods sold B., a certificate from H. of the amount due to B. from H. is not a compliance with the agreement, and constitutes no defence to an action brought by J. against B. to recover pay for the goods thus sold.

ON MOTION to set aside the verdict from the superior court, Kennebec county.

The opinion states the case.

E. Hammons, for the plaintiffs.

S. S. Brown, for the defendant.

APPLETON, C. J. This is an action of assumpsit on an account annexed for $139.90. The jury found a verdict for $4.70.

The defence is that the plaintiffs' agent agreed to take pay in the orders of one Hanson, acting as the agent of the Maine Slate Manufacturing Company.

The defendant procured an order on the plaintiffs for $112, the allowance of which is not contested.

The defendant claims that the amount of $21.20 has been paid. It appears that on December 22, the defendant settled with the Maine Slate Manufacturing Company, and took the following memorandum:

"Clinton, Me., Dec. 22, 1876.

Maine Slate Manufacturing Company, Dr.
H. L. Hanson, Agent.

Dr. as per day book, 132 page,	$140.56
Cr.	177.51
Balance due at this date,	$36.95
Cart to William Rowns,	13.00
	$23.95
	2.75
	$21.20

H. L. HANSON, *Agent.*

This paper, with the exception of the last two figures, the defendant handed to plaintiffs, who, as he says (but they deny it), wrote the figures "$2.75" and made the deduction—there being that amount due from the defendant to the Maine Slate Company, which had been omitted.

The plaintiffs declined taking this paper because they did not like its form, and the defendant took it to have it changed; but upon taking it to Hanson for that purpose, it was not done, Hanson being busy. The next day the Slate Company failed. The memorandum has remained in the defendant's hands to the time of trial. It was never assigned to the plaintiffs. It has never been under their control, so that they could have have brought a suit on it, had they so chosen. It is not an order drawn on them. It can in no way be deemed a payment if the defendant's account of the transaction be true. There is, then, on the defendant's showing, the amount of $21.21, due in addition to the verdict.

Motion sustained. New trial granted.

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

MAINE CENTRAL INSTITUTE *vs.* OREN S. HASKELL and another, Executors of Going Hathorn.

Somerset. Opinion December 6, 1880.

Actions against executors. Notice of claim and demand of payment. Declaration. Demurrer. Amendment.

In an action against executors the declaration should contain a proper averment that the claim was presented in writing to the defendants, executors, and payment demanded, thirty days or more before the action was commenced. An averment that notice of the claim was given in writing is not sufficient.

It is essential to the maintenance of an action against executors to aver and prove what the law (stat. 1872, c. 85,) requires, and the want of such averments constitutes substantial defects, and advantage may be taken of them by a general demurrer.

Such defects may be amended, but the presiding judge has no power to grant leave to amend after the filing of a demurrer and before joinder; after ruling, however, and before allowing exceptions he has the same power as the full court to allow the plaintiff to amend or the defendant to plead anew.

ON REPORT.

An action against the executors of the last will and testament of Going Hathorn, to recover the amount of a subscription made by the testator to the building fund of the Maine Central Institute. The only averment in the declaration of notice of the claim and demand of payment, is as follows:

"And the plaintiffs aver . . . . . that more than one year, and not exceeding two years, have elapsed since the appointment of said defendants as executors aforesaid, and that more than thirty days have elapsed since said plaintiffs gave notice in writing to said executors of the claim aforesaid, and that notice was so given in writing by said plaintiffs, to said defendants, on the fourth day of March, A. D. 1877, of the claim aforesaid."

The writ was dated April 30, 1877, and entered at the September term, 1877. At the March term, 1880, the defendants filed a general demurrer. After the demurrer was filed and before joinder the plaintiffs asked leave to make the following amendments:

(Amendments.)

"Supreme Judicial Court, Somerset county, March term, 1880. And now the plaintiffs move to amend the first and second counts in their writ by adding at the end of each, the words, 'and the plaintiffs aver that said claim was presented in writing to said defendants, executors as aforesaid, and payment thereof demanded, on the fourth day of March, A. D. 1879, which was more than thirty days before the commencement of said action, and that more than one year and less than two years have elapsed since notice of defendants' appointment as executors was given by them.'

By their attorneys, *Strout & Gage.*"

The remaining facts appear in the opinion.

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

The objections to the declaration are raised only by general demurrer.

All objections to the form of pleading must be by special demurrer. This demurrer being general, the defects, if any, to be considered, are only those of substance. Chitty on Pleadings, vol. 1, 9th Am. ed. 662; *Neal* v. *Hanson*, 60 Maine, 86.

It is well settled that a demurrer to a declaration containing several counts cannot be sustained, if any one of such counts is good. And if the third count in the writ, which is more full and specific than the others, is good, the sufficiency of the others is immaterial.

The allegations of notice, required by statute of 1872, c. 85, § 12, are, we think, sufficient. The time of the presentment of the claim, in writing, to the proper persons is stated, and that it was more than thirty days before the commencement of the action, and within two years after notice of defendants' appointment.

It is true it does not say, in so many words, that payment was demanded, but the words used are equivalent to that, its meaning is unmistakable, and the pleader here seems to have used the same language in calling it *notice* as that used by the court in speaking of the same subject matters in *Eaton* v. *Buswell*, 69 Maine, 552.

It clearly comes within the provisions of § 9 of c. 82, R. S., that no process shall abate, &c., for want of form only, when the case can be rightly understood.

Besides, here is a general demurrer only, and had the allegations been omitted altogether it would have been sufficient. Laws on Pleadings,* page 241.

But it is clear that when some allegations of notice are made, as here, it is no longer cause of general demurrer, but the objections must be assigned as cause for special demurrer. Laws on Pleadings,* pages 229 and 245; Chitty on Pleading,* pages 663 and 664; *Bowdell* v. *Parsons*, 10 East. 364.

We insist, therefore, that the third count is good, both in substance and form. It sets out the written promise of Hathorn, states the consideration therefor, that defendants, relying upon such promise, have expended large sums of money and been otherwise injured, and that plaintiffs gave the notice required by the statute to the defendants.

It appears that all the counts are based upon the same promise. Only one notice to the executors was required; at a trial, proof of one would be sufficient. The law favors brevity and conciseness in pleading, and to repeat such allegation of notice at the end of each count would make the pleadings unnecessarily long, and furnish no information not already furnished to the defendants, or additional aid to the court in rightly understanding the case. And we submit that, standing as it does at the close of the declaration in the writ, it may, with propriety, and should be, treated as a general allegation, applicable alike to each count. *Vide* Chitty on Pleading, page 726.

If the declaration is held insufficient, the plaintiffs should be allowed to amend the first and second counts, as prayed for. R. S., c. 82, § 9; *Simpson* v. *Norton*, 45 Maine, 284; *Rowell* v. *Small*, 30 Maine, 30; *Pullen* v. *Hutchinson*, 25 Maine, 252; R. S., c. 82, § 19; *Fryeburg* v. *Brownfield*, 68 Maine, 147.

D. D. Stewart, for the defendants, cited: Stat. 1872, c. 85, § 12; *Eaton* v. *Buswell*, *Adm.* 69 Maine, 552; *Cottage Street Church* v. *Kendall*, 121 Mass. 529; *Mirick* v. *French*, 2 Gray, 423; *Farmington Academy* v. *Allen*, 14 Mass. 172; *Trustees*

Bridgewater Academy v. *Gilbert*, 2 Pick. 579; *Foxcroft Academy* v. *Favor*, 4 Greenl. 382; R. S., c. 82, § 19; *Wakefield* v. *Littlefield*, 52 Maine, 22; *Crocker* v. *Craig*, 46 Maine, 327; *Hathorn* v. *Towle*, 46 Maine, 302; *Fryeburg* v. *Brownfield*, 68 Maine, 147.

SYMONDS, J. We think there is no defect in the manner of setting forth the consideration for the promises alleged in the declaration, such as to render either of the counts bad upon general demurrer. There is the averment in each of a good and sufficient, or a valuable consideration, in general terms; while in the second and third, the allegations of the expenditure of money upon the faith of the promises are such as to show a consideration for them, at least to the extent of the testator's proportion of the expense incurred. There is no defect in the substance of the pleading on the matter of consideration.

But the three counts are all defective for want of a proper averment that the claim was presented in writing to the defendants, executors, and payment demanded, thirty days or more before action brought, as required by the laws of 1872, c. 85. In the first two counts there is no averment about it; in the third, one that is substantially defective and insufficient. The statute requires that the claim be presented in writing. The declaration avers only that notice of the claim was given in writing. Written notice of a claim is not necessarily the same in substance as a presentment of the claim in writing. The one might be equivalent to the other, or might not; depending upon the terms of the notice. But the fault in the count is that it avers neither a presentation of the claim in writing nor what, upon reasonable construction, is necessarily equivalent. Nor does the count allege demand of payment.

It is essential to the maintenance of the action against the executors to aver and prove what the law of 1872 requires. The defects are substantial and advantage may be taken of them by a general demurrer.

The right of the plaintiffs to amend, and the terms, are defined by the statute. R. S., c. 82, § 19. The presiding judge had no power to grant leave to amend before joinder in demurrer;

but after ruling and before allowing exceptions he had "the same power as the full court to allow the plaintiff to amend or the defendant to plead anew." Under another clause the right of the defendant to plead anew is limited to cases where the demurrer to the declaration is filed at the first term. In the present instance, the *pro forma* ruling having been against the demurrer, there was no occasion then for the plaintiff to amend. If the case were before us simply upon exceptions to that ruling, and the exceptions were sustained and the declaration adjudged defective, it would then be for the judge at *Nisi Prius*, after the case was remanded, upon proper motion, to rule in the first instance whether the declaration was amendable or not;—that question not being before this court upon a mere exception to the overruling, or to the sustaining, of the demurrer. In such case, if the declaration was amendable, "the plaintiff may [might] amend upon payment of costs from the time when the demurrer was filed."

But here the parties have stipulated that the law court shall "determine whether the amendment asked by the plaintiff can be allowed if the declaration is held insufficient, and if so, upon what terms."

We think the declaration is amendable in the respect indicated, the amendment is a proper one, and in such case the statute gives the plaintiffs the right to amend on payment of costs from the time of filing the demurrer.

Declaration defective. Amendment allowed on terms.

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

NIVAN MEHAN *vs.* NATHANIEL L. THOMPSON and a ship's frame.

York. Opinion December 11, 1880.

Shipping. Lien on vessels for materials. Contracts, — construction of. Waiver of lien. Negotiable paper — the effect of its acceptance on a debt. Payment.

In order to sustain a lien for material under R. S., c. 91, § 7, the only requirement is that it shall be furnished for a vessel to be built in this State, and that such was the contract. The lien attaches to the material thus furnished though it has never become a part of the vessel.

Though the law imposes the lien for material furnished to build a ship, it can do so only when it appears that the contract was made with reference to the law.

In order to ascertain whether a given contract was made with reference to any particular law, the fundamental principle is, to ascertain whether the contract was made at a place within the jurisdiction of that law, though the place of performance is one of the facts which affects, more or less, and sometimes decisively, the proper interpretation.

The giving of credit for materials furnished for a ship is not a waiver of the lien. Though if the time of credit was so extended that it would probably go beyond the time for enforcing the lien, that fact might be evidence tending to show a waiver.

The acceptance of negotiable paper for a debt, and giving a receipt in discharge thereof, are an extinguishment of the original liability, unless the parties did not so intend. Whenever it appears that the creditor had other and better security than such negotiable paper, for the payment of his debt, it will not be presumed that he intended to abandon such security and rely upon such paper.

Where by the terms of a contract, payment under it was to commence at a certain time named; *Held*, that the amount was to be paid on demand, after the time named.

ON REPORT, the law court to render such judgment as the law and evidence require.

The facts appear in the opinion.

A. P. Gould, for the plaintiff, cited: *Ward* v. *Shaw*, 7 Wend. 404; *Houdlette* v. *Tallman*, 14 Maine, 400; Benjamin on Sales, § § 319–325, 703, 140; *Morrison* v. *Dingley*, 63 Maine, 553; 2 Pars. Contr. 95, and authorities cited; R. S., c. 91, § 7; *Page et al.* v. *Hubbard et al.* Sprague's Decisions, 335; *McCabe* v. *McRea*, 58 Maine, 95; *Melledge* v. *Boston Iron Co.* 5 Cush. 158; *Kidder* v. *Knox*, 48 Maine, 551; *Dey* v. *Anderson*, 39 N. J. Law, 199; *Fuller* v. *Nickerson*, 69 Maine,

236; *Deering* v. *Lord*, 45 Maine, 293; *Taggard* v. *Buckmore*, 42 Maine, 77; *The Brig Nestor*, 1 Sumner, 73; *The John Walls, Jr.*, 1 Sprague, 178; *The Ship Antartic*, 1 Sprague, 206.

R. P. Tapley, for Ocean National Bank, attaching creditors, who were allowed to come in and defend.

If the plaintiff has any claim to the property in controversy, it owes its existence purely and solely to the statute, c. 91, § 7, R. S. This statutory lien takes effect immediately on furnishing the material. There is no interregnum between the furnishing the material and the subsistence of the lien. The statute has no force beyond the jurisdiction of the power making it. The lien is an incident of a contract and cannot vest without it. *Fuller* v. *Nickerson*, 69 Maine, 236.

By the contract between Mahan and Thompson, the delivery of the timber was to be in Virginia, and there it was delivered. This then was a contract to be executed in Virginia. By the *terms of the contract* nothing was to be done at any other place. The terms of the written contract cannot be varied by parol evidence, nor changed by usage.

The counsel for plaintiff contends that it is immaterial where the contract was made if it was for materials for the building of a vessel *in this State*, and is not limited to instances where they are furnished or delivered to the builder in this State. If there is any force in this assumption, it will be noticed that there is no evidence in this case that the materials were furnished for the building of a vessel *in this State*.

By the contract the sale was upon credit. The delivery was in April, and the payment was to commence in November. The defendant could have taken the timber to any port in or out of the United States, outside of this State, and given a good title to it. The extended credit was a waiver of the lien, if there had been any. Counsel cited: Benj. on Sales, § 796; *Tyler* v. *Currier*, 13 Gray, 134; Story Contr. § 654; 2 Pars. Contr. § 5; Story Prom. Notes, § 165, note to § 161; 13 Mass. 23; *Andrews* v. *Pond*, 13 Pet. 65; *Dyer* v. *Hunt*, 5 N. H. 401; 2 Met. 397-8; *Scudder* v. *Balkam*, 40 Maine, 291; *A. S. R.*

Boom Co. v. *Sanborn*, 36 Mich. 358; *Prentiss* v. *Garland*, 67 Maine, 345.

In April, 1878, the plaintiff received from the defendant on "account of oak timber" a negotiable draft for $2000.

It is now pretty well settled in this State, that the giving of negotiable paper is *prima facie* evidence of the payment of the debt *pro tanto*, and in *Coburn* v. *Kerswell*, 35 Maine, 126, it was held to defeat a lien.

DANFORTH, J. This is an action to enforce an alleged lien upon the property attached, by virtue of the provision in R. S., c. 91, § 7, as follows: "Any person who furnishes labor or materials for building a vessel, shall have a lien on it therefor. . . . He shall also have a lien on the materials furnished before they become a part of the vessel, which may be enforced by attachment."

The contract, under which the timber sued for, was furnished, is as follows: "I agree to take two ships' frames from N. Mehan, to be delivered in April, 1877; Ship No. 1, 1450 to 1600 tons; No. 2, from 900 to 1000 tons; time to commence for payment, November 1, 1877. Mould stern, keel and stern post. Price, thirteen dollars, on the banks in reach of ship's tackles." This contract is in writing and signed by the defendant; it was accepted by the plaintiff, and no objection is made that it was not fully complied with and performed on his part.

The first and important question is, whether the contract is such as to give the plaintiff a lien on the timber furnished under it by the provision of the statute.

The timber for each vessel was distinct and separate from the other, and furnished specifically for a particular vessel. All the timber attached in this case, was furnished for one of the vessels, though it has never become a part of the vessel, for it has never been built or even commenced. The vessel was to have been built in this State, and the timber, when attached, was found in the yard, where it had been placed for use. This would seem very clearly to bring the sale within the terms of the statute, as it does within its jurisdiction. The only requirement is that the material shall be furnished for a vessel. This of course means

that such shall be the contract, and when so furnished, the law attaches the lien. It must, too, be for a vessel within the State, for, as said in the argument, the statute can have no force beyond the State line.

It is however contended that by the principles of law applicable to the construction of contracts, the one in question cannot embrace the lien claimed. Though the lien is imposed by law, it is undoubtedly true that it can do so only when the law becomes a part of, or an element in the contract; or in other words, when it appears that the contract was made with reference to the law. This was so held in *Fuller* v. *Nickerson*, 69 Maine, 236; *Rogers* v. *Currier*, 13 Gray, 129; *Tyler* v. *Currier*, *Id.* 134; and *Reed* v. *The Hull of a new Brig*, 1 Story, 250.

We must therefore ascertain from the contract itself, aided by such of the reported evidence in the case as is admissible, whether it was legally within the contemplation of the parties, that this contract should embrace the lien claimed.

It does not in terms refer to a lien. It is not necessary that it should do so. As we have already seen, it comes within the terms of the statute, and if made in reference to it, that would be sufficient. In order to ascertain whether a given contract was made with reference to any particular law, the fundamental principle is to ascertain whether the contract was made at a place within the jurisdiction of that law. This contract it is conceded, was not only made between citizens of this State, but was actually executed within its limits. It is clear, then, that it must be interpreted in accordance with the laws of this State, unless it is brought within some established exception to this rule.

It is claimed in this case that it does come within such an exception, that although it was made between citizens of and within the State, it was to be executed in another, and must therefore be interpreted by the laws of that place where it was to be performed. In the absence of other controlling circumstances, it would undoubtedly be the presumption, that the parties intended to be controlled by the law of the place where the contract was to be performed, so far as it related to that performance. But we are to keep in view the intention of the parties,

so far as it can be ascertained, by the application of legal principles to the language used, the nature and purpose of the contract, as well as the circumstances surrounding the parties when it is made. The place of performance is one of the facts which affects more or less, and sometimes indeed decisively, the proper interpretation.

In *Thompson* v. *Ketcham*, 8 Johns. 146, KENT, C. J., says: "The *lex loci* is to govern, unless the parties had in view a different place, *by the terms of the contract*." In his Commentaries, 2 vol. 459, he says: "But if a contract be made under one government, and is to be performed under another, and the parties *had in view* the laws of such other country in reference to the execution of the contract, the general rule is, that the contract, in respect to its construction and force, is to be governed by the law of the country or state in which it is to be executed."

In *Fanning* v. *Consequa*, 17 Johns. 518, the rule is laid down in these words: "The general rule is, that contracts are to be interpreted according to the laws of the country where they are made. But if by *the terms or nature* of the contract, it appears that it was to be executed in a foreign country, or that the parties *had respect to the laws* of another country, then the place of making the contract becomes immaterial, and the obligation must be tested by the laws of the country where the duty was to be performed." In *Robinson* v. *Bland*, 2 Burr. 1078, Lord MANSFIELD, says: "The law of the place can never be the rule, where the transaction is entered into with *an express view to the law of another country*, as the rule by which it is to be governed."

In *Scudder* v. *Union National Bank*, 1 Otto, 412–13, the law is thus stated: "Matters bearing upon the execution, the interpretation, and the validity of contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance."

Story in his work on the Conflict of Laws, § 272, says: "The general rule, then, is, that in the interpretation of contracts, the law and custom of the place of the contract are to govern in all cases where the language is not *directly expressive* of the actual

intention of the parties, but it is to be tacitly inferred from the nature, and objects, and occasion of the contract. . . . Especially in interpreting ambiguous contracts, ought the domicil of the parties, the place of execution, the various provisions and expressions of the instrument, and other circumstances, implying a local reference, to be taken into consideration."

The law as applicable to the case at bar, is to be found in these citations, and is well expressed by SHAW, C. J., in the opinion in *Carnegie et al.* v. *Morrison et al.* 2 Met. 398. Referring to a contract made in Massachusetts, he says: "Then the rule *prima facie*, is that the construction and legal effect of this transaction, are to be determined by the law of Massachusetts. That is the law which must be regarded in the first instance, in deciding whether the act done, constituted a contract, and if so, between whom, and to what effect, and must prevail unless the case falls within some exception to the general rule; and the question is, whether it does."

So in this case, it is conceded that the contract was made between citizens of and within the State of Maine. It must therefore be governed by the laws of Maine, "unless it falls within some exception to the general rule; and the question is, whether it does."

It is contended that this does come within an exception; that the timber was to be, and actually was delivered in Virginia, and that therefore, that was the place where the contract was to be performed, and hence we must look to the laws of that State for its construction.

But the delivery was only one of the elements which make up the contract, and one in regard to which no question arises in this case. The only question involved is, whether that element which results from the statute giving the lien, is included in the contract. This must depend upon the interpretation of it, which in *Scudder* v. *Union National Bank*, is held to be by the law of the place where made. The case of *Carnegie* v. *Morrison*, *supra*, is perhaps more to the point. There the contract was made in Massachusetts, by which certain acts were to be done in England. The court held that the law of Massachusetts was to govern;

saying on page 400: "The undertaking, it is true, was to do certain acts in England, to wit, to accept and pay the plaintiffs bills; but the obligation to do those acts was created here, by force of the law of this State, giving force and effect to the undertaking of the defendant's agent, and making it a contract binding on them."

So in *Tyler* v. *Currier*, 13 Gray, 124, relied upon by the defendant, the same result is reached at least by implication. There the contract was made as well as to be executed out of the State, and the court placed their decision upon that fact, holding that under such circumstances the plaintiff had no lien because there was no agreement to that effect, but add that "this would not be necessary, if the contract had been *made* in this commonwealth; because the law would then create the lien, and cause it to attach, as an incident to the contract,"—and by the last clause in the opinion, it would seem to have been sufficient to have caused the lien to attach, if there had been a stipulation or agreement that the timber should have been applied to the construction of the vessel.

In this case, not only was the contract made in this State, but considering the terms of the contract, and the circumstances surrounding the parties at the time, there can be no doubt that both parties intended and understood that the timber was to be applied in the construction of a particular vessel in this State.

But what is very significant if not decisive in this case, is the fact that the payment was by force of the contract, to be made in this State. True, no place of payment is alluded to in the contract. It therefore by well settled principles of law, is payable where it is made. Story Conflict of Laws, § 272, a. All the circumstances of the case show clearly that such was the intention of the parties. The lien, though an element of the contract, is made so for the purpose of securing and enforcing the payment, and in this respect it was not only made, but was to be performed in this State, and thus entitled to the benefit of the laws of this State.

Thus the nature, object and purposes of the contract, as well as the place where it was made, all lead to the conclusion that

the parties to it, had in contemplation the laws of no place except those of their own State, and that they did contract in reference to such laws. Even the delivery, such as it was, does not militate against this position. The contract in terms, does not provide for a delivery in a foreign jurisdiction. It fixes a price to be paid "on the banks in reach of ship's tackle," and the evidence shows that the banks contemplated by the parties were in Virginia, and the timber was actually taken in that State. From that time, it may be assumed that the timber was in the possession, and at the risk of the purchaser. But it by no means follows that the purchaser's duty to the vendor, under the contract had then ceased. Such would not be a fair construction of the contract. If the parties had so intended, we should expect a delivery in terms would have been provided for. But instead of that, the price is fixed at that place and the same evidence that shows an actual delivery shows no survey until it arrives at the yard where it was to be used. Besides, from the terms of the contract showing that the timber was for a vessel, and the evidence showing that that vessel was to be built in this State, we must come to the conclusion that when the timber was so delivered, it was in the contemplation of both parties that it was to be brought into this State, and here used. It is possible that after the delivery, the purchaser might have given a good title to a subsequent vendor for a good consideration and without notice, but it can hardly be doubted that such a sale before it came to Maine and was properly surveyed, would be a breach of good faith, if not of the contract. Certainly such a delivery, if not proof that the parties were acting under the laws of Maine, can be no evidence whatever that they were acting in reference to other laws, so as to make this contract an exception to the general rule, requiring its construction in accordance with the laws of the place where made.

It is however, claimed that the credit given was a waiver of any lien which otherwise might have existed.

But the statute makes no such exception. In its terms it covers sales on credit, as well as those where no credit is given. The lien is to secure the debt due for the timber and it is no less

a debt where credit is given, than where it is not. Nor is the credit inconsistent with a lien upon property in the timber, or with the rights of other parties. It is precisely the same in effect in the one case as the other, and either way is in accordance with the ordinary mode of dealing where a vendor takes security for his debt.

It is undoubtedly true that a party having a lien or who might have one, may waive it by express terms, or by implication. Here it is not done by express terms, nor by any act inconsistent with his claim to it. It is true that a person may give so extended a credit, that it might probably go beyond the time for enforcing it. In such case, it might be evidence tending to show a waiver, but it could be no more. Such however is not this case. Here the credit would in all probability expire before the lien is lost by lapse of time.

It is also true that a party having a lien, may lose it by giving a credit, so long that the time for enforcing it shall expire before the credit does. The only means of enforcing a lien, is by an attachment, which must be made within a limited time, and in an action for the recovery of the debt. If the debt does not become payable within the time allowed to enforce the lien, the action cannot be maintained, and the attachment must necessarily fail. Such was the case of *Scudder* v. *Balkam*, 40 Maine, 291, relied upon by the defendant. That case was decided, not upon the ground that credit had been given, but because the debt was not payable, and the action could not be maintained for the purpose of enforcing the lien where it could not be for the recovery of the debt. But such is not this case. Here is a debt payable and the time for enforcing the lien has not elapsed. In the case of *Prentiss* v. *Garland*, 67 Maine, 345, there was an extension of the time of payment, a credit given, but the lien was not discharged. True, there was an agreement that it should not be, but if the credit is inconsistent with a statute lien, an agreement that it should not be discharged could not save it. These cases and others show that a waiver or a discharge of a statute lien, rests upon contract until it becomes discharged by lapse of time. A credit within the limitation of law, can therefore

affect it only as it may be used as evidence of a discharge or waiver.

Another question raised is that of the effect of a draft of $2000, sent by defendant to plaintiff. On the part of defendant, it is claimed that it was a payment *pro tanto* and lessens the lien claim to that extent.

It may now be considered as well settled law in this State, that negotiable paper given for a simple contract debt, is *prima facie* to be deemed a payment or satisfaction of such debt. "This presumption may be rebutted and controlled by evidence that such was not the intention of the parties." "The acceptance of negotiable paper for a debt, and giving a receipt in discharge thereof, are an extinguishment of the original liability, unless the parties did not so intend." *Crosby* v. *Redman*, 70 Maine, 56. Such seems to be the law of this State, sustained by a series of decisions. *Milliken* v. *Whitehouse*, 49 Maine, 527; *Wilkins* v. *Reed*, 6 *Id.* 220; *Coburn* v. *Kerswell*, 35 *Id.* 126; *Perrin* v. *Keene*, 19 *Id.* 355; *Paine* v. *Dwinel*, 53 *Id.* 52; *Ward* v. *Bourne*, 56 Maine, 161.

In the most of the cases where this principle has been applied, the original claim was not secured, and to such, upon well established principles of law, it would seem to be correct. In its application to lien claims, it would seem to be more doubtful, for although the simple contract debt becomes merged in the higher security and discharged, there is still an outstanding debt, which is really unpaid. Hence in many of the States, it is not in such cases, deemed to be a discharge of the lien, but leaving that in full force; on the same ground that a mortgage is not discharged merely by a change in the form of the indebtedness secured by it. But perhaps it is too late to overrule the decisions in our State, and in this case we find no occasion for it. If in the case of a lien the presumption is not overcome, it is certainly very much weakened. In Massachusetts, whose decisions in such cases we have followed, it was said in *Curtis* v. *Hubbard*, 9 Met. 328: "The rule adopted in Massachusetts that a negotiable promissory note, given for a simple contract debt, shall be deemed a payment, is to be taken with considerable qualification. . . . . This is a presumption of fact, which may be rebutted by evidence show-

ing that it was not so intended; and the fact that such a presumption *would deprive the party who takes the note of a substantial benefit, has a strong tendency to show that it was not so intended.*"

In *Butts* v. *Dean*, 2 Met. 76, where a bond was given, conditioned to secure a balance of account, and a promissory note was taken, and a receipt given for the balance of account, it was held not to be a discharge. *Thurston* v. *Blanchard*, 22 Pick. 18.

In *Kidder* v. *Knox*, 48 Maine, 555, we find the following quotation as sound law: "Whenever it appears that the creditor had other and better security than such note for the payment of his debt, it will not be presumed that he intended to abandon such security and rely upon his note."

From the cases cited, it is evident that if the note is taken as collateral, or for any purpose other than as a substitution for the original debt, the presumption of payment or discharge does not attach. If it was so taken when the debt is secured, the presumption is very much weakened if not destroyed. *Parkhurst* v. *Cummings*, 56 Maine, 155.

In this case the evidence is hardly satisfactory that the draft was taken for any part of the debt. It was not asked for as such, or even at all. The demand was for money. The draft was sent instead with the remark: "I trust you can get it discounted." The attempt to get it discounted did not succeed, and it never was used. We find nothing tending to show very strongly that the defendant intended it as a substitution for the debt, or that the plaintiff received it as such. Besides, no receipt was given and nothing whatever to show any application of this or the two subsequent drafts given in exchange. All the drafts have been given up, and the only conclusion to which we can come, is that the original debt is in full force.

The amount claimed in the writ without interest, is $4550. This amount appears to be sustained by the evidence. The provision in the contract as to the time of payment is that it was to commence November 1, 1877. This would not seem to indicate that the whole or any particular part was to be paid at that time. Hence the only construction we can put upon the

contract in relation to this point, is that the amount was to be paid on demand after the time named. No demand is alleged in the declaration, and though money was asked for, no specific demand appears to be proved. The plaintiff is therefore entitled to recover interest from the date of the writ.

Judgment for the plaintiff for the sum of $4550 and interest from date of writ and against the property attached for same amount.

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

F. W. BERRY, Executor, *vs.* ANDREW J. STEVENS and others.

Waldo. Opinion December 13, 1880.

Practice. Verdict. Party. Witness.

Though a verdict has been rendered in favor of a defendant, he still remains a party to the suit until the entry of a judgment on the verdict.

In assumpsit the court will not allow a verdict to be rendered for one defendant, to enable him to testify in favor of his co-defendants, the plaintiff objecting thereto.

ON MOTION to set aside the verdict.

The case is stated in the opinion.

Joseph Williamson, for the plaintiff, cited: *Stephenson* v. *Thayer*, 63 Maine, 143; *Wait* v. *Maxwell*, 5 Pick. 220; *Belmont* v. *Morrill*, 69 Maine, 314; *Davis* v. *Mason*, 4 Pick. 158; *Boyden* v. *Moore*, 5 Mass. 365; 1 Phil. Ev. 61; *Brown* v. *Howard*, 14 Johns. 119; *White* v. *Hill*, 6 Ad. & El. N. S. 487; *Wright* v. *Paulin*, 1 R. & Moody, 396; 1 Greenl. Ev. § 358; *Gilmore* v. *Bowden*, 12 Maine, 412; *Wing* v. *Andrews*, 59 Maine, 505; *Hunter* v. *Lowell*, 64 Maine, 572; *Gallup* v. *Gallup*, 11 Met. 445.

W. H. McLellan, for the defendants.

The case comes before the court upon a motion, only. There are no exceptions to any ruling of the judge at the trial. The

presiding judge directed a verdict in favor of one of the defendants. No exceptions were taken to that ruling. That defendant was then permitted to testify, no exceptions were taken to that ruling. The only question is, did the jury err? There was evidence that the note was settled and paid to the deceased, and the jury rightly came to that conclusion.

APPLETON, C. J. This action is brought by the plaintiff as the executor of the last will and testament of Phebe C. Berry on a promissory note signed by the defendants, and dated June 12, 1868, on which are several indorsements.

The writ was sued out August 22, 1876. The general issue was pleaded with a brief statement that the note was barred by the statute of limitations.

To avoid the statute, the plaintiff called a witness by whom he proved the payment of fifty dollars by John Stevens, the surety, on September 5, 1870, which was indorsed on the note.

At this stage of the trial, there being no evidence to show a valid promise by Andrew J. Stevens within six years prior to the date of the writ, the defendant moved that a verdict be rendered in his favor, which was done against the objections of the plaintiff's counsel.

The cause then proceeded to trial, and Andrew J. Stevens being called as a witness, the plaintiff objecting, testified that the payment of fifty dollars on September 5, 1870, was made by him, and not by his father, John Stevens, who was a surety on the note. The jury found a verdict in favor of John Stevens. Thus, if the verdict be allowed to stand, both will be discharged, though one is unquestionably liable.

There is no doubt the plaintiff may at any time discontinue as to a defendant, who, being thus discharged, is a competent witness.

This case is one relating to defendants in an action by the plaintiff as an executor. The plaintiff was not a witness and the defendants are not within any of the exceptions to the rule prescribed by R. S., c. 82, § 87, excluding defendants as witnesses when the plaintiff is an executor or administrator.

The cause was being tried. The trial had just commenced. The presiding judge erred in ordering a verdict in favor of one of the defendants that he might be a witness for his co-defendants. The defendants were not to be tried *seriatim*. "I know no law," observes GIBBS, C. J., in *Emmet* v. *Butler*, 7 Taunton, 599, "which requires a judge to stop in the middle of a cause, to consider separately, the case of certain defendants, that they may be made witnesses for the other defendants." As was remarked by DALLAS, J., in the same case, "there is no authority for splitting a case in this manner." To the same effect is the decision in *Schermerhorn* v. *Schermerhorn*, 1 Wend. 119.

It is true, that in torts a separate verdict is sometimes directed to be taken in favor of a defendant, who has been improperly joined, and against whom there has been no evidence whatever. This is done on the ground that such joinder was through the artifice or fraud of the plaintiff. But the doing of this is a matter of discretion. It does not apply in cases of assumpsit.

The defendant, Andrew J. Stevens, is still a party to the record. There has been no entry of judgment. Until judgment he is party to the record and as such is within R. S., c. 82, § 87, and not admissible as a witness. A verdict is no evidence until final judgment, for until that is entered, it may be arrested or a new trial granted.

Motion sustained. Verdict set aside.
New trial granted.

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

OCTAVE BERNIER *vs.* CABOT MANUFACTURING COMPANY.

Androscoggin. Opinion December 17, 1880.

Statute of frauds.

An oral contract wherein a laborer agrees that he will not leave the service of his employer for two years, nor in the summer, nor without two weeks' notice, is within the statute of frauds.

It is a clear rule of law that an oral contract within the statute of frauds can no more be made the ground of defence than demand. The obligation of the plaintiff to perform it is no more available to the defendant in the one case, than the obligation of the defendant to perform it would be to the plaintiff in the other.

ON EXCEPTIONS.

The case is stated in the opinion.

The report shows that the defendants in this action had been summoned as trustees in two other actions against the plaintiff.

Mitchell & Atwood, for the plaintiff, cited: 2 Pars. Contr. 519; 65 Maine, 302; 31 Maine, 555; 11 Met. 412; 1 Gray, 131; 19 Pick. 364; 3 Pars. Contr. 36, 17; 1 Pars. Contr. 455; 29 Conn. 515; 2 Kent's Com. 467; 6 Cush. 512; 2 Wharton Ev. § § 907, 912; 58 Maine, 218; 16 Conn. 250; 9 Allen, 14; 5 Gray, 41.

Weston Thompson, for the defendants.

Plaintiff can not recover on an implied contract, because an express one was made. *Marshall* v. *Jones*, 11 Maine, 54; *Charles* v. *Dana*, 14 Maine, 383; *Whiting* v. *Sullivan*, 7 Mass. 107; *Wheelock* v. *Freeman*, 13 Pick. 165; *Jennings* v. *Camp*. 13 Johns. 96; *Merrill* v. *Frame*, 4 Taunt. 329; *Allen* v. *Ford*, 19 Pick. 217.

He can not recover on the express contract, because he has broken it without excuse. *Marshall* v. *Jones*.

He relies on the statute of frauds. Rev. Stat. c. 111, § 1, spec. 5.

The case is not within the *letter* of that law. Statute declares no contract void. "No action shall be maintained." We are not seeking to maintain an action on the contract. *Galvin* v. *Prentice*,

45 N. Y. 162; *Marshall* v. *Jones; Philbrook* v. *Belknap*, 6 Verm. 383; *Foote* v. *Emerson*, 10 Verm. 338.

Money paid on parol contract for purchase of land cannot be recovered back, unless vendor refuses to perform. Contract is not void, though not actionable. It would not maintain a suit; it may defeat one. *King* v. *Brown*, 2 Hill, 487; *Dowdle* v. *Camp*, 12 Johns. 451; *Collier* v. *Coates*, 17 Barb. 471; *Burlingame* v. *Burlingame*, 7 Cow. 92; Browne on Frauds, 122, and cases there cited; *McCampbell* v. *Campbell*, 5 Litt. 92; *Lockwood* v. *Barnes*, 3 Hill, 128; *Abbott* v. *Draper*, 4 Denio, 51; *Erben* v. *Lorillard*, 19 N. Y. 302, 304; *Coughlin* v. *Knowles*, 7 Met. 57.

Neither is this case within the "spirit" of the statute. Purpose of the act is sometimes more regarded than its form. A man makes an unwritten promise "to answer to the debt, etc., of another," holding funds of that "other," sufficient and liable for his indemnity. Whether it be called an original or a collateral promise, if the original debtor continues liable, it is strictly within the letter of the act; yet it is binding and *actionable*. Liability to loss which occasioned the statute, does not exist. Brown on Frauds, 187, and cases there cited; and see *Pratt* v. *Humphry*, 22 Conn. 317; *Stebbins* v. *Smith*, 4 Pick. 97.

Lest courts should place unmerited confidence in parol testimony and be deceived, the statute was made.

In this case there is no danger of being so deceived; for parties agree that the contract was made. Plaintiff can not say the court may be deceived to his prejudice by relying on his own voluntary, deliberate and sworn admission in the case. *Cessante ratione legis cessat, et ipsa lex.*

Statute does not forbid the contract or make it illegal; and if it be established there can be no objection to its enforcement.

Statute "prescribes a rule of evidence," of which the party avails himself or not, at his election. *Bird* v. *Munroe*, and cases there cited; Browne on Frauds, 115; *Witherell* v. *Me. Ins. Co.* 49 Maine, 200; *Stuart* v. *Lake*, 33 Maine, 87; *Montgomery* v. *Edwards*, 46 Vt. 151; *Harris* v. *Morse*, 49 Maine, 432.

If the party who relies on the statute, introduces parol testimony himself to prove the contract and that his own testimony, does he not waive the benefit of the rule of evidence which would have excluded such testimony? Counsel further cited: Browne on Frauds, 273, 274, 279, 281, 286; 7 Met. 46; 97 Mass. 208; 11 Met. 411; 11 Gray, 168; 10 Johns. 244; 46 Vt. 151; 62 N. Y. 560; 15 Maine, 201; 66 Maine, 337; 19 Pick. 364.

SYMONDS, J. Assumpsit to recover the wages of the plaintiff and his minor children. That services were rendered by them for the defendants, which, at stipulated rates, amount to the sum found due by the jury is not denied. But the defence is put upon the ground that these services were rendered under a special contract, by which the plaintiff for himself and his children agreed not to leave the defendants' employ for two years, nor in the summer, nor without two weeks' notice; and that the amount claimed in this action was forfeited by breach of the contract on the part of the plaintiff, the defendants not being in fault and sustaining damage thereby at least to the extent of the balance due for wages earned.

This was an entire contract, to work for the period of two years and, besides, not to leave at any time in the summer nor without notice; not that during the two years the plaintiff might leave, except in summer, upon giving the required notice. For a single consideration, express or implied, the payment of wages at agreed rates, the plaintiff contracted for himself and his children to render the two years' service, and that, if he left after that, it should not be in summer, nor without notice unless by consent. This is the contract, as we understand it from the statement of the case. It was oral and was within the statute of frauds. It could not in any contingency have been fully performed within one year. The death of the plaintiff within the year, or some casualty, might have excused performance, but could not have fulfilled the contract. "If the agreement cannot be completely performed within a year, the fact that it may be terminated, or further performance excused or rendered impossible, by the death of the promisee or of another person within a year, is not

sufficient to take it out of the statute. It was therefore held in *Hill* v. *Hooper*, 1 Gray, 131, that an agreement to employ a boy for five years and to pay his father certain sums at stated periods during that time was within the statute; for although by the death of the boy the services which were the consideration of the promise would cease and the promise thereby be determined, it would certainly not be completely performed. So if the death of the promisor within the year will merely prevent the full performance of the agreement, it is within the statute; but if his death would leave the agreement completely performed and its purpose fully carried out, it is not." *Doyle* v. *Dixon*, 97 Mass. 212.

It is clear that, under this rule, no action could have been maintained on the verbal contract set up in defence. If it be said that the agreement not to leave in summer, nor without notice, applied to the period of two years, as well as to later time, so that to leave during the two years, in summer and without notice, would be a breach of all three stipulations, the same conclusion follows, not only because the contract is entire, but also because each of the several promises made by the plaintiff for one consideration covers a period of more than a year. No one of them could be completely performed within one year. The agreed statement finds the limitation of two years as a part of the contract, and it cannot be ignored on either branch of it.

The report shows the contract to have been, first, that they would not leave the defendants' service within two years; second, that they would not leave said service in the summer time; third, that they would not leave said service without giving previous notice of two weeks of their intention so to do.

The first stipulation cannot be disregarded in construing the second and third.

The agreement not to leave in summer, nor without notice, must relate to the whole period of two years, or it must be referred altogether to the period succeeding the expiration of the two years. An agreement not to leave in summer, nor without notice, for two years, is as much within the statute, as an agreement not to leave the defendants' employment at all during the same time.

The clear rule of law is that an oral contract, within the statute of frauds, "cannot be made the ground of a defence, any more than of a demand; the obligation of the plaintiff to perform it is no more available to the defendant in the former case, than the obligation of the defendant to perform it would be to the plaintiff in the latter case." Browne on Frauds, § 131.

The present case does not fall within any of the exceptions to the rule.

Exceptions overruled. Judgment to await the termination of the trustee suits.

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

JOHN STINSON and another

vs.

ALBERT CASWELL and ARA CUSHMAN & COMPANY, Trustees.

Androscoggin. Opinion December 17, 1880.

Trustee Process. Computing wages by coupons. Assignment of wages.

The only way in which C. & Co. computed the amount due for work done by the piece, in their shoe factory, was by the coupons presented at their office, which, their custom was, to credit and pay to those who presented them. C., an operative in their factory, delivered his coupons to S. by whom they were presented to C. & Co. who credited S. for their amount; *Held*, in an action wherein C. & Co. were summoned as the trustees of C. where the writ was served upon the alleged trustees after they had thus credited to S. on their books the amount of the coupons as presented by him, that the trustees must be discharged.

Also held, that this was a transaction to which — when in good faith — the statute requiring record of assignments of wages does not apply.

ON EXCEPTIONS. On trustee disclosure.

(Disclosure of the alleged trustees.)

. . . That the said principal defendant, Albert Caswell, prior to the service of the plaintiffs' writ, as aforesaid, was employed in the manufactory of the said alleged trustees, on what is called "piece work," that the only way the said alleged trustees compute the labor done by men who "work by the

piece" in said manufactory is by the coupons presented at the office of said alleged trustees, each coupon being so marked as to represent a certain piece of work, and the said alleged trustees have annexed hereto a copy of one of said coupons, marked "Exhibit A." That in making up the pay roll, each coupon so presented is credited to the person presenting it, and payment is made to him accordingly, the pay day following. That each month's pay roll is made up as soon as may be, after the second Saturday of each month as aforesaid. That in paying for the labor performed by men in said manufactory, by the piece, the custom of the said alleged trustees has been and now is to recognize the persons presenting labor coupons as aforesaid, as the legal owners of the same, and entitled to demand and receive the payment for the labor represented by said coupons, and to pay them the same accordingly. That the said principal defendant at the time of the service of the plaintiffs' writ upon the said alleged trustees, to wit: on the nineteenth day of January, A. D. one thousand eight hundred and eighty, had not presented any coupons representing the previous month's work at the office and counting room of the said alleged trustees, and there was nothing to the credit of the said principal defendant, on the books of account and pay roll of the said alleged trustees. That previous to the service of the said plaintiffs' writ upon the said alleged trustees, as aforesaid, to wit: on the fifteenth day of January aforesaid, certain coupons amounting to fifty-one dollars and fifteen cents were presented at the counting room of the said alleged trustees by one Benjamin F. Sturgis as his own, and the same were then and there credited to the said Sturgis, and paid to him accordingly on the pay day next following. That at the time said Sturgis presented said coupons he informed the clerk of the said alleged trustees that the same were once the coupons of the said principal defendant, but that the same were then the property of the said Sturgis. That said credit was given to the said Sturgis, and payment of the same was made, in good faith, in the usual course of business. . .

Upon the foregoing disclosure the presiding judge discharged the trustees; to this ruling the plaintiffs excepted.

J. W. Mitchell, for plaintiffs.

The coupons were not negotiable instruments and could only be transferred by assignment. At the most their transfer would be only an assignment of wages and therefore should have been in writing and recorded. Stat. 1876, c. 93.

George C. Wing and *Charles E. Wing*, for the alleged trustees, cited: 2 Chitty Cont. (11 Am. ed.) 1108, 1373, n. *F; Maxwell* v. *Haynes*, 41 Maine, 559; Bouvier Law Dictionary, "Novation."

SYMONDS, J. The transaction which the disclosure details was something more than an assignment of wages.

The only way in which the alleged trustees were accustomed to compute the amount due for work done by the piece in their factory was by the coupons presented at their office, and their custom was to credit and pay the amount of the coupons to those who presented them. The defendant may be presumed to have known the usual course of the business in which he was employed, the general business methods of the firm for which he worked. Under these circumstances, he delivers the coupons to Sturgis, who presents them to the trustees and before service of the writ obtains credit on their books on his own account, for the amount of them. No credit for the coupons was ever given to the defendant. He could not have expected it. It would have been contrary to the usage of the firm for him to receive credit for coupons presented by another. The understanding of the defendant, the trustees and the claimant must have been that, in consideration of the release by the defendant of his claim for pay from the trustees for the work designated in the coupons, they were to pay the claimant the amount of the debt discharged by the defendant; and this understanding had been so far carried into effect prior to service that the trustees had assumed, unconditionally, the new liability to pay Sturgis that amount, crediting it to him upon their books to be paid at the next monthly pay day. The result of the disclosure is to show that, before the writ was served, by mutual consent the debt due from the trustees to the principal defendant had been discharged and Sturgis had become the creditor of the firm for the same amount. This was a

transaction to which — when in good faith — the statute requiring record of assignments of wages does not apply. The trustees owed the defendant nothing when the writ was served.

In some cases in Massachusetts, under a similar statute, accepted orders, when unrecorded, have been held to be ineffective against the trustee process. *Knowlton* v. *Cooley*, 102 Mass. 233; *Masard* v. *Daley*, 114 Mass. 408.

But that was upon the ground that the acceptances created a liability only to pay the balance remaining after satisfying the claim of the attaching creditor. Here the trustees were liable in full to Sturgis. Compare *O'Brien* v. *Collins*, and *Wart* v. *Mann*, 124 Mass. 98, 586.

Exceptions overruled.

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

ZECHARIAH CHAFEE, in equity, *vs.* THE FOURTH NATIONAL BANK of NEW YORK and another.

Kennebec. Opinion December 20, 1880.

Assignment for the benefit of creditors, made in another State, binding upon assenting creditors. Effect upon property in this State. Non-resident creditors. Corporations, residence of. Equity jurisdiction.

A general assignment for the benefit of creditors made in another State, is valid here so far as to protect the assigned real estate here situated from attachment by a non-resident creditor, who has assented to the assignment, and received in part, the benefits thereby secured to him.

The statutes of this State do not apply to foreign assignments, but leave them to be governed by those principles of comity which have heretofore been recognized as existing in this State, and ought to prevail in all the states.

The recognized rule in this State is to uphold foreign assignments, except as against our own citizens; and this discrimination is not unconstitutional.

It is a general rule that those who assent to an assignment for the benefit of creditors cannot repudiate it. Knowingly receiving payments or dividends thereby secured to them is conclusive evidence of assent.

An exception to the general rule, is where an assignment is declared void by the law of the place where it is made. If declared absolutely void, no ratification or assent of the creditors can make it valid; but if it is only void at the election of such creditors as choose to avoid it, it will be sustained as to such creditors who assent to it or afterwards ratify it.

When a creditor, to whom the law secures the right to avoid an assignment (not void absolutely,) made by his insolvent debtor, assents to the assignment, or knowingly avails himself of the benefits thereby secured to him, he waives his right to treat the assignment as void.

A corporation can have but one legal residence, and that must be within the State or sovereignty creating it, although, by comity, it may be allowed to do business in other jurisdictions through its agents.

A court of equity has jurisdiction to remove a cloud from title to real estate. There is a still stronger reason for taking jurisdiction to prevent a cloud from being placed upon the title. Thus a court of equity will enjoin a non-resident creditor, who has assented to an assignment for the benefit of creditors, made in another State, from levying upon the assigned real estate situated in this State.

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

The facts sufficiently appear in the opinion.

William L. Putman, for the complainant, in an elaborate argument, cited: *Abbott* v. *Goodwin*, 20 Maine, 409; *Adams* v. *Wheeler*, 10 Pick. 199; *Adlum* v. *Yard*, 1 Rawle, 163; *Alsopp's Case*, 1 De Gex F. & J. 289; American Leading

Cases, 74 (4th ed.); Angell and Ames on Corporations, § 191; *Atwood* v. *Protection Insurance Co.* 14 Conn. 436; Bacon's Abr. Tit. Election, E.; *Badlam* v. *Tucker*, 1 Pick. 397; *Baldwin* v. *Bean*, 59 Maine, 482; *Bank* v. *Deming*, 17 Vt. 366; *Bank* v. *Eagle Sugar Refinery*, 109 Mass. 38; *Bank* v. *Hagar*, 65 Maine, 361; *Baxter* v. *Wheeler*, 9 Pick. 21; *Bentley* v. *Whittemore*, 19 N. J. Eq. 462; *Berry* v. *Cutts*, 42 Maine, 448; *Bisbee* v. *Ham*, 47 Maine, 543; *Bodley* v. *Goodrich*, 7 How. 276; *Brett* v. *Carter*, 2 Lowell, 459; *Briggs* v. *French*, 1 Sum. 504; *Briggs* v. *Parkman*, 2 Met. 265; *Bridget* v. *Hames*, 1 Collyer, 72; *Brinley* v. *Spring*, 7 Maine, 241; *Brooks* v. *Marbury*, 7 Wheaton, 556; Bump on Fraudulent Conveyances, 483; Burrill on Assignments, § 337; *Canal Bank* v. *Cox*, 6 Maine, 402; *Carey* v. *Brown*, 2 Otto, 171; *Clay* v. *Smith*, 3 Peters, 411; *Clouston* v. *Shearer*, 99 Mass. 211; *Choate* v. *Williams*, 7 Exchequer, 205; *Commissioners* v. *Thayer*, 4 Otto, 644; *Copeland* v. *Weld*, 8 Green. 413; *Curtis* v. *Leavitt*, 15 N. Y. 131; *Cutter* v. *Copeland*, 18 Maine, 127; *Cuyler* v. *McCartney*, 40 N. Y. 237; *DeRuyter* v. *St. Beter's Church*, 3 N. Y. 238; *Dimmock* v. *Bixby*, 20 Pick. 374; *Dockray* v. *Dockray*, 2 R. I. 547; *Doe* v. *Scribner*, 41 Maine, 280; *Dundas* v. *Bowler*, 3 *McLean*, 401; *Dunham* v. *Waterman*, 17 N. Y. 17; *Dunham* v. *Whitehead*, 21 N. Y. 133; *Erskine* v. *Decker*, 39 Maine, 468; *Felch* v. *Bugbee*, 48 Maine, 18; *Fiske* v. *Carr*, 20 Maine, 301; *Foster* v. *Saco Manufacturing Co.* 12 Pick. 451; *Fox* v. *Adams*, 5 Maine, 253; *French* v. *Holmes*, 67 Maine, 186; *French* v. *Motley*, 63 Maine, 328; *Gerry* v. *Stimson*, 60 Maine, 189; *Griffin* v. *Marquardt*, 17 N. Y. 28; *Halsey* v. *Whitney*, 4 Mason, 231; *Hanford* v. *Paine*, 32 Vt. 453; *Hapgood* v. *Fisher*, 34 Maine, 407; *Hartshorn* v. *Eames*, 31 Maine, 98; *Harrison* v. *Rowan*, 4 Wash. C. C. 202; *Hanselt* v. *Vilmar*, 19 Alb. L. J. 296; *Hays* v. *Heidelberg*, 9 Barr. 203; Hill on Trustees, *543, *544, note; *Hoffman* v. *Mackall*, 5 Ohio St. 124; *Howe* v. *Henriquez*, 13 Wend. 240; *Hunt* v. *Columbian Insurance Co.* 55 Maine, 297; *Ingraham* v. *Geyer*, 13 Mass. 146; *James* v. *Whitbread*, 73 E. C. L. 417; *Jaycox* v. *Green*, 8 Nat. Bank. Reg. 252; *Johnson* v. *Rogers*, 15 Nat. Bank. Reg. 5; *Jones* v. *Huggeford*, 3 Met. 517;

Kendall v. *New England Carpet Co.*, 13 Conn. 390; 4 Kent's Commentaries, *160; *Kimberly* v. *Ely*, 6 Pick. 440; *Livermore* v. *Jenks*, 21 How. 126; *Martin* v. *Graves*, 5 Allen, 602; *May* v. *Wannemacher*, 111 Mass. 208; *McClelland* v. *Remsen*, 3 Keyes (N. Y.) 455; *Mitchell* v. *Winslow*, 2 Story, 644; *Nichols* v. *Patten*, 18 Maine, 238; *Nightingale* v. *Harris*, 6 R. I. 321; *Ockerman* v. *Cross*, 54 N. Y. 29; *Osborn* v. *Adams*, 18 Pick. 245; *Owen* v. *Body*, 31 E. C. L. 254; *Peirsoll* v. *Elliott*, 6 Peters, 95; *Pennock* v. *Coe*, 23 How. 117; *Pike* v. *Bacon*, 21 Maine, 286; *Rapalle* v. *Stewart*, 27 N. Y. 313; *Read* v. *Baylies*, 18 Pick. 497; *Reed* v. *Woodman*, 4 Maine, 400; *Reed* v. *Jewett*, 5 Maine, 96; *Richmondville Manufacturing Co.* v. *Pratt*, 9 Conn. 487; *Ridgeway* v. *Stewart*, 4 Watts & S. 383; *Sanderson* v. *Bradford*, 10 N. H. 260; *Schuyler's Case*, 3 Benedict, 202; *Shreve* v. *Fenno*, 49 Maine, 78; *Simmons* v. *Curtis*, 41 Maine, 379; 1 Smith's Leading Cases, *47; *South Boston Iron Co.* v. *Boston Locomotive Works*, 51 Maine, 589; *Spencer* v. *Jackson*, 2 R. I. 547; *Spencer* v. *Slater*, 42 B. D. 13; *Stone* v. *Bartlett*, 46 Maine, 442; Story's Conflict of Laws, § 424; Story's Equity Jurisprudence, § 694–700; *Stray's Case*, 2 Chanc. (L. R.) 374; *Sumner* v. *Hicks*, 2 Black. 532; *Therason* v. *Hickok*, 37 Vt. 459; *Todd* v. *Bucknam*, 11 Maine, 41; *Treadwell* v. *Salisbury Manufacturing Co.* 7 Gray, 400; *Ulmer* v. *Hills*, 8 Maine, 326; *Union Pacific R. R. Case*, 10 Nat. Bank. Reg. 181; *Varnum* v. *Camp*, 28 N. J. Law, 328; *Vose* v. *Holcomb*, 31 Maine, 407; Wharton's Conflict of Laws, § 392; *Wheeler* v. *Evans*, 26 Maine, 133; *Wheelden* v. *Wilson*, 44 Maine, 19; *Whitney* v. *Kelley*, 67 Maine, 377; *Wiley* v. *Collins*, 2 Fairf. 195; *Zipcey* v. *Thompson*, 1 Gray 243.

Baker & Baker, also for the complainant.

James D. Fessenden, for respondents.

1. Both deeds as to real estate in this State are absolutely void. Both deeds are assignments in trust for the benefit of creditors. Bump on Fraudulent Conveyances, 321–3; Burrill on Assignments, c. 1 and c. 8, § § 148–9; *Harkrader & Crane* v. *Leiby*, 4 Ohio State, 603; *Briggs* v. *Davis*, 21 N. Y. 576;

Dunham v. *Whitehead*, 21 N. Y. 131; *Woodruff* v. *Babb*, 19 Ohio, 216; *Mussey* v. *Noyes*, 26 Vt. 472.

The distinction between deeds of this description and deeds of trust in the nature of a mortgage consists mainly in the creation of a trust for the benefit of third parties, and in the power of absolute disposal of the property for the purposes of the trust. These attributes are contained in the deed of November, 1873, as well as in that of April 6, 1874.

This first mentioned deed, it will be observed, is not a deed poll like the deeds in common use throughout New England, but is an indenture in two parts, containing a covenant to stand seized to a use on the part of the grantee, and the power to make an immediate disposition of all the property for the purpose of paying the debts of the grantors. It does not simply create a lien upon the property for the payment of money, but is an absolute conveyance enabling the trustee to close up at once the business of the corporation, and pay its debts from the proceeds. The provisions to this end are clear and unequivocal, and are not defeated by the provision that the property shall revert upon payment of all the assignor's indebtedness.

II. The provision that the assignment shall be void if the debts are paid is not inconsistent with this interpretation of the deed. It is equivalent to saying that the property shall revert if the purposes of the trust are satisfied, instead of leaving a resulting trust in favor of the grantor. *Todd* v. *Bucknam*, 11 Maine, 41; *Wilkes* v. *Ferris*, 5 Johnson, 355; *Hall* v. *Denison*, 17 Vt. 510; *Porter's Case*, 54 Penn. 465; *Briggs* v. *Davis*, 21 N. Y. 576; *Halsey* v. *Whitney*, 4 Mason, 222.

III. Assignment in trust for creditors cannot transfer real estate in another State. Burrill on Assignments, 406; Story on Conflict of Laws, third edition, pp. 517, 525, 527, 529, 532, 539, 549, 568, 610; *U. S.* v. *Crosby*, 7 Cranch, 115; *McCormick* v. *Sullivant*, 10 Wheaton, 192; *Hutcheson* v. *Peshine*, 16 N. J. 167; *Osborn* v. *Adams*, 18 Pick. 245; *Rogers* v. *Allen*, 3 Hammond, (Ohio,) 488; *Lessee of McCullogh* v. *Roderick*, 2 Hammond, 234; *D'Ivernois* v. *Leavitt*, 23 Barbour, 63.

IV. The above cases recognize the impracticability of the administration of trusts created in a foreign jurisdiction. To the same effect are the cases of *Watkins* v. *Holman*, 16 Peters, 56, 57; *Spurr* v. *Scoville*, 3 Cush. 578; *Campbell* v. *Wallace*, 10 Gray, 162; and the numerous cases where foreign executors or administrators have sought relief in the courts of other countries. The fundamental objection is the same in both cases. It arises from the impossibility of subjecting the same subject matter to the simultaneous action of different tribunals.

It is conceded that the court where the trust originates and which has jurisdiction of the person of the trustee, will exercise its authority over him, though the instrument creating the trust may purport to convey property beyond its jurisdiction. Perry on Trusts, § § 70, 71, 72; Story's Equity, § 1290 *et seq.*; *D'Ivernois* v. *Leavitt*, above cited.

V. These deeds are invalid because they are repugnant to the statutes of this State relating to assignments. R. S., c. 70; *Whitney* v. *Kelley*, 67 Maine, 377; *Simmons* v. *Curtis*, 41 Maine, 373; *Green* v. *Van Buskirk*, 7 Wall. 151; *Guillaudet* v. *Howell*, 35 N. Y. 657, (cited in American Law Register, New Series, vol. 6, 522); see note. *Loving* v. *Pario*, 10 Iowa, 282; *Philson* v. *Barnes*, 50 Penn. St. 230.

VI. The cases of *Fox* v. *Adams*, 5 Greenl. 245; *Felch* v. *Bugbee*, 48 Maine, 9; *South Boston Iron Co.* v. *Boston Locomotive Works & Tr.* 51 Maine, 585, have settled the law in this State in favor of the lien of the attaching creditor as against the assignee under a foreign assignment, even in regard to personal property. It has been supposed that this was founded upon the supposed preference to be given to claims of our own citizens. This doctrine has been exploded by the case of the *South Boston Iron Co.* v. *Boston Locomotive Works*, above cited.

VII. The bill alleges and at the hearing on the preliminary injunction, much stress was laid upon the allegation, that all Maine creditors had assented to this assignment.

The depositions of Smith & Hallet, show that this is not the fact. There are Maine creditors, whose rights are affected by this assignment, one of which has commenced proceedings which must prevail against the claim of the assignee.

That the eminent counsel with whom Mr. Chafee has advised had no confidence in the validity of this conveyance, is evident from his paying the Milliken levy.

VIII. The doctrine of equitable estoppel does not apply to this case. *Vose* v. *Holcomb*, 31 Maine, 406; *Fiske* v. *Carr*, 20 Maine, 301; *Kimberly* v. *Ely*, 6 Pick. 440; *Insurance Co.* v. *Wallis*, 23 Maryland, 173; *Hayes* v. *Heiberger*, 9 Penn. St. 207; (overruling *Adlam* v. *Yard*, 1 Rawle, 163); *Doe* v. *Scribner*, 41 Maine, 277.

IX. It is evident from the exhibits in the case, that the respondent never intended to agree to this assignment, or to induce others to believe that they did. What they did agree to is explicitly stated, and that agreement has been kept. The attempt to spring a technical estoppel upon them is in direct violation of the spirit of these agreements, and deserves no countenance from a court of equity.

B. H. Bristow, for the Fourth National Bank, respondents.

Proceedings under the insolvent laws of one State do not have the effect to transfer property in another State.

Whatever may have been the course of English decisions in this respect at the time of the separation, and whatever doubts may have been expressed by the earlier writers and judges in this country, it is now the settled American doctrine, that the insolvent laws of a State have no force to transfer property beyond its jurisdiction, and within the territory of another State. Kent's Com. 12th ed. vol. II, §§ 405, 406, 407; Story's Conflict of Laws, § 414; Wharton's Conflict of Laws, § 334, *et seq.*; *Upton* v. *Hubbard*, 28 Conn. 274; *May* v. *Breed*, 7 Cush. 15; *Blake* v. *Williams*, 6 Pick. 306; *Abraham* v. *Plestoro*, 3 Wend. 538; *Johnson* v. *Hunt*, 23 Wend. 87; *Hoyt* v. *Thompson*, 19 N. Y. 207; *Willitts* v. *Waite*, 25 N. Y. 587; *Kelly* v. *Crapo*, 45 N. Y. 86; *Milne* v. *Moreton*, 6 Bin. 361; *Harrison* v. *Sterry*, 5 Cranch, 289; *Ogden* v. *Saunders*, 12 Wheaton, 213; *Booth* v. *Clark*, 17 How. 322; *Felch* v. *Bugbee*, 48 Maine, 9; *Dunlap* v. *Rogers*, 47 N. H. 281.

Voluntary assignments by insolvent debtors for the benefit of creditors do not operate to transfer even personal property situate within the jurisdiction of another State.

I. This doctrine seems to be equally well established by the great preponderance of American authorities, and it is held that attaching creditors may prevail against such assignments. Kent's Com. 12th ed. vol. II. § 407, note 1; *Paine* v. *Lester*, 44 Conn. 196; *Osborn* v. *Adams*, 18 Pick. 245; *Ingraham* v. *Geyer*, 13 Mass. 146; *Fox* v. *Adams*, 5 Greenleaf, 245; *South Boston Iron Co.* v. *Boston Locomotive Works*, &c. 51 Maine, 585; *Towne* v. *Smith*, 1 Woodb. & Minot, 137; The Watchman, Ware, 232; *Taylor* v. *Boardman*, 25 Vt. 589; *Ward* v. *Morrison*, 25 Vt. 593; *Oliver* v. *Townes*, 14 Martin (La.), 93; *King* v. *Johnson*, 5 Harrington, 31; *Kidder* v. *Tufts*, 48 N. H. 121, 125; *Guillaudet* v. *Howell et al.* 35 N. Y. 657, (cited and approved by U. S. Supreme Court, in *Green* v. *Van Buskirk*, 7 Wall. 151); *Jonnson* v. *Parker*, 4 Bush. (Ky.) 150; *Hutcheson* v. *Peshine*, 16 N. J. Eq. 167; *Varnum* v. *Camp*, 13 N. J. Law, R. (1 Green,) 326; *Moore* v. *Bonnell*, 31 N. J. Law R. (2 Vroom), 91; *Zipcey* v. *Thompson*, 1 Gray, 243; *Green* v. *Van Buskirk*, 5 Wall. 310; same case, 7 Wall. 139.

II. In some States the opinions of the courts seem to limit this rule to the creditors who are citizens of the State in which the property is situated, and who invoke the remedies of the courts of that State. But such limitation does not seem to be consistent with reason, and has been expressly disclaimed by this court in the case of *South Boston Iron Co.* v. *Boston Locomotive Works*, *supra*.

III. The property in controversy in this case being real estate, and the assignments under which the complainant claims not having been executed and recorded in conformity to the law of Maine, he holds neither a legal nor equitable title against an attaching creditor.

It is a well settled principle of law that the title and disposition of real estate is exclusively subject to the laws of the country where it is situated, the *lex loci rei sitæ*, which alone can prescribe the mode by which it can pass from one person to another. Hence it has been held that even an equitable title under a grant of lands which lie in a State generally, but which have not been selected or located, does not pass from one person to another

unless the instrument is executed and recorded according to the law of the State in which the land is situated. *McCormick* v. *Sullivant*, 10 Wheaton, 192; *United States* v. *Crosby*, 7 Cranch, 115.

1. The reasons given by the courts against giving effect in one State to transfers and assignments of the property of a debtor domiciled in another whether voluntary or involuntary, apply *a fortiori* when the property is real estate; for a conveyance or transfer of such property is effective only by virtue of the law of the State in which it is situated.

A general assignment of all property, real and personal, of a debtor, although it conform to the laws of the State of his residence, does not pass title to lands in another State, even as against the assignor, and creates no equity which a court will enforce. *Rogers* v. *Allen*, 3 Hammond, 488; *Lessee of McCullough* v. *Roderick*, 2 Ham. 235; *Houston* v. *Nowland*, 7 Gill & Johns. 480; *Osborn* v. *Adams*, 18 Pick. 245; *Hutcheson* v. *Peshine*, 16 N. J. Eq. 167; *Knox* v. *Jones et al.* 47 N. Y. 389; *Nicholson* v. *Leavitt*, 4 Sanford, 276.

2. The statute law of Maine (R. S., c. 70,) authorizes and regulates assignments for the benefit of creditors, and declares how they may be made effective. By this statute the legislature has prescribed the policy of the State in respect to such assignments, and this policy is necessarily exclusive of all others. *Moore* v. *Bonnell*, 31 N. J. Law, R. 96.

This statute in terms declares that no such assignment shall be valid against attaching creditors, unless sworn to and notice given in a particular manner, and a bond filed and approved by the judge of probate within ten days. The statute makes no exception, but in terms embraces "every assignment "made by any debtor for the benefit of creditors."

3. Neither of the instruments in question in this case is good as a deed. Chafee is not a creditor, but a mere trustee for creditors generally. Independent of this trust, both instruments are without consideration, and neither can be upheld as a deed. The only consideration upon which either could be rested is the trust itself, and if that be invalid by the law of Maine, then the consideration fails altogether.

III. The doctrine of equitable estoppel has no application in this case.

The notes of the A. & W. Sprague Manufacturing Company were received by respondent only as collateral security for existing debts, and in consideration thereof indulgence was given for a specified time to the drawers and indorsers.

The agreement under which the mortgage notes were received has been strictly complied with by respondent. The original drafts were not surrendered, nor were any of the rights or remedies of the creditor waived, except as to the time within which there was to be forbearance to sue.

Respondent did nothing to induce the debtor company to make the assignment, and took no part in any meeting of creditors for the purpose of considering an assignment.

There was no deception practiced by the respondent, nor any such gross negligence as to amount to constructive fraud.

Neither complainant nor any creditor of the A. & W. Sprague Manufacturing Company could possibly have been misled or deceived, or induced to part with any right, or to forego the use of any remedy by any act of respondent. In such a case the doctrine of equitable estoppel does not apply. *Brant* v. *Va. Coal & Iron Co.* 93 U. S. (3 Otto), 335, and cases cited in the opinion of Mr. Justice FIELD.

But this precise question has been met and decided by this court in the case of *Vose* v. *Holcomb*, 31 Maine, 407.

Charles A. Peabody, *Fisher A. Baker* and *Charles A. Peabody, Jr.*, also furnished a very able brief for the respondents and the Metropolitan National Bank of New York; as did *Austin G. Fox* and *Waldo Hutchins*, for the Manhattan Company, respondents.

WALTON, J. The A. & W. Sprague Manufacturing Company (a corporation created by the laws of Rhode Island), finding itself unable to meet its indebtedness as fast as it matured, on the first day of November, 1873, mortgaged its property, real and personal, to a trustee to secure such of its creditors as should extend the time for the payment of their demands for the term

of three years; and afterward, on the sixth day of April, 1874, by another instrument, made the conveyance absolute, and gave the trustee authority to sell the property and apply the proceeds to the declared purposes of the trust. Creditors whose debts amounted to over eight millions of dollars accepted the security thus offered them and agreed to the desired extension. Among the creditors who agreed to the extension was the Fourth National Bank of the city of New York, the defendant in this suit. A portion of the property conveyed to the trustee was situated in this State. The three years having expired, and its debt not having been paid, the bank above mentioned commenced a suit in this State and attached real estate, and propose to levy upon a portion of the real estate, conveyed to the trustee, to satisfy their demand. This suit is a bill in equity by the trustee asking the court to enjoin the bank from levying upon the real estate conveyed to him, as such a levy would create a cloud upon his title and embarrass him in the discharge of his duties. He avers in his bill that such of the creditors as accepted the security created by the conveyances to him are estopped to deny the validity of his title. The bank, in its answer, says that the two instruments mentioned in the plaintiff's bill were general assignments by an insolvent debtor for the benefit of creditors, and being made in the State of Rhode Island, as to real estate in Maine, were inoperative and void; and that the bank is not estopped from levying upon it.

Assuming that the defendant bank is right in saying that the two conveyances referred to were in effect general assignments for the benefit of creditors, we have the important question presented whether such an assignment, made in another State, is valid here, so far as to protect the assigned real estate here situated from attachment by a non-resident creditor who has assented to the assignment and received in part the benefits thereby secured to him.

The question has been ably argued, and we have given to it the consideration which its great importance and the magnitude of the interests involved seemed to require, and the conclusion to which we have arrived is that the question must be answered in the affirmative.

The ground is taken in defense that all assignments for the benefit of creditors, whether made within or without the state, which are not conformable to our statute, are repugnant to it, and must therefore be regarded as inoperative and void so far as property within this State is concerned. We think this is untenable ground. Our statute does not apply to foreign assignments,—it applies only to domestic assignments, as its terms clearly imply, —leaving the former to be governed by those principles of comity which have heretofore been recognized as existing in this State, and ought to prevail in all the states of the American Union.

In *Ockerman* v. *Cross*, 54 N. Y., 29, the court held that the statute law of New York regulating assignments for the benefit of creditors did not apply to foreign assignments; that such assignments, if valid by the law of the place where made, although not conformable to the law of New York, would protect the property assigned from attachment.

In *Bentley* v. *Whittemore*, 19 N. J. Eq. 462, the question was very fully considered, and the court held that a voluntary assignment for the benefit of creditors made by a non-resident debtor, which was valid by the law of the place where it was made, could not be impeached in that State, with regard to property there situated, in behalf of a non-resident creditor, although the assignment was not conformable to the statute of assignments in force in that State.

In *Bholen* v. *Cleveland*, 5 Mason, 174, the court held that an assignment for the benefit of creditors, made in Pennsylvania, passed property in Massachusetts, as against a creditor who did not reside in Massachusetts.

And such is the recognized doctrine in this State.

In *Fox* v. *Adams*, 5 Maine, 245, the court held that an assignment made by an insolvent debtor in another jurisdiction would not operate upon property in this State, "*so as to defeat the attachment of a creditor residing here.*" But the court did not decide that such an assignment would not defeat the attachment of a creditor who did not reside here. On the contrary, the doctrine is stated as an exception to the general rule. It is

an exception in favor of domestic creditors only. The language of the court clearly implies this. "Comity between states is not thus to be extended, *to the prejudice of our own citizens.*" Such is the language of the court; and we think it clearly implies that while a foreign assignment will not be permitted to defeat the attachment of a domestic creditor, it will have that effect upon foreign creditors. The reason of the rule clearly implies this. It is the supposed duty of every government to protect its own citizens, a duty which it does not owe to foreigners.

In *Todd* v. *Bucknam*, 11 Maine, 41, the court expressly stated that the doctrine which had been previously established in favor of resident creditors, could not be extended to non-residents. The assignment in that case, (although actually executed within the limits of this State,) was made by a non-resident debtor to a non-resident trustee, and the suit in which property found in this State was attached was commenced in the name of a resident of this State, and the rule in favor of domestic creditors was invoked in support of the attachment; but the jury having found that the real owners of the demand sued were non-residents, the court held that the rule did not apply. Although the court might, perhaps, have given some other answer to the argument of the plaintiff's counsel, the only one which it in fact gave, was that the *real* creditors claiming under the attachment, were non-residents, and therefore the rule in favor of domestic creditors did not apply. This point, though actually raised, argued, and decided by the court, does not appear in the head notes of the reporter.

It is claimed, however, that in a more recent case (*South Boston Iron Co.* v. *Boston Locomotive Works*, 51 Maine, 585,) the doctrine in favor of domestic creditors was extended to non-resident creditors. A careful examination of that case will show that this claim is not well founded. The court there held that an attachment by a non-resident creditor would not be defeated by an assignment subsequently made in another State; but the court did not hold that an attachment by a non-resident creditor would not be defeated by such an assignment previously made. On the contrary, it is expressly stated in the opinion of Chief

Justice TENNEY, on page 589, that such would be the effect. He says: "But by the rule of comity referred to, the assignment would be upheld here, and an attachment made *after* the assignment and notice thereof to the creditor, would be invalid."

See also *Felch* v. *Bugbee*, 48 Maine, 9, where the rule, and its limitation to domestic creditors, are accurately stated.

We think it is clear that the recognized rule in this State is to uphold foreign assignments, except as against our own citizens. There is certainly force in the objection that such a discrimination is in conflict with that provision of the federal constitution which declares that the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States. But there are many cases in which such a discrimination has been sustained, and we are aware of none in which this objection has prevailed. Chancellor KENT, although himself opposed to such a discrimination, concedes that it is the prevailing doctrine in this country, and he does not express a doubt of its constitutionality. Nor does Judge STORY in his elaborate examination of this and kindred questions, in his Conflict of Laws. That provision of the federal constitution has heretofore been regarded as applying only to such privileges and immunities as are in their nature fundamental and universal, and not to special privileges enjoyed by the citizens of a State by virtue of its local laws; and it does not apply to corporations at all. *Paul* v. *Virginia*, 8 Wall. 168.

Besides, if the objection were well founded, we think the better remedy would be to abolish the rule in favor of our own citizens, not to extend it to the citizens of other States. But we do not think the discrimination is unconstitutional.

But there is another and an independent ground on which it is claimed that the assignment should be upheld. Creditors, whose debts amount to more than eight millions of dollars, have assented to the assignment and received payments thereby secured to them. Among these creditors are those who have attempted to attach the property assigned. Can these assenting creditors now repudiate the assignment? We think not. It is a general rule that those who assent to an assignment cannot repudiate it.

And knowingly receiving payments or dividends thereby secured to them, is conclusive evidence of assent. These creditors have done both. They not only assented to the assignment, but they have since received payment in part of the large interest thereby secured to them. The Fourth National Bank alone has received over fifty thousand dollars. We think they are thereby estopped to treat the assignment as invalid.

We say such is the general rule. An exception to it is where an assignment is declared void by the law of the place where it is made. If declared absolutely void by the law of the place where made, no assent or ratification of the creditors can make it valid. But if not absolutely void,—if it is only void at the election of such creditors as choose to avoid it,—and they assent to it, or afterwards ratify it by accepting payments or dividends thereby secured to them, then, as to such assenting or ratifying creditors, the assignment will be sustained. The assignment now under consideration is of the latter class. It was valid by the law of the place where made. It is not absolutely void in this State. Non-resident creditors are here bound by it. Resident creditors may here avoid it if they choose so to do. But if, instead of electing to avoid it, they actually assent to it, and accept payments thereby secured to them, then the general rule applies, and we think their right to treat the assignment as void is extinguished.

In *Clay* v. *Smith*, 3 Peters, 411, the court held that a creditor, who is a citizen of one State, by voluntarily making himself a party to proceedings under the insolvent laws of another State, thereby becomes bound by the proceedings to the same extent as the citizens of the State where the proceedings are had; and, if the debtor obtains a discharge, that the creditor's debt will be thereby discharged.

In *Bodley* v. *Goodrich*, 7 Howard, 276, the assignment contained conditions which rendered it void upon its face as against a non-assenting creditor, but the court said that if the creditor had assented to the assignment there could have been no objection to it.

In *Adlum* v. *Yard*, 1 Rawle, 163, the court said that the creditor might originally have repudiated the assignment, but

having taken a dividend under it, he should no longer question its validity.

In *Rapalee* v. *Stewart*, 27 N. Y. 310, the court held that it would be a fraud upon all the other creditors to allow one who had assented to the assignment to repudiate it, and thereby gain a preference and secure his entire debt.

Personal privileges may undoubtedly be waived, although secured by the positive provisions of a statute; and when a creditor, to whom the law secures the right to avoid an assignment made by his insolvent debtor, assents to the assignment, or knowingly avails himself of the benefits thereby secured to him, we think he thereby waives his right to treat the assignment as void. This rule, as already stated, does not apply to assignments which the law declares absolutely void. It applies only to such as are avoidable at the election of creditors. The assignment now under consideration we regard as of the latter class. We hold that all creditors who became parties to it, or knowingly accepted any of its benefits, thereby waived the right to afterward treat it as invalid.

We do not deny that the *lex loci rei sitæ* is to govern in this case. But we hold that the *lex loci rei sitæ* is as here declared. Not that such is the law of this State applicable to domestic assignments, but that such is the law of this State governing foreign assignments when they are brought into litigation here with respect to property here situated. Our statute, as its provisions clearly show, applies only to domestic assignments. No statute can have any extra-territorial force. Our statute cannot govern assignments made in other jurisdictions. The latter, when brought into litigation here, must be governed by the rules of comity already referred to.

It is urged in argument by the defendants' counsel that, for the purpose of applying the Maine assignment act to the Sprague Manufacturing Company, the latter may be regarded as having a residence at Augusta, in this State, where it owned property and where it was doing business. We think this proposition cannot be sustained. A corporation can exist only within the soverignty which created it, although, by comity, it may be allowed to do

business in other jurisdictions, through its agents. It can have but one legal residence, and that must be within the State or sovereignty creating it. *Bank of Augusta* v. *Earle*, 13 Peters, 519; *Runyon* v. *Coster*, 14 Peters, 122; *Tombigbee Railroad Co.* v. *Kneeland*, 4 Howard, 16; *Ex Parte Shellabarger*, 5 Otto, 379.

It is also urged that the assignment was made for the purpose of defrauding creditors. It is a sufficient answer to this argument to say that, in our judgment, the evidence does not support it. The assignment appears to have been made openly, upon consultation with the creditors, and upon their recommendation; and we think it may well be doubted whether a better arrangement for the creditors could now be made if the work should be gone over with again. If the trustee does not perform his duty faithfully, the remedy is to have him removed and a better man put in his place.

But a single question remains for consideration, and that is the question of jurisdiction. Is it competent for the court to grant the relief prayed for? We think it is. It is a rule of equity jurisprudence, too well settled to require the citation of authorities in support of it, that a court of equity has jurisdiction to remove a cloud from one's title to real estate. We think there is still stronger reason for taking jurisdiction to prevent a cloud being placed upon one's title. As recently said by this court, it is better to prevent the creation of a fictitious title than to compel its cancellation, or release, after it has been created. *Gerry* v. *Stimson*, 60 Maine, 186.

Bill sustained. Decree as prayed for.

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

JOSEPH R. SEGARS *vs.* SAMUEL SEGARS.

Lincoln. Opinion December 20, 1880.

Contract. Ratification. Statute of frauds.

A letter written by one brother to another in relation to the latter's returning home and supporting their parents, but written without their knowledge or request, in which the writer says, "I suppose they would give one-half the farm and hold the other as security for their maintenance while they live," does not bind, nor does it purport to bind the father or any one else.

The remark of the father when the existence of the letter was first brought to his knowledge, that "it was all right and that he intended to carry it out just as it was written there," does not constitute a contract on his part. Nor is it a ratification of the letter of one, who was acting as an agent, as it did not even purport to propose a contract on his behalf.

Further, the evidence of the father that "he never at any time promised to give him (the son) a deed of the property or any part of it" negatives the idea of a ratification of the letter.

When an agreement in relation to real estate is void by the statute of frauds, the party who has fully complied with its terms is entitled to recover back the payments made, whether in labor or money, if the other party has incapacitated himself from its performance or has refused to perform.

The defendant's declarations to a third person in making a contract, or his statements of the reasons why he made it, are not admissible in evidence in his behalf.

ON EXCEPTIONS AND MOTIONS.

ASSUMPSIT to recover for five years' services on the defendant's farm in Dresden, and for materials furnished, and money expended in and about the care and management of the farm, and the support and maintenance of the defendant and his wife. The writ was dated May 28, 1878.

The verdict was for plaintiff for $987.16.

The facts sufficiently appear in the opinion.

A. P. Gould, for the plaintiff, cited: *Roberts* v. *Swift*, 1 Yates, 209; *Canada* v. *Canada*, 6 Cush. 15; *Wright* v. *Haskell*, 45 Maine, 489.

W. Gilbert, for the defendant, contended that the plaintiff had mistaken his remedy if there is any wrong to be remedied. By the plaintiff's own showing he had a valid contract for a conveyance as the consideration for his services, and he cannot renounce that contract and recover wages.

The letter of January 14, being ratified, contained all the necessary elements of a promise of a conveyance required by the statute of frauds. Nothing is more clear than that, in dealings, language is to be taken in the sense intended and accepted by the parties, although it be not the literal sense of the words used. Chitty Contr. 74, 75, note 1 by Perkins, and authorities cited.

Wesley Segars, the plaintiff, and the defendant, when his attention was called to it, all understood the letter as a proposal or offer from or in behalf of the defendant to the plaintiff, and when the defendant said "that was all right, that he intended to carry out just as it was written there," it constituted a ratification and became binding upon the defendant, and its acceptance by the plaintiff bound him, and the contract was then closed and answered all the requirements of the statute. R. S., c. 111, § 1; Brown, Stat. of Frauds, §§ 385, 359, 350, 364, 370, 392; Benjamin on Sales, 199, 223, *et seq.* note *f.* to § 91, and § 208; note *g.* and authorities cited; *Marsh* v. *Hyde*, 3 Gray, 33; *Packard* v. *Richardson*, 17 Mass. 122; *Levy* v. *Merrill*, 4 Maine, 189; *Gillighan* v. *Boardman*, 29 Maine, 80; *Cummings* v. *Dennett*, 26 Maine, 400; *Atwood* v. *Cobb*, 16 Pick. 227; *Shaw* v. *Nudd*, 8 Pick. 9; *Blood* v. *Hardy*, 15 Maine, 61; Chitty Contr. 313, and cases cited.

The counsel in an able argument contended further that the verdict was against the evidence and excessive, and the rulings of the presiding judge, as stated in the opinion, erroneous.

APPLETON, C. J. This is an action of assumpsit by a son against his father, for work and labor, materials furnished and on the money counts.

It appears in evidence, that the plaintiff, residing in California, received a letter from his brother, Wesley Segars, dated January 14, 1872, containing these words: "I wish you would come home and take care of the old folks. We are entirely spoiled for anything of that kind, indeed we are, and I expected as much before I came from the West. We have had our own way so long, that it has become second nature, and it is so hard to take a new course, and so entirely different from the one you have

been following, and when you are liable to run against a snag at any time. Because, if you have a new plan to bring forward, you must have the assent of the old folks, or the fat is all in the fire at once. Still the old folks must have some one to look after them, and I do really hope that you will come home and take them in your care very soon. I suppose they would give one half the farm, and hold their half, as security for their maintenance while they live," &c.

"Upon the evidence relating to the letter, the defendant requested the court to instruct the jury that if they find from the evidence that the proposition of Wesley Segars, contained in his letter was ratified and agreed to by the defendant as his own, and as such accepted by the plaintiff, the writing is a valid contract binding the defendant to a conveyance of an undivided half of the farm." This instruction was refused and it is insisted that it should have been given.

By R. S., c. 111, § 1, "No action shall be brought and maintained in any of the following cases: . . Fourthly, upon any contract for the sale of lands, tenements or hereditaments, or of any interest in or concerning them . . unless the promise, contract or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and be signed by the party to be charged therewith, or by some person thereto lawfully authorized."

By R. S., c. 73, § 10, no estate or interests in lands, unless created by some writing and signed by the grantor or his attorney, shall have any greater force or effect than an estate or tenancy at will.

The requested instruction refers "to the evidence relating to the letter." That evidence is properly to be considered as bearing upon the requested instruction.

The letter is not signed by the defendant. The writer testifies that it was written without the knowledge or authority of the defendant. Indeed, that is apparent from the context. Here is no promise, contract or memorandum. There does not purport to be any. It was not written for, or at the instance of the defendant. It does not bind him. It does not purport to bind

him. It does not bind anybody. It does not import a contract or an agreement made or proposed. It was the mere supposition of the writer, as he testifies, and nothing more.

Here then is no promise, contract or agreement, no memorandum nor note thereof signed by the party to be charged or by any person thereto fully authorized. There was none intended.

If there had been, there was no sufficient ratification. The defendant testifies that he does "not recollect any conversation with him in respect to his staying with us" . . that he "never at any time promised to give him a deed of the property or any part of it." This negatives all pretence of a ratification, if true.

But, disregarding the defendant's testimony on this most essential point, his learned counsel relies on that of the plaintiff, who testified that shortly after his return, he had a talk with his father and mother about his expectations if he remained with them, and the understanding was that he was to have half of the farm—that he spoke to his father about the letters sent him, saying he should have if he came home, one half of the place, giving him security for the other half, and that he wanted the matter attended to, and that he shew him the letter of January 14, 1872,—that his father said that was all right and he intended to carry it out just as it was all written there.

But this is not evidence that the letter was written by the defendant's authority, or that he ratified or intended to ratify it as the act of an agent, an act then first brought to his knowledge. As was remarked by BRAMWELL, B., in *Murphy* v. *Boes*, 10 L. R. Ex. Cases, 126: "If he was the defendant's agent, when did the agency commence? Was he agent at the time he wrote? This will hardly be suggested. Did he become agent afterwards by ratification? If so, you would come to this difficulty, that when the agent wrote the paper, he did not profess to act for the defendant."

It will hardly be pretended that at the time of this conversation with his son, he supposed or understood that he was making a new contract or ratifying an old one, or one made by one acting as agent without authority. "I think," remarks BRAMWELL, B., in the case last cited: "that the common understanding is a good

test of the real meaning of the transaction. Now, is there any reason why we should disregard the understanding of reasonable persons for the sake of avoiding the operation of the statute?"

2. The farm of the defendant was deeded to his son, Wesley Segars, to whom as a witness the following question was proposed by defendant's counsel: "At whose instigation was the farm deeded to you? Answer.—"My father's instigation." What was said between you and your father." The answer to this question was properly excluded. It was to make the defendant's declaration evidence in his own behalf.

3. The answer to the inquiry of the defendant as to —"What brought about the making of the deed to Wesley?" was properly excluded. The inducements to the making of that deed, had nothing to do with the contract between the parties to this litigation.

4. There was an agreement of some sort between these parties in relation to real estate. It was not in writing. It was void by the statute of frauds. In such case, the law is well settled that the party who has fully complied with its terms, is entitled to recover back the payments made, whether in labor or money, if the other party has incapacitated himself from its performance, or has refused to perform. *Jellison* v. *Jordan*, 68 Maine, 373; *Cook* v. *Doggett*, 2 Allen, 439; *Crawford* v. *Parsons*, 18 N. H. 293.

There are no exceptions to any rulings of the court, except those already considered. Those given must be regarded as satisfactory. The evidence as to the various facts in dispute is contradictory. The jury saw and heard the witnesses. They are the recognized judges of its weight, and after a careful examination of the able and ingenious argument of the learned counsel for the defendant, we perceive no sufficient reason for interfering with their conclusion.

Motion and exception overruled.

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

CITY OF BANGOR *vs.* INHABITANTS OF WISCASSET.

Penobscot. Opinion December 20, 1880.

Insane persons. Support in hospital. Settlement. Husband and wife. Notice.

The commitment and residence of an insane wife in the insane hospital does not affect "the period of the residence" of the husband necessary to change his settlement.

The husband may gain a new settlement by five years' successive residence in any town without receiving pauper supplies directly or indirectly though the insane wife may be in the insane hospital and supported by the town.

Support furnished an insane wife in the hospital are not pauper supplies and do not affect the husband's residence or prevent his gaining a new residence. The settlement of the wife though in the insane hospital follows that of the husband though he may change it during such residence.

A notice describing the insane person as a pauper but stating that she was supported in the insane hospital and correct in other particulars, is not defective by reason of her being called a pauper. A misdescription of the residence of an insane person in proceedings instituted by the town in the probate court do not constitute any estoppel or prevent the town from contesting her settlement.

The liability of the insane person to remunerate the town committing such person depends on the ability to pay. The husband is primarily liable for the wife's support, "if able."

The liability of the insane wife to pay for her support does not arise till after the death of the husband and upon her having or receiving means wherewith to pay.

There is no debt when there is not an ability to pay and the insane person is not liable unless such ability exists.

ON AGREED STATEMENT of facts the material portions of which appear in the opinion.

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

Upon the question of settlement, cited: *Glenburn* v. *Naples*, 69 Maine, 68.

Gould died in September, 1876. By R. S., c. 24, § 34, Louisa Gould, or her estate, was liable to the city of Bangor for her support after that time. The guardian had a right to pay that indebtedness, the city had a right to appropriate so much as it had in its treasury, or to retain it to be appropriated by law. The law would appropriate it to the oldest indebtedness.

George B. Sawyer, for the defendants.

The most noticeable feature of the authority relied upon in the ingenious argument of the plaintiff's counsel, (*Glenburn* v. *Naples*,

69 Maine, 68,) is its entire dissimilarity to the case at bar. It does not depend upon nor involve the construction of the law of 1870, but was decided under the law as it stood prior to that date. It is not different in principle from *Pittsfield* v. *Detroit*, 53 Maine, 442.

Counsel cited on the question of settlement: R. S., 1841, c. 178, § 13; *Id.* c. 32, § § 5, 6; stat. 1841, c. 1, § 6; *Id.* c. 173, stat. 1842, c. 36; *Garland* v. *Dover*, 19 Maine, 441; *Poland* v. *Wilton*, 15 Maine, 363; *Alna* v. *Plummer*, 4 Maine, 258; *Hanover* v. *Turner*, 14 Mass. 227; R. S., 1857, c. 143; stat. 1870, c. 127; *Cooper* v. *Alexander*, 33 Maine, 453; *Eastport* v. *Belfast*, 40 Maine, 262; *Jay* v. *Carthage*, 53 Maine, 128; *Eastport* v. *East Machias*, 40 Maine, 280; *Orono* v. *Peavey*, 66 Maine, 60; *Overseers* v. *Gullifer*, 49 Maine, 360; *Hampden* v. *Newburgh*, 67 Maine, 370; *Kennebunk* v. *Alfred*, 19 Maine, 221; *Drew* v. *Drew*, 37 Maine, 389; *Atkinson* v. *White*, 60 Maine, 396.

APPLETON, C. J. This is an action to recover the expenses incurred by the plaintiffs for the support of Louisa Gould in the Insane Hospital where she was sent in 1865, and has ever since remained.

It is admitted that the residence and legal settlement of Abiel Gould, the husband, was, at the time of the commitment of his wife, in Bangor. After 1865 he resided a portion of the time in Wiscasset. In January, 1871, he purchased a farm there on which he resided and had his home, until April 14, 1876, when he sold the same, remaining, however, there till his death in the following September. During all this time, he voted every year in the defendant town and paid his poll tax and the taxes assessed on his real and personal estate.

The main questions presented are whether the facts of his wife's insanity and her continued support by the plaintiff town at the Insane Hospital prevented the husband from gaining a settlement in the defendant town by virtue of his continued residence there for five successive years, and whether the wife's settlement followed that of the husband.

There are questions of minor importance, all of which will be duly considered.

1. The city of Bangor was in the first instance chargeable for the support of Mrs. Gould. By R. S., 1857, c. 143, § 20, "Any town thus made chargeable in the first instance, and paying for the commitment and support of the insane in the hospital, may recover the amount paid of the insane, if able, or of persons legally liable for his support, or of the town where his legal settlement is, as if incurred for the ordinary expenses of any pauper; but if he has no legal settlement in this State, such expenses shall be refunded by the state, and the governor and council shall audit all such claims, and draw their warrant on the treasurer therefor. No insane person shall suffer any of the disabilities incident to pauperism, nor shall be hereafter deemed a pauper by reason of such support."

While this statute was in force and before its amendment, it was decided in *Pittsfield* v. *Detroit*, 53 Maine, 442, that an insane person sent to the insane hospital as a patient by the municipal officers of the town in which he has established his residence, does not thereby lose it, but it continues during his residence in the hospital. His residence is there for a temporary purpose. Its duration is uncertain. It is like that of a sailor on a voyage, or one absent on a journey or for the purpose of labor, when there is no intention of abandoning the existing residence or gaining a new one. A settlement may thus be gained by a residence commenced when the insane person was sent to the hospital and continued for the period of five years.

The support furnished there is not support for a pauper. It is not to have the effect of pauper supplies. The statute under which the support is furnished, forbids this, as was held in the somewhat analogous case of aid furnished soldiers in the service during the rebellion. *Veazie* v. *China*, 50 Maine, 518.

2. By the act of 1870, c. 127, an addition was made to c. 143, § 20, of R. S., 1857, in these words: "But the time during which the person is so supported shall not be included in the period of residence necessary to change his settlement." R. S., 1871, c. 143, § 20.

In other words, the time spent in the hospital shall not be a part of the five years' continuous residence, by which a new settlement was gained, as was held to be the law in *Pittsfield* v. *Detroit*. The additional clause was enacted to nullify the effect of that decision. It applies only to the insane person. It affects no one else. It presupposes one, who if sane, could by his own act and volition change his settlement. It assumes the man or woman to be of full age and not under control. But the wife by marriage loses her own settlement and acquires that of her husband and follows and accompanies his, howsoever he may change it. The wife cannot change it or gain a new one, irrespective of the will of the husband. *Parsons* v. *Bangor*, 61 Maine, 457; *Porterfield* v. *Augusta*, 67 Maine, 557.

The insane wife is not to be "deemed a pauper." She has incurred none of "the disabilities incident to pauperism." Having incurred none, she cannot create or impose any, for be it remembered, she is the person "*so* supported," and not her husband.

The municipal officers have duties to perform to the insane who are incapable of self care and self protection. They are duties of charity. The aid furnished is charitable. It is to be recovered by the town rendering it, not as pauper supplies, but "as if incurred for the ordinary expense of any pauper." The process by which recovery is had is the same as in case of pauper supplies, but that is all.

3. By R. S., c. 24, § 1, clause 1, "a married woman has the settlement of her husband if he has any in the state." The wife has and continues to have the settlement of the husband, however it may change. It would be a grave "disability" if it were otherwise. When the husband acquired a settlement by five continuous years, without receiving supplies directly or indirectly in Wiscasset, such settlement became that of the wife, from and after it was so acquired. They cannot have separate and distinct settlements.

It follows that the wife having the settlement of her husband and he having gained one in the defendant town, that the defendants would on these facts be liable. *Glenburn* v. *Naples*, 69 Maine, 68.

4. But Abiel Gould died September 2, 1876. The liability of the insane to pay for support in the hospital depends on ability. The statute imposes the obligation to pay, "if able," otherwise there is no liability on the part of the insane. *Orono* v. *Peavey*, 66 Maine, 60. During the life of the husband, he was primarily liable. No attempt was made to enforce his liability. The wife was not liable. Her liability did not arise until and upon the appointment of a guardian, the allowance by the judge of probate and its payment. The sum allowed by him, as appears by the probate records, was two hundred and fifty dollars. This allowance and its payment was in 1878. Before this, all was contingent—whether there would be an allowance, and if so to what amount and whether it would be paid. Until the payment, there could be no existing liability on her part.

Assuming a liability to exist after the payment, then this allowance is to be appropriated to the support of the insane after her ability, such as it was, accrued, and for which the defendants after due notice are liable. Before that time there was no ability to pay, nor consequent liability—there was no indebtedness on her part to which this money could be appropriated.

The plaintiffs are to appropriate the sum by them received to claims arising since its reception, for which the defendants are liable. It is admitted that in May, 1878, the plaintiff received through the guardian of Mrs. Gould, two hundred and fifty dollars in lieu of her dower, and her distributive share in the estate of her late husdand. This is the first moment when it could be pretended that the insane wife could be liable for her own support. Before that she was not a debtor, to which this amount could be applied. It should therefore be appropriated to the reduction of the plaintiffs' claims for support subsequently furnished. But, that, in this case, is but $135.59. It is therefore over paid by the amount already received from the estate of the widow, and a nonsuit must be entered.

5. The notices given describe Mrs. Gould as a pauper, but state that she was supported in the insane hospital. All the important facts are set forth therein, and we do not think the defendants are to be absolved from legal liability by reason of

calling her a pauper, when it was clear that the demand was for support in the hospital.

6. The writ has two counts — for supplies furnished Mrs. Gould as a pauper — the other for support in the hospital.

The plaintiffs set forth their claim in these alternative counts, to which there is no objection.

7. When a guardian, at the instance of the city, was appointed for Mrs. Gould, she was described in the probate proceedings as of Bangor. But such description does not constitute an estoppel, so that the city cannot deny her settlement.

Plaintiff nonsuit.

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

ROBERT G. AMES *vs.* HENRY B. JORDAN.

Waldo. Opinion, December 27, 1880.

Neligence. Master and Servant. Contract.

If one agrees to furnish another with a team and suitable driver, he is guilty of negligence if he does not furnish such a driver, and he must bear all loss or damage occasioned to the team in consequence of the incapacity and negligence of the driver.

The employer would be liable for the acts of the driver done in pursuance of his orders, but the owner would be liable for the results of his incompetency.

ON EXCEPTIONS.

The opinion states the case.

H. D. Hadlock, for the plaintiff.

Perry, the teamster, was under the supreme control of the defendant, and therefore his servant. Sher. & Redf. Neg. (3d ed.) § 73.

It was the duty of the defendant to provide a safe place for landing and suitable means to carry on his business. *Curley* v. *Harris*, 11 Allen, 112; *Snow* v. *Housatonic R. Co.* 8 Allen, 441; *Sweeny* v. *O. C. & N. R. R.* 10 Allen, 368; *Wendell* v. *Baxter*, 12 Gray, 494; *Worster* v. *R. R.* 50 N. Y. 203; *Mersey*

Docks v. *Gibbs*, 11 H. L. Cases, 686; *Sawyer* v. *Oakman*, 7 Blatch. 290; *Campbell* v. *Portland Sugar Co.* 62 Maine, 552.

When one person does an act under the direction of another, the person thus directing is liable for the resulting damages. Sher. & Redf. Neg. § 59, p. 80, n. 3; *Page* v. *Defries*, 7 Best and S. 137; *Southwick* v. *Estes*, 7 Cush. 385; Edwards' Bailments, § 389.

George S. Peters and *Wm. H. Fogler*, for the defendant.

APPLETON, C. J. The defendant hired a pair of horses and a driver of the plaintiff, to be employed by him in lumbering operations during the winter of 1878 and 1879. While so employed the horses were drowned and the plaintiff brings this action to recover compensation for their loss, on the ground that it occurred through the negligence of the defendant, or that of those in his employ.

The plaintiff engaged to furnish a suitable driver for his team. The team and the suitable driver were to be furnished for forty dollars a month. The defence was that the loss occurred through the carelessness and want of ordinary prudence on the part of Perry, the driver, furnished by the plaintiff, and that in such case, the defendant would not be liable for their loss.

It was for the plaintiff to furnish a suitable driver. He was guilty of negligence in not furnishing such a one, and must suffer for the consequences of his negligence. If, then, the negligence and carelessness of Perry, occasioned the loss of the plaintiff's horses, the defendant is not liable and the jury should have been so instructed.

It is true the horses and driver were under the control and management of the defendant, and he was responsible for whatever was done in pursuance of his orders. He was to see that the landing place provided for logs was a safe one and if not so, he was responsible therefor. The driver in obeying his orders is his servant, for whose acts he is liable so far as within the scope of his employment, but the results of his incompetency, the plaintiff must bear for he should have furnished a suitable servant.

Exceptions sustained.

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

THEOPHILUS G. HATCH *vs.* CHARLES E. BRIER and wife.

Waldo. Opinion December 27, 1880.

Pleading. Abatement. Non tenure. Deed. Dwelling house..

The plea of non tenure is in abatement and not in bar, and cannot avail unless seasonably filed.

A deed of the westerly part of a dwelling house and one half of the cellar conveys the land under the part of the dwelling house conveyed.

ON EXCEPTIONS.

The opinion states the case.

William H. Fogler, for the plaintiff, cited: R. S., c. 104, § 6; *Ayer* v. *Phillips*, 69 Maine, 50; also *Cunningham* v. *Webb*, 69 Maine, 92 and cases cited on pp. 95 and 96; 2 Wash. R. P. 664; 1 Wash R. P. 57.

J. W. Knowlton, for the defendants, on the question of pleading, cited: R. S., c. 82, § 18; *Shelden* v. *Call*, 55 Maine, 159; *Sturtevant* v. *Randall*, 53 Maine, 149.

On the question of title of the plaintiff, counsel contended that he only owned a part of the house as personal property and held no interest in the land, and consequently plaintiff's remedy was in trover and not by writ of entry. *Osgood* v. *Howard*, 6 Maine, 452; *Russell* v. *Richards*, 10 Maine, 429; S. C. 11 Maine, 371; *Hilborne* v. *Brown*, 12 Maine, 162; R. S., c. 104, § § 1, 3; *Orono* v. *Wedgewood*, 44 Maine, 49; Jackson, Real Actions, c. 4, § 1; *Chaplin* v. *Barker*, 53 Maine, 275; *Tibbetts* v. *Estes*, 52 Maine, 566; 1 Bouvier Law Dict. 578, 337; 1 Wash. R. P. 53; *Lincoln* v. *Wilder*, 29 Maine, 180; *Howard* v. *Wadsworth*, 3 Maine, 474; Shep. Touch. 80; *Hammond* v. *Woodman*, 41 Maine, 177; *State* v. *Wilson*, 42 Maine, 9; 2 Wash. R. P. 686, 688, 693; 2 Green. Cruise, 348; *Thompson* v. *Androscoggin Bridge*, 5 Maine, 62; *Gay* v. *Walker*, 36 Maine, 54; *Winthrop* v. *Fairbanks*, 41 Maine, 307; *Smith* v. *Ladd*, 41 Maine, 314; *Cunningham* v. *Webb*, 69 Maine, 96.

APPLETON, C. J. This is a real action brought against husband and wife, who file several pleas and exceptions to the rulings of the justice presiding.

1. The defendant, Charles E. Brier, at the second term pleaded the general issue with a brief statement of non tenure. The general issue admits the tenant in possession. The plea of non tenure is only an abatement and not in bar. R. S., c. 163, § 19. *Colburn* v. *Grover*, 44 Maine, 47; *Wyman* v. *Brown*, 50 Maine, 139. It was filed too late and without leave of the court. *Ayer* v. *Phillips*, 69 Maine, 50.

2. The defendant, Sarah A. Brier, likewise pleaded the general issue with brief statements which are not reported.

It is in proof that Joseph Bryant, on September 11, 1838, conveyed certain premises to Daniel McCurdy with the following reservation: "Reserving, however, the saw mill with the privilege and the yard to said lot. Also, the westerly part of the dwelling house, namely, the front room and the chamber over it, and the west sleeping room; also a clothes room at the head of the front stairs; also the privilege of using the front stairs, and the cellar stairs and one half of the cellar; and privilege to the well." The plaintiff has title by deed of what was thus reserved. The tenant has the title of Daniel McCurdy.

The presiding justice ruled that the deed from David Knowlton to the plaintiff, following the language of the reservation, gave him an estate in fee.

The defendant contended that the part of the house reserved was personal property.

In *Jamaica Pond Aqueduct Corporation* v. *Chandler*, 9 Allen, 159, it was held that a grant of a "house," "a wharf," "a mill" or a "well" would pass the fee in the land, which is occupied and improved at the time of the grant for the use or purpose so designated in the deed, because, remarks BIGELOW, C. J., "such structures necessarily comprehend and aptly describe the entire beneficial occupation and enjoyment of the land itself, continuously, exclusively and permanently, and so clearly indicate an intent to grant the whole interest in the soil." It was held in *Allen* v. *Scott*, 21 Pick. 25, that when land was conveyed with all the buildings standing thereon except the brick factory, that the grantor's title to the land on which the factory stood and the water privilege appurtenant thereto, did not pass by the deed. To the

same effect is the case of *Esty* v. *Currier*, 98 Mass. 500, and of *Cunningham* v. *Webb*, 69 Maine, 93. In the last cited case, LIBBEY, J., uses this language: "A grant of a house standing on a lot of land, fenced and used as a house and garden, conveys not only the house, but the lot of land on which it stands, unless it appears from the deed, or the facts and circumstances existing at the time, applicable to the estate that that was not the intention of the parties." In the deed under consideration, the language used, "the westerly part of a dwelling house," and "one half of the cellar," must be construed to convey the land under the part of the dwelling house conveyed. See *Moulton* v. *Trafton*, 64 Maine, 218.

The defendant relies on the case of *Howard* v. *Wadsworth*, 3 Greenl. 471, where the exception or reservation was of "the grist mill *now standing* on said falls, with right of *maintaining the same*." The decision rests on the peculiar language used. "The grantors," remarks MELLEN, C. J., "repeat the word "*now*," twice, in describing what is excepted." Hence it was held that the reservation secured to the grantor only a right to the use of the mill then standing. So in *Sanborn* v. *Hoyt*, 24 Maine, 118, the reservation was "of all the buildings *on* the premises." "The reservation," remarks SHEPLEY, J., "in this deed, is not a house, barn or shed; but "of the buildings on said premises." Had it been of a house, barn or shed, it would have been otherwise — the land underneath would have passed.

The rulings of the justice presiding were correct.

Exceptions overruled.

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

GOWIN WILSON *vs.* JULIA F. BUCKNAM.

Washington. Opinion December 27, 1880.

Officer's sale of equity of redemption. Officer's return. Public place.

When the sale of an equity of redemption is postponed it should appear in the officer's return:

1. That he deems it for the interest of all concerned to postpone the sale.
2. That he has given notice of the time of such adjournment by public proclamation as required by R. S., c. 76, § 34.

A return defective by reason of the omission of the above requirements may be amended in accordance with the facts, saving the rights of all persons acquired in good faith before such amendment.

Where the officer in his return states, that a "school house," on which he posted a notice of sale, is a public place, it is sufficient evidence of that fact.

ON REPORT.

The case is stated in the opinion.

J. A. Milliken and *George Walker*, for the plaintiff.

The officer's return in this case is sufficient to show that the requirements of the statutes were substantially complied with.

In all or most of the cases cited by defendant's counsel the defects were much more gross than those alleged in this case, *e. g.: Crafts* v. *Elliotsville*, 47 Maine, 141; *Smith* v. *Dow*, 51 Maine, 21; *Boynton* v. *Grant*, 52 Maine, 229; *Pratt* v. *Skolfield*, 45 Maine, 386.

But all the alleged defects are amendable and the officer asks leave to amend according to the facts. His petition should be granted. *Glidden* v. *Philbrick*, 56 Maine, 222; *Fitch* v. *Tyler*, 34 Maine, 463; *Whittier* v. *Vaughan*, 27 Maine, 301; *Keen* v. *Briggs*, 46 Maine, 467; *Knight* v. *Taylor*, 67 Maine, 591.

Joseph Granger, for the defendant, cited: *Pratt* v. *Skolfield*, 45 Maine, 386; R. S., c. 76, § 34; *Crafts* v. *Elliotsville*, 47 Maine, 142; *Banister* v. *Higginson*, 15 Maine, 73; *Smith* v. *Dow*, 51 Maine, 27; *Williams* v. *Amory*, 14 Mass. 20; *Russell* v. *Dyer*, 40 N. H. 173; *Whittier* v. *Varney*, 10 N. H. 296; *Benson* v. *Smith*, 42 Maine, 414; *Wellington* v. *Gale*, 13

Mass. 483; *Davis* v. *Maynard*, 9 Mass. 242; *Eddy* v. *Knap*, 2 Mass. 154; *Purrington* v. *Loring*, 7 Mass. 388; *Munroe* v. *Reding*, 15 Maine, 153; *Boynton* v. *Grant*, 52 Maine, 229.

The petition of the officer for leave to amend his return and deed is not properly before the court. This case is to be decided on the report made up by the parties to it. The amendment should not be granted for reasons stated in *Hayford* v. *Everett*, 68 Maine, 505. Leave to amend can only be granted at *nisi prius*. R. S., c. 77, § 13; *Crocker* v. *Craig*, 46 Maine, 327; *Thompson* v. *McIntyre*, 48 Maine, 34; *Hewett* v. *Adams*, 50 Maine, 271.

APPLETON, C. J. This is a real action in which the plaintiff claims title by deed as a purchaser of a certain equity of redemption of George A. Bucknam sold on execution against him.

The officer in his return states that on the 16th of November, 1875, he "gave to the said George A. Bucknam in hand a notice in writing that the said right in equity would be sold by public auction, on the 8th day of January, A. D., 1876, at one o'clock in afternoon, at the post office, in Machias, in said county, and on the same day I also posted a like notice, in the town of Addison, on the school house, a public place in said town, and on the same day also a like notice in the town of Columbia on the school house in said Columbia, said town of Addison and town of Columbia being adjoining towns of Columbia Falls, in which said land lies; and on the same day I posted up a like notice at the post office, a public place in the town of Columbia Falls, where the land lies. Also I caused a like notice to be published three weeks before the said time of the sale aforesaid in the Machias Republican, a newspaper, printed in Machias, in said county; and on the 8th day of January, A. D., 1876, I adjourned said sale to the 14th day of said January, to the same time and place, and on the 14th, at one o'clock in the afternoon, I sold at public auction at the post office in Machias, all the right in equity which George A. Bucknam had," &c., &c.

By R. S., c. 76, provision is made for the notice of the time and place of sale of an equity of redemption.

Notice having been given, it is provided by § 34, that "when the officer deems it for the interest of all concerned to postpone the sale, he may adjourn it for any time not exceeding seven days, and so on from time to time until a sale is made, giving notice at the time of each adjournment by public proclamation," &c.

The plaintiff to bring himself within the statute must show a compliance with its provisions. *Smith* v. *Dow*, 51 Maine, 27; *Russell* v. *Dyer*, 40 N. H. 173; *Davis* v. *Maynard*, 9 Mass. 242. There should be nothing left to inference. It is for the party claiming under a statute title to establish its validity.

The return does not show that the officer deemed it "for the interest of all concerned to postpone the sale." This should appear, for if not for their interest the sale should have been made at the time and place appointed. No sufficient cause is shown for the adjournment. *Sanborn* v. *Chamberlin*, 101 Mass. 409.

The debtor was notified that the sale would take place on January 8th, 1876. No notice appears to have been given of the time to which the sale was adjourned, by public proclamation as the statute directs. The sale took place at a time of which, for want of such public proclamation, parties interested had no notice. This omission is fatal. *Hayes* v. *Buzzell*, 60 Maine, 205.

The point is made that a "school house" is not a public place. The officer in his return states it to be a public place, which is sufficient. A shoe maker's shop was held to be a public place in *Tidd* v. *Smith*, 3 N. H. 179. So a school house, mill and mechanic's shop may be properly regarded as public places, as was held in *Russell* v. *Dyer*, 40 N. H. 173.

The validity of the sheriff's deed depends upon the officer's return, which must show a full compliance with the requirements of the statute. *Pratt* v. *Skolfield*, 45 Maine, 386; *Wellington* v. *Gale*, 13 Mass. 483; *Davis* v. *Maynard*, 9 Mass. 242. "A statute title must always be perfect, that is, every thing which the law deems essential to transfer the possession from one to another must appear of record to have been done," observes

PARKER, C. J., in *Williams* v. *Amory*, 14 Mass. 20. The return being fatally defective, the deed becomes ineffectual to pass a title.

It is settled in *Welsh* v. *Joy*, 13 Pick. 477, that a misrecital in a deed of an equity may be aided by the return on the execution.

There is a motion to amend the officer's return by supplying its omissions, such amendment being in accordance with the truth. The amendment may be made accordingly, upon proof of the necessary facts, saving the rights of all persons acquired in good faith before the allowance. *Glidden* v. *Philbrick*, 56 Maine, 222; *Whittier* v. *Varney*, 10 N. H. 291.

The motion to amend was made after the case was reported. It has been argued by both sides. Its allowance necessitates a change in the terms of the report as first made and requires that a trial should be had to determine the validity and good faith of the defendant's title.

Amendment allowed.
Case to stand for trial.

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

GEORGINE THOMAS and another
vs.
SANFORD STEAMSHIP COMPANY.

Penobscot. Opinion December 28, 1880.

Landlord and tenant. Tenancy at will—termination of. Burden of proof.

The defendants occupied the plaintiffs' wharf at Bangor for several years prior to April 1, 1877, under a parol agreement at a rent of twelve hundred dollars per year, payable quarterly, and on that day the agreement was renewed for another year on the same terms.

Held, that the agreement, under the statute, created a tenancy at will, which, by R. S., c. 94, § 2, could only be terminated by thirty days' notice in writing therefor, by one party to the other, or by mutual consent.

Also held, the defendants having claimed that the tenancy was terminated by mutual consent, that the burden is upon them to establish that fact.

ON REPORT.

Assumpsit for a quarter's rent of the Thomas Wharf in Bangor, from January 1, to April 1, 1878, $300. Plea, general issue. The court was to render judgment by nonsuit or default according to the legal rights of the parties. The facts are sufficiently stated in the opinion.

A. W. Paine, for the plaintiffs, cited: R. S., c. 94, § 2; *Withers* v. *Larrabee*, 48 Maine, 570; *Randall* v. *Rich*, 11 Mass. 494; Taylor's Landlord & Tenant, § 515; *Hesseltine* v. *Seavey*, 16 Maine, 212; *Amory* v. *Kannoffsky*, 117 Mass. 351; *May* v. *Rice*, 108 Mass. 150.

Wilson & Woodward, for the defendants.

The tenancy of defendants was a tenancy at will, and may permissively be determined by thirty days' notice in writing by either party, and not otherwise, except by mutual consent. R. S., c. 94, § 2.

The termination of the tenancy in the case at bar, was by mutual consent in law, under the facts developed in the case, as presented to the court. Sometime prior to October 10, 1877, Mr. Littlefield, the defendants' agent, notified the person whom Mr. Bright, plaintiffs' agent, had left in his place and stead, that he thought he should not want the wharf after that quarter, therefore the mind of Mr. Bright was prepared, when on the first day of January, 1878, Mr. Downes called upon Mr. Bright to pay the rent and surrender the premises; this was accomplished by the surrender of the key and the acceptance of the same by Mr. Bright.

The court, having authority to draw inferences as a jury might, will not hesitate to conclude, that when a key is handed to the landlord, with a check for his rent, and the statement that they had removed every thing the day before, and the landlord takes the check and key, and deliberately makes out and gives a receipt, and retains the key, making no opposition or objection to the surrender, the landlord accepts the surrender. *Withers* v. *Larrabee*, 48 Maine, 570; *Amory* v. *Kannoffsky*, 117 Mass. 351.

LIBBEY, J. The defendants had been occupying the plaintiffs' wharf in Bangor for several years prior to April 1, 1877, under a parol agreement, at a rent of $1200 per year, payable quarterly, and on April 1, 1877, the agreement was renewed for another year on the same terms. The defendants occupied the wharf to December 31, 1877, and paid the rent to January 1, 1878. This action is for the rent from January 1, to April 1, 1878.

The agreement between the parties, under our statute, created a tenancy at will. By the statute, (R. S., c. 94, § 2,) it could be terminated only by thirty days' notice in writing therefor by one party to the other, or by mutual consent.

It is not claimed that it was terminated by the defendants by thirty days' notice in writing therefor; but it is claimed by them that it was terminated by mutual consent, and here arises the contention between the parties. The burden of proof is upon the defendants to establish this fact.

The following facts appear to be established by the evidence: When the rent due October 1, 1877, was paid, the defendants' agent caused to be communicated, verbally, to the agent of the plaintiffs that he thought the defendants would not want the wharf after the next quarter; about a week afterwards the plaintiffs' agent wrote the defendants' agent, in substance, that he was surprised that they were going to remove from the wharf; that he thought they ought to keep it another quarter; that the lease commenced in April, and should end in April. To this letter the defendants' agent replied, but his reply is not in evidence, and we cannot, therefore, infer that it is favorable to the defendants.

On the 31st of December, the defendants removed all the property they had on the wharf, and ceased to occupy it after that time. On the first day of January, 1878, the defendants' clerk went to the plaintiffs' agent to pay the the rent, handed him a check and the key to a small store house, the only building on the wharf, saying, "here is a check and the key; we moved everything yesterday." He took the check and the key and made a receipt for the rent. Nothing was said about taking the key, or about giving up the wharf. The wharf was unoccupied till April 1, 1878.

The plaintiffs' agent in no way consented to the termination of the tenancy unless the foregoing evidence proves it.

The delivery of the key by the tenant, and keeping it by the landlord, are not sufficient to show a surrender of the premises by the tenant and an acceptance by the landlord, unless that appears to be the intention of the parties. *Withers* v. *Larrabee*, 48 Maine, 570, and cases there cited.

The authorities establish the proposition that the surrender of the premises by the tenant, and taking possession by the landlord, are sufficient to show a termination of a tenancy at will. *Amory* v. *Kannoffsky*, 117 Mass. 351, and cases cited.

In this case there was no acceptance of the possession, and occupation of the premises by the plaintiffs, but they remained unoccupied.

To show that the tenancy was terminated by mutual consent, it must appear that the minds of the parties met and agreed or assented to the fact. It is not sufficient that the premises are abandoned by the tenant and that the fact is known by the landlord, but it must appear that he consents to it. Here the tenant had expressed a probable desire to terminate the tenancy on the first day of January. The landlord had objected, on the ground, in substance, that the rent was fixed by the year; that the year commenced on the first day of April, and that the tenancy should terminate on that day, the quarter from January 1, to April 1, being of but little value, as the river was closed to navigation. This being the position of the parties, and understood by them, we do not think that what occurred between the defendants' clerk and the plaintiffs' agent on the first day of January, proves a termination of the tenancy by mutual consent. The defendants are, therefore, liable.

Defendants defaulted.

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

JOSEPH E. LEWIS in equity

vs.

MARTHA E. SMALL, Administratrix, and others.

Sagadahoc. Opinion December 29, 1880.

Equity. Equitable mortgage—redemption of.

A loan of money and a deed given as security therefor, with a contract, not under seal, showing the transaction, will be regarded as an equitable mortgage, and will be enforced as such in the hands of the equitable mortgagee or his assignee taking the assignment with full knowledge of and subject to all equities between the original parties.

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

The facts are sufficiently stated in the opinion.

John S. Baker, for the plaintiff, cited: R. S., c. 90, § 1; *Thomaston Bank* v. *Stimpson*, 21 Maine, 195; *Howe* v. *Russell*, 36 Maine, 115; *Brown* v. *Holyoke*, 53 Maine, 9; *Erskine* v. *Townsend*, 2 Mass. 493; *Kelleran* v. *Brown*, 4 Mass. 443; *Cutler* v. *Dickinson*, 8 Pick. 387; *Lanfair* v. *Lanfair*, 18 Pick. 304; *Rowell* v. *Jewett*, 69 Maine, 293; *Sellers* v. *Carpenter*, 33 Maine, 485; 1 Greenl. Ev. 558; *Dockray et ux* v. *Noble*, 8 Maine, 278; *Dixfield* v. *Newton*, 41 Maine, 221; *Crooker* v. *Jewell*, 31 Maine, 306; *Connor* v. *Whitmore*, 52 Maine, 185; *Woods* v. *Woods*, 66 Maine, 206.

C. W. Larrabee, for the defendants.

The warrantee deed from George Lewis to Jonathan Davis, of October 19, 1857, was absolute and unconditional, though intended as collateral to a loan. The loan was for a specified time—two years—and not having been paid according to agreement the title to the realty became indefeasible in the grantee. *Thomaston Bank* v. *Stimpson*, 21 Maine, 195.

The equity powers of this court were restricted until the act of 1874, c. 175.

The court had not general chancery powers. *York & Cumberland R. R.* v. *Myers*, 41 Maine, 119; *Hayford* v. *Dyer*, 40 Maine, 245. The equity powers of the court then, did not extend

to equitable mortgages when Lewis conveyed to Davis in 1857 nor when Davis conveyed to Small in 1859.

The evidence fails to show a mortgage. The conveyance to Davis was from Lewis and his mother, the obligation back if under seal was to Lewis alone—not to the grantors in the deed. *Treat* v. *Strickland*, 23 Maine, 234; *Shaw* v. *Erskine*, 43 Maine, 371; *Warren* v. *Lovis*, 53 Maine, 463; *Flagg* v. *Mann*, 14 Pick. 479.

When Elisha Small purchased of Davis, in 1859, it is not pretended that he acted upon the request of George Lewis, who, according to the bill, was the sole owner of the equity till June 30, 1879.

Mrs. Lewis had an interest in the place before it was conveyed to Davis, and she held the instrument given by Davis. If she handed that to Small to redeem from Davis, in the absence of evidence to the contrary, that constituted an equitable assignment to Small and gave him the right to redeem. 1 Jones on Mortgages, "Equitable Assignment." The title acquired thereby would not be defeasible.

APPLETON, C. J. This is a bill in equity brought against the administratrix of the estate of Elisha Small and his heirs. The bill was filed September 20, 1879.

On October 19th, 1857, George Lewis, having the title to the premises in controversy conveyed the same to Jonathan Davis, at the same time giving his note for $453.61 in one and two years, and taking a bond or obligation from said Davis to reconvey on payment of the amount due in two years.

The evidence fails to show with absolute certainty whether the instrument given back was under seal or not. The witnesses describe it as a bond or obligation. The language used would indicate an instrument under seal. If so, as the deed, bond and note bear the same date, and are part of one and the same transaction, they would constitute a mortgage. R. S., c. 90, § 1.

If not under seal, as here was a loan and a deed given as security therefor, with a contract not under seal, showing clearly the nature of the transaction there would be an equitable mortgage. *Thomaston Bank* v. *Stimpson*, 21 Maine, 195; *Rowell* v. *Jewett*, 69 Maine, 293; 1 Jones on Mortgages, § 162.

It is apparent therefore that Lewis had an equity of redemption in the premises in controversy.

In about twenty days Lewis went to California, leaving his mother in possession of the mortgaged premises and the bond or obligation of Davis in her hands.

On September 1st, 1859, Elisha Small, the son-in-law of Mrs. Lewis, having received the bond or obligation from her, at her request redeemed the property by paying and taking up the note of George Lewis, surrendering to Davis his bond or obligation and receiving from him a quit claim of the premises held by him as security for the note of Lewis. The object was that the estate should be redeemed for the benefit of Lewis, Small holding the same as security for the money advanced by him to Davis.

Small took the conveyance with a full knowledge of Lewis' interest as mortgager. The note was transferred to him at the same time he received the deed. He took the land as mortgagee having only and intending to have only the rights of his grantor. He held and was to hold the land only as security for the money he advanced. He was an equitable mortgagee of the premises and was liable as such.

Mrs. Lewis, his mother-in-law, remained in the occupation of the farm, until her death in 1863, when Small entered and continued in possession till his death.

The complainant having the right of George Lewis to redeem, is entitled to maintain this bill—the statute of 1874, c. 175, having given this court full equity jurisdiction in case of equitable mortgages as in case of mortgages under the statutes.

Bill sustained. Master to be appointed.

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

GANCELO WHITE *vs.* ALBERT C. CARR.

Kennebec. Opinion August 25, 1880.*

Probable cause. Opinion of an attorney at law. Malicious prosecution.

When a person desirous of bringing an action against another, goes to an attorney at law for counsel, and the attorney is directly interested in the subject matter of the suit, and this interest is known to the client, if he takes the opinion of the attorney, so interested, that he has good cause of action, and acts upon it, and it turns out to be erroneous, in an action for malicious prosecution such opinion will not be sufficient to show probable cause though honestly given by the attorney.

To render an opinion of an attorney at law probable cause for bringing a suit, the client must prove that he communicated to his attorney all facts within his own knowledge, or of which he had been informed, or might have learned in the exercise of due diligence material to the merits of his case.

The charge of the judge in this case did not require the jury to so find and in that respect was erroneous.

ON EXCEPTIONS from superior court, Kennebec county.

ACTION for malicious prosecution.

Among other things the plaintiff excepted to the following instructions contained in the charge of the presiding justice to the jury:

"And we then come to the second proposition bearing upon this question,—want of probable cause. But I do not adopt the same order that has been adopted by counsel in presenting the the case in argument. Because, frequently, your labors may be much simplified and abbreviated by adopting a different order of inquiry whereby a determination of one question may render it entirely unnecessary to go any step beyond that; as the determination of a question against the plaintiff on a preliminary point may render it unnecessary for you to proceed any further in your inquiries. I therefore instruct you in reference to the proposition that this defendant, Carr, in bringing that action of slander acted upon the advice of counsel; that if Mr. Carr, having certain communications made to him tending to show that Gancelo White had published defamatory and slanderous matter concerning him,

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*Received by the Reporter March 30, 1881.

in good faith submitted all those facts to an attorney and counselor at law, and in good faith sought the advice, the opinion and judgment of that attorney and counselor at law, as to whether all those facts and circumstances afforded a ground for an action of slander, and thereupon received an opinion given also in good faith, that those facts and circumstances did afford a ground for action, and he thereupon commenced the action in good faith, that would be a justification for Mr. Carr in commencing that action of slander, and you would have no occasion to proceed any further in any inquiries of this case.

"You observe I have used the expression that the opinion of the attorney must also have been given in good faith. It is claimed on the part of the counsel for the plaintiff, that, to use his own language, the attorney and counselor at law was a co-conspirator. You will determine whether there is any evidence here tending to show a conspiracy between the attorney and counselor at law and Carr in reference to that action of slander. And if you find that the attorney in giving that opinion upon all the facts and circumstances disclosed by Carr or otherwise put into his possession, acted in good faith, was not so biased by any personal interest he had in the matter that he did not give an honest judgment, but gave his opinion as an attorney and counselor at law based upon his knowledge of law and experience in the trial of cases, that that action could be maintained, that would be a justification for Mr. Carr, and you would have no occasion to go any further in inquiring into the transaction itself, out of which all this difficulty has grown."

Vose & Libbey, for the plaintiff.

Potter & Otis, for the defendant.

We believe the rule of law to be this: Where a party acts *bona fide* in consulting counsel, and honestly and fairly presents his case, and pursuant to said counsel's advice given in good faith, commences a suit, believing he has a good cause of action, he will not be answerable in an action for malicious prosecution. *Stone* v. *Swift*, 4 Pick. 389; *Wills* v. *Noyes*, 12 Pick. 324; *Stevens* v. *Fassett*, 27 Maine, 266.

LIBBEY, J. This is an action against the defendant for maliciously bringing a civil action against the plaintiff for slander. To show probable cause for that action, the defendant claimed that he consulted an attorney of this court, took his opinion in good faith and acted upon it.

The case shows that the alleged slanderous words for which the action was brought, related to and embraced the attorney consulted, as well as the defendant, and in substance, charged both with a conspiracy to defraud. The fact was well known to the defendant when he consulted the attorney; and the attorney brought and entered in court an action for the slander in his own name, at the same term at which he brought and entered the defendant's action.

Upon this point the judge, in substance, instructed the jury, that if the defendant sought the advice of the attorney in good faith, and the attorney in good faith gave him an opinion that he had a good cause of action, and the defendant acted upon that opinion in good faith in bringing the suit it was a good justification therefor.

We think this was error. A party who consults an attorney at law in regard to his legal right to bring an action against another, when the attorney is interested in the subject matter of the suit, and known by him to be so interested when consulted, cannot show the opinion of the attorney as probable cause for bringing the suit, although the opinion is honestly given.

We think the grounds upon which the opinion of an attorney can be shown as probable cause for bringing a suit are, that he is an officer of the court, held out to the public as one learned in the law; and that the client has a right to presume that he will give him a fair, unbiased and well grounded opinion as to his legal rights. But when the attorney is directly interested in the subject matter of the suit, and his interest is known to the client, the client has no right to presume that he will give him an unbiased opinion; and if he takes it and acts upon it, and it turns out to be erroneous, it will afford him no justification. The client knows that he has not consulted a disinterested and unbiased attorney. Neither a judge nor juror thus interested, would be

competent to sit in the trial of the case; and if either should act, it would be good ground for a new trial, although he acted honestly. Why should the opinion of an attorney thus interested be entitled to greater respect than the decision of the judge? It might as well be held that, when an attorney is defendant in an action for malicious prosecution, he may justify on the ground of probable cause, by satisfying the jury that, as a lawyer, he in good faith believed he had a good cause of action, although in fact he had none. We know of no authority to sustain such a proposition. The rule as established by the authorities, has gone quite far enough in holding the opinion of an attorney to be sufficient probable cause, and should not be extended.

But there is another error in the law as given to the jury by the judge in his charge. All the authorities agree that, to make the opinion of the attorney probable cause for bringing the suit, the client must prove that he communicated to the attorney, all facts within his knowledge or of which he had been informed, or might have learned in the exercise of due diligence, material to the merits of his case. This the charge of the judge did not require the jury to find. It did not require the jury to find that the defendant communicated to his attorney what he knew as to the truth or falsity of the alleged slanderous charge. This was a material element to be considered by the attorney. At most it only required the jury to find "that if Mr. Carr, *having certain communications made to him tending to show that Gancelo White had published defamatory and slanderous matter concerning him*, in good faith submitted *all those facts* to an attorney and counselor at law; and in good faith sought the advice, the opinion and judgment of that attorney and counselor at law as to whether *all those facts and circumstances* afforded a ground for an action of slander and *thereupon* received an opinion, given also in good faith, that *those facts and circumstances* did afford a ground for an action," it was a good justification.

It will be seen that this proposition did not require the jury to find anything more than that the defendant communicated to the attorney what had been communicated to him as to the charge

published by the plaintiff. It is wanting in some of the essential elements of the legal rule upon this branch of the case.

Exceptions sustained.

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

RICHARD D. RICE, *vs.* FULLER G. COOK.

SAME *vs.* SAME.

SAME *vs.* SAME.

Knox. Opinion December 29, 1880.

Promissory notes. Joint promisor. Original promisor.

A person who signs a note as "surety" is to be regarded as a joint promisor. If he sign his name on the back of the note, he is regarded as an original promisor.

ON AGREED statement of facts.

These are actions upon three promissory notes.

The following are copies of the notes:

"$1200. February 5, 1879.

Six months after date, for value received, I promise to pay William R. Smith, or order, twelve hundred dollars at Augusta Savings Bank.

(Signed,) J. E. ROBINSON, Prin.
F. G. COOK, Surety.

(Indorsed.)
R. D. RICE.
Without recourse,
WM. R. SMITH."

"$350. Rockland, February, 20, 1879.

Six months after date I promise to pay to the order of Cashier Lime Rock National Bank, three hundred and fifty dollars, at Lime Rock National Bank. Value received.

(Signed,) J. E. ROBINSON.

(Indorsed.)
F. G. COOK.
R. D. RICE.
G. W. BERRY, Cashier of Lime Rock National Bank, without recourse to debt or cost."

"$600. Rockland, May 9, 1879.

Six months after date I promise to pay to the order of Lime Rock National Bank, six hundred dollars at Lime Rock National Bank. Value received.

(Signed,) J. E. ROBINSON.

(Indorsed.)

F. G. COOK.

R. D. RICE.

Without recourse,

G. W. BERRY, Cashier."

The $350 note was duly protested.

It was understood by all the parties to all of said notes, except the payees, that plaintiff signed the same as an indorser, and not as an original promisor, and with all the rights of an indorser legally implied from the papers, except as to said payees.

Rice & Hall, for the plaintiff, cited: *Coolidge* v. *Wiggin*, 62 Maine, 570; *McGregory* v. *McGregory*, 107 Mass. 543.

T. P. Pierce, for the defendant.

If the plaintiff volunteered to pay the several notes when there was no positive obligation on his part, he cannot hold the defendant. 1 Pars. Contr. 32, 33, and notes.

As to the $1200 and $600 notes, the case does not show any protest or that notice of any kind was given by the plaintiff to the defendant. If an indorser wishes to render a preceding indorser liable, he must give him a notice within one day after he receives notice of the dishonor of the note. *Carter* v. *Bradley*, 19 Maine, 62; *Crocker* v. *Getchell*, 23 Maine, 392.

APPLETON, C. J. These actions are founded on three several notes. The plaintiff is to be regarded in all as an indorser, and not as an original promisor.

The first note, dated February 5, 1879, is for twelve hundred dollars, on six months, payable to William R. Smith, and signed by J. E. Robinson, as principal, and the defendant, as surety. It is payable at the Augusta Savings Bank, and is indorsed by the payee and the plaintiff by whom it was paid.

The defendant by signing this note as surety is to be regarded as a joint promisor with the principal and as such is liable. *Hughes* v. *Littlefield*, 18 Maine, 400.

2. There can be no question raised by the defendant as to the note of February 20, 1879, for $350, as, besides being an original promisor, the note was duly protested and notice given. Indeed, his liability seems not to be contested.

3. The third note, dated May 9, 1879, for $600 on six months, and payable to the order of the Lime Rock National Bank, at their bank, is signed by J. E. Robinson, and on the back is the name of the defendant. In such case he is to be held as an original promisor. *Woodman* v. *Boothby*, 66 Maine, 389. By the agreement of the parties the plaintiff is to be regarded only as an indorser and not as an original promisor.

The note not being paid at maturity was indorsed by the cashier of the Lime Rock Bank to the plaintiff, who is entitled to recover on the same, whether he took it up with or without protest. *McGregory* v. *McGregory*, 107 Mass. 543.

Judgment for plaintiff in the three suits.

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

ABBIE BADGER *vs.* MARK P. HATCH.

Kennebec. Opinion December 30, 1880.

Trover. Conversion. Bailment. Divorce—agreement to procure. Promissory note—title by delivery.

In an action of trover for the value of a promissory note which the defendant had in his possession as the bailee of the plaintiff with power under certain restrictions, and upon certain conditions, to deliver to the plaintiff's husband, in pursuance of an agreement, by which the plaintiff was to pay $200, without interest, to her husband in full satisfaction for all claims for labor or otherwise, provided her husband procured a divorce from her within a year from the date of the agreement—the husband having failed to procure a divorce, the plaintiff having procured one from him, and thereafterwards the defendant, without the consent of the plaintiff having transferred the note to a bank which collected it of the maker, and this suit having been brought without demand and within a year from the date of the agreement between the plaintiff and her husband; *Held*,

1. That the defendant had disposed of the note in a manner not authorized by the terms of the agreement under which he received it; and that such disposition amounted to a conversion which at once terminated the bailment and the defendant's right of possession, and that trover may be maintained for the value of the note before the expiration of the original term of bailment and without demand.
2. That there is nothing on the face of the contract of bailment to show that the note was bailed for any but a legal purpose.
3. That the indorsement of the note by the plaintiff and delivery to the defendant for the purposes indicated did not pass the title to the defendant.
4. That the fact that the plaintiff herself procured a divorce did not enlarge the defendant's power, nor would the further fact that the plaintiff owed the defendant one dollar for services justify the mis-appropriation of the note or defeat or suspend the plaintiff's right of action therefor.

ON REPORT from the superior court, Kennebec county.

Trover for the value of the following promissory note indorsed by the plaintiff and delivered by her to the defendant for the purposes stated in the opinion.

"$200. Clinton, March 8, 1879.

For value received I promise to pay Abbie Badger, or order, two hundred dollars, in the month of October, A. D. 1879, with interest at seven per cent. till paid.

(Signed,) GEORGE H. KINGSLEY."

The date of the writ was November 3, 1879.

At the trial, after the testimony for the plaintiff was in, the the case was withdrawn from the jury and reported, with the agreement, that if "the law court should hold the action not maintainable on said evidence the plaintiff is to become nonsuit, but if otherwise the case to stand for trial."

S. S. Brown, for the plaintiff, cited: *Alsago* v. *Chase*, 10 M. & W. 583; *Palmer* v. *Jermaine*, 2 M. & W. 282; *Fiefield* v. *M. C. R. R. Co.* 62 Maine, 77; 1 Hilliard, Torts 26 and cases cited; *Crocker* v. *Gullifer*, 44 Maine, 491; *Hill* v. *Freeman*, 3 Cush. 257; 12 Maine, 382.

E. Hammons, for the defendant. The action was brought prematurely, being within one year from the date of the agreement between the plaintiff and her husband. The plaintiff's indorsement of the note passed the title absolutely to the defendant. There was no conversion by the defendant. The defendant having come rightfully into the possession of the note a demand was necessary to maintain trover. The plaintiff relieved Charles E. Badger from his obligation by procuring a divorce herself. The agreement between the plaintiff and her husband was void and the note without consideration. *Morrill* v. *Goodenow*, 65 Maine, 178.

The defendant had a lien on the note for one dollar due him for professional services. 4 Bur. 2221. See also 2 Espinasses, c. 456; *Ames* v. *Palmer*, 42 Maine, 197; *Clapp* v. *Glidden*, 39 Maine, 448; *Fuller* v. *Tabor*, 39 Maine, 519.

BARROWS, J. The testimony introduced on the part of the plaintiff tends to show that she was the owner of the two hundred dollar note, for the value of which she here sues in trover, having given to the maker in exchange for it her own note of the same date and for the same amount secured by mortgage; and that, after indorsing it, she placed it, on the day of its date, in the hands of the defendant [who was counsel for her husband in a contemplated suit for divorce against herself], in pursuance of a written agreement drawn by the defendant and subscribed by the plaintiff and her husband March 8, 1879, setting forth that in case the husband obtained a divorce from her within a year from

that time she was to pay him "$200 without interest, in full satisfaction for all claims for labor or otherwise that he may have against her; . . . and a note for said amount given by George H. Kingsley to said Abbie [plaintiff], and by her indorsed is hereby deposited with M. P. Hatch [defendant], to be by him delivered to [the husband] when such divorce is decreed, less accrued interest or that amount in cash." Then follow other stipulations as to certain articles of personal property which the husband was to have, and as to the custody and support of their child. It further appears from the testimony of the plaintiff and Kingsley that the defendant was cognizant of an agreement between them made at the time of the exchange of notes in his presence, that if the husband failed to procure a divorce her note was to be paid by delivering up Kingsley's to him.

The husband did not get the divorce here spoken of; but the plaintiff procured a divorce from him on her own libel in the following September.

Notwithstanding this it would seem that the defendant transferred the note to one of the banks in Waterville, whose cashier called on Kingsley to pay it, which he did, and thereupon, November 3, 1879, this suit was brought by the plaintiff, charging in the usual form that the defendant had converted the note to his own use.

The points made by the defendant will not bear examination.

Unlike the note which was the subject of controversy in *Morrill* v. *Goodenow*, 65 Maine, 178, cited by defendant, Kingsley's note to the plaintiff was for a valid consideration. The case cited has no bearing whatever upon the one before us.

Nor is there any evidence to show that Kingsley knew or supposed that the note he gave was to be appropriated in any event for any improper purpose.

Counsel on both sides seem disposed to assume that the object of the agreement in pursuance of which the note was deposited with the defendant, was to promote the procurement of a divorce of the husband from the wife by collusion, apparently forgetting that even if this were the fact and the condition of the agreement had been performed, neither the husband nor the wife nor any

one in privity with them would be permitted thus to impeach or attack the judgment in the divorce suit collaterally in any subsequent litigation between them. *Davis* v. *Davis*, 61 Maine, 395.

But there is nothing in the agreement itself, or in the testimony, which would warrant a finding that its object was the fraudulent procurement of a divorce by collusion. The presumption is that it was honest and lawful, and apparently it relates only to topics about which it was competent for parties, situated as that husband and wife were, to contract, subject to the revision and approval of the court. *Burnett* v. *Paine*, 62 Maine, 122; *Blake* v. *Blake*, 64 Maine, 177. Defendant was plaintiff's bailee with power to dispose of the note [so far as appears,] only in a particular manner and upon a certain condition; but the fair inference from the testimony is that he did dispose of it when the condition had not been performed, and in a manner not authorized by the agreement upon which he received it. Was this a conversion? It was not necessary to show that the defendant had appropriated the money for the note to his own personal benefit and advantage.

Conversion is well defined as consisting "in the exercise of dominion and control over property inconsistent with and in defiance of the rights of the true owner or party having the right of possession." *Fuller* v. *Tabor*, 39 Maine, 519.

The defendant had no right to do anything with the note except in conformity with the terms of the agreement, or by the consent of the owner. "If the bailee uses the property bailed for purposes variant from those for which by the contract of bailment they were to be used, this constitutes a conversion, and trover is maintainable therefor." *Crocker* v. *Gullifer*, 44 Maine, 491. And such tortious use puts an end to the bailment and the bailee's right of possession, and the general owner may maintain trover forthwith without a demand. *Grant* v. *King*, 14 Vt. 367; *Melody* v. *Chandler*, 12 Maine, 282; *Hill* v. *Freeman*, 3 Cush. 257.

The indorsement of the note by the plaintiff would not pass the title unless followed by a delivery with that intent. But

here the delivery was for a specific purpose, and the power of the defendant to deliver to the husband was coupled with conditions that have not been performed. The defendant was not bailee with power to collect the note and dispose of its proceeds, but only to deliver it to the husband when the conditions had been performed. Nor did the fact that the plaintiff procured a divorce from her husband of itself enlarge the defendant's power over the note.

Nor can the further fact that the plaintiff had employed the defendant as a scrivener to write a mortgage, and owed him a dollar therefor, justify the conversion of a note which he held under a special bailment for defined purposes with limited powers, nor defeat nor suspend her right of action therefor. According to the stipulations of the parties in the report,

Case to stand for trial.

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

SETH STINCHFIELD in equity *vs.* ELIAS MILLIKEN and another.

Washington. Opinion December 31, 1880.

Equity. Equitable Mortgage. Evidence. Deed. Chancery powers. Stat. 1874, c. 175. Fixtures. Insurance by Mortgagee. Redemption — a bill to redeem premature if brought before debt is due. Waiver.

The defendants received title to lands by absolute deeds from third parties by the procurement of the complainant, the consideration therefor coming mostly from the complainant. The defendants gave a written promise, not under seal, to convey to complainant when he paid his notes given to them. This transaction constitutes an equitable mortgage.

When it is clear that the intention is to take an absolute conveyance as a security for a debt, the transaction is in equity a mortgage. That intention may be shown by parol or written evidence. The existence of a debt is a well nigh infallible evidence of it.

In equity, a mortgage is not prevented because the conveyance does not come from the equitable mortgager. It is sufficient that the debtor, having an interest in the property conveyed, either legal or equitable, procures the conveyance to be made.

Since the act of 1874, conferring general chancery powers, this court is authorized to declare an absolute deed to be a mortgage, allowing the equitable mortgager the right to redeem. The jurisdiction is exercised upon the ground that, to take an absolute conveyance as a mortgage without any defeasance, is in equity a fraud.

Certain mill fixtures, which were afterwards incorporated into the real estate, were mortgaged as personal property to secure the same debt the deeds were taken to secure.

Held, that the complainant can redeem from the whole or none; he has no right to separate the transaction.

In computing the amount due under an equitable mortgage, where the mortgagee collects an insurance on the property insured in his own name, he must account for the proceeds, if he insures the property upon the authority and at the expense of the mortgager; but not, if he insures merely on his own account; nor if in the policy there is an agreement that the insurer shall be subrogated to the rights of the mortgagee.

A bill in equity does not lie to redeem a mortgage before the mortgage debt is due. But when no objection is taken that the bill is premature, and the debt is overdue when the whole case is before the court for a decision upon the merits, the objection may be considered as waived. It may be a cause for denying costs for the complainant.

BILL IN EQUITY TO REDEEM. Heard on bill, answer and proof.

The facts appear in the opinion.

F. A. Pike, for the plaintiff, cited: Greenlief's note to Cruise, vol. 2, p. 74; *Poindexter* v. *McCannon*, 1 Dev. Eq. Rep. 373; *Skinner* v. *Miller*, 5 Lit. 84; 2 J. J. Marsh, 471; *Edington* v. *Harper*, 3 J. J. Marsh, 354; *Crane* v. *Bonnell*, 1 Green, c. 264; *Robertson* v. *Campbell*, 2 Call. 421; *King* v. *Newman*, 2 Munf. 40; *Prince* v. *Beardon*, 1 A. K. Marsh. 169; *Oldham* v. *Halley*, 2 J. J. Marsh, 114; *Thompson* v. *Davenport*, 1 Wash. 125; *Conway* v. *Alexander*, 7 Cranch, 218; 2 Edw. 138; *Flagg* v. *Mann*, 2 Sum. 533; *Waters* v. *Randall*, 6 Met. 479; *French* v. *Sturdivant*, 8 Maine, 251; *Kelleran* v. *Brown*, 4 Mass. 443; *Thomaston Bank* v. *Stimpson*, 21 Maine, 195; *Richardson* v. *Woodbury*, 43 Maine, 211; *Eaton* v. *Green*, 22 Pick. 526; Story Eq. Jur. § 1018; 2 Washburn, R. P. 43.

A. McNichol, for the defendants.

The defendants hold the title to the real estate. They studiously avoided taking a mortgage or giving a defeasance under seal to make the transaction a mortgage. The contract given by the defendants to the plaintiff subsequent to all the other transactions did not constitute the whole transaction a mortgage at common law, which must be done before the court can apply equity. *Flint* v. *Sheldon*, 13 Mass. 443; *Kelleran* v. *Brown*, 4 Mass. 443; *Erskine* v. *Townsend*, 2 Mass. 493; *Gardiner* v. *Gerrish*, 23 Maine, 46; *Stackpole* v. *Arnold*, 11 Mass. 27; *Cotton* v. *McKee*, 68 Maine, 486; *Shaw* v. *Erskine*, 43 Maine, 371; *Bodwell* v. *Webster*, 13 Pick. 411; *Treat* v. *Strickland*, 23 Maine, 234; R. S., c. 90, § 1; *McLaughlin* v. *Randall*, 66 Maine, 226; *Conway* v. *Alexander*, 7 Cranch, p. 236; *Flagg* v. *Mann*, 14 Pick. 479, authorities cited; *Fales* v. *Reynolds*, 14 Maine, 89; *Richards* v. *Smith*, 9 Gray, 315; *Smith* v. *Burnham*, 3 Sum. 435. Stat. 1874, c. 175, does not enlarge the equity jurisdiction of this court touching mortgages. It says: "Tenth, And shall have full equity jurisdiction according to the usage and courts of equity, *in all other cases*." The jurisdiction of the court as to *mortgages* had previously been defined in the same section.

The steam engine and machinery became a part of the realty when placed in the mill. *Davis* v. *Buffum*, 51 Maine, 160; 7

Met. 40; *Symonds* v. *Harris*, 51 Maine, 14; The foreclosure of a mortgage affects the whole mortgage. *Spring* v. *Haines*, 21 Maine, 126; *Rogers* v. *Saunders*, 16 Maine, 92.

PETERS, J. The following facts are deducible from the evidence in this case: The complainant purchased of the defendants, certain steam-mill machinery, for removal from Hallowell to Danforth, in this State. There was at the time a verbal agreement, that the complainant should build a mill, and put the machinery into it, on a lot of land in Danforth, bought by him of one Russell, who was to deed the lot directly to the defendants. The complainant was also to procure a deed of his home (another) lot to the defendants from the heirs of H. E. Prentiss, who held an absolute title thereof as security for the complainant's indebtedness to them, there being a small balance only unpaid, which the defendants were to pay for him. The defendants were to give an agreement, to convey to the complainant if he paid his indebtedness to them according to the tenor of certain notes to be given.

On June 15, 1875, the complainant gave to the defendants a mortgage on the machinery as personal property to secure the notes hereafter named, in order to protect a lien thereon until the machinery should be put into the mill to be built, and become a part of the real estate. And there was embodied in this mortgage, an agreement of the complainant to build the mill and put the machinery into it. On June 16, 1875, Russell conveyed the mill lot to the defendants. On August 2, 1875, Prentiss conveyed the home lot to them, they paying the balance of the Prentiss claim. On August 4, 1875, the defendants gave a writing to the complainant, agreeing to convey the property to him upon the condition that he would pay to them his notes on one, two, three, four and five years, respectively, with interest. The notes were given for the amount payable for the machinery, the sum paid to Prentiss, and for other loans and advances. The complainant went on and erected and completed a mill on the Russell lot, and the steam mill machinery became a part of it.

The complainant seeks to redeem the property, claiming the transaction to be a mortgage. The defendants contend that the transaction was not a mortgage, that it was a conditional sale.

It was not a legal mortgage: Because the defeasance has no seal. *Warren* v. *Lovis*, 53 Maine, 463. And because the papers were not between the same parties. At law, the conveyance must be made by the mortgager and the defeasance by the mortgagee. *Shaw* v. *Erskine*, 43 Maine, 371.

But the transaction was in equity a mortgage—an equitable mortgage. The criterion is the intention of the parties. In equity, this intention may be ascertained from all pertinent facts either within or without the written parts of the transaction. Where the intention is clear that an absolute conveyance is taken as a security for a debt, it is in equity a mortgage. No matter how much the real transaction may be covered up and disguised. The real intention governs. "If a transaction resolve itself into a security, whatever may be its form, and whatever name the parties may choose to give it, it is in equity a mortgage." *Flagg* v. *Mann*, 2 Sum. 533.

The existence of a debt is well nigh an infallible evidence of the intention. The intention here is transparent. The defendants have a debt and held the property as a security for its collection. A legal mortgage was avoided; an equitable mortgage was made.

Although different at law, in equity a mortgage is not prevented because the conveyance does not come from the equitable mortgager. It is sufficient that the debtor has an interest in the property conveyed, either legal or equitable. Having such an interest, if he procures a conveyance to one who advances money upon it for him, taking the property as security for the money advanced, he has a right to redeem. The grantee in such case, acquiring the title by his act, holds it as his mortgagee. Jones on Mort. 2d ed. § 331. *Stoddard* v. *Whiting*, 46 N. Y. 627; *Carr* v. *Carr*, 52 N. Y. 251.

It is denied that this court has the power to declare that an absolute deed shall be deemed to be a mortgage, allowing an equitable mortgager the right to redeem. At law, it has no such power. Nor, when the court had a limited jurisdiction in equity, was the doctrine admitted. It was always understood, however, that, in a case like the present, if, instead of a demurrer, an answer was filed admitting the facts alleged, the court had the

power to apply the remedy. *Thomaston Bank* v. *Stimpson*, 21 Maine, 195; *Whitney* v. *Batchelder*, 32 Maine, 313; *Howe* v. *Russell*, 36 Maine, 115; *Richardson* v. *Woodbury*, 43 Maine, 206. But since the act of 1874 conferred general chancery powers upon the court, it has full and complete jurisdiction in such cases. *Rowell* v. *Jewett*, 69 Maine, 293–303; Jones, Mort. (2d ed.) § 282.

Courts of equity generally exercise such power. While the grounds upon which the doctrine is admitted vary with different courts, there is a great concurrence of opinion as far as the result is concerned. In our judgment, it is a sound policy as well as principle to declare that, to take an absolute conveyance as a mortgage without any defeasance, is in equity a fraud. Experience shows that endless frauds and oppressions would be perpetrated under such modes, if equity could not grant relief. It is taking an agreement, in one sense, exceeding and differing from the true agreement. Instead of setting it wholly aside, equity is worked out by adapting it to the purpose originally intended. Equity allows reparation to be made by admitting a verbal defeasance to be proved. The cases which support this view are too numerous to cite. The American cases are collected in Jones, Mort. 2d ed. § 241, *et seq.* See *Campbell* v. *Dearborn*, 109 Mass. 130; and *Hassam* v. *Barrett*, 115 Mass. 256.

The complainant seeks to separate the articles originally mortgaged as personal property, and, being allowed the value of them, redeem the balance of the estate only. That would not be equitable. The personal became a part of the real as originally designed to be. It was affixed and solidly bolted thereto. The mortgage was evidently only to serve a temporary purpose. It was not just to either party that there should be two mortgages instead of one. It is urged that the defendants foreclosed the personal mortgage. It could not be done. The personal mortgage was extinguished when attempted to be done. That was but a ruse to get the possession which the defendants were entitled to. No severance was ever made or attempted to be made.

It is intimated that the mill has burned down, *pendente lite*, under an insurance obtained by the defendants, and a question

may arise, before the master, whether the complainant should have a credit of the net proceeds. If the insurance was obtained on the mortgagees' own account only, they should not be allowed. *Cushing* v. *Thompson*, 34 Maine, 496; *Pierce* v. *Faunce*, 53 Maine, 351. The head note in *Larrabee* v. *Lumbert*, 32 Maine, 97, is erroneous in that respect. It was allowed in that case by consent. *Insurance Co.* v. *Woodbury*, 45 Maine, 447.

But where a mortgagee insures the property by the authority of the mortgager, and charges him with the expense, then any insurance recovered should be accounted for. And if a mortgager covenants to insure, and fails to do so, the mortgagee can himself insure at the mortgager's expense.

One of the defendants testifies that "Stinchfield agreed to pay all taxes and insurance." He also says, "We have had the house, stable and mill insured, and have paid the insurance, $108." We think this is evidence of an insurance obtained by the mortgagees at the expense of the mortgager on account of his failure to keep his verbal covenant to insure, and renders it proper that the net proceeds of any insurance obtained should be allowed in the settlement between them.

But this cannot be, if the insurance was collected under a policy in which it is agreed between the insured and insurer that the company in case of loss should be subrogated to the right of the mortgagee. For in such case the insurance is not in fact on the mortgager's account, nor is it such an insurance as could be made available to him. Jones, Mort. (2d ed.) § 420, and cases in note.

The complainant may redeem the whole property upon payment of whatever may be due upon the whole debt. Inasmuch as the complainant sets up a claim exceeding the equitable right, neither party to recover costs up to the entry of this order; and whether future costs shall be recovered by either side, to be reserved for decision when the proceedings are to be finally terminated. Another reason why complainant should not recover costs is, that when his bill was commenced the mortgage debt was not due. The mortgage could not be redeemed until 1880. The bill was

commenced long before that time. But as the mortgage is now due, and no point is taken that the proceeding was premature, it will probably be for the interest of all the parties that their matters may be adjusted under this bill. For which purpose a master must be appointed, unless the parties can best determine the accounts between themselves.

Decree accordingly.

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

INHABITANTS OF SEBEC *vs.* INHABITANTS OF DOVER.

Piscataquis. Opinion December 31, 1880.

Pauper. Liabilities of towns for aid when pauper disabilities do not follow.

Stat. 1875, c. 21, imposes no duty upon towns to render aid to needy persons whether soldiers or otherwise, but simply prohibits pauper disabilities to certain persons dependent upon towns and receiving aid on account of such dependence.

The only statute authorizing aid in such cases as this, is the general pauper law, and while that regulates the duties and rights of towns as to the aid furnished, the law of 1875 refers to and regulates the rights of persons receiving such aid and does not affect the remedy upon the town of settlement.

ON REPORT.

The case is stated in the opinion.

W. P. Young, for the plaintiffs.

A. M. Robinson, for the defendants.

To render defendants liable, the supplies furnished, must be to a pauper. *Verona* v. *Penobscot*, 56 Maine, 11. But the person receiving aid was a disabled soldier, not a pauper. Stat. 1875, c. 21.

This statute affects the towns as well as the person aided. *Glenburn* v. *Naples*, 69 Maine, 68; see also, *Veazie* v. *China*, 50 Maine, 518; and *Milford* v. *Orono*, *id.* 529, where the principle contended for was recognized and applied to former statutes in aid of the soldiers.

DANFORTH, J. This is an action for alleged pauper supplies furnished one Justin E. Blethen. The facts agreed upon leave no doubt as to the liability of the defendant town under the general pauper law.

The defence rests upon the act of 1875, c. 21, which provides that, "No soldier who has served by enlistment in the army or navy of the United States, in the war of eighteen hundred and sixty-one, and in consequence of injury sustained in said service, may become dependent upon any city or town in this State, shall be considered a pauper, or subject to disfranchisement for that cause."

The statement further shows that the person receiving the supplies in this case, and his need of such supplies, comes clearly within the terms of this act, and the only question presented is, whether the defendant town is relieved of its liability under the pauper law, by its provisions.

The language of the act, "may become dependent upon any city or town," must be construed as referring to a town or city under legal obligation to furnish, and a person having a legal right to receive supplies on account of need. In this case, the person receiving aid was at the time, a resident of the plaintiff town, and his poverty as well as the legal liability of such town is conceded. The supplies then were legally furnished. Must the plaintiff bear the expense, or does it have a remedy over upon the town of Blethen's settlement?

The act of 1875 imposes no obligation upon any town to furnish aid to any person, soldier or otherwise. It assumes that the class of persons, there referred to, are entitled to assistance in case of need, and simply declares that when such assistance is received, certain pauper disabilities shall not follow. The same condition of poverty is necessary to entitle one to supplies as under the general pauper law, but the same consequences do not result. The act, then, has reference to the person rather than the towns, and while it prevents any change in his rights, it does not in any way affect or purport to affect, the rights or liabilities of the different towns, except, as held in *Glenburn* v. *Naples*, 69 Maine, 68, such supplies would not prevent the residence

sufficiently long continued, from ripening into a settlement, and as held in the same case this principle, resulting from the provision that supplies under such circumstances do not cause pauper disabilities, has no tendency to destroy or affect the remedy over upon the town where is the settlement of the person receiving such supplies.

We must, therefore, look elsewhere for the rights and liabilities of these towns.

Under our statutes, soldiers who have become poor on account of services rendered in the army or navy, have been treated in a manner differing in some respects from others who have received aid as paupers.

In 1861, and each following year, down to 1865, an act was passed in relation to the support of the families and dependents of volunteer soldiers. All these acts are substantially consolidated in that of 1865, c. 331, and refer to the support of the families and dependents, while the soldier is in actual service, or within a limited time after his death in or discharge from the army in consequence of the casualties of war, and in no case do they provide for aid directly to the soldier. These acts, except that of 1865, as they authorized the raising of money for the support of persons "being inhabitants of such towns," must necessarily be, as they have been, construed to impose the obligation upon the town of such persons' residence, without any remedy over, except so far as they provided for a reimbursement by the State. *Veazie* v. *China*, 50 Maine, 518; *Milford* v. *Orono*, *id.* 529: *Verona* v. *Penobscot*, 56 Maine, 11.

As the aid in this case was not furnished to the family, but directly to the soldier, but more especially as the aid was not and could not have been furnished within the time allowed by the several acts, or in accordance with their provisions, they are not applicable to this case, and imposed no obligation upon the plaintiff town.

The only remaining source whence we can derive any obligation requiring the plaintiff town to furnish the aid rendered in this case, is the act for the support of paupers. This, as we have seen, does impose such a duty. It was under this law and this

alone that Blethen became "dependent upon the town" of Sebec. By this act the remedy over is so connected with the duty that it cannot be separated from it. By R. S., c. 24, § 4, towns are authorized to raise money for the support of such persons only, as have a settlement therein. By § 24, "overseers are to relieve persons destitute found in their towns, and having no settlement therein." The only means provided in the latter case for reimbursement is, not by taxation as in the former, but by a recovery of the expense from the town where the destitute person has a settlement. Thus the right of recovery is a condition of the duty, an elementary part of and inseparable from it.

Nor is the act of 1875 in conflict with this view. The remedy over does not make the person a pauper. It, in no manner, affects the question as to whether he shall be assisted, nor his condition when assisted. It is a matter between the towns as to which shall finally bear the expense, and though it may so far affect the person as to prevent the supplies from having an influence upon his settlement, it certainly imposes no burden upon him in that respect but relieves him from one, as it tends to enable him to gain the settlement of his choice, as held in *Glenburn* v. *Naples*, *supra*.

The pauper law is but a statute and may be changed or modified as the legislature may see fit; or a part of it only may be made applicable to any particular class of persons, while as to them another part may be made of no force. In this respect the act of 1865, c. 331, is an illustration. By § 6 of that act all expenses for the relief of soldiers not reimbursed by the State may be recovered of the town where such persons have their legal settlement, and yet in the same section it is provided that no pauper disabilities shall be created, by any aid furnished under its provisions. *Ames* v. *Smith*, 51 Maine, 602. A similar provision has been incorporated into the law for the support of the insane poor and sustained by the court. *Glenburn* v. *Naples*, *supra*. Thus it is evident that the legislature by a prohibition of pauper disabilites on account of aid rendered the needy soldier, did not mean that he should not be supplied in accordance with the pauper law; for if it were so, no aid could be rendered to

the soldier more than six months discharged from the army, as was Blethen, but by the act of 1875, leaves him to become dependent by that law, and when so dependent imposes the duty of assistance upon towns in accordance with its provisions, but protects his person from its disabilities.

Whether the provision forbidding disfranchisement is in accordance with the constitution is not a question involved in this case. If unconstitutional it can have no effect. If otherwise it is not inconsistent with, and does not affect the duty of towns to render aid in all proper cases, nor with any rights or remedy they may have which do not impair the rights of such as receive assistance.

Defendants defaulted.

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

HENRY J. HOTCHKISS *vs.* JOSIAH W. WHITTEN.

Oxford. Opinion December 31, 1880.

Poor debtor. Escape. Liability of jailer. Measure of damages. Bond.

The jailer is liable for an escape if he permits a prisoner committed to jail on execution to go at large without giving a bond approved as required by R. S., c. 113, § § 24, 42. The mere sending for a bond not in accordance with the statute and its retention without suit upon it or any action in regard to it is not a waiver of its want of legal approval.

The appearance of the creditor's attorney, on a notice to disclose, at the time and place appointed, but refusing to choose a justice and protesting against the jurisdiction of the magistrates and against a discharge, is not a waiver of the escape, though he may examine the debtor.

For an escape of a poor debtor the creditor is only entitled to actual damages against the jailer. The true measure of damages is the value of the custody of the debtor at the time of the escape.

ON AGREED STATEMENT of facts.

The facts are sufficiently stated in the opinion.

S. F. Gibson, for the plaintiff, cited: Hilliard Rem. for Torts. 480; *Brooks* v. *Hoyt*, 6 Pick. 469; *Guilford* v. *Delaney*, 57 Maine, 589; *Ross* v. *Berry*, 49 Maine, 439; *Call* v. *Foster*, *Id.* 452; *Hackett* v. *Lane*, 61 Maine, 31; 47 Maine, 182; 29

Maine, 368; 36 Maine, 494; R. S., c. 113; *Leighton* v. *Pearson*, 49 Maine, 100; *Sargent* v. *Pomroy*, 33 Maine, 388.

The authorities cited abundantly show that the bond taken by the jailer in this case, if good at all, is only good at common law, and in a suit upon it the plaintiff would recover actual damages only. It was the duty of the jailer to have required a good statute bond. In a suit upon that the damages would be the amount of the judgment—debt, costs and interest. The true measure of damages in this case, then, is the difference between what would be recovered in a suit upon the two bonds —between nominal damages and the amount due on the execution from the debtor to the plaintiff.

George A. Wilson, for the defendant, cited: *Coffin* v. *Herrick*, 10 Maine, 126; *Hopkins* v. *Fogler*, 60 Maine, 266; *Dyer* v. *Woodbury*, 24 Maine, 546.

It is immaterial whether the bond is a statute or common law bond, as one of its conditions has been fulfilled.

APPLETON, C. J. This is an action on the case against the sheriff of the county, for the escape of Porter K. Etheridge, under R. S., c. 80 § 31.

It appears that Etheridge, the debtor, was committed May 20, 1878, to jail by virtue of an execution against him in favor of the plaintiff, and on June 12th, following, was permitted to go at large, on giving a bond signed by two sufficient sureties and approved by a justice chosen by the debtor and one chosen by the jailer, who without especial authority assumed to act for the creditor.

The bond was not approved in writing. The justices were not selected in accordance with R. S., c. 113, § § 24, 42. The creditor had no part in the selection of a justice. The bond was not a statute bond, though it may have been good at common law. *Guilford* v. *Delaney*, 57 Maine, 589.

The creditor had a right to require a statute bond. The jailer could not legally release the debtor without one. Here is an escape.

The plaintiff's attorney upon being informed of the debtor's discharge, sent for the bond, which was forwarded him. Had a

suit been brought on the bond it would have been a waiver of all objections to the taking of it, but no suit has been brought. *Kimball* v. *Preble et al.* 5 Maine, 353. Its return to the jailer would have been of no avail to him, as after a voluntary escape he would not have been justified in retaking the prisoner. *Atkinson* v. *Jameson*, 5 D. & E. 25. The mere retention of the bond under the circumstances is not equivalent to its written approval by the plaintiff or his attorney, or its approval by two justices selected according to the requirements of the statute.

The debtor having given the bond, notified the creditor to hear his disclosure. The attorney appeared but declined to choose a justice, when one was chosen by the sheriff. Then protesting against their jurisdiction he proceeded to examine the debtor and ended by protesting against the administration of the poor debtor's oath to him or issuing a certificate. Here, then, has been no waiver of the escape. That was a past fact. When a bond has been forfeited, a creditor's participation in the examination of the debtor after the expiration of the six months, does not constitute a waiver of the forfeiture. *Guilford* v. *Delaney*, 57 Maine, 589. So, where an action commenced before a magistrate has been continued without legal authority, no magistrate being present to continue it, an appearance at the time and place named, under protest, for the purpose of insisting that further proceedings would be illegal, cannot be regarded as a waiver of errors. *Martin* v. *Fales*, 18 Maine, 23. The action of the plaintiff's attorney was merely a prudent precaution against possible contingencies. *Briggs* v. *Davis*, 34 Maine, 158. Persistent protestation can hardly be deemed an approval of a bond wanting in the requirements of the statute.

The plaintiff is only entitled to the damages actually sustained. *Brooks* v. *Hoyt*, 6 Pick. 468; *West* v. *Rice*, 9 Met. 569; *Chase* v. *Keyes*, 2 Gray, 215. The true measure of damages is the value of the custody of the debtor at the time of the escape. *Loosey* v. *Orser*, 4 Bosw. 391.

That value is almost infinitesimally minute. The evidence satisfies us alike of the existing insolvency and utter poverty of the

debtor and of their probable continuance. The plaintiff is entitled to nominal damages.

Judgment for plaintiff for one dollar.

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

SAMUEL SNOW *vs.* INHABITANTS OF BRUNSWICK.

Cumberland. Opinion December 31, 1880.

Action. Collector of school district tax. Town treasurer. Warrant of distress.

An action cannot be maintained by the collector of taxes against the town, for the issuing of a warrant of distress against him and the levying the same on his goods by the treasurer of the town, the issuing and enforcement of the same being the act of the town treasurer on his own responsibility.

ON EXCEPTIONS.

Action on the case, for damages sustained by the plaintiff, because of a warrant of distress wrongfully issued, as he says, and enforced against him as collector of taxes by the treasurer of the defendant town, for neglecting to collect and pay over the village school district tax.

At the trial, after the plaintiff's evidence was all in, the defendants contended that the action could not be maintained. But the presiding justice ruled as a matter of law that the action was maintainable. Thereupon by agreement the case was withdrawn from the jury to be heard by the law court on defendants' exceptions to such ruling. "If the action is not maintainable a nonsuit is to be ordered."

Henry Orr, for the plaintiff.

Objections to a refusal to nonsuit are distinctly forbidden. *Carleton* v. *Lewis*, 67 Maine, 76; *Boody* v. *Goddard*, 57 Maine, 602.

Neither a town nor its officers can appropriate or interfere with private property unless authorized by statute. *Mitchell* v. *Rockland*, 45 Maine, 496.

To authorize distress the defendants must show that they have strictly complied with the statute requirements, especially in regard to the warrant and commitment to the collector. *Railroad Co.* v. *Bolton*, 48 Maine, 451; *Frankfort* v. *White*, 41 Maine, 537; *Boothbay* v. *Giles*, 68 Maine, 160.

The warrant to this collector was not in due form of law as prescribed by R. S., c. 6, § 94.

Weston Thompson, for the defendants, on the question discussed in the opinion, cited: *Barbour* v. *Ellsworth*, 67 Maine, 294; *Lynde* v. *Rockland*, 66 Maine, 309; *Packard* v. *Limerick*, 34 Maine, 266; *Small* v. *Danville*, 51 Maine, 359; *Howe* v. *Boston*, 7 Cush. 273; *Withington* v. *Harvard*, 8 Cush. 66; *Lowell Bank* v. *Winchester*, 8 Allen, 109; *Ogg* v. *Lansing*, 35 Iowa, 495; *Waltham* v. *Kemper*, 55 Ill. 346; *Mead* v. *New Haven*, 40 Conn. 72; *Woodcock* v. *Calais*, 66 Maine, 234; *Brown* v. *Vinalhaven*, 65 Maine, 402; *Watson* v. *Princeton*, 4 Met. 599; *Mitchell* v. *Rockland*, 41 Maine, 363; *Mitchell* v. *Rockland*, 52 Maine, 118; *Osgood* v. *Blake*, 1 Fost. 550; *Perley* v. *Georgetown*, 7 Gray, 464; *Buttrick* v. *Lowell*, 1 Allen, 172; *Detroit* v. *Blakely*, 21 Mich. 84; *White* v. *Bond*, 58 Ill. 297; *Elliot* v. *Philadelphia*, 75 Penn. St. 342.

APPLETON, C. J. This is an action on the case, to recover damages caused by the taking and selling of the plaintiff's property, on a warrant of distress, issued by the treasurer of the defendant town, against him, for official neglect as collector of taxes of the village school district in said town.

No action can be maintained against a town for the assessment and collection of an illegal tax. A town cannot be held responsible for the willful and illegal proceedings of a school district. *School District in Green* v. *Bailey*, 3 Fairf. 259; *Trafton* v. *Alfred*, 15 Maine, 258; *Trim* v. *Charleston*, 41 Maine, 504; *Bacon* v. *School District in Barnstable*, 97 Mass. 421.

The town treasurer in issuing the warrant, was acting on his own responsibility. It was not issued for the benefit of the town, nor by its direction. The proceeds of the sale went to the treasury of the village school district. The town is not liable

for the tortious acts of its officers done under color of official authority. The defendant town has neither directed, sanctioned or ratified any wrongful act of its treasurer, and is in no way responsible for it. If the warrant was illegally issued, the town treasurer issuing it, is liable. *Mitchell* v. *Rockland*, 52 Maine, 118; *Small* v. *Danville*, 51 Maine, 359; *Lynde* v. *Rockland*, 66 Maine, 309; *Barbour* v. *Ellsworth*, 67 Maine, 294; *Perley* v. *Georgetown*, 7 Gray, 464; *Buttrick* v. *Lowell*, 1 Allen, 172.

Assuming the assessment to have been illegal, or being legal the warrant of distress to have been improvidently issued, the remedy of the plaintiff is not against the town. If on the other hand the assessment was legal and the other proceedings in accordance with law, the plaintiff has no cause of action. In either event he must become nonsuit.

Plaintiff nonsuit.

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

LOUISA POWERS *vs.* SARAH T. PATTEN.

Aroostook. Opinion December 31, 1880.

Mortgage as evidence of title. Deed of husband and wife. Estoppel. After-acquired title. Covenants; to what they relate. Life lease. Tax title.

A mortgage alone, without the production of the notes secured by it, is evidence of title and the mortgage debt. It is the mortgager's admission to that effect. Whether sufficient and satisfactory or not depends upon the accompanying circumstances.

Under a deed, by husband and wife, of the wife's land, with covenants of warranty by both, a title afterwards acquired by the husband inures by way of estoppel to the grantee, as against the grantor and all persons who hold under the grantor's deed given after the subsequent title is acquired.

Such after-acquired title descends to any person who holds under the first grantee, however remote from him in the line of title; and the succession is not broken by some of the intervening deeds conveying only "the right, title and interest in the land" which the grantors had; such mode of conveyance being equivalent to a release deed at least.

Covenants in a deed are not qualified by a reference in the deed, in aid of its description, to another deed which is declared to be subject to a mortgage; the reference being for the purpose of describing the land and not the title to be conveyed.

A deed from the demandant's grantor to the tenant, subsequent to his deed to the demandant, obtained after action brought, is not admissible in evidence to enable the tenant to set up a defence that the first deed was given to defraud the grantor's subsequent creditors and purchasers.

A mortgage of land to secure a bond for the support of a person for life, is not extinguished by a lease of the same premises for life afterwards given by mortgager to mortgagee; the latter is ancillary to the former, and so far as executed may operate as a satisfaction of the covenants of the bond *pro tanto*.

ON REPORT.

Writ of entry, wherein the plaintiff demands possession of thirty-one acres of land in Houlton. The plea was the general issue, with a brief statement claiming title in the defendant.

The opinion states the case. The materials referred to in the opinion as put in evidence to establish a tax title, were: A tax deed from William Donovan, a collector of taxes of the town of Houlton for the year 1869, to Samuel H. Powers, dated August 22, 1870, and recorded September 24, 1872; a tax deed from

John V. Putnam, a collector of taxes for the town of Houlton for the year 1868, to Samuel H. Powers, dated April 11, 1870, and not recorded; and a quitclaim deed from Samuel H. Powers to Louisa Powers, dated November 14, 1872, and recorded same day.

By the terms of the report the law court was to render such judgment as the case requires.

Powers & Powers, for the plaintiff, cited: *Bachelder* v. *Lovely*, 69 Maine, 33; *Wilson* v. *Widenham*, 51 Maine, 556; R. S., c. 82, § 15; *Andrews* v. *Hooper*, 13 Mass. 472.

It is true that Isaac Smith, Jr. gave Lydia Smith a bond for the support of herself and husband, and secured it by a mortgage on the premises. Some dissatisfaction having arisen with this arrangement, a life lease of the same premises was given instead of the bond and mortgage. The plaintiff testifies that the life lease was given in the place of the bond, and the bond was considered of no value on that account.

If this is so, neither the mortgagee nor her assignee can make any claim under the mortgage, any more than they could if it had been given to secure a note and the note had been paid.

For what other purpose or with what other understanding could the life lease have been given?

Moreover, in the will of Lydia Smith, mention is made of the life lease, but nothing of the bond or mortgage.

The defendant could not produce the bond at the trial; the presumption is, that it was cancelled and surrendered at the time the life lease was given.

The life lease was discharged and delivered to this plaintiff and was produced by her, with the written discharge upon it, at the trial.

Madigan & Donworth, and *W. M. Robinson*, for the defendant, cited: R. S., c. 6, § 76; *Loomis et al.* v. *Pingree et als.* 43 Maine, 299; *Pike* v. *Galvin*, 29 *Id.* 183; *Harriman* v. *Gray*, 49 *Id.* 537; *Read* v. *Fogg*, 60 *Id.* 481; Bigelow on Estoppel, 274, 293, 294, 337, 338.

See also, 59 Maine, 157; 64 *Id.* 200; 51 *Id.* 367; 50 *Id.* 62; 53 *Id.* 275; 31 *Id.* 177, 395; 12 Pick. 47, 67; 4 Kent's Com.

8th ed. 371, 270, 271; Rawle on Covenants, 4th ed. 383, 387, 388; 13 Maine, 281; 20 *Id.* 260; 14 Johns. 193; 3 Wheat. 452; 6 Cush. 34; *Brown* v. *Staples*, 28 Maine, 497; 13 Pick. 60; 20 Pick. 458; 33 Maine, 483; 34 *Id.* 299. This case differs from *Batchelder* v. *Lovely*, 69 Maine, 33.

PETERS, J. The conveyances upon which the one or the other side depends, to prove its claim of title to the premises in question, are these: Joseph Houlton to Charles B. Smith, in 1852; (Charles B. Smith to Joseph Houlton, mortgage back on same day); Charles B. Smith (subject to mortgage) to I. B. Smith, Jr. in 1856; I. B. Smith, Jr. to Lydia Smith, in 1859; Lydia Smith and husband (I. B. Smith, Sr.) to I. B. Smith, Jr. in 1863; I. B. Smith, Jr. to Lydia Smith, a mortgage back on same day to secure a bond given for her and her husband's life support; I. B. Smith, Jr. to Lydia Smith, in 1864, a life lease for the life of herself and husband, or the survivor of them; Lydia Smith to I. B. Smith, Sr. a devise by will executed in 1867, and probated in 1869; I. B. Smith, Jr. to Samuel H. and Louisa Powers, in 1872; and Samuel H. Powers to Louisa Powers (demandant,) in 1873.

This chain shows the title in the demandant, subject to two mortgages and a lease. The materials put in evidence to establish a tax title, are clearly useless for that purpose.

The defendant claims title or at least a right of possession under the aforenamed mortgages and lease, or some one of them.

Joseph Houlton foreclosed his mortgage from Charles B. Smith, the foreclosure expiring in 1867; Joseph Houlton to Eben Woodbury in 1871, (warranty); Woodbury to I. B. Smith, Sr. in 1874; I. B. Smith, Sr. to Sarah T. Patten (defendant,) in 1874. This chain of conveyances, but for difficulties afterwards stated, shows the title to be in the defendant.

In addition to his previous conveyances, I. B. Smith, Jr. conveyed the same premises to the defendant on January 10, 1880.

Several questions arise, which are to be considered in their legal and not equitable bearings, although possibly some of them might result differently in equity.

The demandant contends, that, as no notes are produced to support the mortgage of Smith to Houlton, the presumption is that they have been paid. This point is not sustained. If the present defendant were in the position of a demandant, and a conditional judgment was demanded by either side entitled to it, in such case she could not recover without producing the notes, or accounting for their non-production. *Blethen* v. *Dwinal*, 35 Maine, 556. But here the defendant, representing the mortgage title, is in possession. At common law, she could not be sued out of possession, even by proof of payment of the mortgage debt, if paid after condition broken, (*Wilson* v. *Ring*, 40 Maine, 116), although now otherwise by statute. R. S., c. 90, § 28. The mortgage itself is a conveyance of the estate, and the recital of the notes in the condition of the mortgage, is an admission of their existence and of the existence of the debt. Jones' Mort. 2d ed. 171. For the purpose of establishing the defendant's right of possession, the mortgage alone without the notes is admissible as evidence of title and the mortgage debt. *Smith* v. *Johns*, 3 Gray, 517. Whether sufficient and satisfactory or not, depends upon the accompanying circumstances. *Mathews* v. *Light*, 40 Maine, 394. We think that the circumstances in this case show that the mortgage notes were never wholly paid. At this place, the title would seem to be in the defendant.

The demandant, however, claims that the deed of Woodbury to Smith, Sr. in 1874, inures to her benefit, in this way: Lydia Smith and husband (I. B. Smith, Sr.) in 1863, as before stated, conveyed the premises to I. B. Smith, Jr. by a warrantee deed, while the mortgage title which descended to Woodbury was outstanding. The demandant claims that, when Woodbury conveyed to Smith, Sr. the mortgage interest passed through Smith, Jr. to her as an after-acquired title; that Smith, Sr. became enabled in this way to make good his covenants of warranty to Smith, Jr. and that the same title became, by the other conveyances before named, assigned to her.

The defendant attempts upon various grounds to avoid this apparent dilemma.

It is said that the covenants of the husband do not run with land conveyed as his wife's estate, and not his. That is not so. It matters not whose land it was, or whether either had any title. *Nash* v. *Spofford*, 10 Met. 192.

It is said, also, that the Woodbury title was known to the demandant and all under whom the demandant claims. That does not affect her right. She claims under that title, and not in hostility to it. The two titles coalesce in her. She only gets what the covenants in the deed to her predecessor in title entitles her to have.

Then, it is contended, that the covenants in the deed from Smith, Sr. and wife, do not descend to the demandant, because in several of the intervening deeds, between that deed and hers, the grantors convey, not the land itself, but only "their right, title and interest" in the land. The argument is, to which we do not assent, that such a conveyance does not assign and transmit covenants of warranty which the grantor holds from parties preceding him. It is decided that a levy upon execution does not assign any covenants of warranty belonging to the debtor. *Crocker* v. *Pierce*, 31 Maine, 177. And the defendant also relies upon the case of *Blanchard* v. *Brooks*, 12 Pick. 46, which decides that such a deed passes the vested, and not the contingent, interest held by the grantor. The former case is determined upon reasons peculiar to itself. In the latter case, the question was whether, in addition to a vested interest, the deed also passed an interest which could come to the grantor under a devise, only upon the happening of a contingency. In the case at bar, there was no contingency whether the grantor was to have covenants of warranty. He had them. They were a part and parcel of his right, title and interest in the land. He assigned and sold all his rights and interests. Such a description would, certainly, be as effectual as a mere deed of release would be, and covenants of warranty may descend, through the operation of deeds that are mere naked releases, indefinitely from party to party. *Wilson* v. *Widenham*, 51 Maine, 566; *Brown* v. *Staples*, 28 Maine, 497.

The defendant contends that, even if the covenants passed by assignment to the demandant, so that she could maintain an action upon them, an after-acquired title only goes to the immediate grantee of the warrantor. That cannot be. The covenants and the title, as soon as they come together, are inseparable. The latest grantee is not only entitled, but is, *nolens volens*, compelled to receive the after-acquired title in satisfaction of the covenants held by him.

The defendant contends, further, that the deed of Smith and wife excepts the Woodbury mortgage from their general warranty. We think otherwise. They describe the land conveyed as being then occupied by themselves, and as "being the same conveyed by C. B. Smith to I. B. Smith, Jr. by deed dated November 7, 1856." The deed of C. B. Smith to I. B. Smith, Jr. referred to, describes the land fully by metes and bounds, concluding thus: "Said premises being subjected to the mortgage to Joseph Houlton," and another mortgage. The mortgage to Joseph Houlton is the one in question. The reference in the deed of Smith and wife to prior deeds was to identify and describe, not the amount of title, but the amount of land, to be conveyed. The title is not conveyed subject to any mortgage. No exception is made. *Hubbard* v. *Apthorp*, 3 Cush. 419.

It has been stated that, in 1880, I. B. Smith, Jr. conveyed to the respondent the same premises which he conveyed to the husband of the demandant in 1873. The defendant claims that the last supersedes the first deed, for the reason that the deed first made was gotten up to defraud the grantor's future creditors and purchasers. This defence comes too late for this suit. The deed to the defendant is dated long after the action was commenced. *Hall* v. *Bell*, 6 Met. 431; *Parlin* v. *Haynes*, 5 Maine, 178.

There is a point, however, urged by the defendant, which prevents the maintenance of the present action. The foregoing discussion has seemed necessary to expose to the parties what their legal rights may be, as a guide for future action. This may be an instance where the rule works harshly, which gives to the grantee of a warrantor an after-acquired title as against a subse-

quent innocent purchaser. The rule has been severely criticised in some quarters. Still it is the settled law of this State, and many titles have been bought and sold upon the strength of it. See *Knight* v. *Thayer*, 125 Mass. p. 27.

The point that saves the present possession of the premises to the defendant, arises upon the following facts: When I. B. Smith, Jr. received the deed of warranty from his father and mother, he mortgaged back to his mother, to secure a bond running to her for her and her husband's life support. He also afterwards made a lease of the premises to her during their lives or the lifetime of the survivor of them. These conveyances were prior to the deed from I. B. Smith, Jr. under which the demandant claims, and have precedence of it, unless they have been discharged or annulled in some way.

Have they been discharged? It is contended that the mortgage was superseded by the lease. That would not be so, at law. There are obligations imposed by the bond which are not performed merely by granting to the obligees a possession and use of the premises. So far as the lease has been executed, its enjoyment may operate as a satisfaction of the covenants of the bond *pro tanto*, and no more.

The lease has never been discharged. A declaration of a discharge upon the back of the lease in 1873, was signed by Smith, Sr., but we are well satisfied that this was signed and delivered conditionally. While these limits will not allow us to extend the discussion into a review of the testimony reported to us, we are convinced that neither lease nor mortgage were to be cancelled or surrendered until a more general arrangement was consummated by the parties, and that was never done. But if either the mortgage or lease shall be considered as now alive and subsisting, this action cannot be maintained. By her will, Lydia Smith bequeathed and devised to her husband all her property, real, personal and mixed, of every description. By his deed to the defendant, the right to hold and possess the premises for at least his life-time passes to her.

Demandant nonsuit.

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

JOHN READ and another *vs.* GEORGE F. HITCHINGS, surviving partner.

Androscoggin. Opinion December 31, 1880.

Contract. Compromise settlement. Consideration.

H. & L. having a contract for the construction of a railroad, let a portion of the work to R. who, in settling, claimed for extra work, but gave H. & L. a receipt in full, in consideration of their promise to pay him for the extra work should they succeed in getting payment of the railroad company therefor. In settling with the railroad company for various claims, amounting to $75,000, including that for R.'s extra work, H. & L. received by way of compromise $25,000 for a lump settlement in full:

Held, that the consideration for the promise of H. & L. to R. was a legal one, and the presumption is that they received as much *pro rata* on R.'s claim as upon any of the claims thus settled, and that presumption is not removed by showing that R.'s claim was not a valid claim, and that some others of the claims were valid.

The compromise of a claim understood by the parties to be doubtful, the nature and extent of which they are fully apprised, is a sufficient consideration to uphold an agreement, if the claim is honestly made and settled in good faith, even though it turns out that no valid claim ever existed. Otherwise, if the claim is utterly without foundation and known to be so, or in its nature an illegal claim.

ON EXCEPTIONS.

The case is stated in the opinion.

Frye, Cotton & White and *Charles B. Read*, for the plaintiffs, cited: 1 Greenl. Ev. § 305; *Richardson* v. *Beede*, 43 Maine, 161; *Rollins* v. *Dyer*, 16 Maine, 475; *Callisher* v. *Bischoffshem*, 5 Q. B. 449; *Stewart* v. *Ahrenfeldt*, 4 Denio, 89; *Cook et als.* v. *Wright*, 101 E. C. L. 557; *Russell* v. *Cook et al.* 3 Hill, 504; *Allis* v. *Billings*, 2 Cush. 19; *Cobb* v. *Arnold*, 8 Met. 403; *Barlow* v. *Ocean Ins. Co.* 4 Met. 270; *Pitkin* v. *Noyes*, 48 N. H. 294; 1 Chitty on Contr. (11 Am. ed.) 46; *Phœnix Bank* v. *Bumstead*, 18 Pick. 77; *Colby* v. *Copp*, 35 N. H. 434.

William L. Putnam, for the defendant.

There was no obligation on the part of defendant to pay plaintiffs anything more than he did pay them, and so the court ruled; and

no consideration for the promise alleged by plaintiffs. Defendant requested the court so to rule, but the request was declined.

Had any question arisen during the progress of the work, in consequence of which plaintiffs declined to proceed, and as an inducement to proceed, defendant had made a new promise, the decisions are that this would constitute a new consideration. But the work was finished, and defendant was ready to pay, and did pay, all that was due, so that there was no shadow of consideration for any new promise.

In *Sanderson* v. *Brown*, 57 Maine, 313, it is said: "But a past and executed consideration without knowledge or request, is no sufficient basis for a promise to pay." That was a case where the services were performed gratuitously, but it cannot alter the principle, that they were performed under a legal obligation to perform them, for a consideration existing at the time of performance, which has been fully paid.

In *Paine* v. *Boston*, 124 Mass. 491, it is said: "A gratuity offered for past services is not a contract, and cannot be enforced at law."

Dodge v. *Adams*, 19 Pick. 430, says: "To constitute a moral obligation, the consideration for an express promise which may be enforced in a court of law, *there must have been some pre-existing legal obligation.*" This is more fully explained in *Mills* v. *Wyman*, 3 Pick. 209–210.

Chitty on Contracts, says a release of an *equitable* claim is a sufficient consideration; but the context shows that the author intends a claim cognizable in a court of equity, and not merely an equitable claim within the meaning of the ruling in the case at bar. The point at bar is very fully discussed in Chitty on Contracts, eleventh edition, pp. 52–64. The cases which we have been able to find, that seem to us most analogous to the case at bar, are: *Smith* v. *Ware*, 13 Johnson, p. 259; *Williams* v. *Hathaway*, 19 Pick. p. 389.

2d. The pith of the other point in the case, though it came up in several forms, is perhaps best shown by defendant's offer of proof, and the court's ruling upon them, in connection with the receipt given to N. & R. R. R. Co. The substance of the offer

was that the claims of the plaintiffs were not valid; that defendant had other claims, which were valid; that upon a lump settlement of the suit brought in defendant's own name, and upon his own claims against the corporation, he received less than was due him upon his valid claims, and that therefore he ought to be allowed to satisfy the jury that nothing was received upon the plaintiffs' claim. This was not permitted him; but the court went further, and held in substance that by reason of the form of settlement and the admission that it was a lump settlement, plaintiffs were not required to give any further affirmative evidence on that point.

Now the alleged agreement, was that when "*he got it I should have it.*"

Note, that this is not a suit for not getting it when he might have got it! If our position is correct, plaintiffs would still have that remedy, if they have or had any just claim; so that no damage would be done by sustaining us upon this point. But as the court ruled, injustice is done; and contrary to the general course of law, a fiction of law is used to work out that injustice upon an arbitrary principle. We are asked to pay the plaintiffs money, which we in fact did not get, and although, as our suit against the railroad corporation progressed, it became clear as day-light that we never could get it.

Phœnix Bank v. *Bumstead*, 18 Pick. p. 77, is undoubtedly relied on by plaintiffs; yet the distinction is a broad one. In that case the claim which defendant settled was received from plaintiff, and upon it suit could have been brought in plaintiff's name. In the case at bar, Hitchings & Lynch brought no suit against the N. & R. R. R. Co. for any apparent cause of action that ever apparently vested in the present plaintiff. The settlement, therefore, included no such cause of action, and the receipt was only of such matters as might be due Hitchings & Lynch; no attempt was made to discharge any claim that ever apparently vested in the present plaintiff; and if any such existed against the N. & R. R. R. Co. it exists to-day.

PETERS, J. The defendant and his partner (now deceased,) contracted with the Nashua and Rochester Railroad Company to

build portions of its road. They sub-let some of the work to the plaintiffs. The amount of compensation to be received both by the plaintiffs and the defendant, under their respective contracts, depended upon the estimate by the company's engineer of the quantity of work done.

The plaintiffs at the end of their employment demanded payment for work done by them beyond the requirement of their contract, and the defendant set up the same claim and other claims for extra work against the company. When the plaintiffs settled with the defendant, they accepted from him the sum due to them under the engineer's estimate, waiving their claim for extra work, and gave to him a receipt in full of all demands, in consideration of a promise then made by the defendant that, if he got anything from the company for the extra work done by the plaintiffs, he would pay it to them; the defendant at the time asserting that he was bound to proceed against the company. The defendant did proceed against the railroad company and collected a portion of the claim.

Here is a conditional promise, the condition performed, and the question is whether the promise is supported by a legal consideration or not.

The defendant contends that the promise was upon a past consideration — that it was for services rendered before the date of the receipt in full.

We should denominate the past services as the motive which actuated the defendant in making the promise, the circumstance which induced him to make the conditional contract to pay, but not the legal consideration for his promise. It matters not that the defendant would not have promised but for the motive. The motive may have been the greater moral consideration. That is often the case. A man may make a contract, only because he is thereby helping a relative or a friend, and be bound by it, there being a consideration for his promise. The promise to pay a debt voluntarily discharged is not binding. *Warren* v. *Whitney*, 24 Maine, 561. There must be a present consideration for the promise, but it may be slight. "If a contract is deliberately made without fraud," said WILDE, J., in *Train* v. *Gold*, 5 Pick.

384, "and with full consideration of all the circumstances, the least consideration will be sufficient." The true legal consideration for the defendant's promise was the waiver by the plaintiffs of their supposed claim by giving the receipt in full of all demands. The promise is founded upon a compromise. The defendant is not sued for the extra work, but for money which he promised to pay out of his collections from the railroad company.

It has been many times held that a compromise of a claim, understood by the parties to be doubtful, the nature and extent of which they are fully apprised, is a sufficient consideration to uphold an agreement, if the claim is honestly made and settled in good faith, even though it turns out that no valid claim ever existed. But it is otherwise, if the claim is utterly without foundation and known to be so, or if it is in its nature an illegal claim. The doctrine, however, should be applied with caution. It is a class of contracts where impositions and frauds may easily be practiced. But here the fact that the defendant did recover some part of the claim from the company is the best evidence, as between these parties, that there was some reasonable foundation for it. The case of *Stapilton* v. *Stapilton*, 1 Atk. 2, a leading case in support of the doctrine above stated, is reported in Leading Cases in Equity, to which numerous cases are added in a note by the American editors. See *Turner* v. *Whidden*, 22 Maine, 121.

We think, therefore, the instruction of the court on this branch of the case was correct. In one portion of the charge, when restating the proposition, the judge missed a proper and accurate expression of it, by inadvertently alluding to the motive or moral inducement as the legal consideration of the contract, but we think the jury could not have been misled by it. The exposition of the case was clear.

Another question came up in the trial. After the defendant settled with the plaintiffs, he sued the railroad company upon an account containing various claims for extra work, including that performed by the plaintiffs and settled by their receipt in full. The defendants' whole claim in suit against the railroad amounted

to about $75,000, and they received by way of compromise $25,000, for the total claim. The counsel for the defendant took the position that the claims sued against the railroad were of various kinds, some valid and some invalid, and that they never received anything specifically for the extra work of the plaintiffs, and they offered to show that the claim of the plaintiffs was really an invalid claim in law, though they believed the claim to be valid when their suit was commenced. They offered to show further, that they were advised by counsel that it was not valid, that they took the $25,000, in consequence of the advice, for all the sums sued for in their suit, and that their suit contained claims that were valid, amounting at least to the amount by them received. The evidence was rejected. The judge ruled as a matter of law that the payment operated as a discharge and satisfaction of all the items and claims mentioned in the bill of particulars in that suit, and a *pro rata* payment upon the claim which represented the extra work of the plaintiffs as much as upon anything else.

No error was committed by this ruling. The railroad company paid $25,000 for all the claims. It was a lump settlement. It wiped out all the claims against them. No distinction between the items was considered. Nothing was specifically paid or appropriated in discharge or satisfaction of one item more than another.

Paying $25,000 for $75,000 in that way, must pay as much on any one dollar as on any other dollar of the claim. It was the payment of a percentage on each and every dollar. This has a logic, amounting to a mathematical certainty. Not that such a settlement does more than raise a presumption that the plaintiffs' claim was partly paid, but the offered proof does not remove the presumption. It does not show that the settlement in fact was only for the claims called valid. It may be a reason why the defendant had better have so settled his suit against the railroad, if he could have done so. But *non constat* that the railroad company did not regard all the claims as equally valid, any one as good as any other. In the settlement made, the company took a receipt which specifically pays each and every claim contained

in the bill of particulars sued, because it pays them all. The receipt would bar any future suit for any or all of them. *Phillips* v. *Moses*, 65 Maine, 70; *Phœnix Bank* v. *Bumstead*, 18 Pick. 77.

Exceptions overruled.

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

HIRAM COFFIN *vs.* FOREST H. PETERSON.

Washington. Opinion December 31, 1880.

Will. Devise; construction of.

A testatrix owned a twelve acre lot, with a house in its centre. She devised to one person the easterly half of the house, and the part of the lot lying east of it "bounded south by the lane," and to another person the westerly half of the house, and "the remaining part of the lot, which lies westerly of the dwelling house;" *Held*, that the two devisees took the whole lot, and that "the lane" limits the portion first devised, although it varies from the southerly line of the lot, near the centre of the lot, in such a manner as to give the second devisee more than half of the land.

ON REPORT.

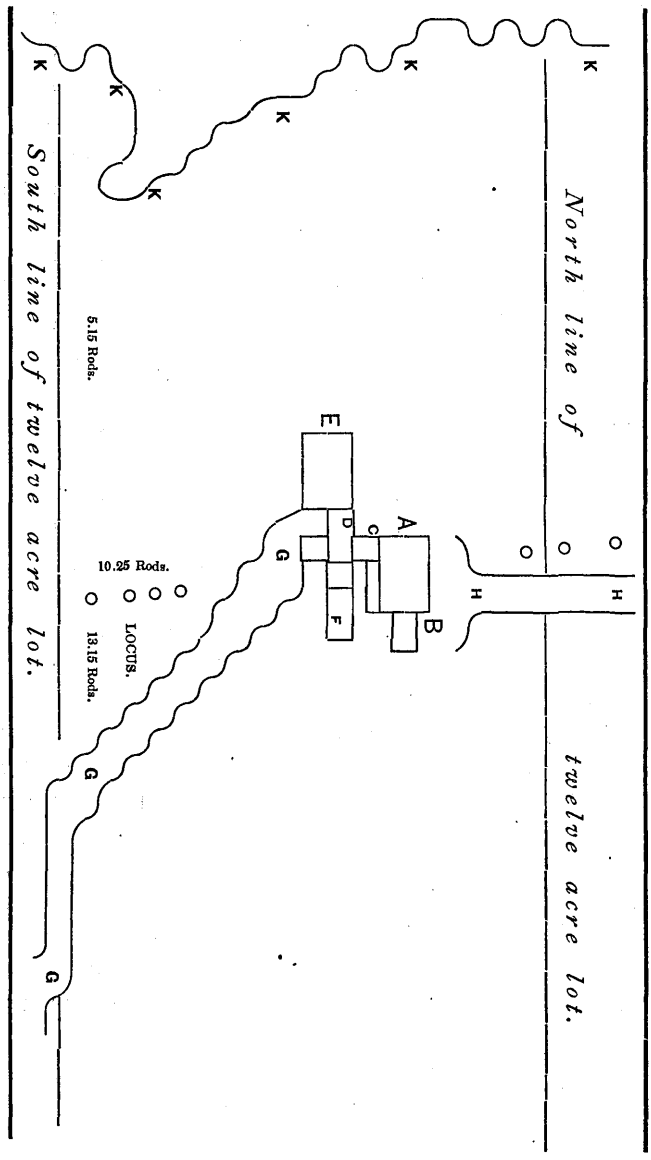
Trespass *quare clausum*. The case involves the construction of the will of Louisa J. Bucknam as stated in the opinion.

The plaintiff claims title under the fifth clause of the will; the defendant justifies under Mary Buzzell who claims the locus under the third clause in the will, being a child and heir of devisee under the third clause.

The plaintiff is husband of such devisee and at date of the will they lived with testatrix to take care of her in the house laid down on the plan, and plaintiff continued to live there until death of testatrix and his wife.

If the will should be so construed as to carry the title to the locus to Mary Buzzell then the judgment is to be for defendant, otherwise for the plaintiff with damages at twelve dollars.

A plan of the premises is shown on the next page.



A. Main dwelling.
B. Parsonage ell.
C. Ell between main house and shed.
D. Shed.
E. Barn.
F. Parsonage barn.
G. G. Lane leading from premises to pasture.
H. Lane leading from premises to county road.
K. K. Shore line of lot.
○○ Indicate magnetic north.

Charles Peabody, for the plaintiff.

J. A. Milliken, for the defendant.

PETERS, J. Two clauses in the will of the testatrix are these: "I give and bequeath unto the Methodist Episcopal Church in

Columbia village, the eastern half part of my dwelling house and its appurtenances, a privilege in the barn and shed, and that part of a twelve acre lot of land which lies to the eastward of the dwelling house, and bounded on the south by the lane." "I give to Mrs. Coffin the western half part of my dwelling house, the barn and shed, and the remaining part of the twelve acre lot which lies westerly of the dwelling house."

Two questions arise. *First:* Do the two devisees take all of the twelve acre lot? *Second:* If they do, is "the lane" the true divisional line between them south of the dwelling house?

We think the testatrix intended the whole of the lot for the two devisees. One devisee takes a part, and the other the "remaining part." The description is not, so much of the remaining part as lies west of the dwelling house, but all of the remaining part, which (in a general sense and for short description) lies westerly of it. The bulk of it lies westerly of the house. This becomes clearer upon an examination of the next question.

We think, too, that "the lane" is a divisional line between the two devisees. It will be seen that an exact and literal construction of the language used would not do. In such case, one devisee would get the land east and the other that west of the house, and neither get the land (of the width of the house) which lies either north or south of it. An exact north and south line would probably divide the house inconveniently for both parties. Neither the lane above nor the lane below the house would be in common between them.

The general rules given for the interpretation of uncertain or contradictory descriptions are stated in *Hathorn* v. *Hinds*, 69 Maine, p. 329. This one applies to this case: That definite boundaries subsequently used will limit the generality of a term previously used, nothing else controlling. This case is considerably like that of *Haynes* v. *Young*, 36 Maine, 557. There a line represented to be running north was found to be partly west. The line deflected very much in the same manner as this line does, from the course called for. See *Jewett* v. *Hussey*, 70 Maine, 433.

The part of the lot first devised is "bounded on the south by the lane." The land, certainly, lies north of the lane, although a portion of the lane is its westerly boundary as well. There was no necessity of invoking "the lane" to assist in the description at all, if the south line of the lot is to strictly govern, for the south line is itself a very definite and certain boundary.

Plaintiff nonsuit.

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

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See EVIDENCE, 3, 9, 14. PRACTICE, (LAW,) 12.

EXECUTION.

See OFFICER, 1, 2, 3.

EXECUTOR AND ADMINISTRATOR.

See SALE, 5, 6. EVIDENCE, 12.

INTOXICATING LIQUORS.

1. When no sufficient reason is given for longer delay, the time during which an officer may keep intoxicating liquors seized without a warrant, before making a complaint and procuring a warrant, should not exceed twenty-four hours. *Weston* v. *Carr*, 356.
2. A demand for intoxicating liquors upon an officer, who is holding it without legal authority, and a refusal to deliver it upon the demand, is sufficient evidence of a conversion to maintain trover. *Ib.*
3. It is a rule of common law of universal application that all participators in misdemeanor are principals. Each is severally liable.
State v. *Murdoch*, 454.

JAILER.

1. The jailer is liable for an escape if he permits a prisoner committed to jail on execution to go at large without giving a bond approved as required by R. S., c. 113, § § 24, 42. The mere sending for a bond not in accordance with the statute and its retention without suit upon it or any action in regard to it is not a waiver of its want of legal approval.
Hotchkiss v. *Whitten*, 577.
2. The appearance of the creditor's attorney, on a notice to disclose, at the time and place appointed, but refusing to choose a justice and protesting against the jurisdiction of the magistrates and against a discharge, is not a waiver of the escape, though he may examine the debtor. *Ib.*
3. For an escape of a poor debtor the creditor is only entitled to actual damages against the jailer. The true measure of damages is the value of the custody of the debtor at the time of the escape. *Ib.*

Held, that this was not a work "of necessity or charity,"—and that M. cannot recover of J. P. the amount so paid by him upon such accepted order because the whole transaction, upon which the claim to recover rests, is in violation of the statute. *Mace* v. *Putnam*, 238.

MAGISTRATE.

See WAIVER, 1.

MALICIOUS PROSECUTION.

See PROBABLE CAUSE.

MANDAMUS.

See OFFICE, 2.

MARRIED WOMAN.

1. A woman who was married before March 22, 1844, cannot, while her husband lives, sustain an action against his grantees for land by him conveyed, even though she should show a title in fee in herself. *Day* v. *Bishop*, 132.
2. By a marriage previous to that date the husband acquired a freehold in her land and a right to the rents and profits of the same during their joint lives, and, in case of living issue, an estate for his own life if he survived her; all which would pass to his grantees by his conveyance. *Ib.*
3. Where a married woman, prior to her marriage, had received a deed of real estate from one, who subsequently became her husband; *Held*, that such a deed was in no sense a conveyance to her from her husband, since she received her title from one, who, at the time, sustained no such relation to her; that her sole deed executed after the marriage gave title.

Reed v. *Reed*, 156.

MASTER AND SERVANT.

1. The employment of one who carries on an independent business, and who, in doing his work, does not act under the direction and control of his employer, but determines for himself in what manner it shall be carried on, does not create the relation of master and servant; and the employer would not be responsible for the negligence of a person thus employed nor that of his servants. *McCarthy* v. *Second Parish of Portland*, 318.
2. A slater by trade, who carried on the business of slater in Portland and had done so for more than twenty years, keeping a shop, and a slate on which to receive orders, and men constantly in his employ to assist in executing such orders as he should receive, was held to be carrying on what the law denominates an independent business. *Ib.*

NUISANCE.

A burial ground which does not affect the physical health of the occupants of of a dwelling house near which it is located, nor their olfactories by any effluvia from the graves, is not in law a nuisance. The human contents of graves cannot offend the senses in a legal point of view. To become a nuisance the graves or their contents must be such in their effect as naturally to interfere with the ordinary comfort physically of human existence, and the inconvenience must be something more than fancy, delicacy or fastidiousness.
Monk v. *Packard*, 309.

OFFER OF DEFAULT.

See PRACTICE, (LAW,) 8.

OFFICE.

1. All offices, except when legislative authority is limited or restricted by constitutional provisions, are subject to the will of the legislature. There is, with this exception, no vested right in an office, or its salary.
Prince v. *Skillin*, 361.

2. Stat. 1880, c. 198, gives a speedy and effectual remedy to a party duly elected to an office, in case of an erroneous or fraudulent count, by the canvassing board. It accomplishes by one process the objects contemplated by two—*quo warranto*, and *mandamus*. It was enacted by a lawful legislature and approved by the governor. *Ib.*

3. The court is bound to take judicial notice of the doings of the executive and legislative departments of the government, and of historical facts of public notoriety passing in our midst. *Ib.*

4. The decision of the governor and council, as a canvassing board, does not constitute an estoppel upon other branches of the government. The board, so far as relates to county officers, are limited and restricted to what appears by the return, and such inquiries as are authorized by R. S., c. 78, § 5, and stat. 1877, c. 212. Their judgment is not made conclusive, it is only *prima facie*. *Ib.*

5. The real title to an elective office depends upon the votes cast. The underlying principle is, that the election, and not the return, is the foundation of the right to such an office. *Ib.*

6. Where by the decision of the canvassing board, six thousand three hundred and eleven voters were disfranchised, because two ballots were returned as "scattering," which, if added to the number received by any of the persons voted for would not change the result, and which from an amended return were shown to have been thrown for William B. Skillings; *Held*, that such decision was at war with the law of the land, the rights of parties, the will of the people and the principles upon which alone a republican government can rest. *Ib.*

7. A suit under stat. 1880, c. 198, is in the nature of a proceeding in equity. When the petition is made returnable in term time, the justice holding that

OFFICER.

PRESUMPTION.

PRINCIPAL AND AGENT.

PROBABLE CAUSE.

SHERIFF.

See EVIDENCE, 12. OFFICER, 4, 6, 7.

SHIPPING.

STATUTES CITED, EXPOUNDED, &c.

UNITED STATES STATUTE.

MASSACHUSETTS STATUTES.

PUBLIC LAWS OF MAINE.

PRIVATE AND SPECIAL LAWS.

RESOLVES.

REVISED STATUTES.

STATUTE, CONSTRUCTION OF.

Statute provisions, unless absolutely conflicting, should be construed so as to make them operate harmoniously as a whole, giving each its appropriate effect, not using one section to evade or abrogate another.

Collins v. *Chase*, 434.

See ACTION, 1. ATTACHMENT, 1. BOND, 1. CONSTITUTIONAL LAW. CORPORATION, 8. EVIDENCE, 6. EXECUTOR AND ADMINISTRATOR, 1, 4, 9, 15. HAY. INSOLVENCY, 1, 2, 3, 8, 10. JAILER, 1. LANDLORD AND TENANT. LIEN, 4, 7. MORTGAGE, 11. OFFICE, 2, 4, 7, 8, 9. OFFICER'S RETURN, 1. PAUPER, 3, 4, 12, 13. PRACTICE (Equity), 2. PRACTICE (Law), 8. SHIPPING, 6. TRUSTEE PROCESS, 6. WAIVER, 1, 3. WAYS, 2.

WILL.

ERRATA.

In the third line from the bottom of page 391, the figures "131" should be 154.

In the eighteenth line from the top of page 427, for "influence" read inference.